

2024 Summer Tax Series

NYS and NYC Tax Issues
for Real Estate
Transactions and Businesses;
State Tax Issues When Selling
a Partnership Interest

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Topics

- NYS Tax Audits and Treatment of 1031 Transactions
- NYC Unincorporated Business Tax Issues for Real Estate Businesses
- NYC Commercial Rent Tax Audits and Issues
- NYS and NYC Real Estate Transfer Taxes
- NYS Tax Incentives for Real Estate Businesses
- State Tax Issues When Selling a Partnership Interest

NYS Tax Audits and Treatment of 1031 Transactions




The Basics of a Like-Kind Exchange

- “Relinquished” and “Replacement” properties must be of like-kind and must be real property
- They must be held for productive use in a trade or business or for investment
- Replacement Property must be identified in writing within 45 days of the sale of the Relinquished Property and meet the 3-property or 200% rule
- Replacement Property must be acquired within 180 days
- No constructive receipt of the proceeds



NYS Tax Treatment of 1031 Transactions

- NYS starts with federal income (subject to certain modifications) to determine taxable income for NYS purposes
- No specific statutory or regulatory provisions that alter the federal IRC § 1031 framework
- The IRS has “blessed” many different variants of like-kind exchanges (reverse exchanges, multi-party exchanges, construction exchange, etc.)
- Nevertheless, NYS has taken an aggressive approach to auditing like-kind exchanges and applying federal guidance and case law to those audits



NYS Tax Audits and Treatment of 1031 Transactions

- NY 1031 exchange issues:
 - “drop and swaps”
 - Delaware Statutory Trusts
 - 200% rule/identification issues
 - Exchange Agreement language
- NY 1031 concern:
 - NY resident exchanges NY property for non-NY property to defer tax and then moves out of NY before selling the replacement property. Result? No NY tax!
- But NY could enact legislation like California to “claw back” any gain in value that accrued in New York but has not done so!



Like-kind Exchanges of NY Property: Seller Beware

- Does the Exchange Agreement have proper limiting language to prevent constructive receipt?
- If a Qualified Intermediary is used, are there signed and dated copies of all required documents, including Exchange Agreement, Assignment of Contract, Notice of Assignment, and Identification of Replacement Properties?
- If the 200% rule is used for identification purposes, how is that calculated?
- In a drop and swap, does there need to be time between the “drop” and the “swap”?
- Is the acquisition of replacement property followed immediately by a refinance?

NYC Unincorporated Business Tax Issues for Real Estate Businesses



- NYC UBT (but not GCT or BCT) has statutory incentives to keep businesses in NYC
- “An owner of real property, a lessee or a fiduciary shall not be deemed engaged in an unincorporated business solely by reason of holding, leasing or managing real property.” NYC Admin. Code § 11-502(d).
 - Does not include a dealer
 - Carrying on a trade or business by the same owner/lessee will eliminate the exemption unless the operating activities are incidental to the holding/leasing/maintaining real property
 - Exempts income and gains from UBT for an eligible business



NYC UBT Exemptions for Real Estate: Audit Issues

- What constitutes a “dealer” in real estate?
 - Is a taxpayer that holds some property primarily for sale in the ordinary course while holding other property for investment a “dealer” for all properties?
 - *See Matter of 85th Estates (TAT-H 93-4058)*
- What constitutes incidental activities for purposes of exempt real estate activities?
 - Presumption that services available only to tenants that lease property are incidental or ancillary to exempt RE activities
 - Operating parking or garage open to the public requires a separate filing of a return for parking charges. Otherwise, such services provided to tenants will be considered an unincorporated business not incidental to the holding or managing of real property. RCNY § 28-02(h).
 - *See NYC FLR 13-4937 (Aug. 13, 2013).*



UBT Self-Trading Exemption

- An unincorporated business does not include a business, other than a dealer, that engages wholly or primarily in the purchase, holding and sale of property for its own account. NYC Admin. Code § 11-502(c)(2).
- Definition of property can include real and personal property but also certain types of investment capital.
- Also includes the holding or disposition of interests in unincorporated entities as an investor.
- An entity is treated as “primarily” engaged in any of the exempt activities if 90% of the value of the entity’s assets consist of property, interests as an investor, etc.



Real Estate Salespeople

- Independent contractors are subject to NYC UBT whereas employees are not.
- NYC Statement of Audit Procedure (96-2-UBT) lays out a safe harbor that can be used to classify real estate professionals as employees.
- Mandatory requirements include:
 - RE professional holds only one license as an associate RE broker or salesperson
 - Affiliated with only one RE firm and the firm provides the individual with office facilities free of charge
 - Printed materials show the RE firm name
 - Individual does not have employees
 - RE professional does not engage in purchases/sales as a dealer or engage in other regular RE activities (e.g. RE development or interior decoration) in an individual capacity
 - Individual must be subject to various requirements, standards, and oversight by the RE brokerage or sales firm

NYC Commercial Rent Tax Audits and Issues

New York City Commercial Rent Tax - What is it?



- A tax imposed on tenants of properties used for **commercial** purposes in Manhattan south of 96th Street
- Rate is 6% of base rent (gross rent less certain statutory deductions), but the effective tax rate is **3.9%** because only 65% of base rent is subject to tax.
- Dates back to 1963, used to apply to the outer boroughs and north of 96th street in Manhattan until such areas were exempted from tax in 1995.

Who is Exempt?

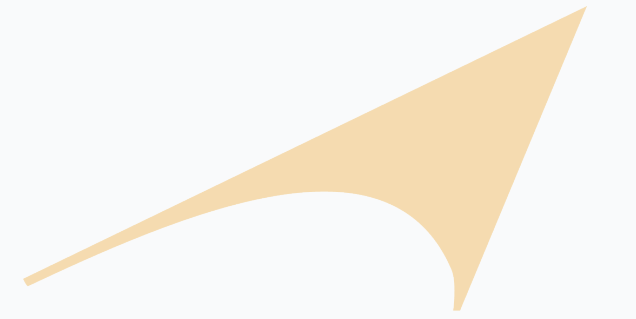
- All commercial tenants with annual or annualized rents less than \$250,000 are exempt from the CRT. (However, a return may be required to be filed.)
- The CRT is phased-in for tenants with base rents between \$250,000 and \$300,000.
- Effective on July 1, 2018, a credit is provided that results in the annualized base rent not subject to tax being increased from \$250,000 to \$500,000 for businesses with no more than \$5M of total income.

NYC Commercial Rent Tax – Who is Exempt?




- Tenants that are governmental or non-profit religious, charitable and educational organizations, tenants located in “World Trade Center Area,” tenants occupying retail space in certain parts of Lower Manhattan, and eligible tenants in Commercial Revitalization Program are exempt from CRT.
- A tenant who uses premises for 14 days or less in a tax year.
- A tenant (other than an operator of a hotel) who uses the premises for residential renting to others to the extent of 75% or more of the rentable floor space.
- A tenant who uses premises for certain dramatic or musical arts performances for less than 4 weeks. Also limited exemption for a tenant who uses the premises for the production and performance of a theatrical work.

NYC Commercial Rent Tax - Who is a Tenant Subject to Tax?



- A tenant is a person who pays or is required to pay rent for premises as a lessee, sublessee, licensee or concessionaire.
- A tenant includes entities that are “disregarded” for income tax purposes.
- A tenant can be a related entity/individual, including:
 - Where a building is owned by a corporation of which the tenant is an officer or holder of all or part of the stock
 - Where the tenant is a corporation and the building is owned by a subsidiary corporation or by a parent corporation
 - Where the tenant is a partner in a partnership

NYC Commercial Rent Tax – Recent Finance Letter Ruling



Finance Letter Ruling #22-5018 (September 2022): Taxpayer, an operator of a members-only workspace for work or business, is entitled to reduce its base rent by the portion of membership fees paid by its members for the use or occupancy of the space for trade, business, professional or commercial activity for more than 14 days in a tax year.

- “In general, the New York City Administrative Code allows a deduction from base rent in the amount received as rent from a subtenant for such premises which constitute taxable premises of the subtenant. A taxpayer is eligible for the subtenant deduction with respect to rent paid by a subtenant for taxable premises that are exempt from CRT because its base rent is less than \$250,000, but ineligible for the subtenant deduction with respect to rent paid by such subtenant if the subtenant is exempt from CRT because it uses the premises for a de minimus period of no more than fourteen days in a tax year.”
- For Taxpayer’s membership fees to be eligible for the subtenant deduction, it must be found that the membership fees qualify as rent paid by a tenant.
 - Because members are paying consideration for the use of the Taxpayer’s premises as a licensee, Taxpayer may reduce its base rent by the portion of membership fees paid by its members for the use or occupancy of the space for trade, business, professional or commercial activity for more than 14 days in a tax year.

NYC Commercial Rent Tax - Audit Issues



- Rent subject to tax:
 - Base rent (fixed rent)
 - Additional rent (i.e., increase in real property taxes)
 - Percentage rent (i.e., percentage of gross receipts, but not in excess of 15% of gross receipts)
 - Building services
 - Utilities
- Rent Abatements
- Subtenant Deduction
- Aggregation of Units
- Related Party Rentals
- Commercial Rent Tax Special Reduction

NYS and NYC Real Estate Transfer Taxes



NYS Real Estate Transfer Tax – Overview

- Applies to deed transfers
- Applies to transfers or acquisitions of a controlling interest in any entity with an interest in real property
 - In the case of a corporation, either 50% or more of the total combined voting power of all classes of stock of the corporation, or 50% or more of the capital, profits or beneficial interest in the voting stock of the corporation.
 - In the case of a partnership, association, trust or other entity, 50% or more of the capital, profits or beneficial interest in such partnership, association, trust or other entity.

NYS Real Estate Transfer Tax - Rates

Total Consideration	Transfer Tax Residential	Transfer Tax Non-Residential
Under \$2,000,000	\$2 per \$500 (.4%)	\$2 per \$500 (.4%)
\$2,000,000 to \$2,999,999.99	\$2 per \$500 (.4%)	\$3.25 per \$500 (.65%)
\$3,000,000 or more	\$3.25 per \$500 (.65%)	\$3.25 per \$500 (.65%)

Residential Transfers – Supplemental/ Mansion Tax Total Consideration:	As of July 1, 2019 – Combined Tax Rate:
Under \$1,000,000	Not subject to tax
\$1,000,000 or more	1% outside NYC
\$1,000,000 to \$1,999,999.99	1% NYC only
\$2,000,000 to \$2,999,999.99	1.25% NYC only
\$3,000,000 to \$4,999,999.99	1.5% NYC only
\$5,000,000 to \$9,999,999.99	2.25% NYC only
\$10,000,000 to \$14,999,999.99	3.25% NYC only
\$15,000,000 to \$19,999,999.99	3.5% NYC only
\$20,000,000 to \$24,999,999.99	3.75% NYC only
\$25,000,000 or more	3.9% NYC only

NYC Real Property Transfer Tax - Overview



- Applies to deed transfers
- Applies to transfers of a controlling interest
 - In the case of a corporation, 50% or more of the total combined voting power of all classes of stock of such corporation, or 50% or more of the total fair market value of all classes of stock of such corporation.
 - In the case of a partnership, association, trust or other entity, 50% or more of the capital, profits, or beneficial interest in such partnership, association, trust or other entity.

NYC Real Property Transfer Tax – Rates

Type of Property:	Tax Rate:	Consideration:
1- 3 family, residential condo or co-op	1% 1.425%	If \$500,000 and less If more than \$500,000
Commercial, vacant and bulk sales	1.425% 2.625%	If \$500,000 and less If more than \$500,000
Tax does not apply		If less than \$25,000

What is a bulk sale?

Whenever there is a transaction in which a single grantor transfers more than one individual cooperative apartment or residential condominium unit to a single grantee, such transactions are described as bulk sales.

- Facts and circumstances analysis. See Fin. Memorandum 00-06 REV.

Determining Whether a Controlling Interest Is Being Transferred



- Transfer taxes are not imposed on all transfers of interests in entities.
- Threshold level of transfer that triggers a tax. 50%
- What is the appropriate measurement to use to determine whether a controlling interest has been transferred.
 - For a corporation, is the test measured by vote or value? If value, how do you handle preferred stock? *Matter of CBS Corp. v. Tax Appeals Tribunal of the State of New York et. al.*, 56 A.D.3d 908, 867 N.Y.S.2d 270 (App Div. 3rd Dept. 2008).

Determining Whether a Controlling Interest Is Being Transferred

- For a partnership or LLC, the test in New York is based on capital or profits. This raises issues when these entities have allocations that are not plain vanilla.
 - Example: Consider an LLC where the initial members contribute capital to the entity to acquire and develop a parcel of land. Later, due to cost overruns, they raise additional funds from an investor in exchange for the investor receiving a 10% compounded return and 15% of remaining distributions from the LLC.
 - Has the investor acquired a controlling interest since he might receive more than 50% of the gross profits? How do you determine if the investor will receive more than 50% of the profits? Are projections sufficient? *In the Matter of the Petition of NS 1999 American Company Nominee for the NS 1999 American Trust*, DTA No. 815191.

Aggregation – Avoiding Pitfalls!



- Once you determine the percentage threshold of transfer in an entity triggers the transfer tax, the issue is how to deal with multiple transfers of interest in an entity.
- Understanding that transfer tax shouldn't be avoidable by merely transferring 49% on one day and 2% on the succeeding day, is it appropriate to aggregate all transfers within a time period whether or not they are related or part of a plan? Should there only be a presumption that transfers within a time period are related?
- **NYC** has a presumption that sales or purchases within 3 years are related.
- **NYS** statute can be read as making aggregation automatic on transfers within 3 years.
- What about multiple transfers involving multiple sellers or buyers?
 - Example: If A sells 40% to B and 2 years later C sells 15% to B, should that trigger a tax on A's sale to B? Does it matter whether or not A knew that C planned to sell to B?
 - Can parties enforce a prohibition on future sales during the next 3 years in order to avoid triggering tax? *In the Matter of Jonis Realty/E. 29th Street, LLC*, TAT (E) 09-9 RP.

Exempt Transfers

- Should the tax be imposed when a transfer is a mere change in form of ownership?
- For the past almost 40 years, New York has had an exemption for such transfers.
- An important issue is the interaction between the aggregation rules and the mere change in form exemption; especially in the context of development deals.



Consideration


Changes in Entity Ownership

- In many cases, the entity subject to tax has numerous assets and/or liabilities in addition to real property and mortgages.
- New York used to apply a formula under which one would first determine the consideration paid for the interest (including all the debt inside the entity,) and then determine the percentage that was allocable to NY real property.
- After attempting to apply this formula to certain large corporate mergers, NY changed its approach and determines the tax based on the value of the NY real property.

Enforcement and Audits

- Enforcement was simple when transfers were imposed only on deeds because a deed could not be recorded without payment of the transfer tax.
- Even assuming taxpayers do not deliberately fail to file returns and pay taxes on transfers of controlling interests in an entity, there are many circumstances in which taxpayers and their advisors reasonably conclude that the tax does not apply (and filing is not required).
- NYS partnership returns and NYC UBT returns now ask whether a controlling interest has been transferred.
- Top 5 Audit Issues:
 1. Controlling interest transfers (aggregation)
 2. Gift and no consideration transfers
 3. Transfers pursuant to divorce or separation
 4. NYC Bulk sales
 5. Mansion tax

NYS Tax Incentives for Real Estate Businesses



Planning for Financial Incentives in NYS - Generally

- Structured Correctly, Project Applicant May –
 - Significantly reduce or eliminate NYS Income Tax Liability
 - Eliminate NYS Sales Tax liability for project related costs
 - Significantly reduce or eliminate NYS Real Property Taxes for a fixed amount of time
 - Obtain NYS refundable credits of certain remedial costs and capital investments on “contaminated” property
 - Obtain grants and low-cost financing through NYS programs



Financial Incentive Planning Tip

- Plan Early– Get a team in place ASAP and Establish Timelines
 - Attorney
 - Accountant
 - Architect/Engineer
 - Lobbyist
 - Project Manager/Owner’s Representation
 - Community Relations Consultant
- Identify All Incentives Up-Front– Best to identify/analyze all benefits together – use CFA application
- Overlap: Overlap financial incentive planning with site acquisition, permitting, lending considerations and timing
 - Project description for permits and incentives need to match
 - Need to tell a good story and get Community and NYS buy-in
 - Job Creation
 - Investment
 - New Real Property Taxes
 - Wealth Creation



Real Property Tax Credits and Incentives

- **Low Income Housing Tax Credits (LIHTC)** Tax credits for new construction or rehab projects with low-income set-asides.
- **420-a** - Complete tax exemption for real property owned by certain nonprofits.
- **420-c** - Complete or partial tax exemption for low-income housing developed with tax credits.
- **421-a** - Partial tax exemption for new multiple dwellings
- **421-b** - Partial tax exemption for new construction or substantial rehabilitation or owner-occupied one- and two-family homes.
- **421-g** - Tax exemption and abatement for conversion of commercial buildings to multiple dwellings in downtown Manhattan.



420-a

1. Real property must be **owned** by a nonprofit corporation or association **organized or conducted exclusively** for one or more of the purposes listed in section 420-a, i.e., religious, charitable, educational, hospital or moral or mental improvement of men, women or children.
2. The real property must be **used exclusively** for carrying out one or more of the purposes listed in section 420-a. Any portion of the property that is not so used is subject to taxation.
3. No officer, member or employee of the organization may be entitled to receive any pecuniary profit from its operations, except reasonable compensation for services performed in furtherance of the corporate purposes.
4. Owner must file application with assessor.

***New* Incentives for Affordable Housing**



- **467-m *NEW*** Affordable Housing from Commercial Conversions - partial tax exemption for affordable housing in new multiple dwellings created from commercial conversions.
- **485-x *NEW*** Affordable Neighborhoods for New Yorkers - partial tax exemption for affordable housing created in new multiple dwellings.



467-m Affordable Housing Commercial Conversion

- Tax exemption for “commercial to residential conversion” projects.
- Benefit schedule runs between 25 to 35 years, depending when the project commences construction.
- To qualify for the program, developers need to prove that the building was predominantly occupied for commercial, manufacturing, or other non-residential purposes.
- Projects must contain as least 6 rental units of which 25% is to be allocated to affordable housing.
- Projects with more than 30 units will be required to pay prevailing wage requirements, timelines, etc.



485-x Affordable Neighborhoods for New Yorkers

- A new tax incentive program, 485-x replaces the expired 421-a program.
- To qualify for the program, projects must allocate 20-25% of the units to permanent affordable housing at a weighted average of 60% or 80% AMI, depending on various factors such as project size and location.
- Units that are free market will not be subject to rent stabilization. Certain projects are required to pay construction wages and all projects must solicit from MWBE firms for construction trades.
- 485-x application filing fee depends on a project size and can vary between \$3,000 and \$5,000.

Real Property Tax Credit for Manufacturers



- Effective for tax years beginning on or after 1/1/14, a credit is available against the New York corporate franchise tax and personal income tax for qualified New York manufacturers. ([Sec. 210-B\(43\), Tax Law](#))
- Requirements to be a qualified New York manufacturer, see *TSB-M-19(5)C*
- The credit is claimed using [Form CT-641](#).
- **Credit amount.**—The credit is equal to 20% of the real property taxes paid during the taxable year for real property owned by qualified manufacturers in New York and principally used for manufacturing. The credit is also allowed for property taxes paid on real property leased from an unrelated third party if the taxes are paid pursuant to explicit requirements in a written lease and remitted directly to the taxing authority. ([Sec. 210-B\(43\), Tax Law](#))



Real Property Tax Credit for Manufacturers

Continued

- **Property leased from related party.**—The 2016 budget legislation amended the law to allow corp. that are qualified NY manufacturers principally engaged in the production of goods by farming, agriculture, horticulture, floriculture, viticulture, or commercial fishing to claim the credit for eligible real property taxes paid on property leased from a **related** party, provided that (1) the taxes are paid by the taxpayer as lessee under explicit requirements in a written lease, and (2) the taxpayer as lessee has paid the taxes directly to the taxing authority and has received a written receipt for payment of taxes from the taxing authority. ([Sec. 210-B\(43\), Tax Law](#); TSB-M-16(2)C)



Real Property Tax Credit for Manufacturers

Continued

- A qualified manufacturer must satisfy the existing receipts and property tests: (1) at least 50% of receipts must be from manufacturing; and (2) either all or at least \$1 million of manufacturing property is in New York. A manufacturer that fails the receipts test may still qualify for the credit if it employs at least 2,500 people in manufacturing in New York and has \$100 million in manufacturing property in New York. ([Sec. 210-B\(43\), Tax Law](#))
- **Credit recapture.**—Taxpayers must add back the amount of real property taxes deducted at the federal level. ([Sec. 210-B\(43\), Tax Law](#))
- **Limitation.**—The credit cannot reduce a taxpayer's tax liability to less than \$25. ([Sec. 210-B\(43\), Tax Law](#))



Other Tax Credits and Incentives in NY

- Excelsior Job Program
- START-UP NY
- Jobs Retention Program
- Life Sciences Tax Credit Program
- Employee Training Incentive Program
- Commercial Tax Credit Program
- NYS Film Tax Credit Program (Production, Post-Production)
- NYS Musical & Theatrical Tax Credit Program
- Empire State Musical and Theatrical Production Tax Credit Program
- NYS Digital Game Development Program



Revitalization Programs

- Economic Transformation Program
- Brownfield Cleanup Program
- New Markets Tax Credits Program (federal)
- New York Empowerment Zone Program
- Opportunity Zone Program (federal)



New York State Incentives - ESD

- Empire State Development ("ESD") is the trade name under which New York State offers benefits that have been statutorily authorized under the Office of Economic Development, Job Development and Urban Development Corporation (d/b/a Empire State Development Corporation)
- Through ESD, the State can provide direct loans, capital grants or interest rate subsidy grants that result in low-cost financing for the acquisition, construction, renovation or improvement of real estate, including both land and buildings, as well as the acquisition of machinery and equipment and related soft costs. Direct loans are provided at below-market rates to provide a lower overall blended rate with conventional sources. Interest rate subsidy grants that reduce the costs of borrowing from a conventional lender are also available.
- ESD has implemented the New York State Consolidated Funding Application (CFA), a single application for multiple sources of state funding. New York State is soliciting grant applications for funding to advance the priorities of the Regional Economic Development Councils (REDC). The CFA can be found at <https://apps.cio.ny.gov/apps/cfa/index.cfm>



Excelsior Jobs Tax Credit

- Companies in this program may qualify for five fully refundable tax credits. Businesses claim the credits over a benefit period of up to 10 years as established in the preliminary schedule of benefits.
- **Excelsior Jobs Tax Credit:**
 - A credit of up to 6.85% of wages per net new job.
 - For a qualified green project or green CHIPS project, a credit of up to 7.5% of wages per net new job.
- **Excelsior Investment Tax Credit:**
 - 2% of qualified investments.
 - For a qualified green project or green CHIPS project, a credit of up to 5% of qualified investments.
 - For investments in childcare services, a credit up to 5% of qualified investments.
- **Excelsior Research and Development Tax Credit:**
 - A credit of 50% of the portion of the Federal Research and Development tax credit that relates to expenditures in NYS up to credit up to 6% of research expenditures attributable to activities conducted in NYS.
 - For a qualified green project or green CHIPS project, a credit of 50% of the portion of the Federal Research and Development tax credit that relates to expenditures in NYS up to 8% of research expenditures attributable to activities conducted in NYS.
- **Excelsior Real Property Tax Credit:**
 - Available to firms locating in certain distressed areas and to firms in targeted industries that meet higher employment and investment thresholds (Regionally Significant Project).
- **The Excelsior Child Care Services Tax Credit:**
 - A credit of up to 6% of net new child care services expenditures for the operation, sponsorship, or direct financial support of a child care services program.

Excelsior Jobs Tax Credit Eligibility



- The Program is limited to firms making a substantial commitment to growth – either in employment or through investing significant capital in a New York facility.
- The Job Growth Track comprises 75% of the Program and includes all firms in targeted industries creating new jobs in New York. 25% is set aside for the Investment Track firms in certain strategic industries who meet the minimum job retention criteria and make significant new capital investments in a New York facility, and which meet a benefit-cost threshold of at least \$10 of investment and new wages for every \$1 of tax credit.
- Every company approved for participation in the program is eligible to apply for the Jobs Tax Credit, the Investment Tax Credit, the R&D Tax Credit, and the Child Care Services Tax Credit. Only certain categories of firms are eligible to also apply for the Real Property Tax Credit or enhanced green project tax credits.



Job Growth Track

Job Growth Track			
Excelsior Minimum Eligibility Criteria (Effective 4/6/2021)			
Strategic Industry	Minimum Jobs	Regionally Significant Project Minimum Jobs & Investments	
Scientific R&D *	5	10	\$3,000,000
Software Development *	5	N/A	N/A
Agriculture *	5	10	\$250,000
Manufacturing *	5	10	\$1,000,000
Financial Services	25	100	\$3,000,000
Back Office	25	100	\$3,000,000
Distribution	50	100	\$15,000,000
Music Production	5	N/A	N/A
Entertainment Company	100	200	N/A
Life Sciences	5	20	N/A
Other	N/A	150	\$3,000,000

* Eligible strategic industry for green project tax credits

[Excelsior-Jobs-Program-Overview-NOV2022.pdf \(ny.gov\)](#)

Investment Track



Investment Track
Firms in Strategic Industries (excluding entertainment company or music production) who retain at least 25 employees; manufacturing firms who retain at least 5 employees
Minimum Benefit Cost Ratio = 10:1
Total investment + new wages and benefits / Excelsior Jobs Program Tax Credits

[Excelsior-Jobs-Program-Overview-NOV2022.pdf \(ny.gov\)](#)



START-UP NY

- The START-UP NY program is administered by ESD and provides tax benefits to approved businesses (and certain employees of these businesses) that locate in vacant space or land of approved New York State public and private colleges and universities, approved strategic state assets, and New York State incubators affiliated with private universities or colleges that are designated as tax-free NY areas.
- A taxpayer that is a business, or an owner of a business taxed as a sole proprietorship, partnership (including a limited liability company taxed as a partnership), or New York State corporation, that is subject to corporation franchise tax or personal income tax under the New York Tax Law ("Tax Law"), is eligible for tax benefits under the START-UP NY program if the business: (1) is approved to participate in the START-UP NY program; (2) operates in a tax-free NY area; (3) annually creates and maintains "net new jobs"; and (4) meets an annual "employment test" beginning with the first year of operation.



START-UP NY

- Participating business must:
 - Be a new business in NYS, or an existing NY business relocating to or expanding within the state
 - Partner with a NYS college or university
 - Create new jobs and contribute the economic development of the local community

START-UP NY – Tax Benefit Highlights



- (1) Tax-Free NY Area Elimination Credit – eliminates corporate and personal income taxes related to income earned in the tax-free NY area by the approved business
- (2) Exemption from organization tax or license and maintenance fees if business is located exclusively in the tax-free area
- (3) Personal Income Tax – Wage Exclusion for eligible employees of an approved business
- (4) Metropolitan Commuter Transportation Mobility Tax exemptions
- (5) Sales and Use Tax credit or refund on the sale of tangible personal property, utility services, and services taxable under the Tax Laws
- (6) State or Local Real Estate Transfer or Real Property Transfer Tax exemptions on any lease of real property located in a tax-free NY area



START-UP NY – Benefit Periods

- **Sales tax benefits** are available for a period of 120 consecutive months beginning with the month during which the business locates in the tax-free NY area. The **MCTMT benefit** for employers is available for 40 consecutive calendar quarters beginning with the calendar quarter during which the business locates in the tax-free NY area in the MCTD. **All other tax benefits** are available for a period of **10 consecutive taxable** years beginning with the taxable year during which the business locates in the tax-free NY area.

START-UP NY – Sales and Use Tax Benefits



- Credit or refund of New York State and local sales and use taxes, imposed on the sale of tangible personal property, utility services, and services taxable under the Tax Law.
- Purchases of tangible personal property by contractors, subcontractors, and repairmen that is used in constructing, improving, maintaining, servicing, or repairing real property of an approved business that is located in a tax-free NY area.
- Property or services must be directly and predominantly used or consumed (more than 50%) by an approved business at its location in a tax-free NY area.

START-UP NY – Sales and Use Tax Benefits

- Consumer utility services and prepaid telephone calling services must be used or consumed directly and exclusively (100%) by an approved business at its location in a tax-free NY area.
- Telephone and telegraph services and telephone answering services must be delivered and billed to the approved business at an address at its location in the tax-free NY area.
- Mobile telecommunications services purchased by an approved business where the approved business's place of primary use is at its location in a tax-free NY area.

START-UP NY – Sales and Use Tax Benefits

- Exclusions:
 - (1) the sales tax imposed on sales of food or drink at restaurants, taverns, or other establishments, or by caterers
 - (2) the sales tax on rent for hotel occupancy
 - (3) the sales tax on admission charges and dues and
 - (4) the sales tax on transportation services



Local Incentives: Local Development Corporation (LDC)

- LDCs are formed and empowered to conduct certain projects pursuant to Not-For-Profit Corporation Law ("N-PCL") § 14114.
- LDCs are predominately formed by, and work closely with, municipalities and IDAs by providing not only greater transactional flexibility for undertaking economic development projects, but also added liability protection because the LDC is a bankruptcy remote entity.
- LDCs are empowered to construct, acquire, rehabilitate and improve for use by others, industrial or manufacturing plants in the territory in which its operations are principally to be conducted (a "Benefited Territory") and to make loans.
- LDCs can provide financial assistance for the construction, acquisition, rehabilitation, improvement, and maintenance of facilities for others in its Benefited Territory.



LDC Powers

- Specific LDC powers include the ability to: (i) disseminate information and furnish advice, technical assistance and liaison services to Federal, State and local authorities; (ii) to acquire by purchase, lease, gift, bequest, devise or otherwise, real or personal property; and (iii) to borrow money and to issue negotiable bonds, notes and other obligations.
- Without leave of a court, LDCs are empowered to sell, lease, mortgage or otherwise dispose of or encumber facilities or any real or personal property or any interest therein upon such terms as they may determine.
- **Generally, LDCs may provide financial assistance in the form of exemptions from mortgage recording taxes and/or sales and use taxes.**
- N-PCL §1411(f) states that "the income and operations of corporations incorporated or re-incorporated under this section shall be exempt from taxation."

Local Incentives: Industrial Development Agency



- Straight Lease or Bond Financing (Federal Tax-Exempt Bonds)
 - Use of Local Development Corporations for Not-for-profits
- Sales Tax Exemption (local and state) on Build-Out Only
- Mortgage Recording Tax Exemption
- Tax Abatement – Payment in Lieu of Taxes (“PILOT”)/tax stability

Making Purchases Exempt from Sales – Form ST-123

- IDA agents required to use Form ST-123, IDA Agent or Project Operator Exempt Purchase Certificate to make purchases exempt from sales tax.
- Contractors and/or subcontractors who have not been appointed as agents of an IDA may continue to use Form ST-120.1, Contractor Exempt Purchase Certificate, to claim a sales tax exemption for construction materials. However, note that Form ST-120.1 does not exempt rentals, tools, supplies or other tangible personal property that does not become an integral part of the finished project (i.e., a capital improvement).

Recordkeeping and Reporting Requirements



- If an IDA amends, revokes, or cancels its appointment of an agent, or if an agent's appointment becomes invalid for any reason, the IDA must send a letter to the Department (within 30 calendar days) explaining that the agent's appointment has been amended, revoked, or canceled, or is no longer valid and include the effective date of the change.
- The IDA is required to attach a copy of the Form ST-60 it originally filed to the letter (IDAs are required to keep records of the sales tax exemption benefits it provides to an agent/project operator, which is accomplished by filing Form ST-60 with the Tax Department within 30 calendar days of appointing an agent/project operator and granting sales tax exemption benefits).

Recapture of Sales Tax Exemptions

- IDAs are required to recapture sales tax exemption benefits whenever the benefits are (1) not entitled or authorized to be taken, (2) in excess of the amounts authorized, (3) for unauthorized property or services, or (4) for property or services not used according to the terms of the agreement with the IDA. IDAs must remit recaptured sales tax exemption benefit amounts to the Department within 30 calendar days.
- Each agent/project operator, or other person or entity that will enjoy IDA sales tax exemption benefits must agree to those terms and conditions, prior to receiving the state sales tax exemption benefits from an IDA.



PILOT Increment Financing

- PIF allows local governments to create TIF-like districts without the constraints of the TIF enabling legislation. PIFs are like TIF districts but involve the use of payments in lieu of taxes (PILOTs) instead of the property tax levy.
- Local governments enter into PILOT agreements with the owners of specific redevelopment sites and agree to use a portion of the proceeds to fund capital improvements related to the development.
- Examples: NYC used a form of PILOT increment financing to pay for the extension of the number 7 subway line to Hudson Yards. NYC determined that it was necessary to offer tax abatements, which required the use of PILOT agreements, to attract new office development.



How PIFs Work

PIFs – Can generate revenue bond proceeds to be used for same TIF Purposes

- Use increment from a specific project (or from projects w/in an area) for debt service
- Identify public site-specific infrastructure needs related to a specific project (or within a PIF District - but note do not need to establish a PIF District – use BOA to establish PIF District)
- Determine how much of the future revenues (the “increment”) related to a specific new private project improvement will be needed to cover the costs of the essential improvements related to the project
- Determine: (1) the current (base) payments and (2) the amount of future revenues generated by the development and (3) amount needed for PIF debt servicing
- Get ATJ Approval for formula to divert ATJ receipts to fund PIF improvements
- Establish fixed dollar PILOT with PILOT Mortgage to secure payments



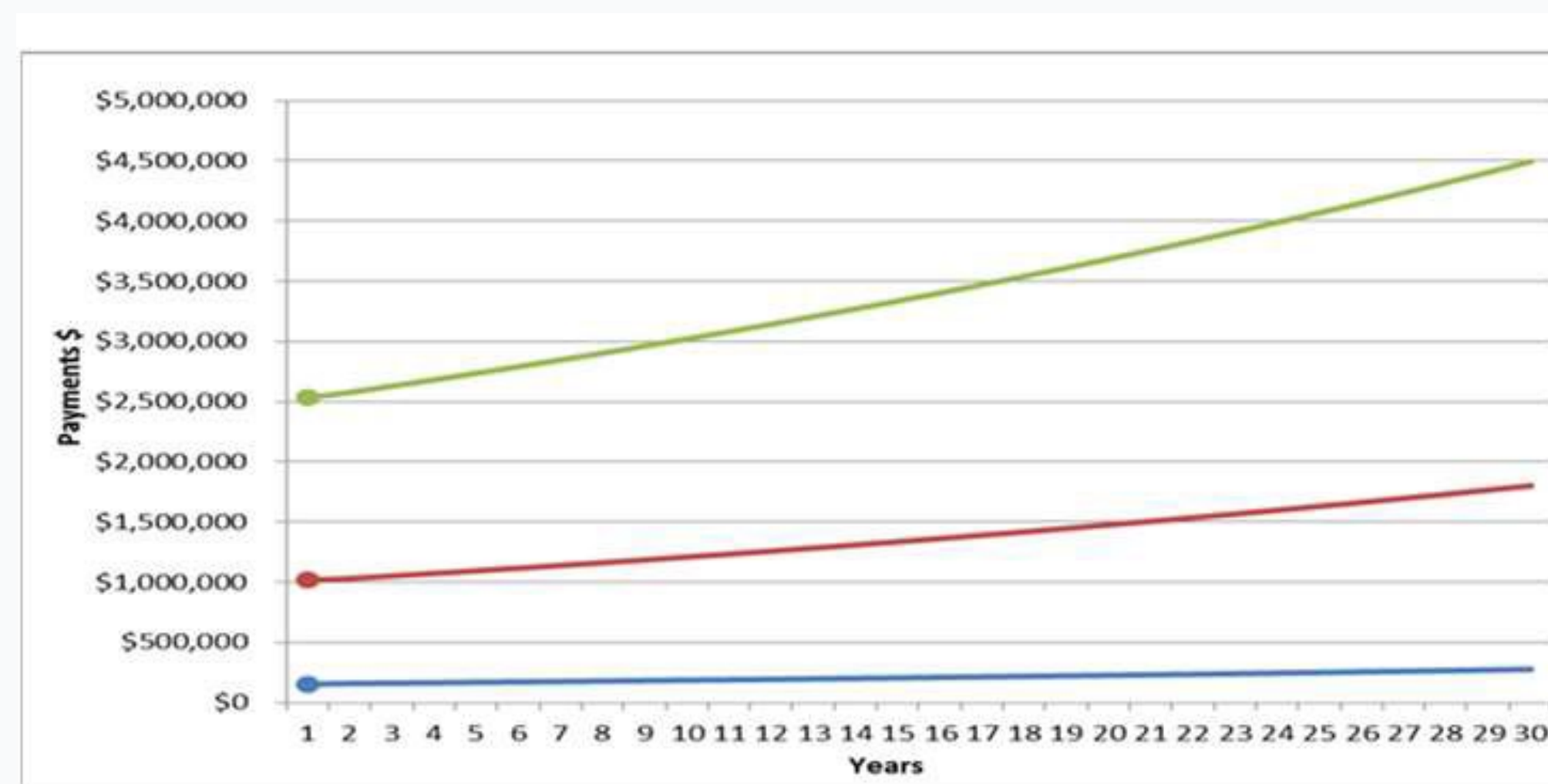
How PIFs Work

Blue Line (bottom line) = Existing total taxes to be paid to ATJ plus 2% annual increase (based on current assessed value)

Red Line (middle line) = (PIF Increment between red line and blue line) – tax dollars needed for debt service for infrastructure improvements generated from new assessed value of private development. These dollars come from the new taxes and represent the amount of new tax dollars needed to fund PIF debt service

Green Line (top line) = (area between red and green lines) Additional tax payments from remaining new assessed value to ATJs

** ATJs get base amount increased by 2%/yr. plus new taxes from remaining increased assessed value after PIF increment is used for debt service





Summary of Important PIF Points

- PIFs are a viable alternative to TIFs
- PIFs – Use a fixed dollar payment to eliminate underwriting uncertainty
- A PIF agreement uses some or all of the future revenue from a development over a set term
- PIFs also usually set a fixed tax payment schedule for the term to give the tax jurisdictions and the developer tax certainty
- Tax jurisdictions will not lose any current tax revenues and often share a portion of future revenues from the development
- Developers waive grievance rights



Summary of Important PIF Points

- Creates partnership among tax jurisdictions to foster economic development (“rising tide lifts all boats”)
- Helps make projects/investment happen—can be transformational for a community affecting its quality of life and economic condition
- Stimulates further economic development and growth in tax base

Practice Tip – It's Never Too Early!



- Pursue all available local, state, and federal level incentives
- Consult with qualified economic development attorney, accountant, and economic development-minded engineer/architect/professional
- Properly understand timing issues related to permit approvals, funding/grant/incentive approvals
- Obtain Incentives Analysis – work with attorney and accountant to identify and pro forma incentives

State Tax Issues When Selling A Partnership Interest



- New York State residents are taxed on one thing: *everything*.
- New York State nonresidents are taxed only on income that is *derived from or connected with New York sources*.
- Partnership interests are intangible, **why do I care?**



Sales of Entities Owning Real Property

- **N.Y. Tax Law § 631(b)(1)(A)(1)**
- New York source income includes gains from the sales of partnerships, LLCs, S corporations, or small, non-publicly traded C corporations, if the entity owns real property in New York State that has a fair market value that equals or exceeds 50% of the fair market value of the assets the entity has owned for at least two years as of the date of the sale or exchange.
- Anti-“stuffing” provision.
- BUT – recently acquired assets will still impact BAP.



Example

William, a nonresident individual of New York State, sells his entire interest in Partnership ABC. For federal income tax purposes, William will recognize a gain of \$12,000 from the sale.


At the time of sale, Partnership ABC owns real property in New York State valued at \$950,000. The fair market value of all the assets that Partnership ABC owns is \$2,375,000; and the fair market value of all the assets that the partnership has owned for at least two years, including any real property located in New York State, is determined to be \$1,532,258.



Example (continued)

The fair market value of Partnership ABC's real property located in New York State exceeds 50% of the fair market value of all the assets Partnership ABC owned for at least two years ($\$950,000 / \$1,532,258 = .62$ or 62%). Therefore, all or a portion of William's gain from the sale of his partnership interest is derived from New York sources.

The portion of gain included in New York source income = federal gain (\$12,000) * fair market value of Partnership ABC's real property located in New York State (\$950,000) / fair market value of all assets owned on the date of the sale (\$2,375,000).




IRC § 1060: Special NY rule on sale of partnership interest

- A nonresident's gain from the sale of their partnership interest is typically not New York source income as it is derived from the sale of an intangible asset.
- BUT for any transaction after April 2017, **N.Y. Tax Law § 632(a)(1)** establishes that this gain can be characterized as New York source income.
- IRC § 1060 contains special allocation rules for certain asset acquisitions:
 - It requires that in an "applicable asset acquisition," the purchaser's basis in the acquired assets and the seller's consideration regarding the acquisition be allocated among the assets under the "residual method."



TSB-M-18(2)I

- According to TSB-M-18(2)I, a sale or transfer of a partnership interest is considered a transaction subject to the provisions of IRC § 1060 (the gain of which is therefore fully or partially sourced to New York State) when:
 1. The transferor recognizes a gain or loss on the sale of the partnership interest for federal income tax purposes.
 2. The transferee treats the purchase of the partnership interest as a purchase of partnership assets.
 3. The assets acquired by the transferee constitute a trade or business.
 4. The transferee's basis in the transferred assets is determined wholly by reference to the transferee's consideration.



IRC § 1060: Special NY rule on sale of partnership interest

- If IRC § 1060 applies, the gain from the sale of the partnership interest is supposed to be allocated to New York in a manner consistent with the applicable methods and rules for allocation under Article 22.
- But what are the applicable method and rules for allocation under Article 22?
 - TSB-M-18(2)I (04/06/2018)
 - *Matter of Schreiber*
 - Deemed asset sale and allocation on an asset-by-asset basis
- What about goodwill?



Termination of Partnership

- New York's Technical Memorandum notes that "[a] sale or transfer of a partnership interest that causes the partnership's status as a partnership to terminate under IRC § 708(b)(1)(A), or that causes the LLC's status as a partnership to terminate under IRC § 708(b)(1)(A) (when, after the sale or transfer, the LLC is treated as a single-member disregarded entity for federal tax purposes) is considered a transaction subject to the provisions of IRC § 1060."
- See Revenue Ruling 99-6.



Example

William, a nonresident of New York State, and George, a resident of New York State, were the only two partners in Partnership AB, a calendar-year filer. On May 15, 2023, Partnership AB terminated under IRC § 708(b) when William and George (the transferors) sold their entire respective interests in Partnership AB to a third party, Marian (the transferee). William recognized a \$50,000 gain for federal income tax purposes. George recognized a \$60,000 gain for federal income tax purposes. Partnership AB's BAP for the taxable year in which the partnership interests were sold (i.e., 2023) was 30%. The total amount of William's gain on the sale of their partnership interest that is derived from New York Sources is therefore \$15,000 (i.e., $\$50,000 \times 30\% = \$15,000$).



IRC § 1060(d)

- TSB-M-18(2)I notes that a sale or transfer of a partnership interest to which IRC § 1060(d) applies is **not** considered a transaction subject to the provisions of IRC § 1060 for purposes of applying Section 632(a)(1) of the Tax Law.
- Section 1060(d) of the Internal Revenue Code can apply in situations when a purchaser acquires less than 100% of the partnership or membership interests, but the purchaser still seeks a basis adjustment.



Example

William and George sell only 80% of their combined partnership interests in Partnership AB to Marian. William therefore recognizes a \$40,000 gain for federal income tax purposes on the sale of their partnership interest. George recognizes a \$48,000 gain for federal income tax purposes on the sale of their partnership interest.

Here, however, even if Partnership AB makes a 754 election, which results in a Section 1060(d) gain allocation, the Tax Department's Technical Memorandum suggests that this is *not* considered a transaction subject to the provisions of IRC § 1060 for purposes of applying Section 632(a)(1) of the Tax Law. This means that William recognizes gain only on the sale of an intangible (the sale of their partnership interest), none of which should be derived from New York sources, regardless of Partnership AB's 2023 BAP.



“Investee” Apportionment Cases

- In at least a few other states, taxing authorities are dealing with similar issues.
- Ongoing question of how states might treat capital gain from business transactions for folks who are really investors.
- Recent decisions out of Ohio and Massachusetts around this question. However, both of these cases involve owners/investors who were clearly actively involved in the business.



The Ohio Case – Garry Rayant and Kathy Fields

- In March 2024, the Ohio Tax Commissioner issued a Final Determination in a matter involving allocation of capital gain income from the sale of interest in a business.
 - Taxpayers treated as nonbusiness income.
 - Tax Commissioner concluded gain should be allocated as business income under R.C. 5747.12.
 - Tax Commissioner concluded taxpayer was active in the underlying business, not a passive investor.
 - Case is being appealed to Ohio Board of Tax Appeals.



The Massachusetts Case – *Welch v. Commissioner of Revenue*

- In November 2023, the Appellate Tax Board of Massachusetts issued a decision in a matter involving allocation of capital gain from taxpayer's sale of "founder's" stock in company headquartered in Massachusetts. Taxpayer was also an employee of the company.
 - Taxpayer treated capital gain as not from Massachusetts sources.
 - ATB ruled that gain on sale of taxpayer's common stock was MA-sourced income (of a compensatory nature) on the basis that the income was derived from or effectively connected with the trade or business of employment carried on in MA.
 - In its analysis, the ATB cited the taxpayer's expectation of a payout from his years of "sweat equity" and his active involvement in the business for more than a decade.

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