PROGRAM BILL # 39

GOVERNOR'S PROGRAM BILL

2014

MEMORANDUM

AN ACT AN ACT to amend the tax law, in relation to banning electronic and other devices used to evade state and local taxes and imposing crimes and penalties for their use in evading such taxes

Purpose of Bill:

This bill would ban the use of electronic devices and software to evade sales, income, and other taxes and would impose criminal and civil penalties for using such devices and software to evade such taxes.

Summary of Provisions:

Section 1 of the bill would add section 1822 to the Tax Law. Subdivision (a) of section 1822 would prohibit the manufacturing, sale, use and other commercial activities involving "zappers", e.g.. devices or software that falsify, delete, conceal, or distort sales or other transaction data in, from, or by a point of sale device, in order to evade any State or local tax, such as sales taxes or income taxes. Subdivision (b) would criminalize all prohibited uses of zappers; the severity of the crime would depend on the amount of tax evaded and would range from a Class A misdemeanor to a Class B felony where the tax evaded exceeds $1,000,000.

Section 2 would add section 177-a to the Tax Law. Section 177-a(1) would impose a civil penalty on a person who uses a banned device or software to evade tax equal to 300 percent of the amount of tax evaded, plus statutory interest. If two or more people conspire to evade tax using a banned device or software, each of them would be jointly and severally liable for a 300% penalty. A person who designs, engineers, creates, offers to sell or lease or license to use, transports, possesses, maintains, services, or repairs a banned device or software, and knows, or reasonably should have known, that the device or software will be used to evade tax or payment or payment over of any moneys collected as tax would also be liable for a 300% penalty.

In the event the Tax Commissioner finds that a person used a banned device or software to evade tax, Section 177-a(2) would empower the Commissioner to estimate the amount of tax owed by the person using external indices. In addition, if the Commissioner hired a forensic computer or software expert to investigate the use of a banned device or software, and the expert showed that such a device or software was used to evade tax, Section 177-a(3) would require the person who evaded tax to reimburse the Commissioner's costs to hire the expert. If a person has a Certificate of Authority for sales tax purposes and uses a banned device or software to evade any taxes, Section 177-a(4) would authorize the Commissioner to revoke that person's certificate, and the person could not obtain a new certificate for five years.

Section 3 of the bill sets forth the effective date.

Existing Law:

Tax Law §§ 1802 through 1806 impose misdemeanor and felony penalties for committing tax fraud acts; other Tax Law sections impose criminal penalties for specific acts relating to various taxes. The Tax Law does not, however, specifically criminalize the use of devices and software to evade tax. Similarly, although there are civil penalties in the Tax Law for failing to file tax returns, pay tax due on a timely basis, and for other failures to comply with requirements of the various taxes imposed by New York law, there is no specific penalty in the Tax Law for using devices or software to evade tax.

Statement in Support:

New York's tax system is based on the principal of voluntary compliance. Although most taxpayers comply with their obligations under Tax Law, some taxpayers evade paying their sales and use taxes, income taxes and other taxes. Tax evasion takes many forms and can include failing to report sales, keeping two sets of books, or even filing false tax returns. Recently, tax evasion has been facilitated by newer and more sophisticated products like automated sales suppression devices, zappers, and phantom software products. In general, these devices electronically and systematically conceal and remove sales from recordkeeping systems. Because these problematic devices and software often work in tandem with widely-used point of sales terminals, it is often difficult to detect the resulting tax fraud that occurs when these devices are used. When left undetected, this fraud burdens the State and local governments in the form of diminished tax receipts. The undetected tax fraud also burdens honest and compliant taxpayers who face competitive disadvantages. This bill is intended to level the playing field.

The devices and software addressed by the bill are difficult to detect. Even when an audit is conducted, there is no guarantee that a taxpayer's use of the banned devices or software will be detected. The bill would address this problem by banning not only the use, but the creation, engineering, sale and possession of these devices and software. Instead of simply penalizing the user, this bill would also subject the seller and developer of an illegal device or software to significant sanctions.

New York should be proactive and curtail the use of these sales suppression devices. The Legislature has recognized, through its enactment of criminal penalties for deliberate taxpayer fraud and evasion, that criminal sanctions play an important role in tax administration. Criminalizing and penalizing the creation, engineering, sale, installation, and use of sales suppression devices and software, as this bill would do, would punish offenders commensurate with the harm caused by the products as well as deter such conduct .

Budget Implications:

[This legislation is not anticipated to have a fiscal impact to the State in the current fiscal year.]

Effective Date:

The bill would take effect on January 1, 2015.