

Changes to Qualified Empire Zone Enterprise (QEZE) Program (Articles 28 and 29) - Effective September 1, 2009

Chapter 57 of the Laws of 2009 (Chapter 57) amended certain provisions of the Tax Law and the General Municipal Law affecting the Empire Zones Program. These changes affect business entities claiming Qualified Empire Zone Enterprise (QEZE) sales tax benefits under Tax Law Articles 28 and 29. The purpose of this memorandum is to summarize the changes made by the legislation.

Issuance of *Empire Zone Retention Certificates* by Empire State Development

Article 18-B of the General Municipal Law (GML) was amended to require Empire State Development (ESD) to review all certified Empire Zone business enterprises and apply new criteria for continued certification of businesses wishing to retain Empire Zone benefits. ESD will issue an *Empire Zone Retention Certificate* (EZRC) to businesses meeting the criteria for continued certification. For information regarding certification, the review process, and EZRCs, contact ESD. Contact information can be found at www.empire.state.ny.us.

However, a business that receives an EZRC is **not** automatically eligible for the QEZE sales tax benefits provided for under the Tax Law. **A business that receives an EZRC from Empire State Development must still meet all eligibility requirements under the Tax Law (including passing the QEZE employment test each year) to qualify for QEZE sales tax benefits.**

Changes to the QEZE sales tax benefits

(1) Repeal of section 1115(z) upfront QEZE exemption

Under current law, a business certified by ESD must also apply for and receive from the Commissioner of Taxation and Finance Form DTF-81, *Qualified Empire Zone Enterprise (QEZE) Sales Tax Certification*, in order to qualify for the QEZE sales tax benefits provided for under the Tax Law. Section 1115(z) of the Tax Law currently provides QEZE sales tax benefits in the form of an exemption from the 4% State tax and the %%% tax imposed by the State in the Metropolitan Commuter Transportation District (MCTD) on certain purchases and uses of tangible personal property and services by a QEZE. The Tax Law also allows a QEZE to apply for a refund of taxes paid when appropriate. The exemption (or refund) does not apply to any locally imposed sales and use taxes unless the county, city, or school district imposing those taxes elected to provide the exemptions. A QEZE currently claims an exemption from tax by issuing sellers a properly completed Form ST-121.6, *Qualified Empire Zone Enterprise (QEZE) Exempt Purchase Certificate*.

Pursuant to Chapter 57, effective September 1, 2009, the exemption provided in section 1115(z) of the Tax Law is repealed. As a result, effective September 1, 2009, there will

be no upfront exemption from tax for any purchases made by a QEZE. As of that date, Form ST-121.6 is invalid and cannot be used to claim an exemption from tax on either a single purchase or blanket basis.

Businesses currently certified as QEZEs may continue to claim an exemption from tax using Form ST-121.6 **only through August 31, 2009**. QEZEs who have issued the exemption document to vendors as a blanket certificate must notify vendors that the certificate is no longer valid and the QEZE must begin paying full New York State and local sales taxes on its purchases as of September 1, 2009.

(2) New section 1119(d) QEZE refund or credit

Effective September 1, 2009, there is no upfront exemption from tax for purchases made by a QEZE; a QEZE must apply for a refund or credit of tax paid on qualifying purchases pursuant to new section 1119(d) of the Tax Law. A business enterprise **must receive** an EZRC from ESD before applying for the refund or taking the credit. Additionally, the business enterprise must still meet all eligibility requirements under the Tax Law (including passing the QEZE employment test each year) in order to claim a refund or credit under new section 1119(d) of the Tax Law.

A business enterprise's eligibility for the refund or credit provided by new section 1119(d) depends on when the business enterprise is certified by ESD and whether or not it has been issued Form DTF-81, *Qualified Empire Zone Enterprise (QEZE) Sales Tax Certification*, by the Tax Department:

- A business enterprise certified by ESD before April 1, 2009, that has already been issued Form DTF-81 is eligible for a refund or credit of tax paid on or after September 1, 2009, on qualifying purchases after it receives its EZRC from ESD. The sales tax benefit period for the business is unaffected and continues to run for 120 months from the effective date on Form DTF-81. The business must pass the employment test for the tax year in which a refund or credit is claimed.
- A business enterprise certified by ESD before April 1, 2009, that has received an EZRC but has not yet applied for Form DTF-81 is eligible for a refund or credit after it has filed the appropriate QEZE application (see Forms DTF-82, DTF-83, and DTF-84) and received Form DTF-81 from the Tax Department. QEZE sales tax benefits are not retroactive; the benefit period is 120 months from the effective date on Form DTF-81. The business must pass the employment test for the tax year in which a refund or credit is claimed.
- A business enterprise certified by ESD on or after April 1, 2009, is eligible for a refund or credit of tax paid on qualifying purchases during the first month **after** certification by ESD, based on the date on the *Certificate of Eligibility* and on the EZRC issued to it by ESD. The business must pass the employment test for the tax year in which a refund or

credit is claimed. **However**, a business certified by ESD on or after April 1, 2009, is eligible for a refund or credit of any taxes paid **only** if the locality in which the purchase is made has elected to provide the section 1119(d) refund or credit. **If the locality has not made this election, no refund or credit of any taxes (State, MCTD and local) paid is available.**

(3) How to claim the new section 1119(d) refund or credit

The Tax Department is creating a new refund form specifically for refund claims made under new section 1119(d) of the Tax Law. This new form must be used for all refund claims made under section 1119(d). **A claim for refund under section 1119(d) may be filed only once each sales tax quarter.** No interest is payable on any claim for refund filed under section 1119(d). **Note:** Form AU-11, *Application for Credit or Refund of Sales or Use Tax*, **cannot be used** to claim a refund under section 1119(d).

QEZE's that are registered for sales tax purposes will also be able to claim the credit allowed under section 1119(d) on their periodic sales and use tax returns. Claims for the credit cannot be made on returns filed more often than quarterly. The Tax Department is developing a schedule to be used to claim the credit. Pursuant to section 1119(a) of the Tax Law, a credit may be claimed with a return due coincident or immediately subsequent to the time the new QEZE refund form is filed.

However, pursuant to Chapter 57, no refunds will be paid and no credits will be allowed for at least 270 days after the new law was enacted, which occurred on April 7, 2009. Therefore, no refund applications will be approved or paid prior to January 2, 2010. QEZE's that are also registered for sales and use tax purposes may begin claiming credits for qualifying purchases beginning with the December 1, 2009, through February 28, 2010, reporting period.

The Tax Department will soon issue a publication listing the QEZE sales tax refund rates. If you sign up for the department's *Subscription Service* through our Web site at www.nystax.gov and select sales tax, you will automatically receive notifications when sales tax publications and other important materials are issued.

(4) Chapter 57 does not affect the Empire Zone refunds program under section 1119(a)(6) of the Tax Law

The changes described in this memorandum do not affect the Empire Zone refunds allowed under section 1119(a)(6) of the Tax Law for tax paid on building materials used in construction, expansion, or rehabilitation of real property located in an Empire Zone. Form AU-11 should continue to be used to file a claim for refund under section 1119(a)(6). For more information on this refund, see Publication 30, *A Guide to Sales and Use Tax Incentives Within Empire Zones*, and Publication 718-EZ, *Empire Zone Sales and Compensating Use Tax Refund Rates*.

General information

Purchase eligible for a QEZE refund or credit

For purchases and uses of property and services to be eligible for a refund or credit, the property or services (other than the section 1105(b) consumer utility services discussed below) must be directly and predominantly used or consumed by the QEZE in an Empire Zone in which the QEZE has qualified for benefits. For purposes of the refund or credit, *predominantly* means 50% or more (or at least 50%).

A QEZE's use of a motor vehicle or property related to a motor vehicle will be found to occur predominantly in an Empire Zone where the QEZE has qualified for benefits if:

- the QEZE uses the vehicle at least 50% exclusively in such a zone; or
- at least 50% of the vehicle's use is in activities originating or terminating in such a zone; or
- at least 50% of its use is a combination of use exclusively in such a zone and in activities originating or terminating in such a zone.

The QEZE may choose to compute the usage of the vehicle based on either hours of use or miles traveled. Property related to a motor vehicle includes a battery, diesel motor fuel, an engine, engine components, motor fuel, a muffler, tires, and similar tangible personal property used in or on a motor vehicle. (**Note:** To apply for a refund of sales taxes paid on qualifying purchases of diesel motor fuel or motor fuel, complete Form FT-500, *Application for Refunds of Sales Taxes Paid on Automotive Fuels*.) The QEZE refunds or credits pertaining to motor vehicles are also applicable to the special taxes imposed under Article 28-A of the Tax Law on passenger car rentals.

Consumer utility services (other than telephony and telegraphy, telephone and telegraph services, and telephone answering services) must be used or consumed directly and exclusively (*i.e.*, 100%) by a QEZE in an Empire Zone in which the QEZE has qualified for benefits. These services include sales of gas, electricity, refrigeration, and steam, as well as gas, electric, refrigeration, and steam services of whatever nature. Telephony and telegraphy, telephone and telegraph services, and telephone answering services must be delivered and billed to the QEZE at an address in the zone in which the QEZE has qualified for benefits in order for the refund or credit to apply. Mobile telecommunications services purchased by a QEZE will qualify for the refund or credit if provided to end users whose business locations are in the zone where the QEZE is certified. See TSB-M-02(4)C, (6)S, *Amendments Affecting the Application of the Sales and Use Tax and Excise Tax Imposed on Mobile Telecommunications Service*, for additional information on the application of sales tax to mobile telecommunications services.

The QEZE refund or credit does not apply to the taxes imposed under section 1105(d) of the Tax Law on sales of food or drink at restaurants, taverns, or other establishments, or to sales by caterers; nor does the refund or credit apply to rent for hotel occupancy or amusement charges subject to tax under sections 1105(e) and (f), respectively.

QEZE employment tests

Please note: The information presented below describes the existing provisions for QEZE employment tests. These provisions were not affected by Chapter 57 of the Laws of 2009 and are presented in this memorandum for informational purposes only, as business enterprises must continue to pass the applicable employment test in order to be eligible to claim a refund or credit under new section 1119(d) of the Tax Law.

For a business enterprise certified by ESD **prior to April 1, 2005**, the employment test is met if:

- the business enterprise's employment number in all EZs for the tax year **equals or exceeds** its employment number in all EZs for the base period; and
- the business enterprise's employment number in New York State outside of EZs for the tax year **equals or exceeds** its employment number in New York State outside of EZs for the base period.

For a business enterprise certified by ESD prior to April 1, 2005, the base period is the five tax years immediately preceding the test year (*i.e.*, the tax year ending before the test date, which is the date the business enterprise was first certified under the GML, or July 1, 2000, whichever is later).

A business enterprise certified by ESD between August 1, 2002, and March 31, 2005, that has a base period of zero years and an employment number in EZs of greater than zero with respect to a tax year will meet the employment test only if the business enterprise qualifies as a new business. The new business test will also apply to a business enterprise certified under the GML prior to August 1, 2002, that has a base period of zero years or zero employment in the base period. If such a business enterprise is substantially similar in ownership and operation to an existing or previously existing taxpayer, it may qualify as a new business only if it was formed for a valid business purpose and not solely to gain Empire Zone benefits.

For a business enterprise certified under the GML **on or after April 1, 2005**, the business enterprise will include its employees within EZs in its statewide employment numbers, and the number of employees in the tax year being measured must exceed (not merely be equal to) the number in the base period for both EZs and the state in order to pass the employment test. The new business test will apply to business enterprises with a base period employment of zero in addition to those with a base period of zero years. The base period for these business enterprises is shortened from five years to three years.

For employment tests using a tax year beginning on or after January 1, 2005, a business enterprise that was certified under the GML on or after April 1, 2005, will meet the employment test if:

- its employment number in all EZs for the tax year **exceeds** its employment number in all EZs for the base period; and
- its employment number in New York State for the tax year **exceeds** its employment number in New York State for the base period (see below).

If the business enterprise has a base period of zero years or its base period employment is zero and it has an employment number in the Empire Zone greater than zero in the tax year, the employment test will be met only if the business enterprise qualifies as a new business.

For purposes of the sales and use tax benefit period, if the business enterprise is certified by ESD during its first tax year and otherwise qualifies as a new business, the employment test will be met for that tax year in any month in which its employment number exceeds zero.

NOTE: A TSB-M is an informational statement of existing department policies or of changes to the law, regulations, or department policies. It is accurate on the date issued. Subsequent changes in the law or regulations, judicial decisions, Tax Appeals Tribunal decisions, or changes in department policies could affect the validity of the information presented in a TSB-M.