



# Instructions for Form CT-638

## START-UP NY Tax Elimination Credit

Tax Law — Article 1, Section 40 and Article 9-A, Section 210.47

**CT-638-I**

### General information

For tax years beginning on or after January 1, 2014, the tax elimination credit is available to taxpayers who are approved to participate in the SUNY Tax-Free Areas to Revitalize and Transform Upstate New York (START-UP NY) Program. This program provides tax benefits to approved businesses that locate in vacant space or land of approved public and private colleges and universities, approved strategic state assets, and New York incubators affiliated with private universities or colleges that are designated as tax-free NY areas. The program is administered by Empire State Development (ESD). Approved businesses will be issued a Form DTF-74, *Certificate of Eligibility*, by the sponsoring campus, university, or college. For additional information about the START-UP NY program, visit [www.esd.ny.gov](http://www.esd.ny.gov) and the Tax Department's Web site (see *Need help?*).

The credit is equal to the product of the tax-free NY area allocation factor and the tax factor.

Unless the taxpayer's tax-free NY allocation factor is 100%, the credit may not reduce the tax liability below the fixed dollar minimum tax.

The credit is not allowed against the metropolitan transportation business tax (MTA surcharge) under Article 9-A.

Any unused amount of credit for the current tax year will be treated as an overpayment of tax to be refunded or credited to next year's tax. Interest will not be paid on the overpayment.

### Eligibility

A taxpayer that is a business, or an owner of a business in the case of a business taxed as a sole proprietorship, partnership (including a limited liability company taxed as a partnership), or New York S corporation, that is subject to tax under Tax Law Article 9-A (corporation franchise tax) or Article 22 (personal income tax), is eligible for the credit if the business:

- is approved to participate in the START-UP NY program under Economic Development Law (EDL) Article 21 by ESD;
- operates in a tax-free NY area at a location approved under EDL Article 21;
- creates and maintains net new jobs as required by EDL section 433.1(b); and
- meets an annual employment test beginning with the first year of operation as required by EDL section 433.1(b).

**Note:** A business that has successfully completed residency in a New York State incubator pursuant to Urban Development Corporation Act section 16-v is **not** required to create or maintain net new jobs as required by EDL section 433.1(b) to claim the tax benefits under the START-UP NY program. However, to qualify for the credit, the business must at least maintain the number of employees of the business in New York State as shown on their application for entry into the program. For more information on New York State incubators, see ESD's Web site.

An eligible taxpayer subject to tax under Article 9-A may claim the credit for 10 consecutive tax years beginning with the tax year during which the business locates in a tax-free NY area. These taxpayers should complete Form CT-638. Eligible taxpayers subject to tax under Article 22 should complete Form IT-638, *START-UP NY Tax Elimination Credit*. An approved business may not claim any other tax credit allowed under the tax law other than those under section 39, with respect to its activities or employees in a tax-free NY area.

If the approved START-UP NY business is notified by ESD that it is subject to a recovery of tax benefits for the current tax year due to not meeting its performance benchmarks outlined in its application, the business must reduce the current year tax credit by the percentage reduction in net new jobs as set by the performance benchmarks.

### Penalties for fraud

If the Commissioner of Economic Development makes a final determination that an approved business participating in the START-UP NY program has acted fraudulently in connection with its participation in the program, the business will be:

- immediately terminated from the program;
- subject to criminal penalties, including but not limited to the felony crime of offering a false instrument for filing in the first degree in accordance with Penal Law section 175.35; and
- required in that year to add back to tax the total value of all of the tax benefits provided under the START-UP NY program that the business and the employees of the business have received up to the date of the final determination. The amount required to be added back is reported on the business's corporation franchise tax return if the business is taxed as a corporation or is a corporate partner of a partnership. If the owner of the business is a sole proprietor, an individual partner in a partnership, or a shareholder of a New York S corporation, the amount required to be added back is reported on their personal income tax return.

### Definitions

A *net new job* means a job created in a tax-free NY area by a business participating in the START-UP NY program that satisfies all of the following criteria:

- the job is new to the state;
- the job has not been transferred from employment with another business located in this state through an acquisition, merger, consolidation, or other reorganization of businesses, or through the acquisition of assets of another business, or transferred from existing employment with a related person, as defined in Internal Revenue Code (IRC) section 465(b)(3)(C), located in the state, to similar employment with the business, unless the business has received approval for such transfers from the Commissioner of Economic Development;
- the job is not filled by an individual employed within the state within the preceding 60 months by a related person;
- the job is either a full-time, wage-paying job or two or more part-time jobs, which together constitute the equivalent of a full-time, wage-paying job (a full-time, wage-paying job requires at least 35 hours of work per week); and
- the job is filled for more than six months during each year for which the tax benefits are being granted.

The annual *employment test* is satisfied if the average number of employees of the business and its related persons in the state during the year equals or exceeds the sum of:

- the average number of employees of the business and of its related persons in the state during the tax year immediately preceding the year in which the business submits its application to locate in a tax-free NY area; and
- the average number of net new jobs of the business in the tax-free NY area during the tax year.

The average number of employees of the business and of its related persons in the state is determined by adding the

total number of employees of the business and of its related persons in the state on March 31, June 30, September 30, and December 31 during the applicable tax year and dividing the sum by the number of these dates occurring within the applicable tax year.

The average number of net new jobs of the business in the tax-free NY area is determined by adding the total number of net new jobs of the business in the tax-free NY area on March 31, June 30, September 30, and December 31 during the applicable tax year and dividing the sum by the number of these dates occurring within the applicable tax year.

The information below represents the Internal Revenue Service (IRS) interpretation of the definition of *related person* in IRC section 465(b)(3)(C) as contained in IRS Publication 925, *Passive Activity and At-Risk Rules*. When preparing your tax return, you should refer to section 465(b)(3)(C) to see if the definition of related person has been amended.

**Related person** includes the following:

- members of a family, but only an individual's brothers and sisters, half-brothers and half-sisters, a spouse, ancestors (parents, grandparents, etc.), and lineal descendants (children, grandchildren, etc.);
- two corporations that are members of the same controlled group of corporations determined by applying a 10% ownership test;
- the fiduciaries of two different trusts, or the fiduciary and beneficiary of two different trusts if the same person is the grantor of both trusts;
- a tax-exempt educational or charitable organization and a person who directly or indirectly controls it (or a member of whose family controls it);
- a corporation and an individual who owns, directly or indirectly, more than 10% of the value of the outstanding stock of the corporation;
- a trust fiduciary and a corporation of which more than 10% in value of the outstanding stock is owned, directly or indirectly, by or for the trust or by or for the grantor of the trust;
- the grantor and fiduciary, or the fiduciary and beneficiary, of any trust;
- a corporation and a partnership if the same persons own over 10% in value of the outstanding stock of the corporation and more than 10% of the capital interest or the profits interest in the partnership;
- two S corporations if the same persons own more than 10% in value of the outstanding stock of each corporation;
- an S corporation and a regular corporation if the same persons own more than 10% in value of the outstanding stock of each corporation;
- a partnership and a person who owns, directly or indirectly, more than 10% of the capital or profits of the partnership;
- two partnerships if the same persons, directly or indirectly, own more than 10% of the capital or profits of each;
- two persons who are engaged in business under common control; and
- an executor of an estate and a beneficiary of that estate.

To determine the direct or indirect ownership of the outstanding stock of a corporation, apply the following rules:

1. Stock owned, directly or indirectly, by or for a corporation, partnership, estate, or trust is considered owned proportionately by or for its shareholders, partners, or beneficiaries.
2. Stock owned, directly or indirectly, by or for an individual's family is considered owned by the individual. The family of

an individual includes only brothers and sisters, half-brothers and half-sisters, a spouse, ancestors, and lineal descendants.

3. Any stock in a corporation owned by an individual (other than by applying rule 2) is considered owned, directly or indirectly, by the individual's partner.

When applying rule 1, 2, or 3, stock considered owned by a person under rule 1 is treated as actually owned by that person. However, if a person constructively owns stock because of rule 2 or 3, he or she does not own the stock for purposes of applying either rule 2 or 3 to make another person the constructive owner of the same stock.

*Value of the business's real and tangible personal property* means the adjusted basis of the properties for federal income tax purposes, except in the case of rented property, where the value is eight times the gross rents payable for the rental of the property during the tax year.

The partner's *entire income* means the entire net income (ENI) or minimum taxable income (MTI) allocated within New York State.

The *partner's income from the partnership* means partnership items of income, gain, loss, deduction, and New York modifications entering into ENI or MTI.

The *business's income for members of a combined group* means the ENI, or MTI, allocated within the state and calculated as if the taxpayer was filing separately.

*Combined group's income* means ENI or MTI allocated within the state, as shown on the combined return.

*Partnership income* means the partnership items of income, gain, loss and deduction, and the associated New York modifications included in ENI or MTI.

## Specific instructions

### Corporations (other than New York S corporations)

If you are a corporation (other than a New York S corporation) that is eligible for this credit, and you are not claiming any other START-UP NY tax elimination credits from flow-through entities (such as partnerships), complete lines A and B and Schedules A, B, D (Part 1), E, F, and G.

If you are a corporation that is eligible for the credit, and you also have START-UP NY tax elimination credits from a partnership(s), file Form CT-638 as instructed above, and file a separate Form(s) CT-638 to compute the credits from the partnership(s). Add the totals from all forms and enter the result in the appropriate credit box on your franchise tax return. Attach all forms to your return.

### Corporate partners

If you are receiving flow-through credits from a partnership, your partnership should provide you with the information you need to calculate the credit. Complete lines A, B, and C and Schedules D (Part 2), E, F, and G.

### New York S corporations

Complete lines A and B and Schedules A, B, C, and G. Transfer the allocation factor (line 11) and the three factor formula business allocation percentage (BAP) (line 12) to Form CT-34-SH, *New York S Corporation Shareholders' Information Schedule*. Provide the shareholders with these factors (**do not** prorate) so they may calculate their credit on Form IT-638.

If you are a corporate partner passing credit from a partnership to your shareholders and you are not passing credit earned by you, **do not** complete this form. Instead, the S corporation must use Form CT-34-SH to report the allocation factor of the partnership (see Form CT-34-SH-I, *Instructions for Form CT-34-SH*). Each individual shareholder can then compute the credit on Form IT-638 to claim it on their New York State personal income tax return.

**Shareholders of New York S corporations: Do not file** this form. Use Form IT-638 to claim your credit if you are an individual, or estate or trust. Your S corporation should provide you with the allocation factor and the three factor formula BAP you need to compute your credit on Form IT-638. Compute the tax factor on Form IT-638.

## Line instructions

**Line A** – Enter the number from the *Certificate of Eligibility* issued to the approved START-UP NY business. Partners should receive this information from the partnership. Attach a copy of the *Certificate of Eligibility* to Form CT-638.

**Line B** – You may claim the credit for 10 consecutive tax years, starting with the first tax year the approved business that was issued the *Certificate of Eligibility* locates in a tax-free NY area. Enter a number 1 through 10 representing the tax year of the START-UP NY business tax benefit period for which you are claiming the credit on this form.

## Schedule A – Employment test

Compute your employment number within New York State for the current tax year and the tax year immediately preceding the year in which the business submitted its application to locate in a tax-free NY area.

For purposes of these instructions, all references to *current tax year* mean the tax year covered by this claim.

**Line 1** – For each date specified of the current tax year, enter the number of employees of the business and of its related persons who are located within New York State. Divide the total number of employees for the current tax year by the number of dates occurring during the current tax year (even if you had no employees on those dates) to obtain the current tax year employment number. Make no entries for any dates that did not occur during your tax year and do not include those dates in the calculation.

**Line 2** – For each date specified of the tax year immediately preceding the year in which the business submitted its application to locate in a tax-free NY area, enter the number of employees of the business and of its related persons who were located within New York State. Divide the total number of employees for the tax year immediately preceding the year of application by the number of dates occurring during that tax year (even if you had no employees on those dates). Make no entries for any dates prior to the date you began business in New York, and do not include those dates in the calculation.

**Line 3** – For each date specified of the current tax year, enter the number of net new jobs (see *Definitions*) of the business in the tax-free NY area. Divide the total net new jobs for the current tax year by the number of the dates occurring during the current tax year (even if you had no net new jobs on those dates) to obtain the current year net new jobs. Make no entries for any dates that did not occur during your tax year and do not include those dates in the calculation.

If this line equals 0 and it is the first year of the START-UP NY business tax benefit period (line B is 1), you **do not** qualify for the credit. **Do not** complete the rest of this form.

**Line 5** – The employment number for the current tax year (line 1) must equal or exceed the employment number for the year immediately preceding application (line 2) **plus** the number of net new jobs (line 3) to qualify for the credit.

## Schedule B – Allocation factor

The *tax-free NY area allocation factor* is the percentage of the business's economic presence in the tax-free NY area where the business was approved to locate under EDL Article 21. The tax-free NY area allocation factor is a percentage computed using two factors: a property factor and a wage factor. The percentage is calculated by adding the two percentages determined on lines 7 and line 9 and then dividing the result by two.

The tax-free NY property factor is determined by dividing:

- the average value of the business's real and tangible personal property (see *Definitions*), whether owned or rented to it, in the tax-free NY area in which the business was located during the period covered by the taxpayer's return, by
- the average value of all the business's real and tangible personal property, whether owned or rented to it, within New York State during the period covered by the taxpayer's return.

The tax-free NY wage factor is determined by dividing:

- the total wages, salaries, and other personal service compensation paid during the tax year to employees (except general executive officers) employed at the business's location in the tax-free NY area, by
- the total wages, salaries, and other personal service compensation paid during the tax year to all of the business's employees within New York State (except general executive officers).

**Line 6, column A** – Enter the average value of real and tangible personal property, whether owned or rented, that is located within the tax-free NY area in which the business was located during the current tax year.

**Line 6, column B** – Enter the average value of real and tangible personal property, whether owned or rented, that is located within New York State during the current tax year.

**Line 8, column A** – Enter the total wages, salaries, and other personal service compensation paid during the tax year to employees (except general executive officers) employed at the business's location in the tax-free NY area.

**Line 8, column B** – Enter the total wages, salaries, and other personal service compensation paid during the tax year to all of the business's employees within New York State (except general executive officers).

## Schedule C – New York S corporation three factor formula business allocation percentage (C corporations do not complete this schedule)

**Line 12** – For purposes of the START-UP NY tax elimination credit only, the shareholders of a New York S corporation must compute their income from the New York S corporation allocated within New York State by multiplying their share of income from the S corporation by the S corporation's BAP computed using a three factor formula that includes property, receipts, and wages. Use Form CT-3-S-ATT, *Attachment to Form CT-3-S*, lines 1 through 18, to compute a three factor formula BAP.

**Do not** complete Schedule D. Transfer the factors from lines 11 and 12 to Form CT-34-SH, and provide them to your shareholders. The shareholders will calculate the START-UP NY tax elimination credit on Form IT-638.

**Schedule D – Tax factor (New York S corporations do not complete this schedule)**

The *tax factor* is the largest of the taxes on the ENI base, capital base, MTI base, or fixed dollar minimum tax after the deduction of any other credits (referred to below as the *applicable tax*). However, in the case of Article 9-A corporate partners and members of a combined group, the tax factor must be computed as follows:

- For corporate partners who are partners in an approved tax-free NY area partnership, the tax factor is the applicable tax determined above multiplied by a ratio of the partner's income from the partnership (see *Definitions*) allocated within New York State to the partner's entire income (see *Definitions*) allocated within New York State. The income from the partnership allocated within New York State is determined as if all of the partners were nonresidents.
- For taxpayers who are required or permitted to file a combined return, the *tax factor* is the portion of the largest of the taxes on the ENI base, capital base, MTI base, or fixed dollar minimum tax computed for the combined group after the deduction of any other credits attributable to the income of the business located in the tax-free NY area. The attribution is computed by multiplying the tax for the combined group after the deduction of any other tax credits by a ratio of the business's income (see *Definitions*) allocated within the state to the combined group's income (see *Definitions*) allocated within the state.

If the partner's share of income is zero or a loss, the tax factor is 0. The Commissioner of Taxation and Finance may prescribe other methods that reasonably reflect the portion of tax attributable to business activity in the tax-free NY area. In all cases, if the approved business is generating or receiving income from a line of business or intangible property that was previously conducted, created, or developed by the business or a related person (see *Definitions*), this income is disregarded in the computation of the tax factor.

Only complete Part 1 or Part 2 as applicable. If you are computing your own credit, complete Part 1 only. If you are computing your share of credit from a START-UP NY partnership, complete Part 2 only.

**Part 1 – Corporations computing their own credit**

**Line 13** – Enter the amount from Form CT-3, line 75, or Form CT-3-A, line 75.

**Line 14** – The tax factor is computed based on your tax after the deduction of any other allowable credits. If you are included in a combined return, include any amount of tax credit(s), including the START-UP NY tax elimination credit, being claimed by other members of the combined group.

**Line 15**

**CT-3 filers:** Subtract line 14 from line 13. Enter this amount here and on line 24.

**CT-3-A filers:** Subtract line 14 from line 13. Multiply this amount by a ratio, the numerator of which is the amount of START-UP NY business income allocated to New York State, and the denominator of which is the income of the combined group allocated to New York State. **Do not** include in the numerator or the denominator any member's losses included in the combined group's income. This ratio may not exceed 1.0. Enter this amount here and on line 24.

**Part 2 – Corporate partners**

When computing the tax factor for corporate partners, if the income from the START-UP NY business is zero or a loss, the tax elimination credit for the corporate partner is 0.

**Note:** If you are a partner in more than one partnership, complete a separate Form CT-638 for each partnership.

**Line 16** – Enter the amount from Form CT-3, line 75, or Form CT-3-A, line 75.

**Line 17** – The tax factor is computed based on your tax after the deduction of any other allowable credits. If you are included in a combined return, include any amount of tax credit(s), including the START-UP NY tax elimination credit, being claimed by other members of the combined group.

**Line 18**

**CT-3 filers:** Subtract line 17 from line 16.

**CT-3-A filers:** Subtract line 17 from line 16. Multiply this amount by a ratio, the numerator of which is the amount of income allocated to New York State attributable to the corporation that is the member of the START-UP NY partnership, and the denominator of which is the income of the combined group allocated to New York State. This ratio may not exceed 1.0.

If the members of the combined group have net operating losses (NOLs), compute the ratio of START-UP NY income as described above without including losses in either the numerator or denominator.

If the corporate member of the combined group that is the member of the START-UP NY partnership has an NOL, the credit is zero.

**Line 19** – Enter your pro rata share of New York partnership income (see *Definitions*) allocated to New York State derived from the START-UP NY partnership.

To allocate your pro rata share of the START-UP NY partnership income to New York State use the worksheet below.

| <b>Worksheet</b>  |                 |
|---|-----------------|
| <b>A</b> Enter your pro rata share of START-UP NY partnership income included in <b>business income before allocation</b> on your New York State corporation tax return ..... | <b>A.</b> _____ |
| <b>B</b> Enter your BAP as calculated on your New York State franchise tax return .....   | <b>B.</b> _____ |
| <b>C</b> Multiply line A by line B .....  | <b>C.</b> _____ |
| <b>D</b> Enter your pro rata share of START-UP NY partnership income included in <b>investment income before allocation</b> on your New York State franchise tax return ..... | <b>D.</b> _____ |
| <b>E</b> Enter your investment allocation percentage as calculated on your New York State franchise tax return .....  | <b>E.</b> _____ |
| <b>F</b> Multiply line D by line E .....  | <b>F.</b> _____ |
| <b>G</b> Add lines C and F; enter here and on line 19.....  | <b>G.</b> _____ |

**Schedule E – Computation of credit**

**Line 23 – Corporate partners:** The allocation factor should be provided to you by the partnership.

**Schedule F – Computation of tax credit used, refunded, or credited as an overpayment to the next year**

**Line 26** – Enter the amount from Form CT-3, line 78, or Form CT-3-A, line 77, **plus** any net recaptured tax credits.

**Line 27** – If you are claiming more than one tax credit for this year, enter the total amount of credits claimed before applying this credit. Otherwise, enter **0**. Tax credits must be applied in a certain order. Refer to Form CT-600-I, *Instructions for Form CT-600*, for the correct order of credits.

If filing as a member of a combined group, include any amount of tax credit(s), including the START-UP NY tax elimination credit(s), being claimed by other members of the combined group that you want to apply before this credit.

### **Need help? and Privacy notification**

See Form CT-1, *Supplement to Corporation Tax Instructions*.

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