



The Economic Transformation and Facility Redevelopment Program

Syracuse, New York

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As part of the FY2013 New York State budget, the Economic Transformation and Facility Redevelopment Program ("ETFR Program") has been created. The ETFR Program is intended to aid communities affected by the upcoming round of prison and juvenile justice facility closures. This program may provide a useful economic development tool for local communities negatively impacted by facility closures.

The benefits provided to businesses under the ETFR Program are refundable tax credits (including both capital investment, job creation and property tax-relief components) and a refund of certain sales taxes paid on improvements to facilities located at the site of a closed facility or surrounding areas. If used in conjunction with an adaptive reuse plan adopted for the closed facility, these tax credits could be an important incentive to replace jobs lost due to the closures.

The information in this article is divided into the following parts:

- Part 1 - Designation of Economic Transformation Areas
- Part 2 - Qualification and Certification of Businesses
- Part 3 - Tax Credits
- Part 4 - Sales Tax Refund
- Part 5 - Property Tax Exemption

Part 1 - Designation of Economic Transformation Area.

The economic development incentives are available only within an Economic Transformation Area. The law defines the potential scope of such areas, but designation of the Economic Transformation Areas is delegated to the Commissioner of the Department of Economic Development ("DED"). Depending upon the location of the closed prison or juvenile justice facility, the geographic area of the Economic Transformation Area is different.

Outside of the MCTD and the Port Authority District, the Economic Transformation Area encompasses the closed facility and an area within a 5-mile radius of such facility. If more than 60 persons were employed in full-time positions at the closed facility as of April 1, 2011, the radius is extended to 10-miles; however, the Commissioner has the authority to increase such radius up to 15-miles or decrease it to 5-miles based upon population density, poverty rate, unemployment rate and loss of jobs in the region.

Within the MCTD but outside of the Port Authority District, the Economic Transformation Area is limited to a 1-mile radius. If more than 60 persons were employed in full-time positions at the closed facility as of April 1, 2011, the radius is extended to 10-miles; however, the Commissioner has the authority to increase such radius up to 5-miles based upon population density, poverty rate, unemployment rate and loss of jobs in the region.

Within the Port Authority District, the Economic Transformation Area is limited to the site of the closed facility.



Communities impacted by a closure of a facility that employed more than 60 persons full-time as of April 1, 2011, will be well-advised to prepare information regarding population density, poverty, unemployment, and the broader job losses that will be caused by the closure of the facility to assist the Commissioner of DED in making a determination as to the extension of the Economic Transformation Area for facilities not located in the Port Authority District. This information may also be important in the development, with DED, of a plan for adaptive reuse of the closed facility.

Part 2 - Qualification and Certification of Businesses.

The benefits available to businesses participating in the ETFR Program are subject to certain qualifications and discretionary certification by the Commissioner of DED. In general, to qualify for certification as a participant in the ETFR Program, a business must:

- Satisfy a new business test (as described below)
- Create at least 5 jobs within an Economic Transformation Area
- Have a benefit-cost ratio of at least 10 to 1
- Be in compliance with all worker protection and environmental laws and regulations
- Not owe any federal or state taxes or local property taxes (except taxes being paid pursuant to an executed payment plan)
- Have a location wholly located within an Economic Transformation Area

In addition to these criteria, the Commissioner of DED may impose additional criteria, including compliance with an adaptive reuse plan for the facility.

New Business Test. The new business test for eligibility purposes is similar to those imposed under other economic development programs that have been offered by the State. A business enterprise will be a "new business" if:

- 1.It is not currently located or operating within the Economic Transformation Area (at the time of application);
- 2.Must not be moving jobs from outside the Economic Transformation Area into the Economic Transformation Area within which it is applying for certification;
- 3.Must not be substantially similar in ownership and operation to another taxpayer taxable or previously taxable under Article 9-A, Article 22, Article 32, Article 33 or portions of Article 9;
- 4.Must not have caused individuals to transfer from existing employment with a related person, and located in New York, to similar employment with the applicant business;
- 5.Must not have had real property located in the Economic Transformation Area transferred to it or leased to it by an entity with similar ownership; and
- 6.Must not be substantially similar in operation to a business entity from which it has acquired real or tangible personal property that is located in the Economic Transformation Area.

The last criteria is the one that is new to the economic development programs in the State. This requirement may eliminate eligibility in the case of an asset purchase from an existing business located within the Economic Transformation Area in which the business is to be certified.

Exclusions from Certification. Certain types of businesses are excluded from certification – unless the Commissioner of DED determines such businesses are eligible pursuant to an adaptive reuse plan for a substantial portion of the closed facility. These excluded businesses are: (1) retail (only with respect to on-site sales to customers), (2) licensed professional service businesses, and (3) real estate holding companies and landlords leasing space for retail businesses or licensed professionals.

Time Period for Application. A business must submit its application for certification on or before the later of (A) January 1, 2015 or (B) within 3 years after the closure of the facility giving rise to the designation of the Economic Transformation Area.



Application. In its application for certification, the applicant must permit the sharing of information between DED and the Department of Taxation and Finance ("DTF"). The law expressly provides that any shared information is not subject to disclosure under FOIL. However, DED is empowered to require the submission of additional tax information – there is no exemption from disclosure under FOIL for this information. It is to be hoped that DED will provide a method for maintaining the confidentiality of confidential tax information and proprietary information. Due to the possibility of public disclosure and disclosure of trade secrets to competitors, the application process may be problematic for some businesses.

Exclusion from Other Programs. An applicant must also agree to not participate in the Empire Zones Program, the Excelsior Jobs Program or claim any tax credits under the Brownfield Cleanup Program with respect to the facility in the Economic Transformation Area.

Net New Jobs. The 5 created jobs must be "net new jobs", as defined in the law. Net new jobs are jobs created in the Economic Transformation Area that:

1. Are new to "the area" (no definition of "area" is provided)
2. Have not been transferred from employment in the State with the business or a related person;
3. Are full-time or full-time equivalents (35+ hours per week);
4. Are filled more than 6 months out of the tax year (problematic for short tax years);
5. Are not general executive officers; and
6. Are not persons with the familial connections set forth in Internal Revenue Code section 267(c)(4).

Benefit-Cost Ratio. Benefit-cost ratio is defined in the law as the quotient of (A) the sum of (i) the value of all remuneration projected to be paid for all net new jobs during the period of participation in the program, and (ii) the cost of qualified investments to be made by the business entity during the period of participation in the program, and (B) the amount of total tax benefits under this article that is projected to be used and refunded.

Time for Commencing Project. A certified business must start construction on or acquire a qualified investment or create at least one net new job within one year of the issuance of its certificate of eligibility in order to qualify for the available tax credits. Qualified investment means "an investment in tangible property (including a building or a structural component of a building) owned by a business entity which: (a) is depreciable pursuant to section one hundred sixty-seven of the internal revenue code; (b) has a useful life of four years or more; (c) is acquired by purchase as defined in section one hundred seventy-nine (d) of the internal revenue code; (d) has a situs in an economic transformation area in this state in which it is certified; and (e) is placed in service in an economic transformation area in the state on or after the date the certificate of eligibility is issued to the business entity."

Part 3 - Tax Credits.

The tax benefits available under the ETFR Program are:

- The Economic Transformation and Facility Redevelopment Program Jobs Tax Credit
- The Economic Transformation and Facility Redevelopment Program Investment Tax Credit;
- The Economic Transformation and Facility Redevelopment Program Job Training Credit;
- The Economic Transformation and Facility Redevelopment Program Real Property Tax Credit; and
- The Economic Transformation and Facility Redevelopment Program Sales Tax Refund.

The Jobs Tax Credit, the Investment Tax Credit, the Job Training Credit and the Real Property Tax Credit are collectively denominated the Economic Transformation and Facility Redevelopment Program Tax Credit.



Eligibility for the Economic Transformation and Facility Redevelopment Program Tax Credit. To be eligible to claim the Economic Transformation and Facility Redevelopment Program Tax Credit, a taxpayer must satisfy all of the following criteria:

1. The taxpayer must be a participant or the owner of a participant in the ETFR Program and must have a certificate of eligibility from the Commissioner of DED.
2. The taxpayer or the entity in which the taxpayer has an ownership interest must pass the new business test.
3. The taxpayer or the entity in which the taxpayer has an ownership interest must have created at least 5 net new jobs.

The taxpayer or the entity in which the taxpayer has an ownership interest must be within the available 5 year benefit period.

Benefit Period. The benefit period for the tax credits is a five year period beginning in the year in which 5 net new jobs have been created. The law requires that the benefit period must commence no later than two years after the certificate of eligibility is issued. As tax years will not necessarily correlate to the anniversary dates of the issuance of the certificate of eligibility, it is not clear how quickly a business must create the 5 net new jobs in order to qualify for the credits. The law provides that, if a business enterprise falls below 5 net new jobs during the benefit period, any year in which that happens would be a forfeited year of the benefit period – however, if in a subsequent period within the benefit period the business enterprise achieves the 5 net new jobs, credits would be available.

Refundability. The Economic Transformation and Facility Redevelopment Program Tax Credits are refundable credits under sections 187-r, 210(43), 606(ss), 1456(x), and 1511(aa).

The ETFR Jobs Tax Credit. This credit is equal to 6.85% of the gross wages paid for each net new job. It appears from the language of the statute that the net new job calculation is done by job and not by person.

The ETFR Investment Tax Credit. Qualified investments (see definition above) made at a closed facility are eligible for a credit equal to 10.0% of the cost or other basis for federal tax purposes (capped at \$8 million for all claimants at each closed facility). All other qualified investments (see definition above) are eligible for a credit equal to 6.0% of the cost or other basis for federal tax purposes (capped at \$4 million per taxpayer). With respect to pass-through entities, the cap is calculated at the entity level. It appears that capital investments at a closed facility in excess of \$80 million would be eligible for the 6.0% credit. A taxpayer electing to claim this credit would not be able to claim any other NYS tax credits with respect to the qualified investment.

The ETFR Job Training Credit. The credit is 50% of qualified training expenditures, capped at \$4,000 per employee per year; however, the credit is only for employees hired after they lost their jobs at a closed facility.

The ETFR Real Property Tax Credit. Outside of a closed facility, the credit is 25% of real property taxes in the first year, declining 5% per year after the first year of the benefit period. Within a closed facility, the credit is 50% of real property taxes, declining 10% per year after the first year of the benefit period. **The law does not include any requirement that the real property be owned by the certified business.** PILOT payments may be treated as real property taxes provided such payments do not exceed the product of federal basis in the property as of the last day of the tax period (disregarding depreciation) and an estimated effective full value tax rate for the county in which the property is located (as determined by the Commissioner of DTF).

Recapture. If, at the end of the 5 year benefit period, the certified business does not satisfy a benefit-cost ratio of at least 10 to 1, there is an add-back as tax of an amount equal to the amount of prior tax credits sufficient to cause at least a 10 to 1 ratio.



Part 4 - Sales Tax Refund.

The law creates a new subdivision (f) to section 1119 of the Tax Law providing for a refund of the state portion of certain sales taxes paid with respect to a business's Economic Transformation Area location. The refund applies to sales tax paid on tangible personal property purchased by the certified business provided that such tangible personal property becomes an integral component part of the real property and was purchased after the issuance of the certificate of eligibility and prior to the issuance of a certificate of occupancy. The exemption is also available with respect to such property acquired by a contractor, subcontractor or repairman for a certified business's property. No time period is provided in the law other than: (1) the purchase must be made after the issuance of a certificate of eligibility, (2) the purchase must be made prior to the issuance of a certificate of occupancy, and (3) such property must become incorporated into the real property within 3 years after purchase.

Part 5 - Property Tax Exemption.

The law adds new section 485-p to the Real Property Tax Law, providing for an opt-in exemption for improvements to property in the Economic Transformation Area owned by a certified business. The exemption must be adopted by local law. The exemption is with respect to assessment attributable to construction, alteration, installation or improvement. The exemption schedule is:

Year 1 -	50%
Year 2 -	40%
Year 3 -	30%
Year 4 -	20%
Year 5 -	10%

The construction, alteration, installation or improvement must be commenced within one year of the date of issuance of the certificate of eligibility.

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Tim Lynn counsels clients with respect to federal, state and local taxation, with an emphasis in partnership taxation and real property development, as well as providing a broad range of tax credit services, including the federal historic rehabilitation tax credit and new markets tax credit, the New York historic rehabilitation tax credit, and the broad range of New York economic development programs, working with the various state and local agencies administering such programs.



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