STATE OF NEW YORK

4887

2019-2020 Regular Sessions

IN ASSEMBLY

February 5, 2019

Introduced by M. of A. PERRY -- read once and referred to the Committee on Ways and Means

AN ACT to amend the tax law, in relation to requiring vendors to establish mandatory escrow accounts for sales taxes collected, establish the mechanism for those accounts and provide the state with the authority to have immediate access to their collected taxes; and to repeal certain provisions of such law relating thereto

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

Section 1. Paragraph 1 of subdivision (a) of section 1132 of the tax law, as amended by chapter 255 of the laws of 1998, is amended to read as follows:

(1) **(i)** Every person required to collect the tax shall collect the tax from the customer when collecting the price, amusement charge or rent to which it applies. If the customer is given any sales slip, invoice, receipt or other statement or memorandum of the price, amusement charge or rent paid or payable, the tax shall be stated, charged and shown separately on the first of such documents given to him. The tax shall be paid to the person required to collect it as trustee for and on account of the state.

(ii) Every person required to collect the tax shall deposit such tax upon collection into a separate account, in trust for and payable to the commissioner, as provided by subparagraphs (iii) and (iv) of this paragraph at a time and in a manner as determined by the commissioner. All amounts deposited in such account shall be kept in such account until paid over to the commissioner.

(iii) If the person required to collect the tax does not accept payments from customers through credit or debit card banking transactions, the person required to collect the tax shall establish an account in any banking institution approved by the commissioner and located in this state the deposits in which are insured by an agency of

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

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the federal government. The account shall be held in trust for and payable to the commissioner and the amount of such tax collected shall be kept in such account until payment over to the commissioner. The person required to collect the tax shall authorize the commissioner to debit such account in a manner determined by the commissioner.

(iv) If the person required to collect the tax accepts payments from customers using credit or debit cards, the person required to collect the tax shall establish a separate escrow account through an approved credit card processing company (ACCPC) and not through an escrow account of the type described in subparagraph (iii) of this paragraph. The commissioner shall by regulation establish standards for approving credit card processing companies for opening and establishing ACCPC escrow accounts for persons required to pay the tax. Persons collecting the tax and required to use ACCPC escrow accounts under this subparagraph shall make daily deposits into their ACCPC escrow account that are an estimate of the amount of taxes they collected that day for all of their taxable sales, both those paid in cash and those paid by credit or debit card. To effectuate the deposit, the ACCPC shall deduct the estimated sales taxes owed from the day's credit and debit card transactions before paying over the receipts from such transactions to the person required to collect the tax. The amount deducted shall be determined by multiplying the day's credit and debit card sales by an algorithmic rate which shall be determined when the ACCPC escrow account is established and at least once a year thereafter. The algorithmic rate shall represent an estimated calculation of the amount of taxes collected and owed each day for both cash and credit and debit card sales. The calculation of the person's algorithmic rate shall be certified by a certified public accountant licensed in this state, an attorney licensed in this state or an enrolled agent or registered tax return preparer who has been authorized by the department to certify the algorithmic rate, as an accurate estimate of the ratio of the person's cash to credit transactions and taxable to non-taxable sales. The commissioner shall promulgate regulations defining how the algorithmic rate shall be calculated, setting standards for that calculation, and identifying the process by which licensed or registered professionals may be approved or disapproved by the department to certify the accuracy of the algorithmic rate. Amounts deposited in an ACCPC escrow account shall be held in trust for and payable to the commissioner and shall be kept in such accounts until payment over to the commissioner. Persons collecting the tax and required to use an ACCPC escrow account under this subparagraph shall, upon establishing the account, authorize the commissioner to debit such account in a manner and frequency to be determined by the commissioner.

§ 2. Paragraph 1 of subdivision (a) of section 1134 of the tax law, as amended by section 160 of part A of chapter 389 of the laws of 1997, subparagraph (iii) as amended by section 44 of part K of chapter 61 of the laws of 2011, is amended to read as follows:

(1) (i) Every person required to collect any tax imposed by this article, other than a person who is a vendor solely by reason of clause (D), (E) or (F) of subparagraph (i) of paragraph eight of subdivision (b) of section eleven hundred one of this article, commencing business or opening a new place of business, (ii) every person purchasing or selling tangible personal property for resale commencing business or opening a new place of business, (iii) every person selling petroleum products including persons who or which are not distributors, (iv) every person described in this subdivision who takes possession of or pays for business assets under circumstances requiring notification by such person to

the commissioner pursuant to subdivision (c) of section eleven hundred forty-one of this [~~chapter~~] part, (v) every person selling cigarettes including persons who or which are not agents, and (vi) every person described in subparagraph (i), (ii), (iii), (iv) or (v) of this paragraph or every person who is a vendor solely by reason of clause (D), (E) or (F) of subparagraph (i) of paragraph eight of subdivision (b) of section eleven hundred one of this article who or which has had its certificate of authority revoked under paragraph four of this subdivision, shall file with the commissioner a certificate of registration, in a form prescribed by the commissioner, at least twenty days prior to commencing business or opening a new place of business or such purchasing, selling or taking of possession or payment, whichever comes first. Every person who is a vendor solely by reason of clause (D) of subparagraph (i) of paragraph eight of subdivision (b) of section eleven hundred one of this article shall file with the commissioner a certificate of registration, in a form prescribed by such commissioner, within thirty days after the day on which the cumulative total number of occasions that such person came into the state to deliver property or services, for the immediately preceding four quarterly periods ending on the last day of February, May, August and November, exceeds twelve. Every person who is a vendor solely by reason of clause (E) of subparagraph (i) of paragraph eight of subdivision (b) of section eleven hundred one of this article shall file with the commissioner a certificate of registration, in a form prescribed by such commissioner, within thirty days after the day on which the cumulative total, for the immediately preceding four quarterly periods ending on the last day of February, May, August and November, of such person's gross receipts from sales of property delivered in this state exceeds three hundred thousand dollars and number of such sales exceeds one hundred. Every person who is a vendor solely by reason of clause (F) of subparagraph (i) of paragraph eight of subdivision (b) of section eleven hundred one of this article shall file with the commissioner a certificate of registration, in a form prescribed by such commissioner, within thirty days after the day on which tangible personal property in which such person retains an ownership interest is brought into this state by the person to whom such property is sold, where the person to whom such property is sold becomes or is a resident or uses such property in any manner in carrying on in this state any employment, trade, business or profession. **A person required to file a certificate of registration and who is required to collect the tax as required by subparagraph (i) of paragraph one of subdivision (a) of section eleven hundred thirty-two of this part shall, at the time such certificate is filed, establish an escrow account as required by subparagraphs (ii), (iii) and (iv) of paragraph one of subdivision (a) of section eleven hundred thirty-two of this part. Persons required to establish an escrow account through an approved credit card processing company pursuant to subparagraph (iv) of paragraph one of subdivision (a) of section eleven hundred thirty-two of this part shall establish an algorithmic formula for payment of the estimated collected sales tax and shall file, within three months of filing their certificate of registration a certification from a licensed, registered or approved professional of the type specified in subparagraph (iv) of paragraph one of subdivision (a) of section eleven hundred thirty-two of this part certifying to the accuracy of their method of estimating their daily collection of sales taxes as provided in subparagraph (iv) of paragraph one of subdivision (a) of section eleven hundred thirty-two of this part.** Information with respect to the

notice requirements of a purchaser, transferee or assignee and such person's liability pursuant to the provisions of subdivision (c) of section eleven hundred forty-one of this [~~chapter~~] part shall be included in or accompany the certificate of registration form furnished the applicant. The commissioner shall also include with such information furnished to each applicant general information about the tax imposed under this article including information on records to be kept, returns and payments, notification requirements and forms. Such certificate of registration may be amended in accordance with rules promulgated by the commissioner.

§ 3. Subparagraph (A) of paragraph 4 of subdivision (a) of section 1134 of the tax law, as amended by section 21-a of part U of chapter 61 of the laws of 2011, is amended to read as follows:

(A) Where a person who holds a certificate of authority (i) willfully fails to file a report or return required by this article, (ii) willfully files, causes to be filed, gives or causes to be given a report, return, certificate or affidavit required under this article which is false, (iii) willfully fails to comply with the provisions of paragraph two or three of subdivision (e) of section eleven hundred thirty-seven of this [~~article~~] part, (iv) willfully fails to prepay, collect, truthfully account for or pay over any tax imposed under this article or pursuant to the authority of article twenty-nine of this chapter, (v) fails to obtain a bond pursuant to paragraph two of subdivision (e) of section eleven hundred thirty-seven of this part, or willfully fails to [~~comply with a notice issued by the commissioner pursuant to paragraph three of such subdivision~~] establish or properly fund an escrow account as required by paragraph one of subdivision (a) of section eleven hundred thirty-two of this part or otherwise willfully fails to comply with the requirements of that section, or (vi) has been convicted of a crime provided for in this chapter, the commissioner may revoke or suspend such certificate of authority and all duplicates thereof. Provided, however, that the commissioner may revoke or suspend a certificate of authority based on the grounds set forth in clause (vi) of this subparagraph only where the conviction referred to occurred not more than one year prior to the date of revocation or suspension.

§ 4. Subparagraph (A) of paragraph 4 of subdivision (a) of section 1134 of the tax law, as amended by chapter 2 of the laws of 1995, is amended to read as follows:

(A) Where a person who holds a certificate of authority (i) willfully fails to file a report or return required by this article, (ii) willfully files, causes to be filed, gives or causes to be given a report, return, certificate or affidavit required under this article which is false, (iii) willfully fails to comply with the provisions of paragraph two or three of subdivision (e) of section eleven hundred thirty-seven of this [~~article~~] part, (iv) willfully fails to prepay, collect, truthfully account for or pay over any tax imposed under this article or pursuant to the authority of article twenty-nine of this chapter, [~~or~~] (v) willfully fails to establish or properly fund an escrow account as required by paragraph one of subdivision (a) of section eleven hundred thirty-two of this part or otherwise willfully fails to comply with the requirements of that section, or (vi) has been convicted of a crime provided for in this chapter, the commissioner may revoke or suspend such certificate of authority and all duplicates thereof. Provided, however, that the commissioner may revoke or suspend a certificate of authority based on the grounds set forth in clause (v) of this subpara-

graph only where the conviction referred to occurred not more than one year prior to the date of revocation or suspension.

§ 5. Paragraph 1 of subdivision (a) of section 1136 of the tax law is REPEALED.

§ 6. Subdivision (c) of section 1136 of the tax law, as added by chapter 93 of the laws of 1965, is amended to read as follows:

(c) The [~~tax commission~~] commissioner may permit or require returns to be made covering other periods and upon such dates as it may specify. If the tax commission deems it necessary in order to insure the payment of the taxes imposed by this article, it may require returns to be made for shorter periods than those prescribed pursuant to the foregoing subdivisions of this section, and upon such dates as it may specify. If the commissioner determines that the person required to collect and pay the tax has established an escrow account as provided by subparagraphs (ii), (iii) and (iv) of paragraph one of subdivision (a) of section eleven hundred thirty-two of this part and that the amount deposited in that escrow account has equaled or exceeded ninety-five percent of the taxes owed for four consecutive quarters, the commissioner shall permit the person to file an annual return in lieu of the returns required by subdivision (a) of this section. The annual return shall reconcile the amounts withheld and paid through the escrow account with the person's annual taxable sales and the return shall be certified as accurate by a licensed, registered or approved professional of the type identified in subparagraph (iv) of paragraph one of subdivision (a) of section eleven hundred thirty-two of this part and shall include a certification as prescribed by the commissioner. The form of the annual return shall be prescribed by the commissioner and shall contain such information as the commissioner may deem necessary for the proper administration of this article. The annual return shall be filed on or before January thirty-first of the year following the calendar year covered by the return.

§ 7. The opening paragraphs of subdivisions (a) and (b) and subdivision (c) of section 1137 of the tax law, the opening paragraphs of subdivisions (a) and (b) as amended by section 2-f of part M-1 of chapter 109 of the laws of 2006 and subdivision (c) as amended by chapter 155 of the laws of 1982, are amended to read as follows:

Every person required to file a return under the preceding section whose total taxable receipts (as "taxable receipts" are described in subdivision (a) of such section), amusement charges and rents are subject to the tax imposed pursuant to subdivisions (a), (c), (d), (e) and (f) of section eleven hundred five of this article shall, at the time of filing such return, pay to the commissioner the total of the following, less any amounts already deposited into the person's escrow account and collected by or available for collection by the commissioner:

Every person required to file a return under the preceding section and not subject to the provisions of subdivision (a) of this section shall, at the time of filing such return, pay to the commissioner the taxes imposed by this article and pursuant to article twenty-nine of this chapter as well as all other moneys collected by such person acting or purporting to act under the provisions of this article or of any local law, ordinance or resolution adopted pursuant to such article twenty-nine; provided, however, that if the commissioner shall have fixed an effective rate of tax applicable to any or all of his or her receipts, amusement charges and rents as provided in subdivision (d) of this section, any such person may elect, with reference to such receipts, amusement charges and rents and subject to approval by the commissioner

and to such regulations as the commissioner may promulgate, to pay to the commissioner at the time of filing his or her return the total of the following, less any amounts already deposited into the person's escrow account and collected by or available for collection by the commissioner:

(c) [~~(1)~~] The provisions of subdivisions (a) and (b) of this section shall not be applicable to[~~: (i)~~] a person filing a short-form, part-quarterly return as defined in paragraph [~~(ii)~~] two of subdivision (a) of section eleven hundred thirty-six [~~hereof~~] of this part who, at the time of such filing shall pay to the tax commission one-third of the total state and local sales and compensating use taxes payable by the person to the tax commission in the comparable quarter of the immediately preceding year under this article and as taxes imposed pursuant to the authority of article twenty-nine with respect to all receipts, amusement charges and rents[~~, or (ii) a person filing a March estimated return as described in paragraph (ii) of subdivision (c) of section eleven hundred thirty-seven-A hereof who, at the time of such filing shall pay to the tax commission one-third of the sales and compensating use taxes payable by such person to the tax commission in the comparable quarter of the immediately preceding year under this article. Notwithstanding the preceding sentence, for the purposes of subparagraph (ii) of this paragraph, the sales and compensating use taxes payable in the comparable quarter of the immediately preceding year shall not include taxes imposed by section eleven hundred seven or eleven hundred eight of this article or pursuant to the authority of article twenty-nine of this chapter.~~

~~(2) The provisions of subdivisions (a) and (b) of this section, however, shall apply to a person filing a March estimated return as described in paragraph (i) of subdivision (c) of section eleven hundred thirty-seven-A hereof who, at the time of such filing shall pay to the tax commission the sales and compensating use taxes, that are estimated to be payable by such person for such month of March. Notwithstanding the preceding sentence, for the purposes of this paragraph, the sales and compensating use taxes that are estimated to be payable by such person for such month of March shall not include taxes imposed by section eleven hundred seven or eleven hundred eight of this article or pursuant to the authority of article twenty-nine of this chapter~~].

§ 8. Paragraph 3 of subdivision (e) of section 1137 of the tax law is REPEALED.

§ 9. Paragraphs 1 and 2 of subdivision (f) of section 1137 of the tax law, paragraph 1 as amended by section 1 of part X of chapter 57 of the laws of 2010 and paragraph 2 as amended by section 1 of part H of chapter 62 of the laws of 2006, are amended to read as follows:

(1) Except as otherwise provided in this subdivision, a person required to collect tax who files a return required to be filed under section eleven hundred thirty-six of this part for a quarterly or longer period shall be allowed a credit against the taxes and fees required to be reported on, and paid with, such return, in an amount as determined in paragraph two of this subdivision, but only where such person files the return on or before the filing due date and pays or pays over with such return the total amount shown on such return (determined with regard to this subdivision) and further only where the amounts deposited by the person into the person's escrow account during the period covered by the filing are equal to at least ninety-five percent of the total tax due; provided, however, that no credit pursuant to this subdivision shall be allowed for any person who files or is required to file a

return pursuant to paragraph two of subdivision (a) of section eleven hundred thirty-six of this part or any person who pays or is required to pay tax pursuant to section ten of this chapter.

(2) The amount of the credit authorized by paragraph one of this subdivision shall be five percent of the amount of taxes and fees (but not including any penalty or interest thereon) required to be reported on, and paid or paid over with, the return but only if the return is filed on or before the filing due date, but not more than [~~two~~] five hundred dollars, for each quarterly or longer period[~~, except that, with respect to returns required to be filed for quarterly or longer periods ending on or before the last day of February, two thousand seven, the amount of the credit shall be not more than one hundred seventy-five dollars for each such quarterly or longer period~~].

§ 10. Section 1137-A of the tax law is REPEALED.

§ 11. Section 1145 of the tax law is amended by adding a new subdivision (l) to read as follows:

(l)(1) In addition to any other penalty provided by this article or any other law, any person failing to establish or properly fund an escrow account required by subparagraph (i), (ii), (iii) or (iv) of paragraph one of subdivision (a) of section eleven hundred thirty-two of this part shall be subject to an additional penalty of ten percent of the amount of tax due if such failure is for not more than one month, with an additional one percent for each additional month or fraction thereof during which such failure continues, not exceeding thirty percent in the aggregate.

(2) If the amount paid by the person required to collect the tax into their escrow account is less than ninety percent than the amount of taxes owed, as shown in the person's quarterly, part-quarterly or annual return, the person shall owe a penalty equal to fifty percent of the delinquency. In addition, if the escrow account maintained by the person is an ACCPC escrow account, the commissioner may issue a notice requiring the person to increase the person's algorithmic rate by an amount not exceeding twice the amount of the deficiency and this increased algorithmic rate shall continue as long as the commissioner determines that such increased rate is necessary.

§ 12. This act shall take effect September 1, 2020; provided that the amendments to subparagraph (A) of paragraph 4 of subdivision (a) of section 1134 of the tax law made by section three of this act shall be subject to the expiration and reversion of such subparagraph pursuant to section 23 of part U of chapter 61 of the laws of 2011, as amended, when upon such date the provisions of section four of this act shall take effect. Effective immediately the addition, amendment and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date are authorized to be made and completed on or before such date.