

SALES TAX AND NEW BUSINESSES IN ERIE COUNTY

A comparison of the County's new business filings for 2009 with the New York State Department of Taxation and Finance Sales Tax Certificate of Authority Database



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Background

Over the past ten years, sales tax revenue has become the single largest component of Erie County's (the "County") revenues. At no point since the year 2000 has sales tax been less than 20% of total County revenues. In fact, pursuant to the 2011 proposed budget, sales tax revenues make up about 34% of the total revenues received by the County.

Pursuant to a 1977 agreement between the County and the cities of Buffalo, Lackawanna and Tonawanda, Erie County shares a portion of that sales tax revenue with the three (3) cities, twenty five (25) towns, sixteen (16) villages, thirty (30) school districts, the Niagara Frontier Transportation Authority ("NFTA") and the Erie County Fiscal Stability Authority ("ECFSA"). The County shares \$267.6 million with cities, towns and schools, an additional \$12.5 million with cities and towns pursuant to an additional allocation required by state legislation and \$17.3 million with the NFTA under a 1990 contractual agreement. Thus, the proper collection of sales taxes impacts not only the bottom line of the County but all local governments.¹

In 2009, Hall County, Georgia, and three other counties in the State of Georgia ran a comparison of new business filings made through their various county clerks with the State of Georgia Department of Revenue sales tax database. The results were astounding: over 1,000 businesses were not present on the State of Georgia's Department of Revenue listing. State of Georgia officials later estimated that the amount of missing sales tax "could equate to \$250 million." Hall County has estimated its loss of sales tax revenue at \$25 million over the past three years.²

After being made aware of the Georgia initiative, the Erie County Comptroller met with the Deputy Comptroller – Audit and asked him to complete a similar study for Erie County. While not in favor of new taxes, The Comptroller believes that those who abuse the tax system should be held accountable for their behavior. It was the Comptroller's concern that the Georgia results would be repeated within Erie County.

Working with representatives of the New York State Department of Taxation and Finance ("NYS"), it was quickly determined that no such project had been undertaken before in New York State and a pilot project was commenced between NYS and the Comptroller's Office to determine whether all new businesses established in Erie County in 2009 that should be collecting sales tax are in fact registered with NYS and collecting sales tax.

The details of which products and services in New York State are exempt from sales tax, and which are not, and the sales tax rate charged in Erie County are not the focus of this report. New York State has assembled several reports and bulletins, easily available on-line, that detail how to apply for a New York State sales tax Certificate of Authority and which products and services are taxable. The most basic of these, New York State publication 750 "A Guide to Sales Tax in New York State," can be found at <http://www.tax.state.ny.us/pdf/publications/sales/pub750.pdf>.

¹ For a more detailed analysis on sales tax collection in Erie County please see the Erie County Comptroller's Report issued on September 4, 2007 entitled "[Comptroller's Review of Revenues Derived from Erie County's Sales Tax and the Sharing Thereof with Other Entities](http://www.erie.gov/comptroller/pdfs/review_2007_sales_tax_report.pdf)" which can be found on the web at http://www.erie.gov/comptroller/pdfs/review_2007_sales_tax_report.pdf

² Gainesville Times, "Study says Georgia has shortchanged Hall County," July 26th, 2010.

The Project

To complete the pilot project, a list of all new businesses formed in the County had to be obtained. Due to the potential size of the project, it was determined to limit the project to all new businesses formed in 2009. The first major task was to identify those businesses.

New York General Business Law § 130 (1) states that no individual or group may transact business under an assumed name unless said business has filed in the office of the local county clerk a certificate identifying the name of the business, the address within the county where it will transact its business and the names and addresses of all individuals conducting said business. Said certificate is often referred to as a “Certificate of Doing Business under an Assumed Name” or, as it is more commonly known as, a “DBA.” A DBA certificate can be filed for various types of entities, including for-profit businesses, not-for-profit entities and religious organizations. Not all entities filing a DBA certificate, such as some religious or charitable groups or those performing certain services, are required to collect sales tax.

Pursuant to the above noted law, the Erie County Clerk’s Office (“Clerk”) maintains a database on all filed DBA certificates in the County. The Clerk is not the official repository for organizational documents creating corporations, limited partnerships and limited liability companies. Those entities file organizational documents with the New York State Department of State. Our office limited its review to entities filing DBA certificates, not those that file organizational documents with the New York State Department of State.

The Clerk and her staff were contacted by the Comptroller’s Office and agreed to assist the Comptroller’s Office in the preparation of this project. Informed of the requisite data and the format required by NYS’s computer systems, the Clerk’s office returned a list of 6,831 new business entities filing a DBA certificate in 2009.

The list of new business entities was forwarded to NYS for processing. NYS then identified from that list entities that filed for a Sales Tax Certificate of Authority and those entities that were known to be exempt organizations. NYS then sent back to the Comptroller’s Office a list of entities that were not registered with NYS or not otherwise known to be an exempt organization. That list contained 5,271 names.

Using publically available information, the Comptroller’s office began to research names on the list to determine the current business status of those entities. As a result of this process it was determined that some businesses had closed since 2009, others were exempt entities, and others were in fact collecting sales tax and remitting the proceeds to NYS. Once it was determined that a business appeared to be collecting sales tax, was an exempt entity, or had closed, it was removed from the final list of entities.

The Results

In the end, the final list identified six hundred six (606) businesses, or approximately nine percent (9.0%) of all new DBA certificates filed in 2009, that appeared to be transacting business in the County but for neither which no sale tax certificate could be located nor an exemption on record. With permission of NYS, the Comptroller's Office sent out a form letter and survey to those 606 businesses inquiring into whether sales tax was being collected or if the entity is exempt from collecting tax, as well as requesting other data on said businesses. A copy of that form letter and survey is attached hereto as Appendix A.

The form letter provided the recipient ten (10) business days to respond and we expected all letters to be returned on or about October 22, 2010. As of November 5, 2010, responses to the form letter and survey have been forwarded to NYS and grouped based on three (3) categories:

- 1) Those businesses that did not respond to the form letter (323 Responses);
- 2) Those businesses who stated they have a Sales Tax Certificate of Authority and do collect tax (40 Responses); and
- 3) Those exempt organizations or businesses who stated they are not required to collect sales tax (136 Responses).

There were 107 surveys that were returned unopened. According to the U.S. Post Office label affixed to the envelopes, these were returned because the business no longer existed at that location.

Tax has been provided the names and addresses of the businesses in each of the three categories as well as a copy of the response received, if any. Pursuant to New York State law, NYS is charged with prosecuting those that fail to properly file or collect sales tax. NYS has informed the Comptroller's Office that it will act upon the information provided by the Comptroller's Office. If a criminal investigation results from this project, NYS has promised to inform the Comptroller's Office of such an investigation and its results.

Three (3) surveys contained statements indicating that the business owner was unsure if they should be collecting sales tax and those surveys will be provided to NYS who will make the final determination whether the businesses should be collecting sales tax. NYS will contact those businesses directly. Throughout this project, NYS has made it clear that the ultimate determination of what products or services are covered by sales tax will be made by NYS.

Though NYS Tax is the final arbiter of whether an entity should be collecting sales tax, our examination of the forms returned revealed businesses that were not collecting sales tax (and in some cases, other taxes or fees) but appear to be required to do so. The following types of businesses were identified and potentially should be collecting sales tax:

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| a jewelry store | a property maintenance service |
| a web design service | an auto repair service |
| a store selling custom bridal gowns | a tattoo artist |
| a landscaping service | a house-painting service |

a music store
a used clothing store
a used CD/bookstore
a bed and breakfast hotel
a chimney sweep
a tavern

a catering service
an ice cream parlor
a house cleaning service
a convenience store
an engine repair shop
a snowplowing service

Forty-five (45) of the one-hundred-thirty-six (136) businesses that stated they were not required to collect sales tax are represented by the above listing.³

Additionally, as noted above, one business on the list was a bed and breakfast hotel in Erie County. In addition to not collecting sales tax this business was not remitting hotel occupancy tax to Erie County. Although the search for unpaid hotel occupancy tax was not a part of the pilot program with NYS, the Comptroller's Office has begun collection actions with this business for unpaid hotel tax.

Conclusion

Sales tax revenue is an important component of Erie County's total revenues. This project has uncovered many businesses created in 2009 that appear not to be collecting sales tax and should be. This project also exposed businesses that are not collecting other taxes and fees, such as Erie County's Hotel Occupancy Tax. Protecting Erie County's and other local governments' revenues by insuring that everyone who should collect sales tax does so is not just good business for the County; it protects those honest businesses from those who would abuse the system.

A project of this type has never been performed in New York State. NYS has asked the Comptroller's Office to provide instructions and guidance on what tasks were performed in connection with this project. NYS believes that if this project is successful in finding businesses that are not charging sales tax but should be other New York State counties will want to replicate Erie County's work. The Comptroller's Office is assembling what would in effect become a manual for this project and will forward that to NYS when complete.

The Comptroller's Office thanks Erie County Clerk Kathleen Hochul and the many employees of her office as well as those working for the New York State Department of Taxation and Finance for their hard work and effort in completing this innovative and important project.

³ The Comptroller's Office will not reveal the names of the 606 businesses identified by this project until such time as the New York State Department of Taxation and Finance concludes that such business should have been collecting sales tax.