

# Whiteman Osterman & Hanna LLP

## TAX PRACTICE NEWSLETTER

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### QEZE Decertification Update

The end of August brought the expiration of a key date for Qualified Empire Zone Enterprises (“QEZE”s) that were decertified in June as the result of recent changes to New York’s Empire Zones (“EZ”) rules. After a review of every QEZE in the EZ program by the Department of Economic Development (“DED”), notices were sent out to those that allegedly failed to meet a 1:1 cost/benefit ratio or that ran afoul of a new “shirt changer” test. The new law required such QEZEs to challenge the decertification by submitting a notice of appeal to DED within 15 days of receiving the decertification notice, followed by a written submission no more than 60 days from date of the original notice. Thus, for a notice issued on June 29, 2009, the final date to submit the appeal was August 28th.

Since neither the law nor the regulations requires any review beyond the foregoing appeal process, the denial of an appeal appears to be the end of the road, at least as far as administrative review is concerned. What’s more, DED officials have informally stated that there is no intent to consider late appeals from those QEZEs that failed to timely provide a written submission. Accordingly, any further challenge to decertification, whether on the merits of DED’s decision or on the validity of the new EZ rules themselves (a significant matter that apparently has yet to be reviewed by the courts), would be brought through the judicial system, through a process known as an “Article 78 proceeding.” Article 78 proceedings can be slow and costly, so the stakes (specifically, the benefits lost) would need to be significant in order for a judicial challenge to make economic sense for a decertified QEZE.

So what can be expected for those QEZEs that have passed both the cost/benefit and “shirt changers” tests in 2010? Might the State attempt another round based on a more stringent cost/benefit ratio – perhaps even the 20:1 ratio that was recently made part of the General Municipal Law’s QEZE certification standards?

The size of the State’s 2010 budget deficit, and its ability to find a way to close it, should influence what comes next. As the next election cycle approaches, Governor Patterson may hesitate to risk further alienating New York’s business community through another round of decertifications, especially when a repeal of the program is almost certain. Also, the principle of retroactive decertification which has been applied to the 2009 decertifications (i.e. decertification effective as of the beginning of a completed tax year, affecting tax credits that have already accrued), coupled with the elimination of procedural rights for decertified QEZEs through changes in the appeal process, raise constitutional law issues. Accordingly, the current round of decertification might ultimately prove invalid, in whole or in part. Of course, any constitutional challenge would require a decertified QEZE to invest in a judicial proceeding, which may not make economic sense. In light of these considerations, the path ahead is muddy at best.