

# *Credits and Incentives Briefing*

**A global and domestic credits and incentives  
network publication**

**April 2011**

*Dear Clients and Alumnae,*

*Welcome to the first Global and Domestic Credits and Incentives Network newsletter. With the credits and incentives landscape always changing, we hope this publication will help you stay abreast of issues that may affect your business. We would like to make this newsletter as relevant to your business as possible and, therefore, welcome any comments or suggestions that you might have.*

*If you have any questions regarding the credits and incentives developments noted within this publication, please feel free to reach out to your local PwC C&I engagement team or the contacts noted within the newsletter.*

*Regards,*

*Kenneth M. Hunter*

*National Leader - Global and Domestic Credits and Incentives Network*

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Start spreading the news.....New York's Excelsior Jobs Program is up and running

## NEW YORK

### Excelsior Jobs Program

As a reminder, on June 22, 2010, then New York Governor David Paterson signed legislation establishing a new "Excelsior Jobs Program." (A.B. 9710 and A.B. 11678) The program, which allows eligible businesses to claim up to four new, fully refundable tax credits for up to five tax years, provides job creation and investment incentives to firms in targeted industries that will provide the high-tech and clean energy jobs of tomorrow, while supporting the manufacturing sector that remains the backbone of the New York economy. The program, the costs for which are capped at \$250 million annually, incorporates strict accountability standards that are intended to guarantee that businesses deliver on job and investment commitments. The program provides businesses an alternative to the Empire Zone Program, as all Empire Zone designations expired on June 30, 2010.

The Excelsior Jobs Program credits are as follows:

- *Jobs Tax Credit* -- Participants in the program are eligible to claim a tax credit for each net new job that they create in the state. The amount of the tax credit for each job is equal to the following: 5 percent of the wages and benefits equal to or less than \$50,000; 4 percent of the wages and benefits in excess of \$50,000 and less than or equal to \$75,000; and 1.33 percent of the wages and benefits in excess of \$75,000. The amount of tax credit for each net new job is limited to \$5,000
- *Investment Tax Credit* -- Participants in the program are eligible to claim a tax credit on qualified investments equal to 2 percent of the cost or other basis used for federal income tax purposes of the qualified investment. Participants may not claim both the Excelsior Investment Tax Credit and existing investment tax credits for the same property in any taxable year. Additionally, any taxpayer that is qualified to claim the Excelsior Investment Tax Credit and that is also eligible to claim the Brownfield Tangible Property Tax Credit may claim either credit, but not both, with regard to a particular piece of property.
- *Research and Development Tax Credit* -- Participants in the program are eligible to claim a tax credit equal to 10 percent of the portion of the participant's federal research and development tax credit that relates to its research and development expenditures in New York during the taxable year. If the federal research and development tax credit has expired, then the research and development expenditures relating to the Excelsior Research and Development Tax Credit are calculated in the same manner as if the federal structure and definition in effect in 2009 were still in effect.
- *Real Property Tax Credit* -- Participants in the program that either qualify as a "regionally significant project" or are located in an investment zone are eligible to claim a tax credit equal to 50 percent of the eligible real property taxes on the real property comprising the

project or located in the investment zone that were assessed and paid in the year immediately prior to application. Participants may claim the tax credit for a period of five years. In years two through five, the tax credit would be reduced as follows: 40 percent of the real property taxes assessed and paid would be allowed as a tax credit in year two; 30 percent of the real property taxes assessed and paid in year three; 20 percent of the real property taxes assessed and paid in year four; and 10 percent of the real property taxes assessed and paid in year five.

Emergency rules, originally issued in September 2010, and readopted in 2011, set forth applicable definitions; outline the application and review process; provide guidance on claiming and calculating tax credits; specify record retention and reporting requirements; clarify the reason for removal from the program; and detail appeal procedures.

To earn any of the available program tax credits, firms must first meet and maintain the established job and investment thresholds outlined below.

### **Eligible taxpayers**

To be eligible for Excelsior Tax Credits, a business must meet and maintain the established job and investment criteria outlined in the program guidelines. Those criteria include a requirement that the business operate in New York State predominantly in one of the following business activities and create a minimum number of net new jobs:

- As a financial services data center or a financial services back office operation and create at least 100 net new jobs;
- In manufacturing and create at least 25 net new jobs;
- In software development and new media and create at least 10 net new jobs;
- In scientific research and development and create at least 10 net new jobs;
- In agriculture and create at least 10 net new jobs;
- In the creation or expansion of back office operations in the state and create at least 150 net new jobs;
- In a distribution center; or
- In an industry with significant potential for private sector economic growth and development in New York as established by the Commissioner by regulation, including job and investment criteria.

Business entities operating predominantly in any of the above industries that do not meet the net new job requirement may still participate in the Excelsior Jobs Program if they have at least 50 full-time job equivalents and can demonstrate that their benefit-cost ratio is at least 10:1. The numerator of the ratio is the sum

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of the value of all remuneration projected to be paid for all net new jobs during the period of participation in the program and the value of capital investments to be made by the business enterprise during the period of participation in the program. The denominator of the ratio is the amount of total tax benefits expected to be used and refunded under the Excelsior Jobs Program.

Any participant that fails to satisfy the eligibility criteria in any one year will lose the tax credit for that year. The event of such failure will not extend the original five-year eligibility period.

Nonprofit businesses, businesses that provide personal services or business services, businesses that provide utilities, businesses engaged primarily in retail or the entertainment industry, and businesses engaged in the generation or distribution of electricity, natural gas, or steam are not eligible for Excelsior Tax Credits.

### **Decertification from empire zone program**

Any taxpayer admitted into the Excelsior Jobs Program is permanently decertified from the Empire Zone Program, effective for the first taxable year that the business enterprise may claim the Excelsior Tax Credits and for all subsequent tax years. Although all Empire Zone designations expired on June 30, 2010, businesses certified under the Empire Zone Program as of that date may continue to claim benefits as allowed by statute.

### **Application and approval process**

To participate in the Excelsior Jobs Program, an eligible business entity must work with the Empire State Development Corporation ("ESD") and complete an application, providing information prescribed by the Department of Economic Development ("Department"). After reviewing completed applications and determining that the business enterprise satisfies the necessary requirements, the applicant will be admitted into the Excelsior Jobs Program and receive a certificate of eligibility and a preliminary schedule of benefits based on the projections set forth in the application. Upon achieving project milestones, applicants must then submit evidence of achieving the job and investment requirements to the ESD. The Department will then, upon reviewing the evidence and finding it sufficient, certify the applicant as a participant and issue a certificate of tax credit for a taxable year.

### **Possible program improvements**

Governor Andrew Cuomo's 2011-2012 Executive Budget proposes revisions to the Excelsior Jobs Program to produce better results for New York's strategic industries by enhancing the tax credits available and improving the program's responsiveness as follows:

- Extend the Excelsior Jobs Program tax benefit period from five to 10 years;
- Revise the Excelsior Jobs Tax Credit to be based upon the projected income tax receipts for each new job, rather than up to \$5,000 per new job;

- Enhance the Excelsior Research & Development Tax Credit to be equal to 50 percent of the taxpayer's actual Federal research and development tax credit;
- Base the Excelsior Real Property Tax Credit on the value of a property after improvements, rather than prior to investment;
- Allow Excelsior participants to access all New York State research and development tax credits;
- Authorize utilities to offer discounted gas or electric rates; and
- Enhance the responsiveness, accountability and transparency of the program through administrative changes.

### PwC observes

“The Excelsior Jobs Program provides for various tax credit and economic incentive opportunities to eligible businesses expanding in New York State,” says James Pomponi, Credits & Incentives Director in New York. Compared to the prior Empire Zone Program, the Excelsior Jobs Program offers more benefits to an expanded base of New York State businesses. Refundable tax credits may also provide opportunity for cash-tax savings for many taxpayers. Similar to pursuing other state and local economic incentives, businesses considering expanding in New York State should be mindful of the pre-certification requirements for applying under the Excelsior Jobs Program.

*For more information about this Program, please contact James Pomponi, Credits & Incentives Director in New York, (646) 471-7801.*

### Advisory Opinion: TSB-A-11(3)C, 2/18/2011

*Parent corporation may claim subsidiary's investment tax credit carryover*

A parent corporation may succeed to the investment tax credit carryover of its wholly owned subsidiary sold to a third party purchaser via a Section 338(h)(10) election, the New York Commissioner of Taxation and Finance held in an advisory opinion. (N.Y. Dept. of Taxation and Finance, [TSB-A-11\(3\)C](#), 02/18/2011]

A parent corporation and wholly-owned subsidiary were members of a federal consolidated group that filed on a combined basis for New York franchise tax purposes (Article 9-A). The subsidiary, a manufacturer with New York operations, was eligible to claim the state's investment tax credit (ITC) for equipment and other property used in its business. However, the subsidiary was not able to use the tax credit against its tax liability in the year the tax credit was claimed but was allowed to carry forward the tax credit for the next 15 tax years. Prior to the expiration of this carry forward period, but after the date of the qualified property's useful life, the parent sold its stock in the subsidiary to an unrelated corporate purchaser. The parent and purchaser made a joint IRC § 338(h)(10) election to treat the stock sale as a deemed asset sale. The parent asked the Department of Taxation and Finance (“Department”) whether it could succeed to the ITC carryover of subsidiary after making the § 338(h)(10) election.

## Federal law

The Department reviewed federal implications of making a § 338(h)(10) election and explained that, for federal tax purposes, the parent corporation would receive the proceeds of the subsidiary's deemed asset sale through a complete liquidation under IRC § 332 and, under § 381(a)(1), the parent would have been able to succeed to any federal investment tax credit carryovers.

## State law

Taxpayers making qualifying investments may claim New York's ITC to offset their corporate income tax liability, subject to certain limitations on use, the Department explained. If a taxpayer is not able to use the entire ITC generated in a tax year, the ITC may be carried over for up to fifteen years. New York also applies a tax credit recapture mechanism if the qualifying property is disposed of or no longer in qualified use prior to the expiration of its useful life. As an example of this recapture, the Department highlighted the Tax Appeals Tribunal decision in *Matter of the Petition of AIL Systems, Inc.*, which required a target corporation in a § 338(h)(10) transaction to add back any New York ITC it had claimed on prior year returns that was attributable to assets that had not yet reached the end of their useful life. The Department noted the Tax Appeals Tribunal's explanation that New York would follow the federal treatment under IRC § 338 and, therefore, under the state's recapture provisions, the target would be required to include any unearned investment tax credit on its final return. Consequently, the new target would have a stepped up basis in the property for which a new ITC may be available.

Applying both the federal framework and the existing New York case law, the Department concluded that if an asset has reached the end of its useful life and the target had not yet claimed the entire ITC associated with the assets, then the parent corporation could claim the remaining tax credit on its returns, provided the parent could substantiate the amount of the carryover.

## PwC observes

"Although a TSB-A is binding only on the requesting taxpayer, this opinion is instructive and brings some insight into the tax Department's view towards attributes in the IRC § 338(h)(10) arena," suggests Greg Lee, SALT Managing Director with PwC in New York.

"It's important to note that this opinion may impact a larger group of taxpayers in that it does not seem to be limited to the investment tax credit available to Article 9-A taxpayers. Although the ruling dealt with the sale of a manufacturing subsidiary, taxpayers in the financial services industry and other ITC eligible industries should review prior dispositions to determine its impact."

James Pomponi, Credits & Incentives Director in New York, further provides that "taxpayers who have previously claimed the ITC and are undergoing a sale of a wholly owned subsidiary should be mindful of this advisory opinion. It is also important to verify the qualified property's useful life to determine any potential ITC recapture upon a sale of a subsidiary. Taxpayers should consider this ruling both prospectively and/or for any recent subsidiary sales to verify whether there are similar attributes available to the parent corporation subsequent to the sale."

*Contact Info:*

*Greg Lee, Managing Director, New York Metro, State and Local Tax, (646) 471-2654,*

*James Pomponi, Director, New York Metro, SALT Credits & Incentives Solutions, (646) 471-7801*

## **WASHINGTON**

### **Proposed Legislation Targets Business and Occupation Tax Credits, Other Tax Benefits**

On Thursday, March 17, 2011, Washington State's Economic and Revenue Forecast Council announced that the state's deficit has grown by \$698 million, bringing the biennium's total spending deficit close to \$5.1 billion. Like many states, Washington legislators are seeking ways to close this budget gap. And, with the 105 day regular legislative session more than half way over and scheduled to end on April 24, 2011, the activity in Olympia will, no doubt, start to heat up. While there are a few bills currently proposed, two bills are of specific note as they provide opposite approaches to help close this gap, but both target tax incentives.

With the hope to "bring transparency and accountability to the special tax preference and exemptions currently in the tax code," Sen. Jeanne Kohl-Welles introduced Senate Bill 5857, which would require, among other things that "all exemptions must be regularly analyzed, and either be reauthorized by the legislature if they are providing a public benefit or, if not, allowed to expire." Sen. Kohls-Welles' statement on SB 5857 - review of tax preferences (Feb. 25, 2011). To this end, the Kohl-Welles bill looks to sunset several tax benefits, which includes a significant number of sales and use tax exemptions and business and occupation tax exemptions, tax credits, deductions, and preferential tax rates. While the primary focus of the bill is the elimination of certain sales and use tax exemptions and preferential tax rates, the bill would also either directly repeal certain tax credits or repeal the application process necessary to claim certain tax credits. Some B&O credits caught in the crosshairs of the bill include the following:

- Main Street Program Tax Incentives (RCW 82.73.020).
- Tax Credits for Rural Counties (RCW 82.62.020).
- Job Training Services Credit (RCW 82.04.4333).
- Credit for Natural or Manufactured Gas Purchased by Direct Service Industrial Customers (RCW 82.04.447).
- Credit for Retail Sales and Use Taxes Paid to Other Jurisdictions with Respect to Property Used (RCW 82.12.035).

Many of these credit eliminations would be effective July 1, 2013, but others would take effect on July 1, 2017.

On the other end of the spectrum to help the budget shortfall is Senate Bill 5735, sponsored by Sen. Maralyn Chase, which would make the research and development tax credit permanent by eliminating the January 1, 2015, expiration date.

#### **PwC observes**

"It is clear from the Economic and Revenue Forecast Council's report on March 17th, that the legislature will have to act to close the growing budget gap," notes Stephanie Anderson, SALT Director with PwC in Seattle. "Any action taken will need to support Washington's businesses ability to grow and support the benefits provided to the Washington citizenry."

## **MULTISTATE DEVELOPMENTS**

While not fully inclusive of all developments in state tax credits and incentives, the following provides highlights of some notable items.

### **Arizona**

**Enacted Legislation Targets Tax Incentives** - On February 17, 2011, Governor Jan Brewer signed into law the Arizona Competitiveness Package, which includes tax incentives focused on both urban and rural job growth and business development. The following incentives are included in the Package:

- The Quality Jobs Program will provide income and premiums tax credits of up to \$9,000 for each qualifying new job (\$3,000 per job, per year with a 400 job cap) (effective June 30, 2011).
- An additional amount of 10 percent of the basic research payments that constitute excess expenses over the base amount will be allowed for qualifying research payments made during the tax year to a university under the jurisdiction of the Arizona Board of Regents (effective from and after December 31, 2011).
- Re-authorization of the Arizona Job Training Program, providing job-specific, reimbursable grants to train employees in new careers.

### **Colorado**

**Amended Credit Regulations** - The Colorado Department of Revenue amended certain tax credit regulations, which include an annual \$500,000 limit on the Enterprise Zone Investment Tax Credit for tax years beginning on or after January 1, 2011, but before January 1, 2014. Additionally, for tax years beginning on or after January 1, 2011, qualifying commercial trucks, truck tractors, tractors, or semitrailers or any parts for such vehicles purchased at the same time will qualify for a limited enterprise zone investment tax credit equalling 1.5 percent of the qualified investment, provided sufficient funding is available.

## *New Jersey*

**Technical Advisory Memorandum on Section 1603, American Recovery and Reinvestment Act, Solar Grant (TAM-11)** - On February 10, 2011 the New Jersey Division of Taxation issued a technical advisory memo that addresses the New Jersey treatment of certain federal cash grants for "specified energy property" placed in service in 2009 or 2010, or where construction began in 2009 or 2010. The TAM also addresses the availability of the IRC Section 48 Energy Credit, whose eligibility dates were extended by the 2009 American Recovery and Reinvestment Act.

## *Ohio*

**Job Retention Credit Now Refundable for Certain Taxpayers** - On March 7, 2011, Governor John R. Kasich signed H.B. 58, which amends the existing job retention tax credit provisions and allows the tax credit to be refundable if the taxpayer meets certain investment and employment requirements and, in 2010, had received a written offer to relocate to another state.

## *Virginia*

**Clean Vehicle and Advanced Cellulosic Job Credit Extended** - Scheduled to sunset on December 31, 2011, S.B. 1236, effective July 1, 2011, extended the sunset date of the Clean Vehicle and Advanced Cellulosic Job Credit until December 31, 2014. On March 15, 2011, S.B. 1236 was approved by Governor Bob McDonnell and is effective July 1, 2011.

**New International Trade Facility Tax Credit** - On March 10, 2011, Gov. McDonnell approved S.B. 1136, which grants an income tax credit equal to: (i) \$3,000 for every qualified employee that results from increased cargo moving through a Virginia cargo facility operated by the Virginia Port Authority or (ii) two percent of any capital investment made by a Virginia shipper to facilitate increased cargo moving through a Virginia cargo facility operated by the Virginia Port Authority. It is at the taxpayer's election which tax credit they will take. The tax credit is available for tax years beginning on or after January 1, 2011, but before January 1, 2015.

## *Wisconsin*

**New Income, Franchise Tax Credits and Deductions for Businesses Relocating to Wisconsin** - Assembly Bill 3, approved by Governor Scott Walker on January 31, 2011, provides a tax credit for corporate income/franchise tax to qualifying taxpayers, which equals the amount of the taxpayer's tax liability after all other allowable credits, deductions and exclusions are applied. This tax credit is available for tax years beginning after December 31, 2010, for two consecutive years beginning with the tax year in which the taxpayer's business locates to the state. Relocating to the state means " moving either 51 percent or more of the workforce payroll of the business or at least \$200,000 of wages, as defined in section 3121 of the Internal Revenue Code, paid to such workforce to Wisconsin during the first taxable year to which a tax credit under this subsection relates."

Other types of qualifying taxpayers, i.e. individuals, partners, etc., may qualify for a deduction if its business relocates to Wisconsin.

*For more information, please do not hesitate to contact:*

*Kenneth Hunter*      *203-539-4218*      *[kenneth.hunter@us.pwc.com](mailto:kenneth.hunter@us.pwc.com)*

*Michael Harris*      *816-218-1667*      *[michael.a.harris@us.pwc.com](mailto:michael.a.harris@us.pwc.com)*

*Thomas Henry*      *203-539-2559*      *[thomas.e.henry@us.pwc.com](mailto:thomas.e.henry@us.pwc.com)*

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