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TO: Members, Senate Finance Committee  
Members, Assembly Ways & Means Committee

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FROM: Ken Pokalsky

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SUBJECT: Executive Budget Tax Issues

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DATE: 2/15/22

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Based on several factors, including a recovering economy, unprecedented increases in federal aid and a nearly \$4 billion increase in personal income and corporate franchise taxes adopted in the FY 2022 state budget, New York is approaching the FY 2023 state budget in a very strong fiscal condition, with the Executive Budget proposing a balanced spending plan for the new fiscal year without a need for new or increased revenue measures, and projecting balanced budgets out over the next several years. As a result, this year's Executive Budget proposes few adverse tax policy proposals. In our comments today, we highlight several of our priority Executive Budget tax issues, including one we oppose, several we support, and several we support while offering additional amendments. In addition, we provide input on several other tax proposals that are not included in the Executive Budget but are deserving of consideration as the Administration and Legislature negotiates a final budget agreement.

As always, we appreciate this opportunity to provide input to the legislative process and welcome the opportunity to provide you with any additional information on these issues.

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### Executive Budget Proposals We Support

- Brownfield Program – While we support the extension of the brownfield program and its remedial and redevelopment credits, as proposed in the Executive Budget, we believe the program requires broader reforms to continue and maximize the economic and environmental benefits from this proven program. The Executive Budget would extend the program to include projects accepted into the program prior to 12/31/32; allows the site preparation and groundwater remediation credit to be claimed for 7 years for projects receiving completion certificates between 3/24/15 and 6/24/21; and allows additional 5% tangible property credit for projects located in CLCPA designated distress communities, a brownfield opportunity area, or a project that is a renewable energy project. While these are welcome provisions, the bill would also impose a \$50,000 application fee for all projects, a provision that has caused concerns, and may be a financial deterrent for some project proposals. Moreover, brownfield program practitioners will be presenting additional amendments to clarify certain provisions that have hampered the efficient administration of the program. These changes will promote predictability for program applicants and would further advance the program's environmental cleanup and urban revitalization goals by incentivizing the remediation, strategic reuse and redevelopment of contaminated land throughout the State, including in environmental justice areas and in brownfield opportunity areas and to encourage renewable energy projects on brownfield sites. S.8008/A.9008, Part LL.

- Small Business Tax Reductions – The Executive Budget proposes to increase the NYS and NYC personal income tax small business income exclusion from 5 to 15 percent of net business or farm income, and expands eligibility to include LLCs, partnerships and sub-S corporations with total income up to \$1.5 million (or up to \$250,000 for farm income). In recent past years, this amendment has been in the Executive Budgets, and in both Senate and Assembly one house budget resolutions. We believe this is a

valuable, targeted tax reduction that will support the state's recovering small business community. S.8009/S.9009, Part C.

- Small Business COVID-19 Credit – This legislation would provide targeted relief to small businesses that were required to make capital outlays in response to the COVID pandemic and state-imposed operations and reopening mandates. This proposal would provide a refundable credit under the corporate franchise and personal income tax of 50 percent of up to \$25,000 in costs of qualifying capital expenditures made in response to COVID-19 pandemic between 1/1/21 and 12/31/22. The total credit program would be capped at \$250 million. While under current law these expenditures qualify for business expense deductions, current tax treatment falls well short of offsetting these costs to small businesses. This legislation would provide additional offsets to significant costs borne by small businesses to make their workplaces safe for employees and customers alike. S.8009/A.9009, Part E.

- Article 9-A MTA Surcharge – The Executive Budget proposes to establish in statute the corporate franchise tax MTA surcharge at 30% for tax years 2023 and beyond. Under current law, the surcharge is set at a “rate determined by the commissioner” based on imprecise factors related to state financial projections. The current statutory language was adopted as part of 2014 corporate tax reform, with its “flexibility” related to uncertainty about future Article 9-A receipts and thus MTA surcharge receipts. With multiple years of tax collections under the current Article 9A-A regime, the state has more confidence in its revenue projections, and the Executive Budget notes that the surcharge has been set at a rate between 28 and 30 percent over the past six years. Re-establishing a fixed percentage for the surcharge makes sense and will provide more certainty and flexibility for the state and taxpayers alike. S.8009/A.9009, Part G.

- Sales Tax on Vacation Rentals - This proposal is intended to “clarify” the application of the sales tax and NYC hotel unit fee to “vacation rentals,” and requires vacation rental marketplace providers (as defined in the bill) to collect and remit sales tax on transactions they facilitate. Basically, it would achieve tax parity between hotels and other rentals that are managed through facilitator organizations. It would apply sales tax collection obligations on entities that facilitates the occupancy of a vacation rental through an agreement with rental operator or operators by providing a physical or virtual forum means of which the sale of the occupancy takes place and collects the rent paid by a customer to an operator for the occupancy of a vacation rental. S.8009/A.9009, Part V.

- Telecommunications Mass Property Valuations - Extends through the 2027 tax year the standardized statewide process for assessing the value of telecommunication mass property; eliminates need for local assessors to defend valuations that mirror state ceiling values. Revenue bill, Part Y

- We support the Executive Budget Farm Employer Credits proposal, S8009, Part B and have recommended a similar mechanism for manufacturing related to green investments & products, COVID essential materials, and production reshoring (increased ITC from 5 to 20% for qualifying investments)

### **Executive Budget Proposals We Oppose**

- Treatment of Federal Sub-S Corporations – This proposal was also included in the FY 2022 Executive Budget but was left out of both the Senate and Assembly one house budget resolutions and ultimate not included in the final budget. It would amend Tax Law Article 9-A (corporate franchise tax), Article 13 (unrelated business income) and Article 22 to provide that all Federal subchapter S corporations will be treated as subchapter S corporations under state tax law, eliminating the state's existing election for subchapter C or subchapter S treatment. While Administration says this amendment would “simplify corporation and shareholder New York tax filings” and “eliminate potential tax avoidance schemes,” it is important to note that New York taxpayers are not calling for this form of simplification, nor do they support the elimination of this state-level election. Removing the election would not be “simplification” for the nonresidents of New York whose only taxable connection to New York is through the ownership of stock in a federal S corporation that has not elected New York Sub-S status. If the proposal is passed, those shareholders would for the first time be required to file returns in New York to report any income or loss

passed through to them from the corporation. Moreover, the state's Sub-S election provisions were already amended significantly in 2014 to eliminate a tax loophole identified by the Tax Department that could have allowed income tax avoidance. We oppose this proposal. [S.8009/A.9009, Part R](#).

## **Other Tax Measures We Support**

- Unemployment Insurance Taxes – One of the most significant tax issues facing New York businesses this year is not actually a function of the tax law. Unemployment insurance taxes, while collected by the state Department of Taxation and Finance, are governed under state and federal labor law. Due to an unprecedented spike in unemployment in early 2020, driven by state ordered reductions in force, New York's unemployment insurance program now has more than \$9 billion in outstanding federal loans, the entirety of which will be repaid through increased state and federal taxes on New York employers. The Senate has already passed legislation that would provide short-term tax relief to employers, and while we support final approval of that legislation, we urge that the final budget agreement also include broader relief. This would require the appropriation of upwards of \$2 billion of emergency federal funds (or revenues from other general sources) to address three major concerns regarding the state's unemployment insurance program: to offset the impact of increased federal unemployment insurance taxes on employers; to pay interests on federal advances; and to make a material down payment on the state's outstanding federal advances. To date, thirty-three other states have used a portion of their CARES act or ARPA funds to bolster their state UI programs. New York should follow this example. [S.6791-A \(Kaplan\)/A.7788-A \(Zebrowski\)](#).

- Pass Through Entity Tax amendments – We appreciate last year's approval of a "pass through entity tax" that provided a mechanism for non-incorporated businesses to restore federal deductibility of state taxes on business income. We are supporting amendments to that statute that will provide more complete relief to subchapter-S corporations whose shareholders include only New York State residents. Due to technical concerns regarding the intersection of federal and state tax treatment of pass-through entities, last year's PTET legislation included limitations on inclusion of sub-S corporation income. This legislation provides a compliance option for those taxpayers and will provide additional federal tax relief while having no impact on state revenues. Legislation pending.

- Work Opportunity Tax Credit – While we support the extension of several targeted hiring incentives proposed in the Executive Budget (i.e., for hiring veterans, proposed in S.8009, Part H, and for hiring workers with disabilities, proposed in S.8009, Part Q), we also support a more comprehensive approach. Specifically, we support legislation that amplifies the impact of the longstanding federal work opportunity tax credit by adopting a comparable WOTC credit under New York's personal income, corporate franchise, and insurance tax. Importantly, to maximize its impact, the state WOTC credit will be refundable, meaning if the credit exceeds tax liability, the excess will be refunded as an overpayment of taxes. State implementation will be straightforward as the criteria and calculations for the state WOTC will be the same as under federal law, and the New York State Department of Labor is already responsible for certifying employee eligibility under the federal WOTC, under federal designation. The credit is explicitly designed to promote the hiring of persons facing barriers to workforce re-entry, including but not limited to the formerly incarcerated, long-term unemployed, public assistance recipients, disabled workers and others. At a time when employers are struggling to find qualified workers, and some workers face significant barriers to returning to the workforce, this tax credit will help businesses address these challenges. [A.9171 \(Joyner\)](#).

- Small Business Manufacturing Tax Rates – We support legislation to provide a personal income tax exemption for income earned by a "qualified pass-through manufacture." This would complete the state's 2014 initiative to cut business income taxes for New York manufacturers, which initially reduced to zero the "entire net income" rate for manufacturers under the corporate franchise tax, which is applicable to businesses organized as "c-corporations." This legislation does the same thing for manufacturers organized as partnerships, LLCs, s-corporations or sole proprietorship, whose income is "passed through" to their owners and taxed under the personal income tax. This legislation will help reduce state-imposed costs on smaller manufacturing firms across New York State. Under this bill, the tax rate reduction applies to businesses that are principally engaged in manufacturing (i.e., more than 50 percent of its gross receipts are derived from the sales of goods produced by manufacturing), and that have all their capital (or at least

\$1 million of manufacturing capital) located in New York State. This legislation advances the State's overall interest in supporting high paying private sector jobs, and in supporting business sectors that are embracing advancing technology. [S.27 \(Kaplan\)/A.3734 \(Stirpe\)](#).

- Telecomm Property – We support legislation that addresses a New York Court of Appeals decision (T-Mobile Northeast, LLC v. DeBellis) that revised a longstanding interpretation of the Real Property Tax Law to re-characterized moveable wireless network equipment like cell site electronics, computers, and antennas as real property. It also impacts the longstanding exemption of fiber optic cable on private property. This bill restores the tax treatment of moveable wireless network property to that which existed prior to the Court of Appeals decision. Updated telecommunications systems are increasingly vital for the health of the state's economy. New York's outdated treatment of telecommunications properties, however, can serve as a significant disincentive to capital investments needed to update and expand these networks. This legislation is one step toward that goal. [S.5389 \(Parker\)/ A.712 \(Rosenthal\)](#).

- Corporate Tax Filing Deadlines – We support a proposal advanced by several national organizations, including the Council on State Taxation and the Tax Executives Network, to provide penalty relief for late return filing (but not late payment) as long as returns are filed within one month of the federal extended due date. This issue has percolated since FY 2017 when Congress changed the extended federal corporate filing deadline to October 15, which results in many extended state corporate returns having the same due date, as state returns are based on federal returns and cannot in practice be completed until the federal return has been filed. The issue is particularly problematic given the complexity surrounding state conformity to CARES Act of 2020 and subsequent federal law changes. Under New York's current tax law, corporate franchise tax returns are due April 15, but six-month extensions are provided "automatically" upon a timely request by the taxpayer, making New York's extension date the same as the IRS'. Providing an automatic extension to New York's corporate income tax extended due date to one month after the federal extended due date would both enhance the accuracy of state returns filed by taxpayers and ease the administrative burdens imposed on tax administrators by reducing the number of amended returns filed due to the concurrent federal and state filing deadlines. This approach would align New York with nineteen other states, including California, Texas, New Jersey, Connecticut, Maryland and others. New York State legislation pending.

- Thirty Day Safe Harbor -- Workers who travel outside their home state on business trips for temporary periods have unforeseen tax liabilities and return filing obligations in many states where they travel, and hard-pressed to comply with the varying and disparate state rules for withholding income earned by their traveling employees. New York is no exception, imposing individual personal income tax liability on the first day of in-state work by a non-resident, and imposing PIT withholding obligations on their employer on the fourteenth day of in-state work. We have heard from member companies that New York's approach has discouraged business activity in and business travel to New York State. Moreover, it imposes compliance burdens especially on business executives and other high earners more likely to be subject to state audit actions. While Congress continues to consider "mobile workforce" legislation, which would set a uniform 30-day safe harbor for personal income tax liability and withholding obligations for employees working outside their resident state, an alternative approach is state-level legislation with a reciprocity provision which would provide the safe harbor to residents of only those states that have similar law. This type of legislation has already been adopted in Illinois (2019), West Virginia (2021), and Louisiana (2021). This legislation protects both employees traveling to a nonresident state for fewer than 30 days and employers (including businesses, associations, governments, and unions) by eliminating withholding obligation for those employees. New York State legislation pending.

- Improving the Process for Taxpayers Reporting Federal Audit Changes – In 2003 the Multistate Tax Commission (MTC) first issued model legislation for states to uniformly address the reporting of federal adjustments to a state. Unfortunately, there was no strong initiative by business at that time to request states to adopt that model. The MTC recently issued a new model, which was developed in conjunction with several business and professional associations that addresses the reporting of federal adjustments for all taxpayers, not just for the new federal partnership audit regime. The MTC model improves the audit adjustment process and provides benefits for taxpayers and states alike. It enhances fairness by establishing a minimum of 80 days for taxpayers to report federal adjustments (interest would continue to

accrue), provides a fair statute of limitations for assessments and refunds, and allows taxpayers to make estimated payments. For partnerships, the model allows a state partnership representative to differ from the federal representative, addresses tiered partnerships (partnerships owning an interest in another partnership), and allows an election for the partnership to push federal tax adjustments out to its partners to differ from the election a partnership takes at the federal level. For states, this will provide a more timely and uniform reporting of federal adjustments and should expedite additional state tax payments. So far, this approach has been adopted by fifteen states, including Massachusetts, Ohio, Minnesota, California and others. New York State legislation pending.