

Sales and Use Taxes

New York Restaurants Among Top 250 Delinquent Taxpayers

Restaurant owners are among the most high profile and common delinquent taxpayers in New York state, according to a Bloomberg BNA analysis of data and media accounts.

The state Department of Taxation and Finance publishes a list on its website of the top 250 business taxpayers who have outstanding tax warrants.

Of the 250 businesses on the list, at least 40 are restaurants. The restaurants owe a total of at least \$19.5 million. The taxes owed range from \$349,000 in sales and use taxes owed by a Syracuse restaurant called the Flatiron Grille to \$3.7 million in sales and use taxes owed by the 1849 Restaurant in New York City.

Sales, Withholding Taxes Most of the back taxes owed are sales taxes, but restaurants also owe withholding taxes, according to the state Department of Taxation and Finance's database. The list, which is updated monthly, excludes warrants where the taxpayer has protested the related bill, filed for bankruptcy, or is paying the debt through an installment payment agreement.

In all, New York businesses collect about \$28 billion in sales taxes each year and remit the funds, according to the department.

James Gazzale, a department spokesman, said the state doesn't have an estimate of how many restaurants are seized or how widespread the problem of tax non-payment is in the restaurant industry.

"We don't track data this way," he told Bloomberg BNA in an Aug. 15 email. "We don't treat any collection case differently based on the industry in which the business is involved."

"In general, when we're aware of a business that isn't living up to its responsibility, we make every attempt to have a dialogue with the owner in hopes of finding a mutually beneficial way to resolve the tax debt," Gazzale said. "When those attempts are ignored, we take the proper steps to protect the state's interests."

Felony Cases The state, in conjunction with prosecutors, will often put out a news release in the most egregious examples of nonpayment.

There were at least nine press statements released in 2016 and 2017 involving criminal charges brought against restaurant owners for failure to pay sales taxes.

In all cases, the owners were charged with felonies for allegedly pocketing sales tax monies owed to the state.

"One of the reasons that there is publicity of restaurant seizures is because it works as a warning to other businesses that they shouldn't be pocketing tax dollars," Verenda Smith, deputy director of the Federation of Tax Administrators, told Bloomberg BNA in an Aug. 16 email.

"Seizures have many different outcomes, but typically what happens is the restaurant that has resisted every other collections effort will respond to a seizure by paying back the sales tax dollars they pocketed and reopening," she said.

Smith said restaurants present a number of unique challenges for tax administrators. Sales tax, she said, has no third-party reporting or withholding. In addition, restaurant sales are frequently paid in cash, creating "more opportunities to play with the books."

Seized Restaurants Make Headlines Seized restaurants tend to make headlines. According to various media accounts, at least 18 restaurants throughout the state were seized between 2016 and 2017.

Kevin Dugan, director of government affairs for the New York State Restaurant Association, said the industry wants more education and outreach from state and local governments.

"We're looking for an education-first approach," he told Bloomberg BNA Aug. 15. "The more, the better."

Dugan didn't characterize the state's enforcement efforts against restaurants as unduly aggressive. In some cases, the restaurant owners are fully aware of the non-payment, they don't correct it, and the state provides adequate time to comply.

"What else can you do, really," he said, referring to seizures. "Sometimes the state government has been a little overeager in terms of going after certain restaurants. It's kind of a case-by-case basis."

Slim Profit Margins Dugan said one of the issues that makes restaurants especially susceptible to tax trouble is slim profit margins. He said successful restaurants often operate on a profit margin of 4 percent to 8 percent. When profits slip, things can snowball, he said.

Karen J. Tenenbaum of Tenenbaum Law P.C. represents many restaurants in her Melville, N.Y. tax practice and recently provided guidance titled "Don't Lose Your Restaurant Because of Unpaid Taxes: Three Things You Need to Know." The main issue that leads to tax problems for restaurants is cash flow, she said.

Some owners dip into the sales or payroll taxes they've collected in order to make rent or pay employ-

ees and they think they'll make it up, she said. The past due taxes and penalties then snowball.

"Once they get into a hole, it's hard to dig out," she told Bloomberg BNA Aug. 14. "It's very hard to catch up."

Last Resort Tenenbaum said the state tax department provides owners "all sorts of opportunities" to resolve tax problems. They don't just come in and slap a "seized" sticker on the front door.

"Seizure is a weapon of last resort," she said. "It's not widespread, but it's not uncommon."

Tenenbaum advises clients to keep detailed records, in case they are audited. She also said owners should be

aware that there are severe consequences for failure to pay taxes, including seizure, interest rates as high as 14.5 percent, criminal prosecution, and personal liability.

"Communications seems to be the key," she said. "The goal is really to get you to the table to work out a collection alternative."

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The delinquent taxpayers list is at <http://src.bna.com/rNu>.

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