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START-UP NY Application Process and Planning Considerations

Wednesday, November 20, 12 - 1PM

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THE LAW APPLIEDSM

The START-UP NY Program

The Application Processes for Sponsors and
Participating Businesses

November 20, 2013

Purpose of the Program

- The START-UP NY Program (the “Program”) promotes entrepreneurialism and job creation by transforming higher education to create Tax-Free communities across the State.
- The Program provides economic incentives to qualifying new businesses and, in some cases, existing businesses that are expanding and increasing employment, that locate in designated Tax-Free NY Areas which have a nexus to a sponsoring higher education institution.
- The Program places emphasis on Upstate New York.
- There is a specific focus on high-tech and start-up businesses to start, grow, and stay in New York.

Regulations Issued by the New York State Department of Economic Development

- In October, the Department of Economic Development issued Emergency Regulations.
- The Regulations mirror and expand upon the statutory provisions.
- The Regulations provide the Commissioner of Economic Development with liberal discretion to approve both the admission of a business into the Program and to approve the inclusion of vacant lands or vacant building spaces as a Tax-Free Area.

New York State Department of Taxation and Finance

- DTF issued its Technical Memorandum regarding the START-UP NY Program. The Technical Memorandum addresses the provisions of the legislation specific to the Tax Law.
- TSB-M-13 (7)C / (6)I
- Outlines the method for calculating each of the credits or benefits available.

How Does the Program Work?

- The sponsoring educational institution (the “Sponsor”) submits its proposed Plan for a Tax-Free NY Area to Empire State Development (ESD).
- ESD (through the Commissioner and Approval Board) approves the Tax-Free NY Area.
- A company that meets the eligibility requirements of the Economic Development Law applies to the Sponsor with final approval from ESD.
- The Department of Taxation & Finance oversees the benefits defined in the Tax Law and claimed on income tax, corporate tax and sales tax returns.

Benefits Available Under the Program

- Tax-Free NY Area Tax Elimination Credit.
- Exemption from Organization Tax imposed under Sections 180 and 181 of the Tax Law.
- Exemption from the MCTMT for payroll expenses and net earnings from self-employment.
- A refund of State and local sales and use taxes.
- Exemption from State or local real estate transfer tax or local real property transfer tax.
- Certain exemptions from real property taxes.
- Wage exclusion for eligible employees.

General Description of the Program

- Detailed process for the submission and approval of Plans to designate Tax-Free NY Areas and the eligibility criteria used in evaluating those plans.
- Detailed process for the application by businesses to participate in the Program and the eligibility criteria used to evaluate those applications.
- Penalty provisions are built into the Program for goals that are not fully realized by participating companies.
- Process for terminating a business from the START-UP NY Program and a process for administrative appeals of such terminations.

Approving Authority

- Both the Commissioner and the START-UP NY Approval Board are involved in the review and approval of Plans to include vacant land or building space as a Tax-Free NY Area.
- All Plans are reviewed by the Commissioner, and the Approval Board conducts its review in the following situations:
 - Private Universities and Colleges applying to become a sponsor.
 - Designation of 20 Strategic State Assets.
 - Finally, the Board has additional latitude to approve Tax-Free Areas in unique circumstances as set forth in the Regulations.

START-UP NY Approval Board

- Comprised of three members.
 - One appointed by the Governor.
 - One appointed by the Speaker of the Assembly.
 - One appointed by the temporary President of the Senate.
- Each member may designate a representative to attend meetings and vote or act on his or her behalf.

Eligibility Criteria for Designation as a Tax-Free NY Area

- By definition, this is land or vacant space of a University or College, or a designated area of a New York State incubator, that meets the eligibility criteria specified in Article 21 of the Economic Development Law, and has been approved by the Commissioner and, if necessary, the START-UP NY Approval Board.

Eligibility Criteria for Designation as a Tax-Free NY Area

- The rules vary depending on the type and location of the educational institution.
- In general, the educational institution cannot relocate housing, administrative, or student facilities in order to create vacant land or vacant building space.
- A New York State incubator with a bona fide affiliation to an educational institution is eligible:
 - Must provide written documentation of affiliation.
 - Must demonstrate that the mission and activities of the incubator align with the educational institution.

Potential Locations of Tax-Free NY Areas

- SUNY and Community College Campuses in Upstate New York
- SUNY and Community College Campuses in Nassau, Suffolk, or Westchester Counties
- SUNY and Community College Campuses in New York City
- CUNY Campuses
- Private Colleges and Universities in Upstate New York
- Private Colleges and Universities in Downstate New York
- Strategic State Assets

Strategic State Assets

- Strategic State Assets are defined as land, a building, or group of buildings, owned by the State of New York that are closed, vacant, or for which notice of closure has been given.
- The Approval Board may approve plans for up to 20 Strategic State Assets.
- Vacant land or vacant building space designated under this provision will not count against any other square footage limitation.

Application Process for Approval as a Tax-Free NY Area

- The first step in the process is for the Sponsor to create a proposed Plan and submit it for approval to the Commissioner.
- The Plan identifies the building space or lands proposed for designation with the specific address(es) and written legal description, including the total square footage of the space or acres of land.

Application Process for Approval as a Tax-Free NY Area

- The Plan must include a detailed written description of the following:
 - Type of business or businesses that may locate in the designated area.
 - The academic mission of the sponsor and how the anticipated businesses will align or further this mission.
 - The positive community and economic benefits anticipated.
 - The process the sponsor will follow in the selection of participating businesses.

Application Process for Approval as a Tax-Free NY Area

- The Plan must be very specific with respect to:
 - Job creation
 - Training opportunities
 - Diversification
 - Environmental sustainability
 - Entrepreneurship opportunities
 - Synergistic links to existing businesses
 - Impact on the local economy
 - Opportunities for economic and social growth

Approval of an Application for Designation of a Tax-Free NY Area

- A copy of the plan must be provided to:
 - The municipality in which the proposed Tax-Free NY Area is located.
 - A local development entity representing the area.
 - The applicable University or College Faculty Senate, Union Representatives, and Campus Student Government.
- The Sponsor must allow 30 days to receive written comments, which information is included in the submission to the Commissioner.

Approval of an Application for Designation of a Tax-Free NY Area

- The Commissioner, and when applicable the Approval Board, will review applications. Preference will be given to plans that include under-utilized properties.
- The Approval Board will give priority for acceptance in counties that contain a city with a population of 100,000 or more, but without a university center.
- Finally, the Approval Board shall approve applications in a manner that ensures regional balance.

Approval of an Application for Designation of a Tax-Free NY Area

- Once approved, the Office of the Commissioner will notify the sponsor in writing.
- At that time the sponsor may solicit businesses to apply to participate in the Program.

Eligibility Criteria for Businesses

- Only eligible businesses approved by the sponsoring educational institution and which locate on land or in vacant space designated as a Tax-Free NY Area are eligible to participate in the Program.

Types of Businesses Prohibited from Participating in the Program

- Retail and wholesale businesses
- Restaurants
- Real estate brokers
- Law firms
- Medical or dental practices
- Real estate management companies
- Hospitality
- Finance and financial services
- Businesses providing personal services
- Businesses providing administrative or support services (100 job carve-out)
- Accounting firms
- Businesses providing utilities
- Businesses engaged in the generation or distribution of electricity, natural gas, or steam

Criteria for Participation in the Program

- The business must satisfy all of the following criteria:
 - Must be a “**new business**” at the time it submits its application;
 - Must be organized as a corporation, partnership, limited liability company or sole proprietorship;
 - Must be in compliance with all worker protection and environmental laws and regulations, and must not owe past due taxes of any kind;
 - The mission and activities of the business must align with the University or College sponsoring the Tax-Free NY Area;
 - Must demonstrate that it will create new jobs in its first year of operation; and
 - Must not be engaged in a line of business previously conducted by a related person.

Exceptions to the New Business Requirement

- A business that graduated as a New York State incubator business is eligible.
- If the business once operated in New York, but moved its operations out of State before June 1, 2013, and it agrees to relocate back to New York, restore jobs, and create additional jobs, the business can be eligible for participation.

Exceptions to the New Business Requirement

- If the company is not a “new business,” but the Commissioner determines that the business has demonstrated:
 - It will create new jobs in the Tax-Free NY Area.
 - Neither it nor any related person has eliminated any jobs in the State in connection with this expansion.

Summary of Businesses Eligible to Participate in the Program

- Cannot be one of the prohibited types of businesses.
- A new business in New York State creating employment.
- A business which successfully graduated as a New York State incubator.
- A business locating back to New York State under certain parameters.
- An existing business in New York State that meets the Commissioner's requirements, demonstrating that it will create New York jobs even if it has ongoing operations and employees and/or was similar in ownership and operation to another business which operated in New York State.

Application Process for Businesses Seeking to Participate in the Program

- The business submits its application to a sponsor, and must incorporate in that application specific information mandated by ESD.
- As a part of its application, a business must agree to allow both the DTF and the Department of Labor to share its tax and employer information with ESD.
- The business must also allow ESD to access any and all books and records of the business.

Application Process for Businesses Seeking to Participate in the Program

- The application must provide the following information:
 - Basic description of the business operations
 - Description of any investment and job creation the business will make in the Tax-Free NY Area
 - Demonstration that the eligibility criteria are met and synergy with the academic mission of the Sponsor
 - Certification that the business will not compete with any other business in the same community, but outside of the Tax-Free Area

Application Process for Businesses Seeking to Participate in the Program

- The application must provide the following information (continued):
 - Certification that the business's participation will have positive community and economic benefits.
 - List and description of all related persons to the business and certification that jobs are not being shifted within the State.
 - Identify the maximum number of net jobs available for the personal income tax wage exclusion benefit.

Performance Benchmarks and Consequences

- The application must also identify performance benchmarks such as the number of net new jobs projected for creation.
- The application must state the proposed consequences for failure to meet performance benchmarks:
 - Suspension of participation in the Program for one or more tax years.
 - Termination of the business's participation in the Program.
 - Proportional recovery of tax benefits under the Program.

Business Approval Process

- Once the Sponsor receives the complete application and determines that the eligibility criteria are met, the Sponsor can act on the application.
- If the Sponsor approves the application, it is then submitted to the Commissioner for final approval.
 - Commissioner may reject an application if it is determined that the eligibility criteria is not met.
 - If Commissioner does not reject the application within 60 days, the business is deemed accepted into the Program.

Benefits Available to Businesses Approved for the Program

- Tax-Free NY Area Tax Elimination Credit.
- Exemption from Organization Tax imposed under Sections 180 and 181 of the Tax Law.
- Exemption from the MCTMT for payroll expenses and net earnings from self-employment.
- A refund of New York State and local sales and use taxes.
- Exemption from State or local real estate transfer tax or local real property transfer tax.
- Certain exemptions from real property taxes.
- Wage exclusion for eligible employees.

Tax-Free NY Area Tax Elimination Credit

- This credit is touted as eliminating all New York State income or corporate franchise tax for a participating business.
- The credit is calculated as the product of the Tax-Free NY Area Allocation Factor and the Tax Factor.
- This credit will not necessarily result in the elimination of all New York State tax liability attributable to the participating business.

Tax-Free NY Area Allocation Factor

- The percentage of the business's economic presence in the Tax-Free NY Area (this is the equivalent of the Zone Allocation Factor under the Empire Zones Program).
- The factor is determined by taking the sum of the Tax-Free NY Area Property Factor and the Tax-Free NY Area Wage Factor and dividing by two.
 - The **Tax-Free NY Area Property Factor** is determined by dividing the average value of the business's real and tangible personal property in the Tax-Free NY Area by the average value of the business's real and tangible property within New York State.
 - The **Tax-Free NY Wage Factor** is determined by dividing the total wages and other compensation paid to employees at the business's location in the Tax-Free NY Area by the total wages and other compensation paid to all of the business's employees within New York State.

Tax-Free NY Area Allocation Factor

- In all cases, regardless of corporate or income tax, this benefit is calculated after the NYS tax liability is reduced by any other allowable credits.

Tax Factor for 9-A Taxpayers

- The Tax Factor is the largest of the tax liability on:
 - Entire net income base
 - Capital base
 - Minimum taxable income base
 - Fixed dollar minimum tax

Tax Factor for Sole Proprietors and Partners

- The Tax Factor is calculated as a product of:
 - The tax liability after the application of other allowable credits, and
 - The ratio of the taxpayer's income from the business in the Tax-Free NY Area to the taxpayer's New York adjusted gross income.
 - The income from the business allocated within NYS shall be determined as if the sole proprietor or partner was a **non-resident** of New York State.

Tax Factor for Shareholders of a New York S Corporation

- The Tax Factor is calculated as the product of:
 - The tax liability after the application of other allowable credits, and
 - The ratio of the shareholder's income from the New York S corporation located in the Tax-Free NY Area to the shareholder's adjusted gross income.
- Do not include any wages paid by the approved business S corporation to the shareholder.
- The income allocated within the State is determined by multiplying the shareholders' share of the S corporation's income by a modified business allocation percentage computed using a three factor formula that includes property, receipts and wages.

Tax-Free NY Area Tax Elimination Credit

- Notwithstanding the name of this credit, it is unlikely that any type of company other than a C corporation will truly eliminate its NYS income tax liability.
- Any approved business operating in a Tax-Free NY Area which sells a significant portion of its products outside of the NYS and/or has property or stored materials and/or a sales force or other employees outside of NYS, will not be able to eliminate all of its NYS income tax
- **If the business generates income from a line of business that was previously conducted, created or developed by the business or a related person, this income is disregarded in the computation of the tax factor.**

Personal Income Tax Wage Exclusion

- All or part of the wages an approved business pays to “eligible employees” are exempt from NYS income tax.
- This benefit allows an eligible employee of the company for the first five years to subtract all of his or her wages paid by the company when computing NY adjusted gross income.
- For the second five years, the employee would be able to subtract the portion of his or her wages up to a range of \$200,000 to \$300,000 depending on the individual’s respective marital filing status.

Definition of “eligible employee”

- An individual whose work is performed exclusively in the Tax-Free NY Area and must be in a “net new job”.
- The individual must work for the company for at least a six month period in the first tax year in which the individual claims the exemption.
- The company must be in compliance with the START-UP NY Program.

Challenges of the Wage Exclusion Benefit

- Each company is allocated a set number of jobs for this benefit; if the company hires more than the allocated amount, those individuals would not be eligible for the benefit.
- Individuals already working for a company that is accepted into the Program would not be eligible for the benefit, while any new hires would be eligible.
- Any individual hired after July 1st of any given year would not be eligible for the benefit for the balance of that tax year and would need to plan accordingly.
- The Regulations define an “eligible employee” as an individual whose work is performed exclusively in the Tax-Free NY Area; individuals that travel routinely from the Tax-Free NY Area location may not qualify for this benefit.

Challenges of the Wage Exclusion Benefit

- There is little precedent for the manner in which DTF will audit this credit and the required documentation that may be requested.
- Companies not in compliance with their Program job creation goals may cause issues for eligible employees anticipating this benefit.
- All employees in a company will not necessarily have the same benefit from this provision, and this disparity will need to be managed carefully by employers.

Sales Tax Exemption

- An approved business is eligible for a refund of NYS and local sales and use taxes. The refund applies to purchases and uses of property and services used predominantly (greater than 50%) at the Tax-Free NY Area location, and consumer utility services used 100% at the approved location.
- Contractors, subcontractors, and repair people can receive a refund of state and local sales tax paid through the purchase of tangible property that becomes an integral part of the facility.
- In all cases, the sales and use tax must be paid with a refund requested through DTF.

State or Local Real Estate Transfer Tax or Real Property Transfer Tax

- Leases of real property located in Tax-Free NY Areas to approved businesses are exempt from real estate transfer tax.
- This exemption also applies to any local real estate transfer tax or local real property transfer tax imposed by a county or municipality.

Real Property Tax Exemption

- The real property tax exemption is dependent on the university or college that is sponsoring the Tax-Free NY Area.
- The TSB contains a matrix outlining possible exemptions.
- This is very fact specific and can be determined when details of the sponsor, the ownership of the proposed location, and business undertaking are determined.

Examples of Specific Real Property Exemptions

- Property owned by a private college or university on or before June 1, 2013, exempt under Section 420-a of the RPTL will remain exempt if leased to an eligible business.
- If the land is owned by a private college or university with a building constructed thereon by an eligible business, the leased parcel and building improvements would be taxable.

Examples of Specific Real Property Exemptions

- Property owned by the State and leased to an eligible business, the property is tax-exempt pursuant to Section 404 of the RPTL.
- Where it's a SUNY Sponsor and the land is owned by the State, but the building is constructed for and owned by the eligible business, the building is taxable per Section 564(1) of the RPTL.

Examples of Specific Real Property Exemptions

- IDA Transaction – An eligible business may utilize the local industrial development agency in its project, and can receive an exemption through Section 412-a of the RPTL, but would likely be subject to a PILOT at the discretion of the IDA.

Tax Benefit Recapture

- The Program has significant tax benefit recapture provisions within both the Economic Development Law and the Tax Law. The penalty provisions included within the business's application for inclusion into the Program are subject to a negotiation process with the Commissioner and ESD staff.
- To remain eligible for the Program a business must
 - (1) maintain net new jobs created
 - (2) Maintain overall levels of employment in both the business and any related person (test looks at employment levels before the application is submitted and in each year of participation.)
 - (3) Submit an Annual Report to the Commissioner.

Consequences

- An approved business which fails to meet the benchmarks is subject to the consequences determined by the business and the Sponsor as stipulated in the business's application.
- ESD is responsible for monitoring and evaluating an approved business to determine its performance benchmarks are met.
- Any failure to meet performance benchmarks will be reported by ESD to the DTF.

Proportional Recovery of Tax Benefits

- The business must reduce the total amount of tax benefits claimed or received during the taxable year by the business or its owners by the percentage reduction in net new jobs promised in the performance benchmark.
- If tax benefits are reduced to less than zero, those negative amounts must be added back as tax and reported on the business's corporate franchise tax return or on the income tax return of the owners if this is a flow through entity.

Other Consequences

- The other consequences which may occur are a suspension of the business's participation in the Program for one or more tax years, or termination of the business's participation from the Program.
- In either of these cases the business would lose the entire benefit package for that given year or years.
- Exception - if the employer's participation in the Program is terminated during the employee's tax year, an employee eligible for the wage exclusion may claim the exclusion for all wages paid during his or her tax year, including wages paid after the date the business is terminated, but within the same tax year.

Summary

- The START-UP NY Program is complicated with extensive regulations under the Economic Development Law and the Tax Law.
- The benefits can be lucrative, but will not eliminate all tax depending on the type of entity and type of business.
- Applications for businesses should be carefully constructed as those businesses that fail to meet benchmark projections will be significantly penalized, and those businesses which under represent job creation will not receive the full amount of benefits available.

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