

2009 Legislative Changes to the Empire Zones Program



On April 15th, 2009, the New York State Department of Taxation and Finance ("NYS DTF") Taxpayer Guidance Division issued TSB-M-09(5)C and TSB-M-09(4)I discussing the changes to the Empire Zones Program that were included in the 2009-10 New York State budget legislation. According to this guidance, an Empire Zone Retention Certificate must be attached to any income tax return claiming Empire Zone tax credits for the 2008 tax year. The Empire Zone Retention Certificate will be issued to each certified Empire Zone business enterprise that is not subject to decertification upon review during calendar 2009 by the Commissioner of Economic Development (the "Commissioner").

The Commissioner's review and the issuance of Empire Zone Retention Certificates are expected to be completed in two months or so. There is no action that must be taken by a certified Empire Zone business enterprise in order for the Commissioner to conduct this review. A certified Empire Zone business enterprise that operates as a flow-through entity (i.e. partnership, limited liability company, or S corporation) will provide a copy of its Empire Zone Retention Certificate to its owners to attach to their original or amended 2008 New York State income tax returns claiming Empire Zone tax credits.



We understand the NYS DTF is NOT asking taxpayer's that have filed their 2008 New York State income tax returns to file an amended return without Empire Zone tax credits. We expect the NYS DTF to send a notice to each taxpayer stating that their Empire Zone tax credit claim has been suspended pending the Commissioner's review and the filing of an Empire Zone Retention Certificate with an amended return.

Taxpayers who have extended their 2008 New York State income tax returns must attach the Empire Zone Retention Certificate to their income tax return to claim Empire Zone tax credits for the 2008 tax year.



Commissioner's Review

The Commissioner will conduct a review during calendar 2009 of all business enterprises certified under the Empire Zones Program to determine whether any of them should be decertified based on the following:

1. Certified under the Program prior to August 1, 2002 and that "caused individuals to transfer from existing employment with another business enterprise with similar ownership and located in New York State to similar employment with the certified business enterprise" (a/k/a "shirt changers") or that "acquired, purchased, leased, or had transferred to it real property previously owned by an entity with similar ownership, regardless of form of incorporation or organization."
2. Fails to provide "economic returns" to New York (i.e., pay wages and invest capital) in an amount greater than its Empire Zone benefits based on data from at least 3 business annual reports (a/k/a 1:1 cost benefit ratio).

In conducting this review, the Commissioner has the authority, after consultation with Director of the Budget, but in the Commissioner's sole discretion, to consider other "economic, social, and environmental factors when evaluating the costs and benefits of a project to the state [of New York] and whether continued certification is warranted based on such factors."

A business enterprise that is not subject to decertification will receive an "Empire Zone Retention Certificate" from the Commissioner. The Empire Zone Retention Certificate must be filed with the tax return to claim Empire Zone benefits for the 2008 tax year. In addition, a petition for refund of an Empire Zone credit may not be filed with the Tax Commission until 6-months after the Commissioner has issued the Empire Zone Retention Certificate to the taxpayer.

Appeal of Decertification

1. Notice of intent to appeal must be sent to the Empire Zone Designation Board within 15-days from receiving the Commissioner's notice of decertification
2. Written submission must be presented within 60 days of receiving the notice of decertification explaining why certification should continue
3. The Empire Zones Designation Board is authorized to reverse a decertification by the Commissioner only upon a unanimous finding that:
 - a. There was insufficient evidence to support the Commissioner's determination that the business enterprise failed to provide economic returns to New York State that were greater in value than the business enterprise's Empire Zone benefits, or
 - b. Extraordinary circumstances occurred that would justify the continued certification of a business enterprise certified prior to August 1, 2002 and that was decertified due to transfers of employment or realty between similarly owned entities.

Taxpayers may also file a petition under Article 78 to appeal a decision by the Commissioner. Please contact us immediately upon receiving a notice of decertification from the Commissioner.



Amendments to the Criteria for Decertification

1. Adds shirt changers and failing a 1:1 cost benefit ratio to the statutory list of criteria for decertification under the Program
2. Adds the making a material misrepresentation of fact on a Business Annual Report
3. Removes the exception for unanticipated economic circumstances beyond the business enterprise's control from the criterion that a business enterprise failed to create or retain jobs
4. Adds a business enterprise's change in ownership or relocation outside of an Empire Zone



QEZE Sales Tax Exemption

The QEZE sales tax exemption is eliminated and a new QEZE sales tax refund or credit has been created. As a result, a sales tax refund or credit claim must be filed to request a refund or credit for sales tax paid on eligible goods and services used or consumed predominately within Empire Zones. It appears this provision will become effective on September 1, 2009.

In addition, a sales tax refund or credit may not be claimed more frequently than once per sales tax quarter with the first refund paid no earlier than 270 days after the budget bill became law. Therefore, it appears the first refund will be paid on January 1, 2010. We expect the NYS DTF to issue guidance confirming these effective dates.

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