

## Reminder: The NYS Pass-Through Entity Tax Election Is Due October 15, 2021

On April 19, 2021, the former governor of New York, Andrew Cuomo, signed the 2021-2022 fiscal year budget bill that included a provision for an elective pass-through entity tax (“PTET”). These provisions were intended as a workaround to the \$10,000 state and local tax (“SALT”) deduction limitation imposed by the federal Tax Cuts and Jobs Act.

The PTET is an optional tax that partnerships, limited liability companies (“LLCs”) treated as partnerships for U.S. federal income tax purposes, and S corporations that have elected to be treated as S corporations for New York State (“NYS”) income tax purposes may annually elect to pay on certain income for tax years beginning on or after January 1, 2021.<sup>1</sup>

If a partnership, LLC or New York S corporation (a pass-through entity or “PTE”) elects to pay PTET, partners, members or shareholders of an electing PTE who are subject to New York income tax under Article 22 are eligible for a PTET credit on their New York State income tax returns.

As discussed in more detail below, on August 25, 2021, the NYS Department of Taxation and Finance released Technical Memorandum TSB-M-21(1)C (the “TM”)<sup>2</sup> to

provide PTEs further guidance on electing to be subject to the PTET and when and how to make estimated PTET payments for 2021 and beyond. Although the TM states that estimated payments for 2021 are not due until March of 2022, based on current Internal Revenue Service guidance, in order to take the PTET deduction for federal income tax purposes (which is the reason for the PTET in the first place), PTEs should make their 2021 PTET payments before December 31, 2021 (see discussion below).

For tax year 2021 only, the election is due on **October 15, 2021**. After 2021, the annual election for calendar year taxpayers will be March 15. For fiscal year taxpayers, the election will be due on or before March 15 following the close of the calendar year in which its fiscal year ends. Note, once an election is made for a tax year, it cannot be revoked for such year.

The TM confirmed that PTET quarterly estimated payments will be optional for the 2021 tax year. However, PTEs electing the NYS PTET may choose to make optional online estimated tax payments prior to December 31, 2021. An online estimated tax application for PTET will be available by December 15, 2021. As noted above, the Internal Revenue Service has issued guidance that the PTET payments are deductible for federal income tax purposes only for the taxable year in which the payment is made. Therefore, it is advisable that both cash and accrual method PTEs make 2021 PTET payments by the end of their 2021 tax year. However, in subsequent years, quarterly payments will be required in four equal installments. The installment due dates for taxpayers that file timely elections are the following: March 15, June 15, September 15, and December 15. Note, the installment due dates apply to both calendar-year and fiscal-year taxpayers and must be paid online through the Business Online Services account. The estimated payments are calculated at 25% of the required annual payment, which is the lesser of (a) 90% of the PTET for the current year or (b) 100% of the PTET reported for the preceding PTET tax year.

Note that the election by the PTE to pay PTET tax does not relieve the PTE’s partners, members or shareholders from their obligation to remit timely and proper 2021 estimated state income tax payments to New York. Individuals will have to file for refunds of any such overpaid taxes when they file their 2021 tax return. Hopefully in future years, the state will alleviate this cash flow burden imposed on PTE members.

The PTET will be based on the total taxable income of the PTE at the following rates and thresholds:

- 6.85% for PTE taxable income that is \$2 million or less
- \$137,000 plus 9.65% for taxable income that is greater than \$2 million but less than or equal to \$5 million
- \$426,500 plus 10.30% for taxable income that is greater than \$5 million but less than or equal to \$25 million
- \$2,486,500 plus 10.90% for taxable income that is greater than \$25 million

The total taxable income calculation differs for Partnerships and S corporations. There are also special rules for “tiered partnerships.” A PTE calculates its PTET on its taxable income allocable to partners, members or shareholders who are subject to New York personal income tax. Therefore, the PTET does not include income allocable to corporate or partnership partners of a PTE, and such partners will not be eligible to claim a PTET credit. A partner, member or shareholder of an electing PTE will be allowed a refundable dollar-for-dollar tax credit based on their direct share of the PTET paid by the PTE. For individuals, the credit will be claimed when they file their New York State income tax return and by attaching Form IT-653<sup>3</sup>. New York State residents will also be allowed a credit for other “substantially similar” PTE taxes paid to other states, local governments or the District of Columbia. Currently, eight states have enacted elective PTE income taxes, while many other states have drafted proposed legislation. According to the TM, a list of substantially similar taxes that qualify for the resident tax credit will be posted on the department’s website at a later date.

The TM clarified that only an “authorized person” can make the election on behalf of the PTE. The authorized person will need to create a Business Online Services account and register the PTE to be able to make the annual election online.

The following table lists the various types of authorized persons for each respective PTE<sup>4</sup>.

If the entity is:	Authorized persons include:
a New York S corporation	any officer, manager, or shareholder of the New York S corporation who is authorized under the law of the state where the corporation is incorporated or under the S corporation’s organizational documents to make the election and who represents to having that authorization under penalty of perjury.
a partnership <sup>5</sup>	any member, partner, owner, or other individual with authority to bind the entity or sign returns under Tax Law § 653.

**The election should be considered by owners of pass-through entities that derive New York source income. In addition, partnerships and LLCs taxed as partnerships that conduct business outside New York but have New York resident partners also should consider the election.**

Note that tax professionals do not appear eligible to make the election on behalf of their clients.

<sup>1</sup> Legislation. NY State Senate. <https://www.nysenate.gov/legislation/laws/TAX/A24-A>

<sup>2</sup> Pass-through entity tax - tax.ny.gov. <https://www.tax.ny.gov/pdf/memos/ptet/m21-1c-1i.pdf>

<sup>3</sup> Pass-through entity tax - tax.ny.gov. Claim the PTET credit. Pg8. <https://www.tax.ny.gov/pdf/memos/ptet/m21-1c-1i.pdf>

<sup>4</sup> Pass-through entity tax - tax.ny.gov. Who may make the election. Pg1. <https://www.tax.ny.gov/pdf/memos/ptet/m21-1c-1i.pdf>

<sup>5</sup> Pass-through entity tax - tax.ny.gov. Who may make the election. Pg1. <https://www.tax.ny.gov/pdf/memos/ptet/m21-1c-1i.pdf>

**Contact Us:**

For more information on the NYS PTET election or other federal and state tax matters, please contact any of the following members of FTI Consulting’s Real Estate Solutions Practice:

<p><b>SCOTT TANNENBAUM</b> Senior Managing Director +1 973.852.8171 scott.tannenbaum@fticonsulting.com</p>	<p><b>PHIL BRADY</b> Senior Managing Director +1 646.632.3875 phil.brady@fticonsulting.com</p>	<p><b>STEPHEN BERTONASCHI</b> Senior Managing Director +1 973.852.8174 stephen.bertonaschi@fticonsulting.com</p>
<p><b>LAURA JACKSON</b> Senior Managing Director +1 973.852.8148 laura.jackson@fticonsulting.com</p>	<p><b>SCOTT DRAGO</b> Managing Director +1 646.632.3864 scott.drago@fticonsulting.com</p>	<p><b>GERARDO LONDONO</b> Senior Director +1 848.702.9973 gerardo.londono@fticonsulting.com</p>

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