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## Implications of the Budget Bill on the Empire Zones Program

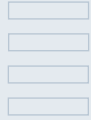
Governor Paterson, Senate Majority Leader Malcom Smith, and Speaker of the Assembly Sheldon Silver, recently agreed on a budget bill which will be submitted to the full Legislature for a vote in the next few days, and it is likely to pass. The budget that the Legislature will vote on includes extreme consequences for many Qualified Empire Zone Enterprises ("QEZEs"). In addition, much of the budget is written in vague terms which allow the Commissioner of Economic Development (the "Commissioner") to determine the meaning of certain provisions at a later date.

The budget requires the Commissioner to review every certified entity in the year 2009. Although the review will look at several factors to determine whether an entity should be decertified, there are three situations which will require decertification:

- (1) if an entity was certified prior to August 1, 2002, and either (a) employees were transferred from a related company to the certified entity, or (b) property was transferred, sold or leased from a related entity to the certified entity;
- (2) if the amount of wages and benefits paid to employees plus investments made by the QEZE is not greater than the amount of benefits the entity received from the state for that same time period; or
- (3) if the business enterprise has changed ownership or moved its operations out of the empire zone.

The review will be based on data contained in "at least three business annual reports filed by the business enterprise." It is unclear which three (or more) years the Commissioner will select to review. If the entity is decertified in the review process, the Commissioner will notify the entity in writing of the decision. Furthermore, the entity will have only 15 days to appeal the decision to the Empire Zone Designation Board ("EZDB"), and must present an additional written submission to the EZDB within 60 days. If an entity is decertified, the decertification date would be the date of the "earliest event constituting grounds for revoking certification," which could be the first day employees were

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transferred from a related entity or the first day property was transferred from a related entity. The language of the bill is too vague to ascertain the purpose or intended goal of this section.

If the entity is not decertified following the review, a retention certificate will be issued to the entity. The retention certificate is required for the entity to remain eligible for benefits, starting with tax years beginning on or after January 1, 2008. The retention certificate is also necessary to claim any credits which are being carried forward from previous taxable years. The credits carried forward will be lost if an entity does not receive its retention certificate. Additionally, it appears that an entity cannot claim a sales tax exemption until it has received a retention certificate.

Any entities which are certified on or after April 1, 2009, will be required to meet a cost benefit analysis ratio of 20:1, or 10:1 if the entity is a manufacturer. The Commissioner has sole discretion to certify entities based on criteria including:

- (1) creation of new employment and prevention of loss of employment in the zone,
- (2) whether the certification will cause employees to leave other businesses in the zone,
- (3) whether the entity will enhance the economic climate in the zone,
- (4) whether the entity has any violations of labor laws, and
- (5) whether the entity will meet the cost benefit analysis.

Local input regarding future certifications is significantly reduced.

Additionally, businesses which are certified after April 1, 2009, will receive a real property tax credit equal to 75% of the amount calculated pursuant to the statute. Further, it is unlikely that a newly certified entity will be able to receive any sales tax exemption unless the municipality in which it is located has enacted a local exemption to include QEZE as exempt from sales tax. QEZE were previously entitled to an exemption from the state sales tax even if local laws did not allow an exemption from local sales tax. As local law exemptions cannot go into effect until March 1, it is unlikely that new businesses will receive sales tax exemptions in 2009.

The Department of Taxation and Finance will now be required to publish an annual report on the empire zones benefits received by all certified entities. The report will be published each year by January 31, with the first report due in 2013. Each report will include the name of each taxpayer claiming a credit and the amount of each credit claimed. If a taxpayer is a member of an LLC or other pass-through entity, the name of the entity which earned the credits will be included in the report, rather than the name of the individual taxpayer claiming the credits. ■

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