S T A T E O F N E W Y O R K

10082

I N A S S E M B L Y

June 12, 2014

Introduced by COMMITTEE ON RULES -- (at request of M. of A. Farrell) -- (at request of the Governor) -- read once and referred to the Committee on Ways and Means

AN ACT to amend the tax law, in relation to banning electronic and other devices used to evade state and local taxes and imposing crimes and penalties for their use in evading such taxes

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. The tax law is amended by adding a new section 1822 to read as follows:

S 1822. DEVICES AND SOFTWARE USED TO EVADE TAX. (A) BAN. THE DESIGN, ENGINEERING, CREATION, SALE, LEASE, LICENSE TO USE, OFFER TO SELL OR LEASE OR LICENSE, TRANSPORT, PURCHASE, INSTALLATION, OFFER TO PURCHASE, POSSESSION, UPDATING, MAINTAINING, SERVICING, REPAIR, OR USE OF A DEVICE OR SOFTWARE THAT FALSIFIES, DELETES, CONCEALS, SECRETES, SUPPRESSES, HIDES, OR DISTORTS SALES OR OTHER TRANSACTION DATA IN, FROM, OR BY A POINT OF SALE DEVICE, OR THAT CREATES, MANIPULATES, MAINTAINS, OR THAT STORES AN ADDITIONAL FALSE OR INCORRECT SET OF RECORDS OR REPORTS, IN ORDER TO EVADE ANY TAX IMPOSED BY THIS CHAPTER OR A RELATED STATUTE OR TO EVADE THE PAYMENT OR PAYMENT OVER OF ANY MONEYS COLLECTED PURPORTEDLY AS TAX IS HEREBY PROHIBITED.

(B) CRIMES. (1) ANY PERSON WHO VIOLATES ANY PROHIBITION IN SUBDIVISION (A) OF THIS SECTION OR WHO CAUSES ANOTHER PERSON TO VIOLATE ANY PROHIBITION IN SUBDIVISION (A) OF THIS SECTION SHALL BE GUILTY OF CRIMINAL USE OF AN ILLEGAL TAX DEVICE OR SOFTWARE IN THE FIFTH DEGREE. CRIMINAL USE OF AN ILLEGAL TAX DEVICE OR SOFTWARE IN THE FIFTH DEGREE IS A CLASS A MISDEMEANOR.

(2) ANY PERSON WHO VIOLATES ANY PROHIBITION IN SUBDIVISION (A) OF THIS SECTION OR WHO CAUSES ANOTHER PERSON TO VIOLATE ANY PROHIBITION IN SUBDIVISION (A) OF THIS SECTION SHALL BE GUILTY OF CRIMINAL USE OF AN ILLEGAL TAX DEVICE OR SOFTWARE IN THE FOURTH DEGREE WHERE THE AGGREGATE TAX LIABILITY PAID THE STATE OR A POLITICAL SUBDIVISION OF THE STATE (WHETHER BY MEANS OF UNDERPAYMENT OR RECEIPT OF REFUND OR BOTH) AS A RESULT OF THE USE OF SUCH DEVICE OR SOFTWARE IS AT LEAST THREE THOUSAND

EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets [ ] is old law to be omitted.

LBD12087-01-4

DOLLARS LESS THAN THE TAX LIABILITY THAT IS DUE. CRIMINAL USE OF AN ILLEGAL TAX DEVICE OR SOFTWARE IN THE FOURTH DEGREE IS A CLASS E FELONY.

(3) ANY PERSON WHO VIOLATES ANY PROHIBITION IN SUBDIVISION (A) OF THIS SECTION OR WHO CAUSES ANOTHER PERSON TO VIOLATE ANY PROHIBITION IN SUBDIVISION (A) OF THIS SECTION SHALL BE GUILTY OF CRIMINAL USE OF AN ILLEGAL TAX DEVICE OR SOFTWARE IN THE THIRD DEGREE WHERE THE AGGREGATE TAX LIABILITY PAID THE STATE OR A POLITICAL SUBDIVISION OF THE STATE (WHETHER BY MEANS OF UNDERPAYMENT OR RECEIPT OF REFUND OR BOTH) AS A RESULT OF THE USE OF SUCH DEVICE OR SOFTWARE IS AT LEAST TEN THOUSAND DOLLARS LESS THAN THE TAX LIABILITY THAT IS DUE. CRIMINAL USE OF AN ILLEGAL TAX DEVICE OR SOFTWARE IN THE THIRD DEGREE IS A CLASS D FELONY.

(4) ANY PERSON WHO VIOLATES ANY PROHIBITION IN SUBDIVISION (A) OF THIS SECTION OR WHO CAUSES ANOTHER PERSON TO VIOLATE ANY PROHIBITION IN SUBDIVISION (A) OF THIS SECTION SHALL BE GUILTY OF CRIMINAL USE OF AN ILLEGAL TAX DEVICE OR SOFTWARE IN THE SECOND DEGREE WHERE THE AGGREGATE TAX LIABILITY PAID THE STATE OR A POLITICAL SUBDIVISION OF THE STATE (WHETHER BY MEANS OF UNDERPAYMENT OR RECEIPT OF REFUND OR BOTH) AS A RESULT OF THE USE OF SUCH DEVICE OR SOFTWARE IS AT LEAST FIFTY THOUSAND DOLLARS LESS THAN THE TAX LIABILITY THAT IS DUE. CRIMINAL USE OF AN ILLEGAL TAX DEVICE OR SOFTWARE IN THE SECOND DEGREE IS A CLASS C FELONY.

(5) ANY PERSON WHO VIOLATES ANY PROHIBITION IN SUBDIVISION (A) OF THIS SECTION OR WHO CAUSES ANOTHER PERSON TO VIOLATE ANY PROHIBITION IN SUBDIVISION (A) OF THIS SECTION SHALL BE GUILTY OF CRIMINAL USE OF AN ILLEGAL TAX DEVICE OR SOFTWARE IN THE FIRST DEGREE WHERE THE AGGREGATE TAX LIABILITY PAID THE STATE OR A POLITICAL SUBDIVISION OF THE STATE (WHETHER BY MEANS OF UNDERPAYMENT OR RECEIPT OF REFUND OR BOTH) AS A RESULT OF THE USE OF SUCH DEVICE OR SOFTWARE IS AT LEAST ONE MILLION DOLLARS LESS THAN THE TAX LIABILITY THAT IS DUE. CRIMINAL USE OF AN ILLEGAL TAX DEVICE OR SOFTWARE IN THE FIRST DEGREE IS A CLASS B FELONY.

(C) DISPOSITION OF FINES AND INTEREST. ALL FINES, PENALTIES, AND INTEREST LEVIED UNDER THIS SECTION SHALL BE PAID INTO THE STATE TREASURY TO THE CREDIT OF THE GENERAL FUND. HOWEVER, FINES OR INTEREST PAID IN RESPECT TO THE EVASION OF SALES AND COMPENSATING USE TAXES IMPOSED PURSUANT TO THE AUTHORITY OF ARTICLE TWENTY-NINE OF THIS CHAPTER SHALL BE DISPOSED OF AS PROVIDED IN SECTION TWELVE HUNDRED SIXTY-ONE OF THIS CHAPTER.

(D) SEPARATE OFFENSE. THE CRIMES AND PENALTIES IN THIS SECTION SHALL BE IN ADDITION TO AND CONSIDERED A SEPARATE OFFENSE FROM ANY OFFENSE UNDER THE OTHER SECTIONS OF THIS ARTICLE OR UNDER THE PENAL LAW.

(E) DEFINITIONS. FOR PURPOSES OF THIS SECTION:

(1) "DEVICE" INCLUDES AN ELECTRICAL, ELECTRONIC, MECHANICAL, OR OTHER DEVICE.

(2) "SOFTWARE" INCLUDES PREWRITTEN OR CUSTOM SOFTWARE, OF ANY NATURE WHATSOEVER, WHETHER SOLD AS PART OF A PACKAGE, AS A SEPARATE COMPONENT, OR OTHERWISE, AND REGARDLESS OF THE MEDIUM BY MEANS OF WHICH THE SOFTWARE IS CONVEYED TO THE PURCHASER, LESSEE, LICENSEE, OR USER, AND INCLUDES ANY UPDATE TO SUCH SOFTWARE.

(3) "CREATION" INCLUDES MANUFACTURING, PRODUCING, PROCESSING, ASSEMBLING, FABRICATING, WRITING, PROGRAMMING, UPDATING, AND OTHER PROCESSES THAT CULMINATE IN A DEVICE OR SOFTWARE.

(4) "POINT OF SALE DEVICE" MEANS A DEVICE THAT ACCEPTS, RECORDS, COMPILES, PROCESSES, OR STORES DETAILS OF A TRANSACTION AT THE TIME OF OR IN CONJUNCTION WITH A SALE, SUCH AS A COMPUTER, CASH REGISTER AND THE LIKE, AND SHALL INCLUDE, AMONG OTHER THINGS, A TAXIMETER UNDER ARTICLE TWENTY-NINE-A OF THIS CHAPTER AND SIMILAR DEVICES.

(5) "SALES OR OTHER TRANSACTION DATA" INCLUDES DATA ASSOCIATED WITH PROPERTY OR SERVICES PURCHASED BY A CUSTOMER, THE PRICES FOR EACH ITEM, A TAXABILITY DETERMINATION FOR EACH ITEM, A SEGREGATED TAX AMOUNT FOR EACH OF THE TAXED ITEMS, THE AMOUNT OF CASH OR OTHER CONSIDERATION TENDERED, ANY AMOUNT RETURNED TO THE CUSTOMER IN CHANGE, THE DATE AND TIME OF THE PURCHASE, THE NAME, ADDRESS, AND IDENTIFICATION NUMBER OF THE SELLER, AND THE RECEIPT, SEQUENCE OR INVOICE NUMBER OF THE TRANSACTION.

(6) "PERSON" SHALL ALSO INCLUDE THE ENTITIES INCLUDED IN SUBDIVISION (A) OF SECTION ELEVEN HUNDRED ONE OF THIS CHAPTER.

(7) "WILLFULLY," "THIS CHAPTER," "RELATED STATUTE," AND "RELATED INCOME OR EARNINGS TAX STATUTE" SHALL HAVE THE SAME MEANING AS THOSE TERMS HAVE IN SECTION EIGHTEEN HUNDRED ONE OF THIS ARTICLE.

S 2. The tax law is amended by adding a new section 177-a to read as follows:

S 177-A. DEVICES AND SOFTWARE USED TO EVADE TAX BANNED, CIVIL PENALTIES. (1) CIVIL PENALTIES. (A) ANY PERSON WHO USES A DEVICE OR SOFTWARE BANNED PURSUANT TO SECTION EIGHTEEN HUNDRED TWENTY-TWO OF THIS CHAPTER TO EVADE ANY TAX DUE UNDER THIS CHAPTER OR A RELATED STATUTE OR TO EVADE THE PAYMENT OR PAYMENT OVER OF ANY MONEYS COLLECTED PURPORTEDLY AS TAX SHALL BE LIABLE FOR A PENALTY EQUAL TO THREE HUNDRED PERCENT OF THE AMOUNT EVADED OR ESTIMATED TO BE EVADED TOGETHER WITH INTEREST AT THE UNDERPAYMENT RATE SET BY THE COMMISSIONER AS DESCRIBED IN SUBDIVISION (E) OF SECTION ONE THOUSAND NINETY-SIX OF THIS CHAPTER IN ADDITION TO ANY CRIME OR PENALTY UNDER THIS CHAPTER OR OTHER LAW THAT SUCH PERSON MAY BE SUBJECT.

(B) TWO OR MORE PERSONS WHO CONSPIRE TO USE A DEVICE OR SOFTWARE BANNED PURSUANT TO SECTION EIGHTEEN HUNDRED TWENTY-TWO OF THIS CHAPTER IN A SCHEME TO EVADE ANY TAX DUE UNDER THIS CHAPTER OR A RELATED STATUTE OR TO EVADE THE PAYMENT OR PAYMENT OVER OF ANY MONEYS COLLECTED PURPORTEDLY AS TAX SHALL BE LIABLE FOR A PENALTY EQUAL TO THREE HUNDRED PERCENT OF THE AMOUNT EVADED OR ESTIMATED TO BE EVADED TOGETHER WITH INTEREST AT THE UNDERPAYMENT RATE SET BY THE COMMISSIONER AS DESCRIBED IN SUBDIVISION (E) OF SECTION ONE THOUSAND NINETY-SIX OF THIS CHAPTER IN ADDITION TO ANY CRIME OR PENALTY UNDER THIS CHAPTER OR OTHER LAW THAT SUCH PERSONS MAY BE SUBJECT. SUCH PERSONS SHALL BE JOINTLY AND SEVERALLY LIABLE FOR THE TOTAL AMOUNT OF THE PENALTY AND INTEREST. A PERSON WHO SELLS, LEASES, OR LICENSES THE USE OF SUCH A BANNED DEVICE OR SOFTWARE TO ANOTHER PERSON WHO USES THE BANNED DEVICE OR SOFTWARE TO EVADE THE PAYMENT OF ANY SUCH TAX OR MONEYS COLLECTED PURPORTEDLY AS TAX SHALL BE PRESUMED TO HAVE CONSPIRED TO USE A BANNED DEVICE OR SOFTWARE IN A SCHEME TO EVADE ANY TAX DUE WITH SUCH OTHER PERSON.

(C) ANY PERSON WHO DESIGNS, ENGINEERS, CREATES, OFFERS TO SELL OR LEASE OR LICENSE TO USE, TRANSPORTS, POSSESSES, MAINTAINS, SERVICES, OR REPAIRS A DEVICE OR SOFTWARE BANNED PURSUANT TO SECTION EIGHTEEN HUNDRED TWENTY-TWO OF THIS CHAPTER, AND KNOWS, OR REASONABLY SHOULD HAVE KNOWN, THAT THE DEVICE OR SOFTWARE WILL BE USED TO EVADE TAX OR PAYMENT OR PAYMENT OVER OF ANY MONEYS COLLECTED AS A TAX SHALL BE LIABLE FOR A PENALTY EQUAL TO THREE HUNDRED PERCENT OF THE AMOUNT EVADED OR ESTIMATED TO BE EVADED TOGETHER WITH INTEREST AT THE UNDERPAYMENT RATE SET BY THE COMMISSIONER AS DESCRIBED IN SUBDIVISION (E) OF SECTION ONE THOUSAND NINETY-SIX OF THIS CHAPTER IN ADDITION TO ANY CRIME OR PENALTY UNDER THIS CHAPTER OR OTHER LAW THAT SUCH PERSONS MAY BE SUBJECT.

(D) THE COMMISSIONER SHALL ASSESS PENALTY AND INTEREST UNDER THIS SUBDIVISION IN ACCORD WITH PROCEDURES APPLICABLE TO THE TYPE OF TAX FOUND TO HAVE BEEN EVADED.

(2) ESTIMATION OF TAX EVADED. IF A RETURN OR REPORT REQUIRED TO BE FILED BY THIS CHAPTER OR A RELATED STATUTE IS INCORRECT OR INSUFFICIENT BECAUSE THE PERSON REQUIRED TO FILE IT IS FOUND TO HAVE USED A DEVICE OR SOFTWARE BANNED PURSUANT TO SECTION EIGHTEEN HUNDRED TWENTY-TWO OF THIS CHAPTER WITH INTENT TO EVADE TAX, THE COMMISSIONER SHALL DETERMINE THE AMOUNT OF TAX DUE FROM SUCH INFORMATION AS MAY BE AVAILABLE. IF NECESSARY, THE COMMISSIONER MAY ESTIMATE TAX ON THE BASIS OF EXTERNAL INDICES, SUCH AS STOCK ON HAND, PURCHASES, RENTAL PAID, NUMBER OF ROOMS, LOCATION, SCALE OF RENTS OR CHARGES, COMPARABLE RENTS OR CHARGES, TYPE OF ACCOMMODATIONS AND SERVICE, NUMBER OF EMPLOYEES OR OTHER FACTORS. IN THE CASE OF RETAIL FOOD STORES AND OTHER PARTICIPANTS APPROVED FOR PARTICIPATION IN THE FEDERAL FOOD STAMP PROGRAM UNDER OR PURSUANT TO THE FEDERAL FOOD STAMP ACT OF NINETEEN HUNDRED SEVENTY-SEVEN (7 U.S.C. S 2011 ET SEQ.), AS AMENDED, WHOSE RECORDS ARE INCOMPLETE OR INADEQUATE TO DETERMINE TAX, THE EXTERNAL INDICES UPON WHICH TAX MAY BE ESTIMATED AND DETERMINED MAY ALSO INCLUDE INFORMATION CONTAINED IN APPLICATIONS, UPDATES OF APPLICATIONS, REDEMPTION CERTIFICATES, RETURNS AND REPORTS WHICH SUCH RETAIL FOOD STORES AND OTHER PARTICIPANTS FURNISH TO OR ARE FURNISHED BY THE UNITED STATES GOVERNMENT OR THIS STATE OR THEIR AGENCIES IN ORDER FOR SUCH RETAIL FOOD STORES AND OTHER PARTICIPANTS TO PARTICIPATE IN THE FOOD STAMP PROGRAM OR TO REDEEM COUPONS ISSUED UNDER OR PURSUANT TO SUCH FOOD STAMP ACT AND ANY OTHER AVAILABLE INFORMATION CONSIDERED RELEVANT. WHENEVER SUCH TAX IS ESTIMATED AS PROVIDED FOR IN THIS SUBDIVISION, THE COMMISSIONER'S NOTICE TO SUCH PERSON SHALL CONTAIN A STATEMENT IN BOLD FACE TYPE CONSPICUOUSLY PLACED ON SUCH NOTICE ADVISING THE TAXPAYER: THAT THE AMOUNT OF THE TAX WAS ESTIMATED; THAT THE TAX MAY BE CHALLENGED THROUGH A HEARING PROCESS; AND THAT THE PETITION FOR SUCH CHALLENGE MUST BE FILED WITH THE DIVISION OF TAX APPEALS WITHIN NINETY DAYS. THE COMMISSIONER SHALL OTHERWISE ASSESS TAX ESTIMATED PURSUANT TO THIS SUBDIVISION IN ACCORDANCE WITH PROCEDURES APPLICABLE TO THE TYPE OF TAX FOUND TO HAVE BEEN EVADED.

(3) REIMBURSEMENT OF COMMISSIONER'S EXPENSES. IF THE COMMISSIONER EMPLOYS OR HIRES A COMPUTER OR SOFTWARE FORENSIC EXPERT OR OTHER PERSON TO INVESTIGATE AND DETECT OR FIND THE USE OF A DEVICE OR SOFTWARE BANNED PURSUANT TO SECTION EIGHTEEN HUNDRED TWENTY-TWO OF THIS CHAPTER BY A PERSON REQUIRED TO FILE A RETURN OR REPORT REQUIRED UNDER OR PURSUANT TO THE AUTHORITY OF THIS CHAPTER OR RELATED STATUTE, AND SUCH EXPERT OR OTHER PERSON DETECTS OR FINDS THAT SUCH PERSON REQUIRED TO FILE A RETURN OR REPORT HAS USED SUCH A BANNED DEVICE OR SOFTWARE, OR COMBINATION OF THEM, AND THE COMMISSIONER FINDS THAT SUCH PERSON HAS EVADED THE REPORTING OR PAYMENT OR PAYMENT OVER OF ANY TAX OR MONEYS COLLECTED PURPORTEDLY AS TAX, THEN THE COMMISSIONER SHALL BE AUTHORIZED TO CHARGE TO SUCH PERSON THAT SO EVADED TAX OR THE PAYMENT OR PAYMENT OVER OF SUCH MONEYS THE COMMISSIONER'S COSTS AND EXPENSES TO EMPLOY OR HIRE SUCH EXPERT OR OTHER PERSON FOR SUCH INVESTIGATION, INCLUDING ALL REASONABLE COSTS AND EXPENSES OF THE COMMISSIONER OR OF SUCH EXPERT OR OTHER PERSON. ANY SUCH COSTS AND EXPENSES CHARGED UNDER THIS SUBDIVISION SHALL BE IN ADDITION TO ANY CIVIL OR CRIMINAL FINES, PENALTIES, AND INTEREST THAT MAY BE IMPOSED BY ANY OTHER PROVISION OF LAW.

(4) LOSS OF CERTIFICATE OF AUTHORITY. IF THE COMMISSIONER HAS ISSUED A CERTIFICATE OF AUTHORITY UNDER SECTION ELEVEN HUNDRED THIRTY-FOUR OF THIS CHAPTER TO A PERSON, AND THE COMMISSIONER FINDS THAT THE PERSON HAS USED SUCH A BANNED DEVICE OR SOFTWARE, OR COMBINATION OF THEM, TO EVADE THE REPORTING OR PAYMENT OR PAYMENT OVER OF ANY TAX OR ANY MONEYS COLLECTED PURPORTEDLY AS TAX UNDER THIS CHAPTER OR A RELATED STATUTE, THE COMMISSIONER SHALL REVOKE SUCH CERTIFICATE OF AUTHORITY PURSUANT TO

THE PROCEDURES SET FORTH IN SECTION ELEVEN HUNDRED THIRTY-FOUR OF THIS CHAPTER; PROVIDED HOWEVER, THAT A PERSON WHOSE CERTIFICATE OF AUTHORITY HAS BEEN SO REVOKED SHALL NOT BE ALLOWED TO APPLY FOR OR HOLD ANY CERTIFICATE OF AUTHORITY ISSUED UNDER SUCH SECTION ELEVEN HUNDRED THIRTY-FOUR FOR A PERIOD OF FIVE YEARS FROM THE EFFECTIVE DATE OF SUCH REVOCATION. IN ADDITION, SUCH PERSON SHALL NOT BE ALLOWED TO BE A "PERSON REQUIRED TO COLLECT TAX" WITH REGARD TO ANY OTHER PERSON THAT HOLDS OR SEEKS TO APPLY FOR SUCH A CERTIFICATE OF AUTHORITY DURING SUCH FIVE YEAR PERIOD, AND THE COMMISSIONER SHALL NOT ISSUE A CERTIFICATE OF AUTHORITY DURING SUCH FIVE YEAR PERIOD TO ANY PERSON WHO EMPLOYS SUCH PERSON WHOSE CERTIFICATE WAS SO REVOKED OR TO ANY PERSON IN WHICH SUCH PERSON WHOSE CERTIFICATE WAS SO REVOKED IS A PERSON REQUIRED TO COLLECT TAX OR HAS A TEN PERCENT OR MORE OWNERSHIP INTEREST OF ANY NATURE. "PERSON REQUIRED TO COLLECT TAX" SHALL HAVE THE SAME MEANING AS SUCH TERM HAS IN SECTION ELEVEN HUNDRED THIRTY-ONE OF THIS CHAPTER.

(5) DISPOSITION OF FINES AND INTEREST. ALL FINES, PENALTIES, AND INTEREST LEVIED UNDER THIS SECTION SHALL BE PAID INTO THE STATE TREASURY TO THE CREDIT OF THE GENERAL FUND. HOWEVER, FINES OR INTEREST PAID IN RESPECT TO THE EVASION OF SALES AND COMPENSATING USE TAXES IMPOSED PURSUANT TO THE AUTHORITY OF ARTICLE TWENTY-NINE OF THIS CHAPTER SHALL BE DISPOSED OF AS PROVIDED IN SECTION TWELVE HUNDRED SIXTY-ONE OF THIS CHAPTER.

(6) ADDITIONAL FINES, PENALTIES AND INTEREST. THE FINES, PENALTIES, AND INTEREST IN THIS SECTION SHALL BE IN ADDITION TO ANY PENALTIES AND INTEREST IMPOSED BY ANY OTHER SECTION OF THIS CHAPTER OR OTHER LAW.

(7) DEFINITIONS. FOR PURPOSES OF THIS SECTION, THE DEFINITIONS IN SECTION EIGHTEEN HUNDRED TWENTY-TWO OF THIS CHAPTER SHALL BE APPLICABLE.

S 3. This act shall take effect January 1, 2015.