

Qualified Empire Zone Enterprise (QEZE) Exemptions (Articles 28 and 29)

On May 15, 2000, Governor George E. Pataki signed Chapter 63 of the Laws of 2000. This legislation amended the Tax Law to provide certain tax benefits under the new “Empire Zones Program Act,” which is applicable to the New York State and local sales and compensating use taxes imposed by and pursuant to the authority of Articles 28 and 29, as well as to certain other taxes. Beginning March 1, 2001, certain purchases and uses of tangible personal property and services by a “Qualified Empire Zone Enterprise” (QEZE) are exempt from the New York State’s 4% sales and use taxes and from the ¼ % taxes imposed within the Metropolitan Commuter Transportation District (i.e., the city of New York and the counties of Dutchess, Nassau, Orange, Putnam, Rockland, Suffolk, and Westchester). The exemptions do not apply to any locally imposed sales and use taxes unless the county, city, or school district imposing those taxes elects to provide the exemptions.

The sales and use tax exemptions are generally available for 10 taxable years, provided the QEZE annually meets the employment test described below.

The Empire Zones Program Act, by declaration, also changed the term “economic development zone” to “empire zone” wherever it appeared in the Consolidated or Unconsolidated Laws of New York. Section 969(a) of Article 18-B of the General Municipal Law currently provides that a designation of an area as an empire zone will remain in effect during the period beginning on the date of designation and ending July 31, 2004. This memorandum assumes the statutory extension of these designations beyond July 31, 2004. However, whether or not these provisions are in fact extended is a matter that will require specific legislative action.

For information concerning other taxes affected by this Act, see TSB-M-01(1)C, (1)I, *Qualified Empire Zone Enterprise (QEZE) Tax Credits (Articles 9-A, 22, 32 and 33)*.

Definitions

A “Qualified Empire Zone Enterprise” (QEZE) means a business enterprise that has been certified as eligible to receive benefits under Article 18-B of the General Municipal Law prior to July 1, 2005, and that annually meets the *employment test*.

The “employment test” will be met for a *taxable year* if: (i) the business enterprise’s *employment number* in empire zones in which the enterprise is certified under Article 18-B of the General Municipal Law for the taxable year equals or exceeds its employment number in the zones for the *base period*, and (ii) the business enterprise’s employment number in New York State outside of the zones for the taxable year equals or exceeds its employment number in the State outside of the zones for the base period.

“Taxable year” means the taxable year of the business enterprise under Article 9-A (Franchise Tax on Business Corporations), Article 22 (Personal Income Tax), Article 32 (Franchise Tax on Banking Corporations), or Article 33 (Franchise Tax on Insurance Corporations) of the Tax Law.

“Employment number” means the average number of individuals (excluding general executive officers, in the case of a corporation) *employed full-time* by the business enterprise for at least one-half of the taxable year. The number of these individuals who are employed full-time by the business enterprise for at least one-half of the taxable year is computed by: (i) determining the number of individuals so employed on March 31, June 30, September 30, and December 31 during the applicable taxable year; (ii) adding together the number of such individuals determined on each of those dates; and (iii) dividing the sum by the number of such dates occurring within the applicable taxable year. “Employed full-time” means a job consisting of at least 35 hours per week and includes two or more jobs which together constitute the equivalent of a job of at least 35 hours per week.

“Test date” means the later of July 1, 2000, or the date prior to July 1, 2005, on which the business enterprise becomes certified under Article 18-B of the General Municipal Law. Accordingly, a business enterprise that has been certified under the General Municipal Law prior to July 1, 2000, is deemed to have a test date of July 1, 2000. That business enterprise does not need to be recertified under Article 18-B to qualify for the QEZE exemption benefits.

“Test year” means the last taxable year of the business enterprise ending on or before the test date.

“Base period” means the five taxable years immediately before the test year. If a business enterprise has fewer than five taxable years before the test year, then the term “base period” will mean the smaller set of taxable years. In the case of a new business enterprise that is first doing business and creating jobs in New York State, the employment numbers in the base period are zero. In the case of a newly designated zone or where the boundaries of an existing zone have been revised, the employment numbers in the base period are determined as if the new zone or the boundaries of the revised zone existed during the base period. It is noted that the employment numbers in the base period remain constant and do not have to be recomputed each time that the employment test is determined.

(Tax Law, Sections 14(a) through (g) and 1101(b)(23))

QEZE certifications issued by the Commissioner of Taxation and Finance

In addition to certification under Article 18-B of the General Municipal Law and in addition to meeting the employment test, every QEZE that seeks sales and use tax exemption benefits is also required to apply to the Commissioner of Taxation and Finance for a *Qualified Empire Zone Enterprise (QEZE) Certification* (Form DTF-81). The application for a QEZE certification must be

approved and the certification issued before any exemption benefits may be claimed. The application must be made on Form DTF-80, *Application for Qualified Empire Zone Enterprise (QEZE) Certification*, and must be filed with the Department of Taxation and Finance at the address indicated in the application. Along with any other information that may be required to be completed, the application must contain sufficient information in order for the Department to verify that the employment test has been met for the first taxable year. Since a QEZE must annually determine whether or not it has met the employment test, the Department will issue annual reminders that the employment test must be met in the prior taxable year in order to claim any sales and use tax benefits during the current year. The QEZE will not be required to submit information regarding the employment test to the Department after it has received its QEZE certification, but must make this information available to the Department upon request. The business enterprise's status as a QEZE may be subject to verification on audit.

Lists of the names of QEZEs and other identifying information, along with those QEZEs whose QEZE certifications have been revoked or have expired, may be made public. For sales and use tax purposes, a business enterprise will cease to be a QEZE on the day that its certification is revoked under Article 18-B of the General Municipal Law.

During the period that a business enterprise is eligible to apply, or is qualified, for exemptions from the sales and use taxes, the Commissioner of Economic Development will, at the time that he or she certifies or decertifies the business enterprise under Article 18-B of the General Municipal Law, notify the Commissioner of Taxation and Finance of the certification or decertification. The notification will include the full legal name, address, and federal employer identification number of the enterprise. The Commissioner of Economic Development will, at the time of certification under Article 18-B, also advise the business enterprise of the need to apply for the QEZE certification described in this section.

(Tax Law, Sections 14(h) and (i))

Exempt purchase certificates

A QEZE that has received a QEZE certification from the Commissioner of Taxation and Finance is then authorized to furnish a person required to collect the tax (i.e., a vendor) with a properly completed *Qualified Empire Zone Enterprise (QEZE) Exempt Purchase Certificate* (Form ST-121.6) in order to purchase qualifying tangible personal property and services exempt from tax. This exempt purchase certificate may be used, at the option of the QEZE, as a *single purchase certificate* or as a *blanket certificate* covering future purchases. A QEZE exempt purchase certificate is considered to be properly completed when it contains **all** of the information that is required to be completed on the document (see 20 NYCRR 532.4).

The QEZE exempt purchase certificate is an exemption certificate under Section 1132 (c) of the Tax Law. Accordingly, a vendor that in good faith accepts a properly completed QEZE exempt

purchase certificate not later than 90 days after the delivery of the property or the rendition of a service is relieved of the liability for failure to collect the tax with respect to the applicable transaction, and the burden of proving that the transaction is not taxable rests solely with the QEZE. A vendor may not accept a QEZE exempt purchase certificate in good faith if the vendor has actual knowledge (i.e., more than a mere suspicion or belief) that the certificate is false or fraudulent. If a vendor accepts the exempt purchase certificate in good faith, it is under no duty to investigate the QEZE or to debate the taxability of the sale with the QEZE.

(Tax Law, Section 14(h))

Exemptions from tax

The sales and use tax exemptions for purchases and uses of tangible personal property and services by a QEZE are generally available for each day of the 10 taxable years next following the test year, but only if the taxable year immediately follows a taxable year that meets the employment test. (See the example on page 5.) In the special case of a QEZE with a test date falling within the year 2000, the 10-year period starts not in the year immediately following the test year, but in the year after that. While a business enterprise may remain a QEZE for each day of either of these 10-year periods, the sales and use tax benefits are contingent upon the March 1, 2001, effective date of the applicable statutory provisions and certification by the Commissioner of Taxation and Finance as discussed on page 2. These factors, together with the test date and the taxable year of the individual QEZE, must be taken into consideration in determining the actual duration of the exemption period.

In addition, in order for purchases and uses of property and services to be exempt from tax, 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. As used in these exemptions, “predominantly” means 50% or more (or at least 50%).

A QEZE’s use of a motor vehicle will be found to occur predominantly in an empire zone where the QEZE has qualified for benefits if: (i) the QEZE uses the vehicle at least 50% exclusively in such zone, or (ii) at least 50% of the vehicle’s use is in activities originating or terminating in such zone, or (iii) at least 50% of its use is a combination of use exclusively in such zone and in activities originating or terminating in such zone. The QEZE may choose to compute the usage of the vehicle based on either hours of use or miles traveled. The QEZE exemptions 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 directly and exclusively (i.e., 100%) used or consumed 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 these tax benefits in order for the exemptions to apply.

The QEZE exemptions do 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 do the exemptions apply to rent for hotel occupancy or amusement charges subject to tax under Sections 1105(e) and (f), respectively.

The exemptions are also not applicable to local sales and compensating use taxes unless the individual locality elects the QEZE exemptions. (See *County, city, and school district taxes* on page 8.)

If QEZE determines that the employment test has not been met and that the exemption benefits have been erroneously claimed, the QEZE must report the transactions to the Department and pay any sales and use taxes that are due. If the QEZE is a registered vendor, it must report and pay the tax when it files its next sales tax return. If the QEZE is not a registered vendor, it must immediately file Form ST-130, *Purchaser's Report of Sales and Use Tax*, and pay the taxes due.

(Tax Law, Sections 1115(z)(1) and (3))

Example

Company A began business in New York State in January 1990 and became zone certified under Article 18-B of the General Municipal Law on March 5, 2001 (the test date). Company A was certified by the Commissioner of Taxation and Finance for sales and use tax purposes on March 15, 2001. The company has activities both within and outside of the zone. For New York State franchise tax purposes, Company A files on a calendar-year basis. Company A's test year is January through December 2000 (the last taxable year ending on or before the test date of 3/5/2001) and its base period is January 1995 through December 1999 (the five taxable years immediately before the test year). The company, once certified by the Commissioner of Taxation and Finance, is eligible for sales and use tax exemption benefits for each remaining day of the taxable year (2001) next following the test year (2000), but only if the taxable year in question (2001) immediately follows a taxable year (2000) that meets the employment test.

Employment Test

Part 1, Zone Employees: Computation of average number of employees (excluding general executive officers) employed full-time for at least one-half of the taxable year within the zone.

	Year	Qtr 3/31	Qtr 6/30	Qtr 9/30	Qtr 12/31	Total	Average # employees (employment number)
Number of full-time employees within the zone for the taxable year immediately prior to 2001:	2000	450	450	450	450	1800	450
Number of full-time employees within the zone for the five-year base period:							
Base Year 1:	1995	350	350	350	350	1400	
Base Year 2:	1996	350	350	350	350	1400	
Base Year 3:	1997	350	350	350	350	1400	
Base Year 4:	1998	350	350	350	350	1400	
Base Year 5:	1999	350	350	350	350	1400	
Total full-time employees within the zone for the five-year base period:						7,000	
Average full-time employees within the zone in the five-year base period (total divided by 20 or number of dates in base period [employment number]):							350

The average number of full-time employees within the zone (employment number) in the taxable year immediately prior to 2001 exceeds the average number of full-time employees within the zone (employment number) for the base period.

Part 2, Non-Zone, NYS Employees: Computation of average number of employees (excluding general executive officers) employed full-time for at least one-half of the taxable year in New York State outside the zone.

	Year	Qtr 3/31	Qtr 6/30	Qtr 9/30	Qtr 12/31	Total	Average # employees (employment number)
Number of full-time employees in New York State outside the zone for the taxable year immediately prior to 2001:	2000	300	300	300	300	1200	300
Number of full-time employees in New York State outside the zone for the five-year base period:							
Base Year 1:	1995	200	200	200	200	800	
Base Year 2:	1996	200	200	200	200	800	
Base Year 3:	1997	200	200	200	200	800	
Base Year 4:	1998	200	200	200	200	800	
Base Year 5:	1999	200	200	200	200	800	
Total full-time employees in New York State outside the zone for the five-year base period:						4,000	
Average full-time employees in New York State outside the zone in the five-year base period (total divided by 20 or number of dates in base period [employment number]):							200

The average number of full-time employees in New York State outside the zone (employment number) in the taxable year immediately prior to 2001 exceeds the average number of full-time employees in New York State outside the zone (employment number) for the base period.

The employment test has been satisfied since Parts 1 and 2 of the test have been met. Therefore, Company A is eligible for the sales and use tax benefits beginning on March 15, 2001, and will be eligible for each day of the 10 taxable years next following the test year (2000), but only where each of the remaining taxable years in question immediately follows a taxable year that meets the employment test.

County, city, and school district taxes

The QEZE exemptions are not applicable to the local sales and use taxes imposed in New York City or imposed by a county, city, or school district, unless the locality adopts a local law, ordinance, or resolution to elect the QEZE exemptions using an appropriate model resolution prepared by the Tax Department. Since an empire zone in which a QEZE has qualified for tax benefits may be located in both a county and a city imposing local taxes, QEZE transactions would not be fully exempt from tax unless both the county and the city elect the QEZE exemptions. For example, if an empire zone is located in City A, which is located in County B, and both City A and County B impose sales and use taxes, a QEZE's use of property and services in the empire zone in which the QEZE has qualified for tax benefits would not be fully exempt from these local taxes unless both City A and County B each separately elect the QEZE exemptions. If a zone is also located in a school district that imposes sales and use taxes on utility services, the QEZE's purchases of utility services would not be fully exempt from tax unless the school district also elects the QEZE exemptions.

Like State sales tax, the location where tangible personal property or services (or the location where tangible personal property upon which services have been performed) are delivered generally determines the incidence of the local sales taxes. Accordingly, in addition to any other requirement described in this memorandum, in order for a QEZE to be able to purchase tangible personal property or services exempt from local sales taxes, it must pick up or take delivery of the property or services in a locality (or localities) that has elected the QEZE exemptions. Additionally, similar to the State compensating use tax, the local use taxes are imposed on, among other things, the use in a locality of tangible personal property or services that were purchased outside of the locality without payment of the local sales taxes due at the time of purchase. Therefore, in order for a QEZE to use tangible personal property or services exempt from local use taxes, it must also use the property or services in a locality (or localities) that has elected the QEZE exemptions. For example, if County D elects the QEZE exemptions, and a QEZE from County E goes into County D to make purchases of tangible personal property or services, the QEZE's purchases would be exempt from County D's **sales** tax. But the QEZE's use of the property or services would nevertheless be subject to the local **use** tax in County E where the QEZE uses the property or services, unless County E has elected the QEZE exemptions.

Counties, cities, and school districts may elect to provide the exemptions (or repeal them) effective on March 1 of each year. The Tax Department will annually publish a list of those counties, cities, and school districts that have elected to provide the QEZE exemptions from tax. The Department will also publish at such time a list of those counties, cities, and school districts that have not elected the QEZE exemptions and the rates of tax in those localities.

(Tax Law, Sections 1115(z), 1210(a)(1), 1210(b)(1), 1210(d), 1210(l), and 1212.)

Contractors, subcontractors, and repairmen

In addition to the exemptions that are applicable to a QEZE's direct purchases and uses, the Tax Law also provides exemptions from tax for tangible personal property that is sold to a contractor, subcontractor, or repairman for use in erecting a structure or a building of a QEZE; or for use in adding to, altering, improving, maintaining, servicing, or repairing real property, property, or land of a QEZE. These exemptions apply only if: (i) the tangible personal property becomes an integral component part of the QEZE's structure, building, real property, property, or land; (ii) the structure, building, real property, property, or land is located in an empire zone in which the QEZE has qualified for tax benefits; and (iii) the QEZE has issued to the contractor, subcontractor, or repairman a properly completed QEZE exempt purchase certificate, as discussed on page 3, which indicates that the QEZE is entitled to these benefits.

Tangible personal property that becomes an integral component part of the QEZE's structure, building, real property, property, or land includes items such as building and landscaping materials, but does not include items such as tools, equipment, and supplies that are used or consumed by the contractor, subcontractor, or repairman.

A contractor, subcontractor, or repairman must use Form ST-120.1, *Contractor Exempt Purchase Certificate*, when purchasing the tangible personal property that is exempt from tax.

(Tax Law, Section 1115(z)(2))

Reporting requirements for vendors making exempt sales

Vendors that make sales of tangible personal property and services to QEZEs (or to qualifying contractors, subcontractors, or repairmen) must report these sales to the Department and pay any local taxes that may be due on the receipts from these sales. The local taxes are not taken into consideration in determining any vendor collection credits that may be claimed pursuant to Section 1137(f) of the Tax Law. The Department will supply a schedule for purposes of reporting these sales to all quarterly and annual filers of Forms ST-100 (*New York State and Local Quarterly Sales and Use Tax Return*), ST-101 (*New York State and Local Annual Sales and Use Tax Return*), ST-102 (*New York State and Local Sales and Use Tax Return for a Single Jurisdiction*), and ST-810 (*New York State and Local Sales and Use Tax Return Quarterly for Part-Quarterly Filers*).

Empire zone refunds and credits

The QEZE sales and use tax exemptions described in this memorandum are alternatives to the empire zone refund and credit provisions that were originally enacted in 1986 and that are found in Section 1119(a)(6) of the Tax Law. However, the QEZE exemptions from tax occur at the time of purchase, whereas the refund and credit provisions require the purchaser to pay the tax and to then

file a claim for refund or credit of the tax paid. In addition, the QEZE exemptions apply to a broad class of tangible personal property and to utility and other services, provided that the property and services are used by the QEZE in the empire zone as previously described in this memorandum. The empire zone refund and credit provisions apply only to tangible personal property that is incorporated into industrial or commercial real property that is being constructed, expanded, or rehabilitated within an empire zone and that becomes an integral component part of that real property. See Publication 30, *A Guide to Sales and Use Tax Incentives Within Empire Zones*, for additional information on empire zone refunds and credits.