STATE OF NEW YORK

4642

2021-2022 Regular Sessions

IN ASSEMBLY

February 4, 2021

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

AN ACT to amend the tax law, in relation to establishing a pass-through business tax and a credit for pass-through business tax for partners and shareholders of S corporations

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 article 24-A to read as follows:

ARTICLE 24-A
PASS-THROUGH BUSINESS TAX

Section 860. Definitions.
861. Imposition and rate of tax.
862. Tax credits.
863. Payment of estimated tax.
864. Filing of return and payment of tax.
865. Accounting periods and methods.
866. Procedural provisions.

§ 860. Definitions. For purposes of this article:

(a) Partnership. Partnership means any partnership as provided in section 7701(a)(2) of the Internal Revenue Code. An affected partnership shall include any limited liability company treated as a partnership for federal income tax purposes.

(b) S corporation. S corporation means a corporation or a limited liability company that is treated as an S corporation for federal income tax purposes.

(c) Affected business entity. Affected business entity means a partnership or an S corporation which elects to file under this article, but does not include a publicly-traded partnership as defined in section 7704(b) of the Internal Revenue Code, that has agreed to file an annual return pursuant to section eight hundred sixty-one of this article

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

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reporting the name, address, Social Security number or federal employer identification number and such other information required by the commissioner of each unitholder whose distributive share of income derived from or connected with sources within this state was more than five hundred dollars.

(d) Lower-tier entity. A lower-tier business entity means any partnership or S corporation in which an affected business entity has a direct ownership interest.

(e) Pass-through business tax. Pass-through business tax means the total tax imposed by this article without regard to the pass-through business credit calculated under subdivision (a) of section eight hundred sixty-two of this article.

(f) Pass-through business credit. Pass-through business credit means the total credit calculated under subdivision (a) of section eight hundred sixty-two of this article without regard to any limitation imposed by paragraph three of such subdivision.

(g) Ownership percentage. Ownership percentage means a fraction, the numerator of which is the net total of the partner's or shareholder's distributive share of income, gain, loss and deductions of, and guaranteed payments from, the affected business entity for such taxable year, and the denominator of which is the sum, for such taxable year, of the net total distributive shares of income, gain, loss and deductions of, and guaranteed payments to, all partners in the affected partnership or shareholders of an S corporation for whom or which such net total, as separately determined for each partner or shareholder, is greater than zero.

(h) Pass-through business net income. Pass-through business net income means the sum of (1) federal ordinary business income, as described in section 702(a)(8) of the Internal Revenue Code and as applied to the affected business entity by section 703 of the Internal Revenue Code; and (2) taxes paid or incurred during the taxable year pursuant to this article by the affected business entity to the extent deducted in computing federal ordinary income; and (3) guaranteed payments paid by the affected entity to its partners or shareholders as described in section 707(c) of the Internal Revenue Code.

(i) Pass-through business taxable income. Pass-through business taxable income of an affected business entity means the sum of (1) the affected business entity's pass-through business net income or loss, excluding the affected business entity's distributive share of any such amounts from a lower-tier business entity included in paragraph two of this subdivision, allocated to New York state pursuant to subdivision (b) of section eight hundred sixty-one of this article; and (2) any pass-through business net income of a lower-tier entity to the extent it was sourced to New York by such lower-tier entity pursuant to subdivision (b) of section eight hundred sixty-one of this article.

(j) Estimated tax. Estimated tax means the amount that an affected business entity estimates to be the tax imposed by section eight hundred sixty-one of this article for the current taxable year, less the amount that it estimates to be the sum of any credits allowable against the tax.

§ 861. Imposition and rate of tax. (a) General. A tax is hereby imposed for each taxable year on the pass-through business taxable income of every affected business entity doing business within this state. This tax shall be in addition to any other taxes imposed and shall be at the rate of five percent for each taxable year beginning on or after January first, two thousand twenty-one.

(b) Allocation to New York. In determining the amount of pass-through business taxable income, the pass-through business net income or loss of the affected business entity shall be allocated to this state by multiplying the pass-through business net income or loss of the affected business entity by the average of the following three percentages:

(1) Property percentage. The property percentage is computed by dividing (A) the average of the values, at the beginning and end of the taxable year, of real and tangible personal property owned and rented by the affected business entity and located within the state, by (B) the average of the values, at the beginning and end of the taxable year, of all real and tangible personal property owned or rented by the affected business entity and located both within and without New York state.

(2) Payroll percentage. The payroll percentage is computed by dividing (A) the total wages, salaries and other personal service compensation paid or incurred during the taxable year to employees of the affected business entity, in connection with the business carried on within this state, by (B) the total of all wages, salaries and other personal service compensation paid or incurred during the taxable year to employees of the affected business entity in connection with the business carried on both within and without New York state.

(3) Gross income percentage. The gross income percentage is computed by dividing (A) the gross sales or charges for services performed by or through an office, branch or agency of the affected business entity located within New York state, by (B) the total of all gross sales or charges for services performed within and without New York state. The sales or charges to be allocated to New York state include all sales negotiated or consummated, and charges for services performed, by an employee, agent, agency, or independent contractor chiefly situated at, connected by contract or otherwise with, or sent out from offices, branches of the affected business entity, or other agencies, situated within New York state.

§ 862. Tax credits. (a) Pass-through business credit. An affected business entity that is a partner or shareholder in a lower-tier business entity shall be allowed a credit against the tax imposed under this article as computed under paragraphs one through three of this subdivision.

(1) Calculation of credit. The pass-through business credit shall be calculated by multiplying the affected business entity's ownership percentage of a lower-tier business entity by the larger of:

(A) the pass-through business tax of the lower-tier business entity; or

(B) the pass-through business credit calculated by the lower-tier business entity.

(2) Credit from multiple lower-tier entities. If an affected business entity has a direct ownership interest in more than one lower-tier business entity, the pass-through business credit shall be the sum of the credits calculated under paragraph one of this subdivision with regard to each lower-tier business entity in which the affected business entity has a direct ownership interest.

(3) Limitation on credit. If the pass-through business credit calculated under this subdivision for any taxable year exceeds the amount of tax due under this article for such year, such credit shall be used to reduce the tax due to zero and any excess shall not be carried over to any succeeding taxable year.

(b) Personal income tax credit. A taxpayer subject to tax under article twenty-two of this chapter that is a partner or shareholder in an

affected entity subject to tax under this article shall be allowed a credit against the tax imposed under article twenty-two of this chapter, computed pursuant to the provisions of subsection (kkk) of section six hundred six of this chapter.

(c) Corporation franchise tax credit. A taxpayer subject to tax under article nine-A of this chapter that is a corporate partner in an affected business entity subject to tax under this article shall be allowed a credit against the tax imposed under article nine-A of this chapter, computed pursuant to the provisions of subdivision fifty-five of section two hundred ten-B of this chapter.

§ 863. Payment of estimated tax. (a) General. The estimated tax shall be paid as follows for an affected business entity that reports on a calendar year basis:

(1) If such estimated tax can reasonably be expected to exceed one thousand dollars on or before March fifteenth of the taxable year, the estimated tax shall be paid in four equal installments on March fifteenth, June fifteenth, September fifteenth, and December fifteenth.

(2) If such estimated tax can reasonably be expected to exceed one thousand dollars after March fifteenth and not after June fifteenth of the taxable year, the estimated tax shall be paid in three equal installments on June fifteenth, September fifteenth, and December fifteenth.

(3) If such estimated tax can reasonably be expected to exceed one thousand dollars after June fifteenth and not after September fifteenth of the taxable year, the estimated tax shall be paid in two equal installments on September fifteenth and December fifteenth.

(4) If such estimated tax can reasonably be expected to exceed one thousand dollars after September fifteenth of the taxable year, the estimated tax shall be paid on December fifteenth.

(b) Application to short taxable year. This section shall apply to a taxable year of less than twelve months in accordance with procedures established by the commissioner.

(c) Fiscal year. This section shall apply to a taxable year other than a calendar year by the substitution of the months of such fiscal year for the corresponding months specified in this section.

(d) Installments paid in advance. An affected partnership may elect to pay any installment of its estimated tax prior to the date prescribed for the payment thereof.

§ 864. Filing of return and payment of tax. (a) General. On or before the fifteenth day of the third month following the close of the taxable year, each affected business entity required to file a return under paragraph one of subsection (c) of section six hundred fifty-eight of this chapter, shall also be required to report the information required under this article on such return.

(b) Information on return. Each affected business entity shall report any tax due under this article on the face of such return and such other pertinent information as prescribed by the commissioner. The balance of any tax shown on the face of such return, not previously paid as installments of estimated tax, shall be paid with such return.

(c) Information provided to partners or shareholders. Each affected business entity subject to tax under this article shall report to each partner or shareholder its distributive share of:

(1) the pass-through business net income of the affected business entity;

(2) the pass-through business taxable income of the affected business entity;

(3) the pass-through business tax imposed on the affected business entity; and

(4) the total pass-through business credit calculated by the affected business entity under subdivision (a) of section eight hundred sixty-two of this article, before application of the limitation on such credit under paragraph three of such subdivision.

§ 865. Accounting periods and methods. (a) Accounting periods. An affected business entity's taxable year under this article shall be the same as the affected business entity's taxable year for federal income tax purposes.

(b) Accounting methods. An affected business entity's method of accounting under this article shall be the same as the affected business entity's method of accounting for federal income tax purposes.

(c) Change of accounting period or method. (1) If an affected business entity's taxable year or method of accounting is changed for federal income tax purposes, the taxable year or method of accounting for purposes of this article shall be similarly changed.

(2) If an affected business entity's method of accounting is changed, any additional tax that results from the adjustments determined to be necessary solely by reason of such 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, not in excess of two, during which the affected business entity used the method of accounting from which the change is made.

§ 866. Procedural provisions. (a) General. All provisions of article twenty-two of this chapter shall apply to the provisions of this article in the same manner and with the same force and effect as if the language of article twenty-two of this chapter had been incorporated in full into this article and had been specifically adjusted for and expressly referred to the tax imposed by this article, except to the extent that any provision is either inconsistent with a provision of this article or is not relevant to this article.

(b) Liability for tax. Only the affected business entity shall be liable for the tax under this article, and no partner or shareholder shall be personally liable for such tax.

(c) Deposit and disposition of revenue. All taxes, interest, penalties, and fees collected or received by the commissioner under this article shall be deposited and disposed of pursuant to the provisions of section one hundred seventy-one-a of this chapter, as added by chapter sixty-nine of the laws of nineteen hundred seventy-eight.

(d) Secrecy provision. All the provisions of subsection (a) of section six hundred ninety-seven of this chapter will be applied to the provisions of this article. Notwithstanding any provisions of this chapter to the contrary, the commissioner may disclose information and returns regarding the calculation and payment of the tax imposed by this article and any credit calculated on taxes paid directly or indirectly under this article to an affected business entity, its lower-tiered entity or entities and to any taxpayer under article nine-A or twenty-two of this chapter that owns, in whole or in part, directly or indirectly, such affected business entity.

§ 2. Section 606 of the tax law is amended by adding a new subsection (kkk) to read as follows:

(kkk) Credit for pass-through business tax. (1) A taxpayer partner or shareholder of an affected business entity subject to tax under article twenty-four-A of this chapter shall be entitled to a credit against the tax imposed by this article as provided in this subsection. For

purposes of this subsection, the terms "affected business entity", "ownership percentage", "pass-through business tax", and "pass-through business credit" shall have the same meanings as set forth in article twenty-four-A of this chapter.

(2) The credit shall be equal to the product of:

(i) the taxpayer's ownership percentage of the affected business entity;

(ii) ninety-three percent; and

(iii) the greater of:

(A) the pass-through business tax of the affected business entity; or

(B) the pass-through business credit of the affected business entity.

(3) If a taxpayer has a direct ownership interest in multiple affected business entities subject to tax under article twenty-four-A of this chapter, the taxpayer's credit shall be the sum of such credits calculated under paragraph two of this subsection with regard to each affected business entity in which the taxpayer has a direct ownership interest.

(4) If the amount of the credit allowable under this subsection for any taxable year shall exceed the taxpayer's tax for such year, the excess allowed for the taxable year may be carried over to the following year or years and may be deducted from the taxpayer's tax for such year or years.

§ 3. Subparagraph (B) of paragraph 1 of subsection (i) of section 606 of the tax law is amended by adding a new clause (xlvi) to read as follows:

(xlvi) Credit for pass-through business tax under subsection (kkk)	Amount of credit under subdivision fifty-five of section two hundred ten-B

§ 4. Section 210-B of the tax law is amended by adding a new subdivision 55 to read as follows:

55. Credit for pass-through business tax. (a) A corporate partner or shareholder of an affected business entity subject to tax under article twenty-four-A of this chapter shall be entitled to a credit against the tax imposed by this article as provided in this subdivision. For purposes of this subdivision, the terms "affected business entity", "ownership percentage", "pass-through business tax", and "pass-through business credit" shall have the same meanings as set forth in article twenty-four-A of this chapter.

(b) The credit shall be equal to the product of:

(i) the taxpayer's ownership percentage of the affected business entity;

(ii) ninety-three percent; and

(iii) the greater of:

(A) the pass-through business tax of the affected business entity; or

(B) the pass-through business credit of the affected business entity.

(c) If a corporation has a direct ownership interest in multiple affected business entities subject to tax under article twenty-four-A of this chapter, the corporation's credit under this subdivision shall be the sum of such credits calculated under paragraph two of this subdivision with regard to each affected business entity in which the corporation has a direct ownership interest.

(d) The credit allowed under this subdivision for any taxable year shall not reduce the tax for such year to less than the amount prescribed in paragraph (d) of subdivision one of section two hundred

ten of this article. However, if the amount of credit allowed under this subdivision for any taxable year reduces the tax to such amount or if the taxpayer otherwise pays tax based on the fixed dollar minimum amount, any amount of credit thus not deductible in such taxable year may be carried over to the following year or years and may be deducted from the taxpayer's tax for such year or years.

§ 5. Subdivision 1 of section 171-a of the tax law, as amended by section 3 of part XX of chapter 59 of the laws of 2019, is amended to read as follows:

1. All taxes, interest, penalties and fees collected or received by the commissioner or the commissioner's duly authorized agent under articles nine (except section one hundred eighty-two-a thereof and except as otherwise provided in section two hundred five thereof), nine-A, twelve-A (except as otherwise provided in section two hundred eighty-four-d thereof), thirteen, thirteen-A (except as otherwise provided in section three hundred twelve thereof), eighteen, nineteen, twenty (except as otherwise provided in section four hundred eighty-two thereof), twenty-B, twenty-D, twenty-one, twenty-two, twenty-four, twenty-four-A, twenty-six, twenty-eight (except as otherwise provided in section eleven hundred two or eleven hundred three thereof), twenty-eight-A, twenty-nine-B, thirty-one (except as otherwise provided in section fourteen hundred twenty-one thereof), thirty-three and thirty-three-A of this chapter shall be deposited daily in one account with such responsible banks, banking houses or trust companies as may be designated by the comptroller, to the credit of the comptroller. Such an account may be established in one or more of such depositories. Such deposits shall be kept separate and apart from all other money in the possession of the comptroller. The comptroller shall require adequate security from all such depositories. Of the total revenue collected or received under such articles of this chapter, the comptroller shall retain in the comptroller's hands such amount as the commissioner may determine to be necessary for refunds or reimbursements under such articles of this chapter out of which amount the comptroller shall pay any refunds or reimbursements to which taxpayers shall be entitled under the provisions of such articles of this chapter. The commissioner and the comptroller shall maintain a system of accounts showing the amount of revenue collected or received from each of the taxes imposed by such articles. The comptroller, after reserving the amount to pay such refunds or reimbursements, shall, on or before the tenth day of each month, pay into the state treasury to the credit of the general fund all revenue deposited under this section during the preceding calendar month and remaining to the comptroller's credit on the last day of such preceding month, (i) except that the comptroller shall pay to the state department of social services that amount of overpayments of tax imposed by article twenty-two of this chapter and the interest on such amount which is certified to the comptroller by the commissioner as the amount to be credited against past-due support pursuant to subdivision six of section one hundred seventy-one-c of this article, (ii) and except that the comptroller shall pay to the New York state higher education services corporation and the state university of New York or the city university of New York respectively that amount of overpayments of tax imposed by article twenty-two of this chapter and the interest on such amount which is certified to the comptroller by the commissioner as the amount to be credited against the amount of defaults in repayment of guaranteed student loans and state university loans or city university loans pursuant to subdivision five of section one hundred seventy-one-d

and subdivision six of section one hundred seventy-one-e of this article, (iii) and except further that, notwithstanding any law, the comptroller shall credit to the revenue arrearage account, pursuant to section ninety-one-a of the state finance law, that amount of overpayment of tax imposed by article nine, nine-A, twenty-two, thirty, thirty-A, thirty-B or thirty-three of this chapter, and any interest thereon, which is certified to the comptroller by the commissioner as the amount to be credited against a past-due legally enforceable debt owed to a state agency pursuant to paragraph (a) of subdivision six of section one hundred seventy-one-f of this article, provided, however, he shall credit to the special offset fiduciary account, pursuant to section ninety-one-c of the state finance law, any such amount creditable as a liability as set forth in paragraph (b) of subdivision six of section one hundred seventy-one-f of this article, (iv) and except further that the comptroller shall pay to the city of New York that amount of overpayment of tax imposed by article nine, nine-A, twenty-two, thirty, thirty-A, thirty-B or thirty-three of this chapter and any interest thereon that is certified to the comptroller by the commissioner as the amount to be credited against city of New York tax warrant judgment debt pursuant to section one hundred seventy-one-l of this article, (v) and except further that the comptroller shall pay to a non-obligated spouse that amount of overpayment of tax imposed by article twenty-two of this chapter and the interest on such amount which has been credited pursuant to section one hundred seventy-one-c, one hundred seventy-one-d, one hundred seventy-one-e, one hundred seventy-one-f or one hundred seventy-one-l of this article and which is certified to the comptroller by the commissioner as the amount due such non-obligated spouse pursuant to paragraph six of subsection (b) of section six hundred fifty-one of this chapter; and (vi) the comptroller shall deduct a like amount which the comptroller shall pay into the treasury to the credit of the general fund from amounts subsequently payable to the department of social services, the state university of New York, the city university of New York, or the higher education services corporation, or the revenue arrearage account or special offset fiduciary account pursuant to section ninety-one-a or ninety-one-c of the state finance law, as the case may be, whichever had been credited the amount originally withheld from such overpayment, and (vii) with respect to amounts originally withheld from such overpayment pursuant to section one hundred seventy-one-l of this article and paid to the city of New York, the comptroller shall collect a like amount from the city of New York.

§ 6. Subdivision 1 of section 171-a of the tax law, as amended by section 4 of part XX of chapter 59 of the laws of 2019, is amended to read as follows:

1. All taxes, interest, penalties and fees collected or received by the commissioner or the commissioner's duly authorized agent under articles nine (except section one hundred eighty-two-a thereof and except as otherwise provided in section two hundred five thereof), nine-A, twelve-A (except as otherwise provided in section two hundred eighty-four-d thereof), thirteen, thirteen-A (except as otherwise provided in section three hundred twelve thereof), eighteen, nineteen, twenty (except as otherwise provided in section four hundred eighty-two thereof), twenty-D, twenty-one, twenty-two, twenty-four, **twenty-four-A,** twenty-six, twenty-eight (except as otherwise provided in section eleven hundred two or eleven hundred three thereof), twenty-eight-A, twenty-nine-B, thirty-one (except as otherwise provided in section fourteen

hundred twenty-one thereof), thirty-three and thirty-three-A of this chapter shall be deposited daily in one account with such responsible banks, banking houses or trust companies as may be designated by the comptroller, to the credit of the comptroller. Such an account may be established in one or more of such depositories. Such deposits shall be kept separate and apart from all other money in the possession of the comptroller. The comptroller shall require adequate security from all such depositories. Of the total revenue collected or received under such articles of this chapter, the comptroller shall retain in the comptroller's hands such amount as the commissioner may determine to be necessary for refunds or reimbursements under such articles of this chapter out of which amount the comptroller shall pay any refunds or reimbursements to which taxpayers shall be entitled under the provisions of such articles of this chapter. The commissioner and the comptroller shall maintain a system of accounts showing the amount of revenue collected or received from each of the taxes imposed by such articles. The comptroller, after reserving the amount to pay such refunds or reimbursements, shall, on or before the tenth day of each month, pay into the state treasury to the credit of the general fund all revenue deposited under this section during the preceding calendar month and remaining to the comptroller's credit on the last day of such preceding month, (i) except that the comptroller shall pay to the state department of social services that amount of overpayments of tax imposed by article twenty-two of this chapter and the interest on such amount which is certified to the comptroller by the commissioner as the amount to be credited against past-due support pursuant to subdivision six of section one hundred seventy-one-c of this article, (ii) and except that the comptroller shall pay to the New York state higher education services corporation and the state university of New York or the city university of New York respectively that amount of overpayments of tax imposed by article twenty-two of this chapter and the interest on such amount which is certified to the comptroller by the commissioner as the amount to be credited against the amount of defaults in repayment of guaranteed student loans and state university loans or city university loans pursuant to subdivision five of section one hundred seventy-one-d and subdivision six of section one hundred seventy-one-e of this article, (iii) and except further that, notwithstanding any law, the comptroller shall credit to the revenue arrearage account, pursuant to section ninety-one-a of the state finance law, that amount of overpayment of tax imposed by article nine, nine-A, twenty-two, thirty, thirty-A, thirty-B or thirty-three of this chapter, and any interest thereon, which is certified to the comptroller by the commissioner as the amount to be credited against a past-due legally enforceable debt owed to a state agency pursuant to paragraph (a) of subdivision six of section one hundred seventy-one-f of this article, provided, however, he shall credit to the special offset fiduciary account, pursuant to section ninety-one-c of the state finance law, any such amount creditable as a liability as set forth in paragraph (b) of subdivision six of section one hundred seventy-one-f of this article, (iv) and except further that the comptroller shall pay to the city of New York that amount of overpayment of tax imposed by article nine, nine-A, twenty-two, thirty, thirty-A, thirty-B or thirty-three of this chapter and any interest thereon that is certified to the comptroller by the commissioner as the amount to be credited against city of New York tax warrant judgment debt pursuant to section one hundred seventy-one-l of this article, (v) and except further that the comptroller shall pay to a non-obligated spouse that

amount of overpayment of tax imposed by article twenty-two of this chapter and the interest on such amount which has been credited pursuant to section one hundred seventy-one-c, one hundred seventy-one-d, one hundred seventy-one-e, one hundred seventy-one-f or one hundred seventy-one-l of this article and which is certified to the comptroller by the commissioner as the amount due such non-obligated spouse pursuant to paragraph six of subsection (b) of section six hundred fifty-one of this chapter; and (vi) the comptroller shall deduct a like amount which the comptroller shall pay into the treasury to the credit of the general fund from amounts subsequently payable to the department of social services, the state university of New York, the city university of New York, or the higher education services corporation, or the revenue arrearage account or special offset fiduciary account pursuant to section ninety-one-a or ninety-one-c of the state finance law, as the case may be, whichever had been credited the amount originally withheld from such overpayment, and (vii) with respect to amounts originally withheld from such overpayment pursuant to section one hundred seventy-one-l of this article and paid to the city of New York, the comptroller shall collect a like amount from the city of New York.

§ 7. This act shall take effect immediately and shall apply to taxable years beginning on or after January 1, 2021; provided however that the amendments to subdivision 1 of section 171-a of the tax law, made by section five of this act, shall not affect the expiration and reversion of such subdivision, when upon such date the provisions of section six of this act shall take effect.