

ECONOMIC &  
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DEVELOPMENT

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## Operational Issues with Respect to Changes Made to the Empire Zones Program

We have updated you previously and have been focusing on certain issues many companies would face with regard to being decertified from the Empire Zones Program. It is important to point out that even those companies not facing decertification will face challenges due to the changes in the law.

Yesterday afternoon, the New York State Department of Taxation and Finance ("DTF") released a bulletin addressing, among other things, specific instructions regarding the handling of Corporation Tax and Income Tax filings as a result of the recent legislative changes to the Empire Zones Program. These changes are consistent with what we have communicated to you, however, we wanted to make you aware of the following, as these changes affect every certified entity and those individuals receiving refunds:

### Tax Filing

As discussed in previous updates, Empire State Development ("ESD") will conduct a review of all certified businesses in 2009 and will issue EZ retention certificates to those businesses meeting the criteria for continued certification. For tax years beginning on or after January 1, 2008, the EZ retention certificate is required to receive any Empire Zone benefits, including the use of new credits or carryover credits from previous tax years.

The EZ retention certificate must be attached to **all** tax returns for tax years beginning on or after January 1, 2008, where Empire Zone credits are being claimed. Pass-through entities must circulate copies of the EZ retention certificate to all partners, shareholders, or members, for attachment to their individual returns. Credit claim forms filed without the EZ retention certificate attached will result in the credit being denied and the return being processed without the benefit of the credits. Should this scenario result in the

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underpayment of tax, the taxpayer will receive a notice of deficiency, interest will be charged, but no penalties will be imposed for the 2008 tax return. Interest rates are currently approximately 8%.

Interest will be allowed on overpayments of tax on any 2008 tax return filed in which an Empire Zone credit is claimed beginning with the 180th day after the date that the EZ retention certificate is filed with the Tax Department. However, no interest is payable on any refundable credits. In other words, a taxpayer will have to pay interest from the date of filing if a retention certificate is not received and additional tax is owed. However, no interest will be paid on refunds for six months after the retention certificate is issued, and there is no timeframe established for the issuance of these certificates.

Petitions for refund based on Empire Zone credits for the 2008 tax year cannot be filed with the Tax Department until six months after an EZ retention certificate is issued to the QEZE.

A QEZE or taxpayer claiming Empire Zone credits which has already filed its 2008 tax return **will be required to file an amended return** once the company receives its EZ retention certificate.

Businesses not meeting the criteria for continued certification will receive written notification of revocation of their Certificate of Eligibility from ESD, together with the reasons for decertification and process for appeal. In this case, the taxpayer will likely need to file an amended return.

### Sales Tax Exemption

Although a TSB has not yet been issued from the DTF Sales Tax Division, the following is our understanding:

1. For certified entities with the QEZE sales tax certification already in place, the sales tax exemption process remains the same through August 31, 2009. Beginning September 1, 2009, a QEZE possessing an EZ retention certificate will **no longer be eligible for an exemption** from state sales tax. Rather, the QEZE must pay the sales tax and request a refund. The expected timeline for a sales tax refund is six to 12 months.

2. A QEZE that has been approved for local certification and is awaiting receipt of its Certificate of Eligibility can still apply for the QEZE sales tax certification once its Certificate is received. The process outlined in paragraph one will also apply to these QEZEs.

3. A QEZE certified on or after April 1, 2009, will only be allowed the QEZE sales tax refund if the local municipality has a local exemption in place. This is currently limited to the following areas: Allegany, Auburn, Buffalo, Erie, Herkimer, and Niagara. ■

*If you require further information regarding the information presented in this Legal Alert and its impact on your organization, please contact any of the members of the Practice Area listed on the front of this Alert.*