

Industrial Development Agencies in New York State

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In this installment of Real Assessment, the authors discuss the impact that COVID-19

has had on tax incentive programs and industrial development agencies in New York.

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The COVID-19 crisis has affected almost all aspects of business and industry in the United States and the world. One area that has received little public attention, however, is the impact that the crisis has had on tax incentive programs.

In New York, industrial development agencies (IDAs) are one means used to provide tax incentives to businesses. An IDA is a public

benefit corporation governed by article 18-A of the General Municipal Law (the Act) that promotes economic development in the municipality in which it is established.¹ Recognizing that IDAs perform government functions and serve public purposes, the Act authorizes IDAs to provide specific real property tax and sales and use tax benefits for property owned or controlled by an IDA.²

Real Property Tax Benefits

Once an IDA determines that a project qualifies for, and has been approved by the IDA for, financial assistance,³ the IDA enters into project agreements with the property owner to either sell and lease back the property, or lease and lease back the property from the IDA. At the same time, the property owner and the IDA enter into a payment-in-lieu-of-taxes agreement (PILOT agreement) under which the property owner makes payments to the IDA instead of the normal taxing jurisdiction. The payments are usually just a portion of the property taxes the company would have otherwise paid.⁴ Typically, a default in making PILOT payments will subject the property owner to some penalties, which may include interest and late fees,⁵ a tax lien on the property, and termination of the PILOT agreement. Termination of the agreement eliminates future abatements and potentially includes a clawback of tax benefits already provided under the agreement.

A company experiencing COVID-19-related economic hardships may face delays in project

¹ General Municipal Law section 856(2).

² General Municipal Law section 874.

³ General Municipal Law section 854(14).

⁴ General Municipal Law section 858(15).

⁵ General Municipal Law section 874.

completion or cash flow problems affecting PILOT payments, and therefore may want to consider approaching the IDA for an amendment to its PILOT agreement. In either case, the company should notify the IDA as soon as possible to provide the IDA with sufficient time to consider the request and to determine the impact of an amendment on the affected tax jurisdictions. Under the Act, IDAs have discretion to approve amendments to projects. However, the members of an IDA, who constitute its governing board, are subject to significant political scrutiny under the Act. The members of the IDA serve at the pleasure of the governing body of the municipality for whose benefit the IDA was established (the Appointing Authority);⁶ thus, the Appointing Authority is empowered to remove any member or members, or the entire board, of the IDA at any time.

Further, the local taxing jurisdictions may apply pressure on the IDA in connection with any proposed amendment to the PILOT agreement. Lastly, IDAs are also subject to significant regulatory oversight by state agencies, including the Office of the New York State Comptroller and the Authorities Budget Office, which may also exert influence over IDA actions. So while IDAs have discretion to amend PILOT agreements, there will likely be significant public and political scrutiny of those decisions.

In 2015 the state enacted reform legislation that requires IDAs to develop uniform approval processes and adopt policies for the monitoring and recapture of IDA benefits.⁷ The purpose of the reform legislation was to enhance transparency regarding an IDA's approval of financial assistance for projects through the mandated use of a standard application for projects, uniform criteria for the evaluation and selection for each category of an IDA project, and a uniform agency project agreement that sets forth the terms and conditions for the financial assistance provided.⁸ The additional transparency and procedural requirements increase the likelihood of political pressure on the Appointing Authority from the

public, the media, the state agencies, and the affected tax jurisdictions for each action by an IDA to approve or amend the financial assistance granted to a company benefitting from a project.⁹ Further, it increases the likelihood of a state regulatory review under a state audit of any action by an IDA.

The financial impact of a PILOT agreement modification, consideration of the IDA's uniform tax exemption policy, and how to address the modification with the affected tax jurisdictions and the public will determine whether an IDA will approve the requested amendment. Also, an IDA must determine if a proposed amendment will trigger the requirement for a public hearing under the Act before its approval.¹⁰ If an amendment provides an additional \$100,000 in financial assistance, the IDA must hold a public hearing after providing 10 calendar days' published notice before approving the amendment by resolution at an IDA meeting.¹¹

The critical issue is to provide the IDA with sufficient time to review and consider the request. A request for an extension of a PILOT agreement in order to delay the implementation of the PILOT payment schedule because of pandemic-related construction delays is certainly an easier request for an IDA to consider than a request for a reduction in PILOT payments because of pandemic-related cash flow issues. However, in either case, failure to give the IDA time enough to consider the request may result in defaults under the PILOT agreement, termination of the PILOT agreement, and potential clawback of benefits by the IDA.

Sales and Use Tax Benefits

In addition to an abatement of real property taxes under a PILOT agreement, IDAs can provide a sales and use tax exemption to a company benefitting from an IDA project.¹² To grant this financial assistance, the IDA must appoint the company as an agent of the IDA for

⁶ General Municipal Law section 856(2).

⁷ 2015 N.Y. Sess. Laws, Ch. 563 (S. 5867).

⁸ General Municipal Law section 859-a(4)-(6).

⁹ General Municipal Law section 854(16).

¹⁰ General Municipal Law section 859-a(2).

¹¹ General Municipal Law section 859-a(1)-(3).

¹² General Municipal Law section 874(1) and N.Y. Tax Law section 1116(a)(1).

the project. Within 30 days of the appointment, the IDA must file Form ST-60 with the Department of Taxation and Finance identifying the amount of the exemption granted and the date on which the appointment as an agent of the IDA expires.¹³ The appointment typically expires at the end of the construction period or when the company receives its certificate of occupancy. Once appointed, agents can make purchases to acquire, build, or equip a project exempt from both the state and local sales and use taxes.¹⁴

If construction of a project is delayed or a supply chain is interrupted because of COVID-19, an IDA can approve an extension of the agency exempt sales tax period. The company may also need a modification in the sales tax appointment to increase the amount of the sales tax exemption. Notifying an IDA well in advance of the need for an extension of the agency exempt sales tax period or an increase in the amount of the exemption will provide the IDA with the required time to review the request and determine its impact. Similar to an amendment to a PILOT agreement, if an amendment to the appointment for sales and use tax exemption results in more than \$100,000 of financial assistance, the IDA must hold a public hearing.¹⁵

As in the case of potential amendments of PILOT agreements described above, companies seeking modification of a sales and use tax exemption should provide the IDA with sufficient time to review and consider the request. Failure to do so may result in defaults under the sales tax documents, termination of the sales tax benefits, and potential clawback of benefits by the IDA.

One additional issue to consider when requesting an increase in the amount of the sales tax exemption from an IDA is the impact of the overall increase in the project costs. An IDA's administrative fee is typically based on the total cost of an IDA project, and an increase in the total cost of a project post-closing can lead to an increase in the IDA's administrative fee. Some

IDAs require a final report following the construction period to confirm the total cost of the project. If the project costs have increased significantly from the amount described in the application submitted to the IDA for the project, then the IDA will calculate the amount of additional administrative fees that the company owes to the IDA.

A company should review its straight-lease documents to determine if the IDA will require a final report for this purpose. A company should also confirm when requesting an increase in the sales tax exemption because of COVID-19 supply chain interruptions and supply shortages that the IDA will not require an increase in its fee because of the increased project costs. There is some concern on the part of IDAs that companies underreport the total project cost on the application to reduce the IDA fee. A company should emphasize that any cost increases are directly related to the impact of COVID-19 to assure the IDA that it properly reported its project cost on the application. ■

¹³ General Municipal Law section 874(9).

¹⁴ See *Wegmans Food Markets Inc. v. Department of Taxation and Finance* (126 Misc.2d 144, *aff'd*, 115 A.D.2d 962 *lv denied* 67 N.Y.2d 606); *Wegmans Food Markets v. Department of Taxation and Finance of the State of N.Y.* (Sup. Ct., Monroe County, Jan. 10, 1992, Galloway, J.); and Tax Status of IDA Projects, TSB-M-87(7)S (Apr. 1, 1987).

¹⁵ General Municipal Law section 859-a(1)-(3).