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The Empire State is Open for Business—Overview of Select New York Credits & Incentives

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New York offers a variety of tax and financial incentives programs that may provide a valuable return on investment for companies considering expanding or relocating operations in New York. This article provides a high-level overview of a number of credits and incentives ("C&I") programs at the state and local levels that may be available in New York.

At a high level, New York's C&I programs consists of two primary categories: discretionary incentives and statutory tax credits. Discretionary incentives typically require an application and pre-approval and are often used in the context of inducing economic activity in the state that would have gone elsewhere, or may not occur, but for an economic incentive. These types of incentives may include, but are not limited to, cash grants, refundable income tax credits, property tax abatements, sales and use tax exemptions, and other monetary-type awards. Statutory tax credits generally do not require pre-approval and are typically generated upon a taxpayer meeting defined eligibility requirements, including the performance of a particular business activity (e.g., purchase of qualified property).

Overview of select New York discretionary incentives programs

The Excelsior Jobs Program ("EJP") is targeted towards providing competitive financial incentives for businesses to create jobs and invest in New York, and is available for businesses that are subject to tax under the New York Corporate Franchise Tax (Article 9-A of the New York Tax Law), Personal Income Tax (Article 22 of New York Tax Law), or Insurance Corporation Franchise Tax (Article 33 of New York Tax Law).¹

The EJP is administered by the New York Department of Economic Development (dba/Empire State Development Corporation or "ESD"). The EJP provides discretionary refundable tax credits for qualifying projects that, among other evaluation criteria, are demonstrated to be economically advantageous to New York and are being evaluated for out-of-state alternatives.² In order to participate in the EJP, an applicant must successfully seek pre-approval for an EJP incentives package from the ESD.³

A participant in the EJP may be awarded any one or more of four refundable tax credit components, including a jobs tax credit, an investment tax credit, a research and development ("R&D") tax credit, or a real property tax credit.⁴ To be a participant in the EJP, a company must operate in New York predominantly in one of the following lines of businesses:

1. manufacturing;
2. software development and new media;
3. scientific research and development;
4. life sciences;
5. financial services data center or a financial services back-office operation;
6. agriculture;
7. creation or expansion of back-office operations in New York;
8. distribution center;
9. operate in an industry with significant potential for private-sector economic growth and development in New York as established by the Commissioner in regulations;⁵
10. entertainment company; or
11. music production.⁶

The EJP was enacted on June 22, 2010,⁷ shortly before the expiration of the Empire Zone Program. The Empire Zone Program, which is estimated to have cost New York approximately \$3–4 billion over the life

of the program,⁸ did not cap the amount of benefits a company could qualify for or receive over the time period in which a company was certified.

The EJP, by contrast, provides a fixed benefit amount at the time an incentives proposal is issued by ESD and is a post-performance incentive that requires companies to provide evidence that they have satisfactorily achieved commitments in each year in order to receive a certificate of tax credit allowing the company to claim a refundable EJP tax credit.⁹

According to the 2017 First Quarter Excelsior Jobs Program Quarterly Report,¹⁰ as of March 31, 2017, 464 businesses have been admitted into the program, constituting 480 projects and over \$808 million in committed tax credits. These businesses, in return, have committed to capital investment of over \$4.86 billion, \$2.67 billion in research and development expenditures, and the creation of 47,238 jobs. The Program's total lifetime budget for approved EJP tax incentives is \$2.1 billion, with program costs capped annually between \$50–250 million.¹¹

Overview of select local discretionary incentives in New York

In addition to the various state level incentives available in New York, certain incentives are available at the local level. Several of the more significant are discussed below.

Industrial development agencies: One of the primary agencies responsible for local economic development incentives in New York are industrial development agencies (IDAs). IDAs are public benefit corporations established by New York in order to attract, retain, and expand industrial, manufacturing, warehousing, commercial, research, and recreational facilities within New York.¹²

IDAs are able to provide tax exemptions under the premise that the corporate purpose of an IDA is in all respects for the benefit of the people of the state of New York, which causes the IDA to be regarded as providing a governmental function.¹³ IDAs across New York typically can assist economic development projects by offering a range of benefits,¹⁴ including:

- real property tax abatements through a payment in-lieu of tax arrangement;
- sales and use tax exemptions on various categories of qualified purchases, including construction materials and equipment associated with a project;
- mortgage recording tax exemption; and
- tax-exempt bond financing.

IDAs, as public benefit corporations, may take title to a taxpayer's real property for the duration of the benefit period, which allows the real property to be exempt from property taxes, sales and use taxes, and mortgage recording taxes. The value of these exemptions are conveyed to approved businesses and, at the conclusion of the project benefit period, title to the real property is transferred back to the business.¹⁵

One of the most common IDA incentives is a payment in-lieu of tax ("PILOT") arrangement, which provides an abatement on incremental real property taxes resulting from an economic development project that entails a substantial investment in real property, which causes an increase in assessed value. While properties held by an IDA are tax exempt, businesses occupying IDA-owned properties typically make PILOT payments that are shared with the affected local tax jurisdictions (i.e., local government, local school district, etc.).¹⁶

It is important to become familiar with the PILOT arrangements in place within each jurisdiction under consideration, as they can vary significantly. For example, the standard abatement for the town of Bethlehem, located in Albany County, commences at 50% of the increase in assessed valuation resulting from a project and then declines by five percentage points per year for a 10-year period.¹⁷ Conversely, in Nassau County (Long Island), the abatement percentage commences at 100% of the increase in assessed valuation resulting from a project and then declines by 10 percentage points per year for a 10-year period.¹⁸

An additional potential benefit is that IDA-approved projects may be exempt from the payment of sales and use taxes on qualified purchases.¹⁹ A business that is approved for IDA benefits, along with its contractor, can be appointed as an agent of the IDA with respect to a project in order to receive an exemption from sales and use taxes for certain purchases.²⁰

A business wishing to receive IDA benefits must typically pay an application fee, which varies across different IDAs in New York. For example, the New York City IDA²¹ has a non-refundable application fee of \$5,000, whereas the Nassau County IDA has a \$1,000 application fee.²² Businesses are also subject to other fees, including a project fee that is often computed as a percentage of the approved benefits. For example, the New York City IDA has a project fee of 1.5% of the financed amount for benefits up to \$5,000,000, and a 0.75% fee on amounts above \$5,000,000. Various other fees may also apply, such as reimbursement for the IDA's attorney's fees and annual compliance fees.

New York real property tax law Section 485-b real property tax exemption: A business that is primarily interested in real property tax abatement and is willing to forego the other IDA-related benefits noted above, can potentially receive a property tax abatement through a 485-b property tax exemption. The

New York Real Property Tax Law Section 485-b exemption ("485-b exemption"), enacted in 1976, provides partial exemptions from taxation for facilities used primarily for the buying, selling, storing, or development of goods or services; the manufacture or assembly of goods; or the processing of raw materials.²³ The basic exemption calculation commences at 50% of incremental assessed value, and decreases annually at a rate of five percentage points.²⁴ It should be noted that not all taxing jurisdictions in New York allow a 485-b exemption.

The 485-b exemption requires an application submission within one year from the date of completion of the improvements and or construction.²⁵ A significant advantage of the 485-b real property tax exemption over an IDA PILOT arrangement is that a 485-b filing does not require payment of application fees. However, a business that foregoes applying for IDA benefits in order to take advantage of the 485-b exemption would not receive any of the IDA benefits outlined above, such as a sales and use tax exemption, mortgage recording tax exemption, etc. We recommend that a business conduct a comparative analysis of the IDA benefits available to a project (net of fees) versus the benefits available under a 485-b exemption in order to make an informed decision about which program to pursue for a project.

Statutory tax credits and incentives

In addition to discretionary incentives, the following statutory tax credits and incentives are available.

New York investment tax credit/employment incentive credit: Another notable statewide program,²⁶ the New York Investment Tax Credit ("ITC"), allows a credit against the corporate franchise tax or personal income tax for qualified property placed into service during a given tax year that is principally used in a qualified production-related activity.²⁷ The credit is broadly applicable to equipment used in manufacturing, processing, assembling, R&D, or film production, among other activities. The ITC is generally equal to 5% of the first \$350 million of qualified investment and 4% of qualified investments over \$350 million for corporate taxpayers. For R&D property, taxpayers may claim the ITC at an optional 9% rate, in which case the taxpayer would not qualify for the Employment Incentive Credit (discussed below).²⁸

Businesses claiming the ITC that pass an employment test are eligible to receive the Employment Incentive Credit ("EIC"), which is an additional income tax credit computed as a percentage of the

qualified investment upon which an ITC was claimed.²⁹ The EIC, when coupled with the ITC can provide a total benefit of up to 10% of the amount of qualified investment over a period of three taxable years.

For both the ITC and EIC, unused credits may be carried forward for up to 15 years for corporate franchise taxpayers.³⁰ A new business can receive a refund of unused ITC during its first five taxable years of existence as a taxpayer in New York. In general, a new business is a business that is not owned or controlled, directly or indirectly, by a corporation subject to taxation in New York; that does not conduct a business that is substantially similar in operation and ownership to a business conducted or previously conducted by any entity subject to taxation in New York; and that has not been subject to corporate franchise tax for more than five taxable years, excluding short taxable years.³¹

Qualified New York Manufacturer real property tax credit and 0% net income tax rate: For tax years beginning on or after January 1, 2014, a business that is properly classified as a "Qualified New York Manufacturer" (QNYM) enjoys significant advantages for corporate franchise tax and personal income tax purposes.

A QNYM subject to taxation in New York under either the corporate franchise tax or personal income tax laws may claim a real property tax credit in the amount of 20% of eligible real property taxes paid during the taxable year.³² The subject real property must be principally used during the taxable year in manufacturing, processing, assembling, refining, mining, extracting, farming, agriculture, horticulture, floriculture, viticulture, or commercial fishing.³³ The corporate franchise tax QNYM real property tax credit provision does not have a provision for carryforward or refund of unused credits,³⁴ whereas the personal income tax QNYM real property tax credit provision allows for refund of unused credit or treatment of the unused credit as an overpayment of tax to be credited to the following tax year.³⁵ For corporate taxpayers, the QNYM real property tax credit may reduce the total New York corporate franchise tax liability to as low as \$25, thus potentially offsetting the capital base tax or the fixed dollar minimum tax.³⁶

In addition, for tax years beginning on or after January 1, 2014, the New York corporate franchise tax rate for the business income base tax for qualified New York manufacturers is reduced to 0%.³⁷

A manufacturer is a taxpayer or a combined group that is principally engaged in the production of goods³⁸ by manufacturing, processing, assembling, refining, mining, extracting, farming, agriculture, horticulture, floriculture, viticulture, or commercial fishing during the tax year. A taxpayer or combined group is considered a manufacturer only if the combined group is principally engaged in the above qualifying activities.³⁹ A taxpayer or combined group is "principally engaged" in activities described above if, during

the taxable year, more than 50% of the gross receipts of the taxpayer or combined group, respectively, are derived from receipts from the sale of goods produced by such activities.⁴⁰ Alternatively, a taxpayer may be "principally engaged" in such activities if the taxpayer or the combined group employs during the taxable year at least 2,500 employees in manufacturing in New York and the taxpayer or the combined group has property in New York used in manufacturing with an adjusted basis for federal income tax purposes at the close of the taxable year of at least \$100,000,000.⁴¹

The term "Qualified New York Manufacturer" is defined by the New York Tax Law as a manufacturer that either:

1. has property in New York of the type described for the ITC with an adjusted basis for federal income tax purposes at the close of the taxable year of at least \$1,000,000; or
2. has all its real and personal property in New York.⁴²

A taxpayer must meet the QNYM definition annually in order to qualify for the manufacturer's real property tax credit or the reduced corporate tax rates for qualified New York manufacturers.⁴³ Other eligibility criteria may be applicable. A detailed technical analysis of a taxpayer or combined group's activities is recommended in order to determine if the taxpayer may be classified as a "Qualified New York Manufacturer."

It is worth noting that the federal tax reform legislation ("Tax Cuts and Jobs Act") contains provisions for immediate expensing of capital expenditures, which may have implications for taxpayers seeking to meet the QNYM definition for New York tax purposes. With full expensing of capital expenditures, it may be more difficult for taxpayers to meet the QNYM requirement of having property in New York of the type described for the ITC with an adjusted basis for federal income tax purposes at the close of the taxable year of at least \$1,000,000.

Conclusion

The state and local credits and incentives programs available to businesses investing in New York demonstrate the state's commitment to attracting and retaining businesses. When pursued in combination with available federal credits and incentives programs, substantial benefits may be available to companies creating new jobs and/or making significant capital investments in New York.

¹ N.Y. Econ. Dev. Law §351; N.Y. Tax Law §210-B.31; N.Y. Tax Law §606(qq); N.Y. Tax Law §1511(y).

² N.Y. Econ. Dev. Law §355(5); N.Y. Comp. Codes R. & Regs. tit. 5, §191.3.

³ N.Y. Econ. Dev. Law §352(15).

⁴ N.Y. Econ. Dev. Law §351.

⁵ As required by N.Y. Econ. Dev. Law §353, the commissioner has promulgated specific job and investment criteria in order to assess whether a business operates in an industry with significant potential for private sector growth and economic development in New York. See N.Y. Comp. Codes R. & Regs. tit. 5, §190.2.

⁶ N.Y. Econ. Dev. Law §353.

⁷ 2010 N.Y. Laws, ch. 59.

⁸ Tim Knauss, *Empire Zones, NY's Failed Aid to Companies, Still Costing Taxpayers: \$3 Billion Plus*, www.syracuse.com (9 Aug. 2017).

⁹ N.Y. Econ. Dev. Law §354(3-4).

¹⁰ *Excelsior Jobs Program Quarterly Report March 31, 2017*, <https://esd.ny.gov/esd-media-center/reports/excelsior-jobs-program-quarterly-report-3312017>.

¹¹ *Id.*

¹² N.Y. Gen. Mun. Law §852; TSB-M-14(1.1)S.

¹³ N.Y. Gen. Mun. Law §874.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Town of Bethlehem Industrial Development Agency Uniform Tax Exemption Policy, available at http://bethlehemida.com/images/uploads/Part_IV_-_Project-Specific_Policies__Procedures_-_Uniform_Tax_Exemption_Policy_2016-01-22.pdf.

¹⁸ Nassau County Industrial Development Agency Uniform Tax Exemption Policy, available at http://www.nassauida.org/Public/Page/Files/38_UNIF%20TAX%20EXEMPT%20POLICY%20NCIDA2017.pdf.doc.pdf. See also http://www.nassauida.org/Public/Page/Files/13_NassauCountyFinancialIncentivesExamples.pdf.

¹⁹ N.Y. Tax Law §1116(a)(1).

²⁰ TSB-M-14(1.1)S; N.Y. Gen. Mun. Law §874.

²¹ https://www.nycedc.com/sites/default/files/filemanager/NYCIDA/NYCIDA_Industrial_Incentive_Program_Fee_Schedule_09262016.pdf.

²² http://nassauida.org/Public/Page/Files/13_NassauCountyFinancialIncentivesExamples.pdf.

²³ https://www.tax.ny.gov/research/property/assess/manuals/vol4/pt2/sec4_06/sec485_b.htm.

²⁴ N.Y. Real Prop. Tax Law §485-b.

²⁵ *Id.*

²⁶ Administered by the New York Department of Taxation and Finance.

²⁷ N.Y. Tax Law §210-B.1; N.Y. Tax Law §606(a).

²⁸ *Id.*

²⁹ N.Y. Tax Law §210-B.2; N.Y. Tax Law §606(a-1).

³⁰ N.Y. Tax Law §210-B.1; N.Y. Tax Law §210-B.2.

³¹ N.Y. Tax Law §210-B.1(f). New York tax law provides a detailed technical definition of a "new business" that should be referenced to determine actual eligibility for classification as a new business.

³² N.Y. Tax Law §210-B(43); N.Y. Tax Law §606(xx).

³³ New York TSB-M-15(3)C, (3)I, Corporation Tax, Income Tax, February 26, 2015.

³⁴ N.Y. Tax Law §210-B(43).

³⁵ N.Y. Tax Law §606(xx).

³⁶ N.Y. Tax Law §210-B(43)(d).

³⁷ N.Y. Tax Law §210(1)(a)(VI).

³⁸ The definition of goods is not codified by statute, but there are various cases and advisory opinions offering interpretations that should be reviewed in a taxpayer's evaluation of its potential qualification as a "Qualified New York Manufacturer."

³⁹ N.Y. Tax Law §210(1)(a)(VI). Further, the generation and distribution of electricity, the distribution of natural gas, and the production of steam associated with the generation of electricity are not qualifying activities for a manufacturer.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*