



New York State Business Incubator and Innovation Hot Spot Support Act

This memorandum summarizes the New York State Business Incubator and Innovation Hot Spot Support Act that was signed into law as part of the 2013-2014 New York State budget (Part C of Chapter 59 of the Laws of 2013).

Chapter 59 of the Laws of 2013 (Part C) added new section 16-v to the Urban Development Corporation Act (L.1968, Ch.174). Section 16-v creates the New York State Business Incubator and Innovation Hot Spot Support Act (the Act) to support companies in New York State that are in the early stages of development. The Act will be administered by [Empire State Development](#) (ESD).

The Act provides for operating grants and other assistance to New York State incubators and New York State innovation hot spots for the purpose of developing successful businesses in the state. It provides technical assistance, direct mentorship, entrepreneurial education, and business development services. In addition, new section 38 has been added to the Tax Law to provide for New York State innovation hot spot program tax benefits.

Law and background

Under the Act, ESD is authorized to designate entities as New York State incubators (incubators). In addition, ESD is authorized to designate five incubators as New York State innovation hot spots (innovation hot spots) in each of state fiscal years 2013-14 and 2014-15. These innovation hot spots can certify certain clients as qualified entities eligible for tax benefits under section 38 of the Tax Law. An incubator that is not designated as an innovation hot spot cannot certify any client as a qualified entity.

Definitions

For purposes of the Act, the following definitions apply:

- *New York State incubator* is a designation granted by ESD to a business incubation program that provides physical space or a virtual incubation program to eligible businesses. Designation as a New York State incubator allows the incubator to become eligible for certain benefits, support, services, and programs provided by the Act. (A virtual incubator that provides assistance to eligible businesses in residence in more than one physical location must have a plan of operation that sets forth the maximum number of eligible businesses to be served and their geographic location.)

- *New York State innovation hot spot* is a designation granted by ESD to a New York State incubator. An innovation hot spot must be affiliated with and have the support of at least one college, university, or independent research institution. Additionally, its programs and purposes must be consistent with regional economic development strategies.
- *Qualified entity* means a business enterprise (corporation, sole proprietorship, partnership, limited partnership, limited liability company (LLC), or New York S corporation) that is in the formative stages of development and is located in New York State. It must be certified by a New York State innovation hot spot as being approved to locate in, or be a part of a virtual incubation program operated by, that innovation hot spot.

However, the following business enterprises **cannot** be certified as a qualified entity:

- A corporation where more than 50% of the number of shares that entitle the holder to vote for the election of directors or trustees is owned or controlled (either directly or indirectly) by a corporation subject to tax under sections 183, 184, or 185 of Article 9 (corporation tax); Article 9-A (corporation franchise tax); Article 32 (franchise tax on banking corporations); or Article 33 (franchise tax on insurance corporations) of the Tax Law.
- A corporation, sole proprietorship, limited partnership, LLC, or New York S corporation that is substantially similar in operation and ownership to a business entity (or entities) that is now or has ever been subject to tax under sections 183, 184, 185, or former section 186 of Article 9; Article 9-A; Article 32; Article 33; or former Article 23 (the unincorporated business tax, as it was in effect on January 1, 1980); or for which the business income or loss is or was includable under Article 22 (personal income tax) of the Tax Law.

New York innovation hot spot program tax benefits (section 38 of the Tax Law)

As previously stated, an innovation hot spot can certify certain clients as qualified entities. A qualified entity is eligible for New York innovation hot spot tax benefits under section 38 of the Tax Law. However, a taxpayer that claims any of these tax benefits¹ is not eligible for any other New York State exemption, deduction, credit, or refund attributable to business operations in, or as part of a virtual incubation program operated by, an innovation hot spot. The election to claim any of the tax benefits available under section 38 of the Tax Law is not revocable.

¹ The tax benefits allowed under section 38 of the Tax Law are provided for in sections 208(9)(a)(18), 209.11, 612(c)(39) and 1119(d)(1) of the Tax Law.

In addition to any recordkeeping requirements imposed by ESD, a qualified entity that is located within and without a New York innovation hot spot must keep books and records to disclose, to the satisfaction of the Tax Department, the amount of items of income, gain, loss, and deduction attributable to operations in, or as part of a virtual incubation program operated by, the innovation hot spot. The books and records must accurately reflect the income, gain, or loss attributable to operations in (or as part of) the innovation hot spot.

Corporation franchise tax benefit

A corporation franchise tax benefit is allowed for five tax years beginning with the first tax year the qualified entity becomes a tenant in, or part of a virtual incubation program operated by, an innovation hot spot.

Fixed dollar minimum benefit. A qualified entity that is taxable under Article 9-A and is located completely within the innovation hot spot is only liable for the fixed dollar minimum tax under that Article (i.e., the qualified entity is not subject to the MTA surcharge or the tax on subsidiary capital). However, the entity is still subject to any tax imposed on the corporation by any other article of the Tax Law (e.g., the license fee under Article 9).

Subtraction modification benefit. A qualified entity that is taxable under Article 9-A and is located both within and without an innovation hot spot, or that is a corporate partner in a qualified entity, is allowed a subtraction modification benefit in computing entire net income (ENI) for the amount of income or gain included in its federal taxable income that is attributable to operations in, or as part of a virtual incubation program operated by, the innovation hot spot. The amount of the subtraction modification is determined using books and records, as explained above.

Note: A qualified entity that is filing as a member of a combined group is allowed only the subtraction modification benefit. Therefore, when a qualified entity is filing as a member of a combined group, the fixed dollar minimum benefit is **not** available.

Personal income tax benefit

A personal income tax benefit is allowed for five tax years beginning with the first tax year the qualified entity becomes a tenant in, or part of a virtual incubation program operated by, the innovation hot spot.

- An individual who is the sole proprietor of a qualified entity, or a member of an LLC treated as a partnership, a partner in a partnership, or a shareholder in a New York S corporation (where the LLC, partnership, or New York S corporation is a qualified entity) who is taxable under Article 22 is allowed a deduction (in the form of a subtraction modification) for the amount of income or gain included in his or her federal adjusted gross income, to the extent that the income or gain is attributable to the

operations of the qualified entity in, or as part of a virtual incubation program operated by, an innovation hot spot². The amount of the subtraction modification is determined using books and records, as explained on page 3.

Sales and use tax benefit

A qualified entity that is a tenant in, or part of a virtual incubation program operated by, an innovation hot spot is eligible for a credit or refund of the 4% state sales and use tax and the 3/8% tax imposed by the state in the Metropolitan Commuter Transportation District on the purchase of tangible personal property, certain utility services, and other services taxable under section 1105(c) of the Tax Law. The credit or refund will be allowed for 60 months beginning with the first full month after the qualified entity becomes a tenant in, or part of a virtual incubation program operated by, an innovation hot spot.

Note: A qualified entity that is a tenant in, or part of a virtual incubation program operated by, an innovation hot spot that makes sales subject to sales and use tax is still required to be registered as a sales tax vendor and to collect and remit the appropriate state and local sales tax on its sales.

Purchases eligible for a credit or refund. For purchases and uses of property and services to be eligible for a credit or refund, the property or services (other than the section 1105(b) consumer utility services discussed below) must be directly and predominantly used or consumed by a qualified entity at its location in, or as part of a virtual incubation program operated by, an innovation hot spot. For purposes of the credit or refund, *predominantly* means more than 50%.

Consumer utility services (other than telephony and telegraphy, telephone and telegraph services, and telephone answering services) and prepaid telephone calling services must be used or consumed directly and exclusively (100%) by a qualified entity at its location in, or as part of a virtual incubation program operated by, an innovation hot spot. Consumer utility services include sales of gas, electricity, refrigeration, and steam, as well as gas, electric, refrigeration, and steam services of whatever nature.

Telephony and telegraphy, telephone and telegraph services, and telephone answering services must be delivered and billed to a qualified entity at an address at its location in, or as part of a virtual incubation program operated by, an innovation hot spot. Mobile telecommunications services purchased by a qualified entity will qualify for the credit or refund where the qualified entity's place of primary use is at its location in, or as part of a virtual incubation program operated by, an innovation hot spot. See [TSB-M-02\(4\)C, \(6\)S](#), *Amendments Affecting the Application of the Sales and Use Tax and Excise Tax Imposed on Mobile*

² The Administrative Code of the City of New York section 11-1712(c) has been correspondingly amended to conform with the amendments made to Article 22 section 612(c)(39).

Telecommunications Service, for additional information on the application of sales tax to mobile telecommunications services.

The credit or refund for a qualified entity that is a tenant in, or part of a virtual incubation program operated by, an innovation hot spot does not apply to:

- the sales tax imposed under section 1105(d) of the Tax Law on sales of food or drink in or by restaurants, taverns, or other establishments, or by caterers;
- the sales tax on rent for hotel occupancy imposed under section 1105(e) of the Tax Law;
- the sales tax on admission charges and dues imposed under section 1105(f) of the Tax Law;
- the sales tax on transportation services imposed under section 1105(c)(10) of the Tax Law; and
- the local sales taxes imposed under the authority of Article 29 of the Tax Law.

A claim for credit or refund for the sales and use tax paid on eligible purchases must be made by filing [Form AU-11](#), *Application for Credit or Refund of Sales or Use Tax*. Taxpayers may submit Form AU-11 electronically using [Sales Tax Web File](#).

A qualified entity may file a claim for credit or refund only once each sales tax quarter. No interest is payable on any credit allowed or refund made. For further information on applying for a sales tax credit or refund, see [Claiming sales tax refunds and credits](#) on our Web site.

Maintaining designation as a New York State incubator or New York State innovation hot spot

Once designated as an incubator or innovation hot spot, the incubator or innovation hot spot will be subject to conditions and information reporting requirements as set forth by ESD. ESD has the authority to audit incubators, innovation hot spots, and any client of an innovation hot spot that has been designated as a qualified entity.

ESD is also authorized to periodically evaluate the operations of incubators and innovation hot spots using methods that include, but are not limited to, site visits, requests for additional reports that require specific information, and review evaluations. In addition, incubators and innovation hot spots that receive operating grants under the Act are subject to independent peer reviews at least once every three years.

TSB-M-14(1)C, (1)I, (2)S
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If ESD is unsatisfied with the progress of an incubator or innovation hot spot, it will allow the incubator or innovation hot spot the opportunity to remedy the deficiencies in a timely manner. Failure to correct a deficiency could result in the loss of the grant and the designation as an incubator or innovation hot spot.

NOTE: A TSB-M is an informational statement of existing department policies or of changes to the law, regulations, or department policies. It is accurate on the date issued. Subsequent changes in the law or regulations, judicial decisions, Tax Appeals Tribunal decisions, or changes in department policies could affect the validity of the information presented in a TSB-M.