STATE OF NEW YORK

3252

2023-2024 Regular Sessions

IN ASSEMBLY

February 2, 2023

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

AN ACT to establish the "billionaire mark-to-market tax act"; and to amend the tax law, in relation to establishing a mark-to-market tax

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

Section 1. This act shall be known and may be cited as the "billionaire mark-to-market tax act".

§ 2. The tax law is amended by adding a new section 612-a to read as follows:

§ 612-a. Billionaire mark-to-market taxation. (a)(1) Notwithstanding any other provision of law to the contrary, resident individual taxpayers with net assets worth one billion dollars or more on the date of December thirty-first, two thousand twenty-two, shall recognize gain or loss as if each asset owned by the individual taxpayer were sold for its fair market value on that date. Any resulting net gains from these deemed sales, up to the phase-in cap amount, shall be included in the taxpayer's income for the two thousand twenty-three tax year. Proper adjustment shall be made in the amount of any gain or loss subsequently realized for gain or loss taken into account under the preceding sentence. At the taxpayer's option, any additional tax payable as a result of this subsection shall either be payable along with any other tax owed for the two thousand twenty-three tax year or else shall be payable annually in ten equal installments beginning in the year of the effective date of this section and with all such installment payments commencing after the initial installment payment also being subject to an annual nondeductible deferral charge. The annual nondeductible deferral charge shall be set by the state comptroller at a rate that the comptroller estimates is equal to the unsecured borrowing rate of the taxpayer for a loan repaid over a ten-year term in equal annual installments. The comptroller may estimate a single rate for all taxpayers

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

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subject to the deferral charge. For resident individual taxpayers who would recognize net gains as a result of this subsection except for the operation of this sentence, if the taxpayer can show that any portion of such gains was accumulated prior to the taxpayer becoming a resident individual of New York, and if the taxpayer can also show that such portion of such gains was previously taxed by any prior state or jurisdiction in which the taxpayer was a resident prior to becoming a resident individual of New York, then credit shall be provided in the amount of any such tax on such gains paid to any such prior states or jurisdictions in which the taxpayer was a resident prior to becoming a resident individual of New York. Any credits so provided by this subsection, however, shall not exceed the lesser of the total tax owed under this subsection on such gains and the tax imposed on such gains by such other prior states or jurisdictions in which the taxpayer was a resident prior to becoming a resident individual of New York.

(2) For the two thousand twenty-three tax year, whether an individual is a resident individual for purposes of this section shall be determined using the tests provided pursuant to paragraph one of subsection (b) of section six hundred five of this article.

(b) Subsequent to two thousand twenty-three, resident individual taxpayers with net assets that are worth one billion dollars or more at the end of the last day of any tax year shall recognize gain or loss as if each asset owned by such taxpayer on such date were sold for its fair market value on such date, but with adjustment made for tax paid on gain in previous years. Any resulting net gains from these deemed sales, up to the phase-in cap amount, shall be included in the taxpayer's income for such taxable year. Proper adjustment shall be made in the amount of any gain or loss subsequently realized for gain or loss taken into account under the preceding sentence. To the extent that the losses of a taxpayer exceed such taxpayer's gains, such net losses shall not be recognized in such taxable year and shall instead carry forward indefinitely. For resident individual taxpayers who would recognize net gains as a result of this subsection except for the operation of this sentence, but who were not resident individuals for all of the preceding five tax years, solely for purposes of deemed sales pursuant to this subsection, the tax basis of each asset owned on the last day of the last tax year before the resident individual became a New York resident shall be the fair market value of the asset as of that day.

(c) For each date on which gains or losses are recognized as a result of this section, the phase-in cap amount shall be equal to a quarter of the worth of a taxpayer's net assets in excess of one billion dollars on such date.

(d) For the purposes of determining whether a resident individual taxpayer has net assets worth one billion dollars or more, the term "assets" shall include all of the following, but only to the extent allowable under the New York Constitution, the United States Constitution, and any other governing federal law: all owned real or personal, tangible or intangible, property, wherever situated, (1) owned by the taxpayer, (2) owned by the taxpayer's spouse, minor children, or any trust or estate of which the taxpayer is a beneficiary, (3) contributed by the taxpayer or any person or entity described in paragraph two of this subsection to any private foundation, donor advised fund, and any other entity described in section 501(c) or section 527 of the Internal Revenue Code of which the taxpayer and/or any person or entity described in paragraph two of this subsection is a substantial contributor (as such term is defined in Section 4958(c)(3)(B)(i) of the Internal Revenue

Code), and (4) without duplication, all gifts and donations made within the past five years by the taxpayer or any person or entity described in paragraph two of this subsection as if such gifts and donations were still owned by the taxpayer. For the purpose of this section, "net assets" shall include the fair market value of assets less the fair market value of liabilities of the taxpayer and, in appropriate cases as determined by the commissioner, liabilities of such other persons described in the definition of assets.

(e) (1) The fair market value of each asset owned by the taxpayer shall be the price at which such asset would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell, and both having reasonable knowledge of relevant facts. The value of a particular asset shall not be the price that a forced sale of the property would produce. Further, the fair market value of an asset shall not be the sale price in a market other than that in which such item is most commonly sold to the public, taking into account the location of the item wherever appropriate. In the case of an asset which is generally obtained by the public in the retail market, the fair market value of such an asset shall be the price at which such item or a comparable item would be sold at retail.

(2) For purposes of this section, any feature of an asset, such as a poison pill, that was added with the intent, and has the effect, of reducing the value of the asset shall be disregarded, and no valuation or other discount shall be taken into account if it would have the effect of reducing the value of a pro rata economic interest in an asset below the pro rata portion of the value of the entire asset.

(f) (1) (A) The commissioner shall amend the New York personal income tax forms and amend or create any other forms as necessary for the reporting of gains by assets. Assets shall be listed with (i) a description of the asset, (ii) the asset category, (iii) the year the asset was acquired, (iv) the adjusted New York basis of the asset as of December thirty-first of the tax year, (v) the fair market value of the asset as of December thirty-first of the tax year, and (vi) the amount of gain that would be New York taxable income, unless the commissioner shall determine that one or more categories is not appropriate for a particular type of asset.

(B) Asset categories shall include, but not be limited to, the following:

(i) stock held in any publicly traded corporation;

(ii) stock held in any private traded C corporation;

(iii) stock held in any S corporation;

(iv) interests in any private equity or hedge fund organized as a partnership;

(v) interests in any other partnerships;

(vi) interests in any other noncorporate businesses;

(vii) bonds and interest bearing savings accounts, cash and deposits;

(viii) interests in mutual funds or index funds;

(ix) put and call options;

(x) futures contracts;

(xi) financial assets held offshore reported on IRS tax form eight thousand nine hundred thirty-eight;

(xii) real property;

(xiii) art and collectibles;

(xiv) pension funds;

(xv) other assets;

(xvi) debts and liabilities; and

(xvii) assets not owned by the taxpayer but which count toward the one billion dollar threshold pursuant to subsection (d) of this section.

(2) The commissioner shall specifically request the filing of such forms by any resident individual expected to have net assets in excess of one billion dollars. Such taxpayers shall include, but not be limited to, (A) taxpayers listed as billionaires on published lists, and (B) taxpayers with an adjusted gross income summed over the previous ten years in excess of six hundred million dollars.

(g) In the event that any resident individual taxpayer becomes a New York resident subsequent to paying tax to another state as a result of recognizing gain or loss pursuant to any mark-to-market or deemed-realization regime of that other state, proper adjustment shall be made in the amount of any gain or loss subsequently realized for gain or loss taken into account under such mark-to-market or deemed-realization regime of that other state for purposes of computing gain or loss under subsection (a) or (b) of this section or under section six hundred twelve of this part.

(h) In the event that any provision of this section is found to be invalid, unconstitutional, or otherwise unenforceable, that finding shall not affect any other provision in this section which can be enforced without the use of the offending provision.

(i) No legal or equitable process shall issue in any proceeding in any court against this state or any officer thereof to prevent or enjoin the collection of the tax imposed by this section. Any action for a refund of the tax imposed by this section paid, with interest, based solely on a question of law involving the construction of the constitution of the state or of the United States shall be heard in the court of appeals. All other claims for a refund, with interest, shall be maintained in the same manner as the personal income tax.

(j) The commissioner shall promulgate such rules and regulations necessary or appropriate to carry out the purposes of this section, including rules to prevent the use of year-end transfers, related parties, or other arrangements to avoid the provisions of this section.

§ 3. This act shall take effect immediately.