

# CUNNINGHAM & CUNNINGHAM, LLP

## NEW YORK STATE SALES TAX E-MAIL UPDATE

*September 2011*

### **STRICT LIABILITY RELIEF FOR CERTAIN INDIVIDUALS ASSESSED AS RESPONSIBLE PERSONS ON BEHALF OF A PARTNERSHIP OR LIMITED LIABILITY COMPANY: The Department of Taxation and Finance Does the Right Thing.**

In New York, an individual can be assessed personally for the sales tax liabilities of a business if he or she was under a duty to act for that business in complying with the Tax Law. The Tax Law identifies these individuals as responsible persons. Responsible persons can include officers, directors, employees, managers, partners, or members of a limited liability company.

Unfortunately because of the language in the Tax Law, a two-tiered system has developed. Individuals assessed as responsible persons on behalf of a corporation are allowed the opportunity to contest the assessment and prove they were not under a duty to act for the business. Partners and LLC members, on the other hand, are strictly liable and not given an opportunity to prove whether or not they displayed what is referred to as the "indicia of responsibility." As a result, passive investors with negligible membership interests in limited liability companies have found themselves being held personally liable for a businesses entire sales tax liability. Despite the fact that these passive investors had no responsibility for or involvement with the day to day activities of the company, the Department still issues the responsible person assessment.

The Department has received complaints from taxpayers and practitioners stating that members of limited liability companies and partners should be afforded the same rights to contest assessments as those individuals assessed on behalf of corporations. The Department recently responded by providing relief for the limited partners of limited partnerships, and LLC members with membership interests of less than 50 percent. While the relief does not create parity and the Tax Law has not been amended, it is a welcomed movement in the right direction. Eligible persons are now afforded an opportunity to establish that they were under no duty to act. If they can prove their claim, the Department will limit their personal liability to an amount determined by multiplying the business assessment and the individual's percentage interest in the business. In many instances, especially those involving passive investors, this will greatly reduce the assessment.

While ultimately only a change to the Tax Law will result in equal treatment for persons being assessed as responsible persons, the Department's willingness to actively address the problem should be commended.

### **SALES AND USE TAX AND THE NEW YORK CONSTRUCTION INDUSTRY:**

Brian G. Cunningham's book, *Sales and Use Tax and the New York Construction Industry*, published by the New York State Bar Association, makes a great addition to any business library. For more information, go to [www.nysba.org/pubs](http://www.nysba.org/pubs).

## **SALES TAX SEMINARS:**

Is your business complying with New York's sales tax laws and regulations? Are you exposed to liability? Are you paying unnecessary sales taxes? If you are interested in learning more about sales tax as applied to the New York construction and real estate industries, Cunningham & Cunningham, LLP has prepared an instructive seminar course on this topic that can be provided in-house.

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