STATE OF NEW YORK

3946

2019-2020 Regular Sessions

IN ASSEMBLY

January 31, 2019

Introduced by M. of A. WEPRIN -- Multi-Sponsored by -- M. of A. BENEDETTO, COOK, DenDEKKER, DINOWITZ, GOTTFRIED -- read once and referred to the Committee on Ways and Means

AN ACT to amend the general city law and the tax law, in relation to imposing the earnings tax on nonresidents

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The general city law is amended by adding a new article 2-E to read as follows:

ARTICLE 2-E

CITY EARNINGS TAX ON NONRESIDENTS

Section 25-m. Authorization to impose tax.

25-n. Administrative provisions.

25-o. Deposit and disposition of revenues.

§ 25-m. Authorization to impose tax. In addition to any other taxes, now authorized by law, any city having a population of one million or more is hereby authorized and empowered to adopt and amend local laws imposing a tax on the earnings of nonresidents of such city to be administered in the manner provided for in this article by the administrator as defined in section one of the model local law hereinafter set forth.

The tax authorized by this article may be imposed only if the city imposing the tax authorized by this article also imposes a tax on the personal income of its residents. The rates of such tax shall be the rates contained in section two of the model local law and such rates may be reduced and increased, provided that the rates shall not be fixed higher than those contained in section two of such model local law.

The terms of such local law shall be substantially the same as the following model local law except that the appendix and the supplement to the appendix in such local law may be amended for the purpose of conforming it with the United States internal revenue code or other

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

LBD07518-01-9

federal laws relating to taxation as presently in effect or as they may be amended.

EARNINGS TAX ON NONRESIDENTS

Sec. 1. Meaning of terms.--As used in this local law, the following terms shall mean and include: (a) "Administrator" means the state tax commission.

(b) "City" means the city imposing the tax.

(c) "Payroll period" and "employer" shall mean the same as payroll period and employer as defined in subsections (b) and (d) of section thirty-four hundred one of the internal revenue code, and "employee" shall also include all those included as employees in subsection (c) of such section of such code.

(d) "Wages" shall mean wages as defined in subsection (a) of section thirty-four hundred one of the internal revenue code, except that (1) wages shall not include payments for active service as a member of the armed forces of the United States and shall not include, in the case of a nonresident individual or partner of a partnership doing an insurance business as a member of the New York insurance exchange described in section six thousand two hundred one of the insurance law, any item of income, gain, loss or deduction of such business which is such individual's distributive or pro rata share for federal income tax purposes or which such individual is required to take into account separately for federal income tax purposes and (2) wages shall include (i) the amount of member or employee contributions to a retirement system or pension fund picked up by the employer pursuant to subdivision f of section five hundred seventeen or subdivision d of section six hundred thirteen of the retirement and social security law or section 13-225.1, 13-327.1, 13-125.1, 13-125.2 or 13-521.1 of the administrative code of the city of New York or subdivision nineteen of section twenty-five hundred seventy-five of the education law, (ii) the amount deducted or deferred from an employee's salary under a flexible benefits program established pursuant to section twenty-three of the general municipal law or section twelve hundred ten-a of the public authorities law, (iii) the amount by which an employee's salary is reduced pursuant to the provisions of subdivision b of section 12-126.1 and subdivision b of section 12-126.2 of the administrative code of the city of New York, and (iv) the amount of member or employee contributions to a retirement system or pension fund picked up or paid by the employer for members of the Manhattan and Bronx surface transportation authority pension plan and treated as employer contributions in determining income tax treatment under section 414(h) of the internal revenue code.

(e) "Net earnings from self-employment" shall mean the same as net earnings from self-employment as defined in subsection (a) of section fourteen hundred two of the internal revenue code, except that the deduction for wages and salaries paid or incurred for the taxable year which is not allowed pursuant to section two hundred eighty-C of such code shall be allowed, and except that an estate or trust shall be deemed to have net earnings from self-employment determined in the same manner as if it were an individual subject to the tax on self-employment income imposed by section fourteen hundred one of the internal revenue code diminished by (1) the amount of any deduction allowed by subsection (c) of section six hundred forty-two of the internal revenue code and (2) the deductions allowed by sections six hundred fifty-one and six hundred sixty-one of said code to the extent that they represent distributions or payments to a resident of the city. However, "trade or business" as used in subsection (a) of section fourteen hundred two of

such code shall mean the same as trade or business as defined in subsection (c) of section fourteen hundred two of such code, except that paragraphs (4), (5) and (6) of such subsection shall not apply in determining net earnings from self-employment taxable under this local law. Provided however, in the case of a nonresident individual or partner of a partnership doing an insurance business described in section six thousand two hundred one of the insurance law, any item of income, gain, loss or deduction of such business which is the individual's distributive or pro rata share for federal income tax purposes or which the individual is required to take into account separately for federal income tax purposes shall not be considered to be "net earnings from self-employment".

(f) "Taxable year" shall mean the taxpayer's taxable year for federal income tax purposes.

(g) Resident individual.--A resident individual means an individual:

(1) who is domiciled in the city, unless (A) he or she maintains no permanent place of abode in the city, maintains a permanent place of abode elsewhere, and spends in the aggregate not more than thirty days of the taxable year in the city, or (B) (i) within any period of five hundred forty-eight consecutive days he or she is present in a foreign country or countries for at least four hundred fifty days, and (ii) during such period of five hundred forty-eight consecutive days he or she is not present in the city for more than ninety days and does not maintain a permanent place of abode in the city at which his spouse (unless such spouse is legally separated) or minor children are present for more than ninety days, and (iii) during any period of less than twelve months, which would be treated as a separate taxable period based on a change of resident status, and which period is contained within such period of five hundred forty-eight consecutive days, he or she is present in the city for a number of days which does not exceed an amount which bears the same ratio to ninety as the number of days contained in such period of less than twelve months bears to five hundred forty-eight, or

(2) who is not domiciled in the city but maintains a permanent place of abode in the city and spends in the aggregate more than one hundred eighty-three days of the taxable year in the city, unless such individual is in active service in the armed forces of the United States.

(h) Nonresident individual.--A nonresident individual means an individual who is not a resident.

(i) Resident estate or trust.--A resident estate or trust means: (1) the estate of a decedent who at his or her death was domiciled in the city,

(2) a trust, or a portion of a trust, consisting of property transferred by will of a decedent who at his or her death was domiciled in the city, or

(3) a trust, or portion of a trust, consisting of the property of:

(A) a person domiciled in the city at the time such property was transferred to the trust, if such trust or portion of a trust was then irrevocable, or if it was then revocable and has not subsequently become irrevocable; or

(B) a person domiciled in the city at the time such trust, or portion of a trust, became irrevocable, if it was revocable when such property was transferred to the trust but has subsequently become irrevocable. For the purposes of the foregoing, a trust or portion of a trust is revocable if it is subject to a power, exercisable immediately or at any future time, to revest title in the person whose property constitutes

such trust or portion of a trust, and a trust or portion of a trust becomes irrevocable when the possibility that such power may be exercised has been terminated.

(j) Nonresident estate or trust.--A nonresident estate or trust means an estate or trust which is not a resident.

(k) Unless a different meaning is clearly required, any term used in this local law shall have the same meaning as when used in a comparable context in the laws of the United States relating to federal taxes but such meaning shall be subject to the exceptions or modifications prescribed in or pursuant to article two-E of the general city law or by the laws of this state. Any reference in this local law to the internal revenue code, the internal revenue code of nineteen hundred eighty-six or to the laws of the United States shall mean the provisions of the internal revenue code of nineteen hundred eighty-six (unless a reference to the internal revenue code of nineteen hundred fifty-four is clearly intended), and amendments thereto, and other provisions of the laws of the United States relating to federal taxes, as the same are included in this local law as an appendix and supplement to the appendix or as included by reference to an appendix and supplement to the appendix of a title enacted by the same local law as enacts this local law. (The quotation of the aforesaid laws of the United States is intended to make them a part of this local law and to avoid constitutional uncertainties which might result if such laws were merely incorporated by reference. The quotation of a provision of the federal internal revenue code or of any other law of the United States shall not necessarily mean that it is applicable to or has relevance to this local law.)

(l) The term "partnership" shall include, unless a different meaning is clearly required, a subchapter K limited liability company. The term "subchapter K limited liability company" shall mean a limited liability company classified as a partnership for federal income tax purposes.

The term "limited liability company" means a domestic limited liability company or a foreign limited liability company, as defined in section one hundred two of the limited liability company law, a limited liability investment company formed pursuant to section five hundred seven of the banking law, or a limited liability trust company formed pursuant to section one hundred two-a of the banking law.

Sec. 2. Persons subject to tax.--(a) Imposition of tax.--A tax is hereby imposed for each taxable year beginning after July first, two thousand eighteen on the wages earned, and net earnings from self-employment, within the city, of every nonresident individual, estate and trust which shall comprise a tax at the rate of one percent on all wages and all net earnings from self-employment.

(b) Exclusion.--(1) In computing the amount of wages and net earnings from self-employment taxable under subsection (a), there shall be allowed an exclusion against the total of wages and net earnings from self-employment in accordance with the following table:

Total of Wages and Net Earnings From Self-Employment	Exclusion Allowable
Not Over $10,000	$3,000
Over $10,000 But Not Over $20,000	$2,000
Over $20,000 But Not Over $30,000	$1,000
Over $30,000	NONE

(2) The exclusion allowable shall be applied pro rata against wages and net earnings from self-employment.

(3) For taxable periods of less than one year, the exclusion allowable shall be prorated pursuant to regulations of the administrator.

(c) Limitation.--In no event shall a taxpayer be subject to the tax under this local law in an amount greater than he or she would be required to pay if he or she were a resident of the city and subject to a tax on personal income of residents of the city adopted by the city pursuant to authority granted by the general city law.

Sec. 3. Taxable years to which the tax imposed by this local law applies; tax for taxable years beginning after July first, two thousand twenty.--The tax imposed by this local law is imposed for each taxable year beginning on or after July first, two thousand twenty.

Sec. 4. Accounting periods and methods.--(a) Accounting periods.-- A taxpayer's taxable year under this local law shall be the same as his taxable year for federal income tax purposes.

(b) Change of accounting periods.--If a taxpayer's taxable year is changed for federal income tax purposes, his or her taxable year for purposes of this local law shall be similarly changed. If a taxable period of less than twelve months results from a change of taxable year, the exclusion allowable under section two of this local law shall be prorated under regulations of the administrator.

(c) Accounting methods.--A taxpayer's method of accounting under this section shall be the same as his or her method of accounting for federal income tax purposes. In the absence of any method of accounting for federal income tax purposes, net earnings from self-employment within the city shall be computed under such method as in the opinion of the administrator clearly reflects net earnings from self-employment within the city.

(d) Change of accounting methods.--(1) If a taxpayer's method of accounting is changed for federal income tax purposes, his or her method of accounting for purposes of this local law shall be similarly changed.

(2) If a taxpayer's method of accounting is changed, other than from an accrual to an installment method, any additional tax which results from adjustments determined to be necessary solely by reason of the change shall not be greater than if such adjustments were ratably allocated and included for the taxable year of the change and the preceding taxable years, beginning after July first, two thousand twenty, not in excess of two, during which the taxpayer used the method of accounting from which the change is made.

(3) If a taxpayer's method of accounting is changed from an accrual to an installment method, any additional tax for the year of such change of method and for any subsequent year which is attributable to the receipt of installment payments properly accrued in a prior year, shall be reduced by the portion of tax for any prior taxable year attributable to the accrual of such installment payments, in accordance with regulations of the administrator.

Sec. 5. Returns and payment of tax.--On or before the fifteenth day of the fourth month following the close of the taxable year, every person subject to the tax shall make and file a return and any balance of the tax shown due on the face of such return shall be paid therewith. The administrator may, by regulation, provide for the filing of returns and payment of the tax at such other times as he or she deems necessary for the proper enforcement of this local law. The administrator may also provide by regulation that any return otherwise required to be made and filed under this local law by any nonresident individual need not be made and filed if such nonresident individual had, during the taxable year to which the return would relate, no net earnings from self-employment within the city. Any regulation allowing such waiver of return may

provide for additional limitations on and conditions and prerequisites to the privilege of not filing a return.

Sec. 6. Combined returns, employer's returns and payments.--The state tax commission may require:

(1) The filing of any or all of the following:

(A) A combined return which in addition to the return provided for in a local law authorized by this article may also include returns required to be filed under a local law authorized by article thirty of the tax law and under article twenty-two of the tax law.

(B) A combined employer's return which in addition to the employer's return provided for in a local law authorized by this article may also include employer's returns required to be filed under a local law authorized by article thirty of the tax law and under article twenty-two of the tax law.

(2) Where a combined return or employer's return is required, and with respect to the payment of estimated tax, the state tax commission may also require payment of a single amount which shall be the total of the amounts (total taxes less any credits or refunds) required to be paid with the returns or employer's returns or in payment of estimated tax pursuant to the provisions of local laws imposed under the authority of article two-E of the general city law, article thirty of the tax law and pursuant to the provisions of article twenty-two of the tax law.

Sec. 7. Effect of invalidity in part; inconsistencies with other laws.--(a) If any clause, sentence, paragraph, subsection, section, provision or other portion of this local law or the application thereof to any person or circumstances shall be held to be invalid, such holding shall not affect, impair or invalidate the remainder of this local law or the application of such portion held invalid, to any other person or circumstances, but shall be confined in its operation to the clause, sentence, paragraph, subsection, section, provision or other portion thereof directly involved in such holding or to the person and circumstances therein involved.

(b) If any provision of this local law is inconsistent with, in conflict with, or contrary to any other provision of law, such provision of this local law shall prevail over such other provision and such other provision shall be deemed to have been amended, superseded or repealed to the extent of such inconsistency, conflict or contrariety.

§ 25-n. Administrative provisions. (a) General. Any local law adopted pursuant to this article shall also contain provisions necessary and appropriate for the collection and the administration of the tax herein authorized.

(b) Methods of review.--Such local law shall also contain provisions substantially the same as the following:

(i) Any final determination of the amount of any tax payable hereunder shall be reviewable for error, illegality or unconstitutionality or any other reason whatsoever by a proceeding under article seventy-eight of the civil practice law and rules if application therefor is made to the supreme court within four months after the giving of the notice of such final determination, provided, however, that any such proceeding under article seventy-eight of the civil practice law and rules shall not be instituted unless (A) the amount of any tax sought to be reviewed, with such interest and penalties thereon as may be provided for by local law or regulation, shall be first deposited and there is filed an undertaking, issued by a surety company authorized to transact business in this state and approved by the superintendent of financial services of this state as to solvency and responsibility, in such amount as a justice of

the supreme court shall approve to the effect that if such proceeding be dismissed or the tax confirmed the petitioner will pay all costs and charges which may accrue in the prosecution of such proceeding or (B) at the option of the petitioner such undertaking may be in a sum sufficient to cover the taxes, interest and penalties stated in such determination plus the costs and charges which may accrue against it in the prosecution of the proceeding, in which event the petitioner shall not be required to pay such taxes, interest or penalties as a condition precedent to the application.

(ii) Where any tax imposed hereunder shall have been erroneously, illegally or unconstitutionally collected and application for the refund thereof duly made to the proper fiscal officer or officers, and such officer or officers shall have made a determination denying such refund, such determination shall be reviewable by a proceeding under article seventy-eight of the civil practice law and rules, provided, however, that such proceeding is instituted within four months after the giving of the notice of such denial, that a final determination of tax due was not previously made, and that an undertaking is filed with the proper fiscal officer or officers in such amount and with such sureties as a justice of the supreme court shall approve to the effect that if such proceeding be dismissed or the tax confirmed, the petitioner will pay all costs and charges which may accrue in the prosecution of such proceeding.

(iii) No assessment of additional tax shall be made after the expiration of more than three years from the date of the filing of the return except that where no return has been filed or, in the case of the filing of a wilfully false or fraudulent return with intent to evade the tax, the tax may be assessed at any time; provided, however, where a taxpayer omits from his or her return an amount which should be properly included therein which is in excess of twenty-five percent of the amount of the gross income derived by him or her from any trade or business, no assessment of additional tax shall be made after the expiration of more than six years from the date of the filing of the return, except as otherwise provided herein.

(c) Delegation of functions.--The local law may provide that the administrator of the tax imposed, as defined in the local law, may delegate his or her powers and functions under the local law to one of his or her deputies or to any employee or employees of his or her department and authorize banks or trust companies which are depositories or financial agents of the city to receive and give a receipt for any tax imposed under the local law.

§ 25-o. Deposit and disposition of revenues. One-half the revenues resulting from the imposition of the tax authorized by this article shall be:

(a) paid into the treasury of the city and shall be credited to and deposited in the general fund of such city and shall be available for any lawful city purpose; and

(b) deposited in the metropolitan transportation authority financial assistance fund established pursuant to section ninety-two-ff of the state finance law.

(c) Such revenues shall be deposited and disposed of in the same manner as revenues resulting from the imposition of the taxes authorized by article thirty of the tax law.

§ 2. Section 1301 of the tax law is amended by adding a new subsection (c) to read as follows:

(c) The taxes authorized by this article may be imposed only if the general city law authorizes the adoption of a city tax on the earnings of nonresidents and the city imposing the tax authorized by this article also imposes such tax on the earnings of nonresidents.

§ 3. Subsection (b) of section 1305 of the tax law, as amended by chapter 5 of the laws of 1999, is amended to read as follows:

(b) City nonresident individual. A city nonresident individual means an individual who is not a resident of such city [~~or the state of New York~~].

§ 4. Separability. If any clause, sentence, paragraph or part of this act shall be adjudged to be unconstitutional or invalid, such judgment shall not affect, impair, or invalidate, the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, section or part thereof directly involved in the controversy in which such judgment shall have been rendered.

§ 5. This act shall take effect immediately. The commissioner of taxation and finance is authorized to promulgate immediately and on an emergency basis all necessary and reasonable rules and regulations for the timely implementation of this act.