

Summary of the 2000 Sales and Compensating Use Tax Budget Legislation

On May 15, 2000, Governor George E. Pataki signed Chapter 63 of the Laws of 2000. This memorandum summarizes amendments to the Tax Law that are applicable to the State and local sales and compensating use taxes.

Empire Zones Program Act

The Tax Law was amended to provide certain tax benefits under the new "Empire Zones Program Act," which is applicable to the sales and compensating use taxes as well as certain other taxes. The new Act, by declaration, changes the term "economic development zone" to "empire zone" wherever it appears in the Consolidated or Unconsolidated Laws of New York.

A "Qualified Empire Zone Enterprise" (QEZE) means a business enterprise that has been certified under Article 18-B of the General Municipal Law prior to July 1, 2005 and which meets the "employment test" specified in Section 14 of the Tax Law. Every QEZE that seeks sales and use tax exemption benefits is also required to apply to the Commissioner of Taxation and Finance for a QEZE exemption certificate in order to receive the QEZE sales and use tax exemptions described below. A QEZE that has received a QEZE exemption certificate is then authorized to furnish vendors with QEZE exemption documents, which are deemed to be exemption certificates under Section 1132 (c) of the Tax Law.

Purchases and uses of tangible personal property and services by a QEZE will be exempt from the State's 4% sales and compensating use taxes and from the ¼ % taxes imposed within the Metropolitan Commuter Transportation District. The sales and use tax benefits are generally available for each day of the ten taxable years next following a predetermined "test year," as defined in the new law, but only where the taxable year in question immediately follows a taxable year which meets the employment test. In addition, in order for purchases and uses of property and services to be exempt, the property or service (other than a Section 1105(b) utility service) must be directly and predominantly (meaning 50% or more) used or consumed by the QEZE in the empire zone in which the QEZE has qualified for benefits. Consumer utility services (other than telephony and telegraphy, telephone and telegraph services, and telephone answering services) must be directly and exclusively used in such empire zone. Telephony and telegraphy, telephone and telegraph services, and telephone answering services must be delivered and billed to the QEZE at an address in the zone in which the QEZE has qualified for these tax benefits in order for the exemptions to apply.

A QEZE's use of a motor vehicle will be found to occur predominantly in the empire zone where the QEZE has qualified for benefits if the QEZE uses the vehicle at least 50% exclusively in such zone, or at least 50% of the vehicle's use is in activities originating or terminating in such zone, or at least 50% of its use is a combination of use exclusively in such zone and in activities

originating or terminating in such zone. The QEZE may choose to compute the usage of the vehicle based on either hours of use or miles traveled.

In addition to the exemptions from tax that are applicable to a QEZE's direct purchases and uses, the new law provides that tangible personal property sold to a contractor, subcontractor, or repairman for use in erecting, adding to, improving, repairing, maintaining, or servicing a building, structure, or real property owned by a QEZE in an empire zone will be exempt from tax. This exemption will apply only if (i) the tangible personal property becomes an integral component part of the QEZE's building, structure, or real property; (ii) the building, structure, or real property is located in the empire zone in which the QEZE qualified for tax benefits; and (iii) the tangible personal property is purchased during a year in which the QEZE is entitled to such benefits.

The new QEZE exemptions do not apply to a QEZE's purchases of food and drink at a restaurant, tavern, or other establishment; hotel occupancy; or amusement charges subject to tax under Section 1105(d), (e), or (f), respectively.

The new exemptions are also not applicable to the local sales and use taxes imposed in New York City, or to county, city, or school district taxes, unless the locality elects the QEZE exemptions. Since an empire zone in which a QEZE has qualified for tax benefits may be located in both a county and a city imposing local taxes, QEZE transactions would not be fully exempt from tax unless both the county and the city elect the QEZE exemptions. If the zone is also located in a school district that imposes sales tax on utility services, the QEZE's purchases of utility services would not be fully exempt from tax unless the school district also elects the QEZE exemptions.

Counties, cities, and school districts may elect to provide the exemptions (or repeal them) effective on March 1 of each year. The election must be enacted and notice mailed by certified or registered mail to the Commissioner of Taxation and Finance at least 90 days prior to March 1. The Commissioner may reduce the minimum 90-day period to not less than 30 days if the Commissioner finds that would be consistent with the Commissioner's duties. Certified copies of the enactment must also be sent to the Secretary of State and State Comptroller, as well as to the local clerk (in the case of counties and cities) or the State Education Department (in the case of school districts). Counties, cities, and school districts must obtain model enactments from the Tax Department in order to elect these local exemptions.

The amendments take effect on March 1, 2001.

(See Tax Law, Sections 14, 15, 16, 1101(b)(23), 1115(z), 1210(a)(1), 1210(b)(1), 1210(d), 1210(l), and 1212.)

Web hosting

The Tax Law was amended to exempt from State and local sales and use taxes machinery, equipment, and certain other specified items of tangible personal property purchased by an operator

of an Internet data center that is located in this State. The property must be placed or installed in an Internet data center for use at the center, and it must be required for and directly related to the provision of Internet Web site services for sale by the operator of the center.

An “operator of an Internet data center” is a person that (i) operates a data center that is specifically designed and constructed to provide a high security environment for the location of servers and similar equipment that host Internet Web sites; and (ii) provides at such center the Internet Web site services of uninterrupted Internet access to customers’ Web pages (i.e., twenty-four hours a day, seven days a week, three hundred sixty-five days a year) and continuous management of Internet traffic for the customers’ Web pages.

The tangible personal property that is exempt from tax under the new law includes computer system hardware, software, storage racks and cages for computer equipment, property related to building systems designed for an Internet data center, property necessary to maintain the appropriate climate controlled environment, property related to fire control, power generators and power conditioners, property related to providing a secure environment, property that constitutes raised flooring, and other similar property. A contractor, subcontractor, or repairman may also purchase this property exempt from tax when the property is to be incorporated into the real property of an Internet data center as a capital improvement.

The Tax Law was also amended to exempt certain services rendered directly to or in relation to Internet data center property that is exempt from tax. These services include installing, maintaining, servicing, and repairing qualified tangible personal property; maintaining, servicing, and repairing qualified real property; and protective and detective services. If any of these services relate to property that is both taxable and exempt from tax, an allocation may be used to determine the portion of the total receipt that is exempt from tax.

An operator of an Internet data center that is primarily engaged at the data center in the retail sale of its own “Internet access service” (as defined in Section 1115(v) of the Tax Law) is not considered to be providing Internet Web site services for sale for purposes of the new exemptions from tax.

The amendments take effect on September 1, 2000.

(See Tax Law, Sections 1115(a)(37) and 1115(y).)

Farming and commercial horse boarding

The Tax Law was amended to expand the exemptions from State and local sales and use taxes for certain property and services used predominantly in farm production. When the new law takes effect, there will no longer be a requirement in the farming exemptions that the property or services must be used “directly” in farming. The property or services need only be used “predominantly” (more than 50%) in farm production in order to qualify for the exemptions. Nor

will there be any distinction made in the law between “farm building materials” and “non-qualifying farm building materials.”

The law was also amended to add new exemptions from tax for property and services used predominantly in a “commercial horse boarding operation,” as defined in Section 301(13) of the Agriculture and Markets Law. In general, commercial horse boarding operations will receive sales and use tax exemptions similar to those provided for farm production. A commercial horse boarding operation is an agricultural enterprise with at least ten acres that boards at least ten horses, regardless of ownership, and that receives \$10,000 or more in gross receipts annually from fees generated either through the boarding of horses or through the production for sale of crops, livestock, and livestock products (or through both of these boarding and production activities). A commercial horse boarding operation does not include an operation whose primary on-site function is horse racing.

The Tax Law, as amended, provides an exemption for all tangible personal property (whether or not incorporated into a building or structure) that is used or consumed predominantly in either the production of tangible personal property for sale by farming or in a commercial horse boarding operation, or in both. The exemption includes motor vehicles that are used predominantly in either, or both, of these activities.

The services of installing, maintaining, servicing, and repairing tangible personal property that is used or consumed predominantly in either the production of tangible personal property for sale by farming or in a commercial horse boarding operation (or in both) are also exempt from tax under the new law. In addition, the services of maintaining, servicing, and repairing real property, property, or land that is used or consumed predominantly for these purposes are not subject to tax.

A new provision was added to the Tax Law that provides a specific exemption from tax for utility services used or consumed in the production of tangible personal property for sale by farming or in a commercial horse boarding operation (or in both). The Tax Law was also amended to allow an exemption from tax on sales and uses of 4500 gallons or less of diesel motor fuel in a 30-day period that is used or consumed in these exempt activities, provided the fuel is not used or consumed upon the highways of this State except to reach adjacent farmlands or adjacent lands used in commercial horse boarding operations, or both. This exemption also applies to sales of more than 4500 gallons of diesel motor fuel in a 30-day period, provided the Commissioner of Taxation and Finance has given prior approval. These amendments remove references in the Tax Law to, “directly and exclusively” with respect to utilities and diesel motor fuel used or consumed in farming.

The amendments include exemptions for tangible personal property sold to a contractor, subcontractor, or repairman when used to (i) to erect a structure or building; (ii) add to, alter, or improve real property, property, or land; or (iii) maintain, service, or repair real property, property or land, provided that in each case the tangible personal property is used or consumed predominantly in either farm production or in a commercial horse boarding operation, or in both. The tangible personal property must become an integral component part of the structure, building, or real property. These amendments also remove references to, “directly” and “non-qualifying building

materials.”

The amendments take effect on September 1, 2000.

(See Tax Law, Sections 1101(b)(20); 1105(c)(3)(vi) and (c)(5); 1115(a)(6), (15), and (16); and 1115(c) and (j). Technical and conforming amendments were also made to Sections 1108(b)(1) and 1210(a)(1) of the Tax Law.)

Telecommunications services and Internet access services

The Tax Law was amended to exempt from State and local sales and use taxes tangible personal property (including wires, cables, and optical fibers) that are used or consumed directly and predominantly in the receiving, initiating, amplifying, processing, transmitting, retransmitting, switching, or monitoring of switching of telecommunications services for sale or Internet access services for sale, or any combination of these two services. This includes property used or consumed to upgrade systems to allow for these activities. Examples of this type of telecommunications equipment are transmission equipment, such as multiplexers, switches, and repeaters; and customer-premises equipment, such as phones and private branch exchanges (PBX's). Examples of exempt Internet access equipment are switches, routers, and modems. The tangible personal property must be used in providing these services for sale and does not include property owned by the customers of the services. When the new law takes effect, there will no longer be a requirement that the telecommunications equipment must constitute “central office equipment or station apparatus.”

The services of installing, maintaining, servicing, and repairing this exempt tangible personal property are also exempt from tax.

For purposes of the new exemptions, “telecommunication services” has the same meaning as set forth in Section 186-e(g) of the Tax Law. See *1995 Legislation Affecting Telephone and Telegraph Businesses and Other Providers of Telecommunication Services*, TSB-M-95(3)C. “Internet access service” is defined in Section 1115(v) of the Tax Law. See *Internet Access Charges Not Subject to Sales Tax and Telecommunications Excise Tax*, TSB-M-97(1.1)S.

The amendments take effect on September 1, 2000.

(See Tax Law, Section 1115(a)(12-a). Technical and conforming amendments were also made to Sections 1105(c)(3)(x), 1105-B(a), 1108(b)(1), 1115(a)(12), and 1210(a)(1) of the Tax Law.)

Cable television service

The Tax Law was amended to exempt from State and local sales and use taxes machinery, equipment, and apparatus used or consumed directly and predominantly to upgrade cable television systems to allow for the receiving, initiating, amplifying, processing, transmitting, retransmitting,

switching, or monitoring of switching of a digital cable television service for sale. A decoder (“black box”) located at a customer’s premises that is necessary for program reception in a digital format is an example of this type of equipment. This exemption includes parts, tools, and supplies used in connection with the exempted machinery, equipment, and apparatus. A “digital cable television service” is defined as a cable television service, as presently defined in Section 186-e.2(b)(2) of the Tax Law, that is transmitted by the use of digital technology.

The law was also amended to provide an exemption from tax for entities principally engaged in providing cable television service for sale with respect to equipment or apparatus used or consumed directly and predominantly in receiving, initiating, amplifying, processing, transmitting, retransmitting, switching, or monitoring of switching of Internet access service for sale. Modems provided for use in high-speed Internet access would be an example of the exempted equipment. Parts, tools, and supplies used in connection with this equipment or apparatus also qualify for the exemption. “Internet access service” is defined in Section 1115(v) of the Tax Law.

The services of installing, maintaining, servicing, and repairing these exempt properties are also exempt from tax.

The amendments take effect on September 1, 2000, and expire on September 1, 2003. However, with respect to providing an Internet access service for sale, a cable television provider may still be able to qualify under the exemption relating to Internet access discussed on page 5 of this memorandum.

(See Tax Law, Sections 1105(c)(3)(xi) and 1115(a)(12-b).)

Television and radio broadcasting

The Tax Law was amended to exempt from State and local sales and use taxes machinery, equipment, and other items of tangible personal property (including parts, tools, and supplies) that are used or consumed by a broadcaster directly and predominantly in the production (including post-production) of live or recorded programs. The programs must be used or consumed by the broadcaster predominantly for broadcast over the air or for transmission through a cable television system or a direct broadcast satellite system. Examples of program production properties that are exempt from tax under the new law include cameras, lighting, sets, costumes, and sound equipment.

The Tax Law was also amended to exempt from tax machinery, equipment, and other tangible personal property (including parts, tools, and supplies) that are used or consumed by a broadcaster directly and predominantly to transmit live or recorded programs over the air or through a cable television system or direct broadcast satellite system. Examples of program transmission properties include amplifiers, transmitters, and antennas.

If a broadcaster leases any of these program production or program transmission properties to another person for that person’s use or consumption directly and predominantly in the exempt

production or transmission activities, the property will be deemed to have been used or consumed by the broadcaster (lessor) for purposes of determining whether the broadcaster has met the direct and predominant use requirements of the new exemptions.

As defined in the new law, a “broadcaster” means a FCC-licensed television or radio station, a television or radio broadcast network, or a cable television network. A “television or radio broadcast network” is an organization that (i) produces and/or purchases programs that are intended for transmission by affiliated, FCC-licensed stations; and (ii) has distribution facilities or circuits available to such affiliated stations during all or a portion of one or more days each week. A “cable television network” is an organization that (i) produces and/or purchases programs that are intended for transmission by either direct broadcast satellite systems or cable systems, pursuant to an affiliation or similar agreement; and (ii) has distribution facilities or circuits available to such satellite or cable systems during all or a portion of one or more days each week.

For purposes of the program production exemption, a broadcaster includes a cable system operator or direct broadcast satellite system operator, but only with respect to property used or consumed directly and predominantly in the production of live or recorded programs intended for transmission to viewers over its own system. For purposes of the transmission exemption, a broadcaster does not include a cable system operator or a direct broadcast satellite system operator.

“Programs,” as defined in the new law, means any performance, event, play, story, or other work (e.g., literary, musical, and artistic works) that is used for entertainment or educational purposes. This includes news, news specials, sporting events, game shows, talk shows, and commercials. “Recorded programs” means any program contained on film, tape, disc, or other physical media.

The law was also amended to exempt from tax certain services rendered to a broadcaster in connection with its broadcasting business. These services include producing, fabricating, processing, printing, and imprinting tangible personal property (as described in Section 1105(c)(2) of the Tax Law) as well as the services of editing, dubbing, and mixing. The services must be performed in connection with exempt production or transmission activities. In addition, the services of installing, maintaining, servicing, and repairing exempt tangible personal property and the services of maintaining, servicing, and repairing exempt property which, when installed, becomes a capital improvement to real property are also exempt from tax under the new law.

The amendments take effect on September 1, 2000.

(See Tax Law, Sections 1115(a)(38) and 1115(aa).)

Pollution control equipment

The Tax Law was amended to provide a new exemption from State and local sales and use taxes for machinery or equipment used in the control, prevention, or abatement of pollution or

contaminants from manufacturing or industrial facilities, if not otherwise exempted under existing production exemptions.

The amendment takes effect on March 1, 2001.

(See Tax Law, Section 1115(a)(40).)

Food and drink sold through vending machines

The Tax Law was amended to provide an exemption from State and local sales and use taxes for sales of candy, soda, and certain fruit drinks when these items are sold for 75 cents or less from vending machines that accept coins, currency, or credit or debit cards.

The amendment takes effect on September 1, 2000.

(See Tax Law, Section 1115(a)(1).)

Gas and electricity and gas and electric service

The Tax Law was amended to provide for the following:

- Beginning **June 1, 2000**, gas and electricity are subject to State and local compensating use taxes in order to eliminate the disparity in taxation favoring out-of-state sellers of gas or electricity.
- Beginning **June 1, 2000**, an exemption from State and local sales and compensating use taxes is created for certain purchases of gas or electricity used to provide gas or electric service.
- Beginning **September 1, 2000**, a phase-out is created for State and local sales taxes on receipts from sales of transportation, transmission or distribution of gas or electricity when purchased from someone other than the vendor of the gas or electricity.

Purchasers of gas and electricity or gas and electric service whose purchases qualify for exemption under Section 1115 of the Tax Law should give the vendor a properly completed *Exempt Use Certificate* (Form ST-121). See *Sales and Use Taxes on Gas and Electricity*, TSB-M-00(4)S.

The amendments are effective on the dates indicated above.

(See Tax Law, Sections 1101(b)(3), 1110(a) and (i), 1115(b)(ii) and (w), and 1105-C. Technical and conforming amendments were also made to Sections 1105-A(b) and (d), 1131(4), 1210(a) and (b), 1212(a), 1220, and 1224(b) and (s) of the Tax Law.)