



# Instructions for Form IT-645

## Recapture of START-UP NY Tax Benefits

Tax Law – Sections 39 and 39-a

# IT-645-I

### General information

The SUNY Tax-Free Areas to Revitalize and Transform Upstate New York (START-UP NY) 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 are issued a 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 website (see [www.tax.ny.gov](http://www.tax.ny.gov)). Also see TSB-M-13(7)C, (6)I, *SUNY Tax-Free Areas to Revitalize and Transform Upstate New York Program (START-UP NY program)*.

### Who must file

Complete Form IT-645 to report a recapture of START-UP NY tax benefits due to proportional recovery or fraud. You must file Form IT-645 with your personal income tax return.

Do **not** use this form if:

- you are terminated from the program under Economic Development Law (EDL) section 436.4(b) because you no longer satisfy the eligibility criteria. You are not subject to recapture. However, upon termination you may not claim any tax benefits under Tax Law section 39 for that or any future tax year, calendar quarter, or sales tax quarter.
- you chose suspension from the program as a consequence of not meeting your performance benchmarks. **Note:** You are not eligible for any tax benefits during any tax years that you are suspended from the START-UP NY Program.

### Proportional recovery of tax benefits

If the approved START-UP NY business is notified by ESD that they are subject to a recovery of tax benefits due to not meeting their performance benchmarks outlined in their START-UP NY Program application, the business must reduce the total amount of START-UP NY tax benefits that were claimed or refunded for that measurement year by the percentage reduction in the number of net new jobs as set by the performance benchmarks. The percentage is calculated by dividing the difference between the number of net new jobs promised by the performance benchmark, and actual net new jobs created by the number of net new jobs promised in the performance benchmark. ESD will perform an annual review on a calendar-year basis and notify you if you have not reached your performance benchmark. If you are notified that you are subject to proportional recovery, you must file Form IT-645 to report your recapture with your next personal income tax return due after the date of notification. The recovery of tax benefits amount is computed in Schedule A of Form IT-645.

### 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 for 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. The add back of tax benefits is computed in Schedule B of Form IT-645.

### How to recapture tax benefits

File Form IT-645 if you are an individual, a partnership, or an estate or trust, and you are subject to the recapture. In addition, if you are a partner in a partnership (including members of a limited liability company (LLC) treated as a partnership for federal tax purposes), a shareholder of a New York S corporation, or a beneficiary of an estate or trust, file Form IT-645 to claim your share of the recapture from the entity.

An estate or trust that divides the recapture among itself and its beneficiaries must submit Form IT-645 with Form IT-205, *Fiduciary Income Tax Return*, showing each beneficiary's share of the recapture.

Partnerships must file Form IT-645 with Form IT-204, *Partnership Return*, showing the total amount of recapture.

An S corporation does not file Form IT-645; it must file Form CT-645. If you are a shareholder of an S corporation that made the election under Tax Law, Article 22, section 660, obtain your share of the S corporation's recapture from the S corporation and report it on Form IT-645.

### Definitions

*Approved START-UP NY business* is a taxpayer who is a business or owner of a business that operates within a tax-free NY area and who is approved to participate in the START-UP NY Program pursuant to EDL Article 21.

*A net new job* means a job created by a business participating in the START-UP NY Program in a tax-free NY area 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 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.

## Specific instructions

See the instructions for your tax return for the *Privacy notification* or if you need help contacting the Tax Department.

### Individual (including sole proprietor) and partnership:

Complete lines A and B, and Schedules A or B, and E.

### A married couple in a business enterprise that made an IRC 761(f) election to file two federal Schedule C forms instead of a partnership return:

If you file jointly, compute your recapture amount as if you were filing one federal Schedule C for the business. Complete lines A and B, and Schedules A or B, and E.

### Partner in a partnership, shareholder of a New York S corporation, and beneficiary of an estate or trust:

Complete lines A and B, and Schedules C and E.

**Fiduciary:** Complete lines A and B, and Schedules A or B, D, and E. If you are an estate or trust that divides the recapture among itself and its beneficiaries, submit all Forms IT-645 with Form IT-205 showing each beneficiary's share of recapture.

**Note:** If more than one of the above applies to you, complete all appropriate parts on one Form IT-645.

## Line instructions

**Line A** – Enter the number from the *Certificate of Eligibility* issued to the approved START-UP NY business. Partners, shareholders and beneficiaries will receive this information from the partnership, New York S corporation, estate or trust.

**Line B** – Enter the employer identification number (EIN) of the certified START-UP NY business.

### Complete either Schedule A or Schedule B

Complete Schedule A if you are notified by ESD that the business is subject to recovery of tax benefits due to not meeting its performance benchmarks outlined in its application.

Complete Schedule B if ESD has made a final determination that the business is required to add back the total value of all tax benefits provided under the START-UP NY Program due to fraud.

## Schedule A – Proportional recovery of tax benefits

**Line 1** – Enter the beginning and ending dates for the year subject to proportional recovery as shown on the notification letter received from ESD. This is the year subject to ESD's annual review to determine if you met your performance benchmark.

**Line 2** – Enter the period (1 through 10) during which you are reporting a proportional recovery of tax benefits.

### Proportional recovery percentage

**Line 3** – Enter the number of net new jobs benchmark provided for in the business's START-UP NY application.

**Line 4** – Enter the net new jobs actually created for the year.

**Line 6** – Divide line 5 by line 3. This is your **proportional recovery percentage**. This should match the proportional recovery percentage shown on the notification letter received from ESD. Enter this percentage as a decimal rounded to the fourth place (for example, 33.33% should be entered as .3333). Also enter the decimal on lines 8, 11, 14, 17, and 20 as those tax benefits are applicable to the year that is subject to proportional recovery.

**Lines 7 through 22** – Complete all applicable lines that represent the tax benefits received for the year that is subject to proportional recovery.

#### **START-UP NY tax elimination credit**

**Line 7** – Enter the total credit amount from Form IT-638, *START-UP NY Tax Elimination Credit*, for the tax year ending within the measurement year entered on line 1.

#### **START-UP NY telecommunication service excise tax credit**

**Line 10** – Enter the total credit amount from Form IT-640, *START-UP NY Telecommunication Services Excise Tax Credit*, for the tax year ending within the measurement year entered on line 1.

#### **Metropolitan Commuter Transportation Mobility Tax (MCTMT)**

**Line 13** – Multiply the amount of payroll expense excluded in computing your MCTMT for each quarter ending within the year entered on line 1 by the applicable MCTMT rate for the quarter. Enter the total MCTMT on payroll expenses excluded on line 13. See the instructions for Form MTA-305, *Employer's Quarterly Metropolitan Commuter Transportation Mobility Tax Return*.

#### **Sales and use tax**

**Line 16** – Enter the amount of all credit or refunds of sales or use tax claimed on Form AU-11, *Application for Credit or Refund of Sales or Use Tax*, as a result of participation in the START-UP NY Program for the year shown on line 1.

#### **Real estate transfer tax**

**Line 19** – If during the year entered on line 1, you filed Form TP-584-SNY, *Real Estate Transfer Tax Return for START-UP NY Leases*, to claim exemption from the New York State real estate transfer tax, complete Form TP-584, *Combined Real Estate Transfer Tax Return, Credit Line Mortgage Certificate, and Certification of Exemption from the Payment of Estimated Personal Income Tax*, as if the exemption had not applied and enter the total tax due on line 19.

#### **Schedule B – Recapture of tax benefits due to fraud**

**Lines 23 through 29** – Complete all applicable lines that represent the tax benefits received for all tax years that the business participated in the START-UP NY Program. If you were subject to proportional recovery during a tax year, report the tax benefits received for all tax years minus any proportional recovery amount.

**Line 23** – For each year that the business participated in the START-UP NY Program, enter the total amount of credits claimed on Form IT-638.

**Line 24** – For each year that the business participated in the START-UP NY Program, enter the total amount of credits claimed on Form IT-640.

**Line 25** – For each year that the business participated in the START-UP NY Program and excluded payroll expenses in computing the MCTMT, recompute the MCTMT without the exclusion. From this recomputed MCTMT subtract the actual MCTMT paid for the year. Enter this result on line 25.

**Line 26** – Enter the total amount of refunds and credits of sales or use tax paid claimed by the START-UP NY business on Form AU-11.

**Line 27** – For each year that the business participated in the START-UP NY Program and filed Form TP-584-SNY, complete Form TP-584 as if the exemption did not apply and enter the total amounts from Form TP-584, line 6.

**Line 28** – For each year that the business participated in the START-UP NY Program and had eligible employees who claimed a START-UP NY wage exclusion from NYS personal income taxes, NYC personal income taxes, the Yonkers city income tax and the Yonkers nonresident earnings tax, the tax benefits received by those employees must be recaptured by the business. You must use one of the methods below:

- Recompute each employee's tax without the exclusion. From this recomputed tax, subtract the actual tax paid by each employee; **or**
- Multiply the amount of wages excluded for each year by the highest personal income tax rate in effect for that year.

#### **Schedule C – Partnership, New York S corporation, and estate and trust information**

Enter the appropriate information for each partnership, S corporation, or estate or trust from which you received a share of the recapture. You may obtain this information from the partnership, New York S corporation, estate or trust.

**Line 30** – If you need more space, enter your name and taxpayer identification number, and complete only Schedule C on additional Forms IT-645. Place the extra forms behind the first Form IT-645. Include on line 30 of the first Form IT-645 the total of column E from all additional Forms IT-645.

#### **Schedule D – Beneficiary's and fiduciary's share of recapture**

An estate or trust must complete this schedule. If an estate or trust allocates or assigns the recapture to its beneficiaries, base the division on each beneficiary's proportionate share of the income of the estate or trust. Provide your beneficiaries with their proportionate amount of the recapture.

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