This draft includes updates to Parts 5 – 9 (*previously posted January 2021*) and Part 10 (*previously posted April 2021*). In addition to minor editorial and consistency edits, the more notable changes are outlined by topic below.

Reports

- Clarification that a short period report is generally not required when a corporation remains in the same New York State combined group before and after changes that would have otherwise necessitated a short period report.
- Confirmation that a designated agent may change between tax years.

MTA Surcharge

- Clarification that the underlying assets of a capital lease are considered owned by the surcharge taxpayer for purposes of the property factor.

Special Entities

- Inclusion of a separate accounting election for certain foreign limited corporate partners in a new section 10-2.6.
- Addition of a new Subpart 10-6 that addresses the tax computation for residual interest holders of a real estate mortgage investment conduit (REMIC).

As the Department would like to begin the formal regulation adoption process this year, we strongly encourage feedback on necessary changes being submitted in the near future so the Department has time to consider changes before regulations are proposed.

As a reminder, the revisions to Part 5 (*Tax Credits*) only make minimal changes to existing regulations necessary to correspond to the timing and objective of the larger corporate tax reform project. The Department still intends to undertake a more comprehensive credit regulation effort after the corporate tax reform regulations are adopted.

PART 5

CREDITS AGAINST TAX

SUBPART 5-1

INVESTMENT TAX CREDIT

Section 5-1.1 General. (Tax Law, Section 210-B(1)(a)).

(a) A corporation is allowed an investment tax credit against the tax imposed by article 9-A with respect to qualified tangible personal property and other tangible property, including buildings and structural components of buildings that were acquired, constructed, reconstructed or erected after December 31, 1968.

(b) A corporation must claim the investment tax credit for the first taxable year in which the property becomes qualified property.

(c) The investment tax credit shall not reduce the tax to less than the fixed dollar

minimum tax. If the corporation has an excess investment tax credit after reducing the tax due to the fixed dollar minimum tax or otherwise pays tax on the fixed dollar minimum, the excess credit may be carried over to the fifteen taxable years immediately following such taxable year and may be deducted from the corporation's tax for such year or years. In lieu of the carryover, any corporation that qualifies as a new business under section 210-B(1)(f) may elect to treat the excess credit as an overpayment of tax to be credited or refunded.

(d) A corporation must submit a Claim for Investment Tax Credit on Form CT-46 when claiming the credit.

Section 5-1.2 Qualified and nonqualified tangible personal property. (Tax Law, Section 210-B(1)(b)).

(a) The term "qualified tangible personal property" means tangible property that satisfies the requirements set forth in section 210-B(1)(b)(i).

(b) The term "nonqualified tangible personal property" means tangible personal property that is not qualified tangible personal property. It includes, but is not limited to, the following:

(1) Tangible personal property and other tangible property, including buildings, and structural components of buildings, that a corporation leases to any other person or corporation. For purposes of the preceding sentence, any contract or agreement to lease or rent or for a license to use such property will be considered a lease. However, in cases where production property is leased in form and the lessee is in fact the beneficial owner and entitled to take Federal depreciation on the property and the property qualifies, the lessee may be entitled to take the investment tax credit. The use of a qualified film production facility by a qualified production company is not considered a lease of that facility to that company.

(2) Retail equipment, office furniture, and office equipment.

(3) Excavating and road building equipment.

(4) Transportation equipment used on public roads.

(5) Property used to transport raw materials to the raw materials warehouse or finished goods to customers.

(6) Public warehouses used to store the corporation's goods.

(7) Property principally used in the production or distribution of electricity, natural gas after extraction from wells, steam, or water delivered through pipes and mains.

Section 5-1.3 Meaning of other terms. (Tax Law, section 210-B(1)(b)(ii))

For purposes of the investment tax credit, the following terms have these meanings:

(1) The term "manufacturing" means the process of working raw materials into wares suitable for use or which gives new shapes, new quality or new combinations to matter which already has gone through some artificial process by the use of machinery, tools, appliances and other similar equipment.

(2) The term "property" used in the production of goods includes machinery, equipment or other tangible property which is principally used in the repair and service of other machinery, equipment or other tangible property used principally in the production of goods and includes all facilities used in the production operation, including storage of material to be used in production and of the products that are produced. Since property and equipment used to store raw materials and finished goods are included in the meaning of manufacturing, property and equipment at the raw material warehouse and at the finished goods warehouse of a manufacturer qualify, provided that the property and equipment are principally used in storing the raw materials or finished goods. Property used for transportation of goods during

the manufacturing process qualifies.

(3) The term "principally used" means more than 50 percent. A building or addition to a building is principally used in production where more than 50 percent of its usable business floor space is used in storage and production. Floor space used for bathrooms, cafeterias and lounges is not usable business floor space. Space used for offices, accounting, sales and distribution is not used in production. Dual purpose machinery is principally used in production when it is used in production more than 50 percent of its operating time.

Section 5-1.4 Computing the investment tax credit. (Tax Law, section 210-B(1)(a), (e))

The amount of credit that a corporation is allowed is computed at the rate set forth in section 210-B(1)(a) of the investment credit base as determined in section 210-B(1)(a).

Section 5-1.5 Re-computation of investment tax credit on property disposed of or property that ceases to qualify. (Tax Law, section 210-B(1))

(a) If property on which investment tax credit has been claimed is disposed of or ceases to be in qualified use prior to the end of its useful life, the difference between the credit taken and the credit allowed for actual use must be added back to the tax otherwise due in the year of disposition or disqualification.

(b) The amount of investment tax credit to be added back is computed as follows:

(1) divide the total number of months in qualified use of the property by the total number of months of useful life;

(2) multiply the amount computed in paragraph (1) of this subdivision by the amount of the credit claimed on the property to ascertain the credit allowed for actual use;

(3) subtract the credit allowed for actual use from the credit claimed on the property to

determine the amount of investment tax credit to be added back; and

(4) add the amount to be added back to the tax due for the year the property was disposed of or ceases to qualify.

(c) A disposition of qualified property includes:

(1) a sale of the property;

(2) a liquidation other than as part of a statutory merger or consolidation; see subdivision (e) of this section for the exception;

(3) a legal dissolution of the corporation;

(4) a trade-in of the property;

(5) a gift of the property;

(6) transfer upon foreclosure of a security interest in the property;

(7) retirement of the property before expiration of its useful life;

(8) condemnation of the property;

(9) loss of the property due to fire, theft, storm or other casualty; and

(10) transfer of the property to a corporation not taxable under article 9-A.

(d) Property that ceases to be in qualified use includes:

(1) property that initially qualified but no longer meets the requirements of section 5-1.2 (a) of this Subpart, such as property that no longer has situs in New York State or property that no longer is used in the production of goods; and

(2) property on which a credit was allowed that was subsequently leased to others.

(e) For purposes of this section, a disposition does not occur where property is transferred from a corporation as part of a transaction to which IRC section 381(a) applies: e.g., a complete liquidation of a subsidiary under IRC section 332, or a reorganization under

IRC section 361 and IRC section 368 (a)(1)(A) (statutory merger or consolidation), IRC section 368 (a)(1)(C) (certain acquisitions of property from one corporation by another), IRC section 368 (a)(1)(D) (certain transfers of assets), IRC section 368 (a)(1)(F) (mere change in identity, form or place of organization, however effected) or IRC section 368 (a)(1)(G) (bankruptcy reorganizations). As there is no disposition in these cases, an add back is not required provided that the property continues in qualified use and is acquired by a corporation subject to tax under article 9-A. Generally, in these cases, the acquiring or surviving corporation cannot claim an investment tax credit because it takes over such property at the adjusted basis of the transferor and the transfer therefore does not qualify as a purchase pursuant to IRC section 179(d)(2). If the property in the hands of the acquiring corporation is not in qualified use for its entire life or for more than 12 consecutive years, a recovery from the acquiring corporation is required. In measuring the period of qualified use, the period during which the property was held by the transferor corporation and the acquiring corporation are to be taken into account.

(f) There is no add-back of the investment tax credit if the property is disposed of or ceases to be in qualified use after it has been in qualified use for more than 12 consecutive years or after the end of its useful life.

(g) As used in this section, the useful life of property shall be the same number of years as the corporation uses for Federal depreciation purposes.

(h) If property that qualifies for the investment tax credit is disposed of or ceases to be in qualified use prior to the end of the taxable year in which the credit is to be taken, an investment tax credit is allowed for the period the property was in qualified use. The credit that will be allowed is that part of the credit that would have been allowed for the entire taxable year

multiplied by a fraction, the numerator of which is the total number of months in qualified use of the property and the denominator of which is the total number of months of the property's useful life.

SUBPART 5-2

EMPLOYMENT INCENTIVE TAX CREDIT

Sec.

5-2.1 Employment incentive tax credit

Section 5-2.1 Employment incentive tax credit. (Tax Law, section 210-B(2))

(a) Where a corporation is allowed an investment tax credit under section 210-B(1), the corporation may be allowed an employment incentive tax credit for each of the two years next succeeding the taxable year for which the investment tax credit is allowed. The amount of the employment incentive credit is a percentage of the investment credit base that varies depending on the percentage increase in employment. The employment incentive credit will be allowed for any taxable year only if:

(1) the average number of employees during such taxable year is at least 101 percent of the average number of employees during the taxable year immediately preceding the taxable year for which the investment tax credit is allowed; or

(2) in case of a corporation that was not subject to the tax imposed by article 9-A and did not have a taxable year immediately preceding the taxable year for which the investment tax credit is allowed, the average number of employees in the taxable year for which the credit under this Subpart is allowable is at least 101 percent of the average number

of employees during the taxable year in which the investment tax credit is allowed.

(b) The employment incentive tax credit shall not reduce the tax to less than the fixed dollar minimum tax. If the corporation has excess employment incentive tax credit after reducing the tax due to the fixed dollar minimum tax or the corporation otherwise pays tax on the fixed dollar minimum, the excess credit may be carried over to the fifteen taxable years immediately following such taxable year and may be deducted from the corporation's tax for such year or years.

(c) A corporation entitled to claim the employment incentive tax credit must submit a Claim for Investment Tax Credit that includes the employment incentive tax credit on Form CT-46 when claiming the credit.

SUBPART 5-3

SECURITY TRAINING TAX CREDIT

Sec.

Section 5-3.1 General (Tax Law, sections 26 and 210-B(21)) .

(a) A corporation that is a qualified building owner, as defined under section 26(b)(1), and that has been issued a certificate of tax credit by the State Office of Homeland

Security is allowed to claim a credit against the tax imposed by article 9-A. The amount of the credit allowed is three thousand dollars for each qualified security officer, as defined under section 26(b)(4), who is directly or indirectly employed to provide protection to the corporation's building or buildings for a full year. However, the amount of the credit may be reduced due to the limitation placed on the total amount of all tax credits issued by the State Office of Homeland Security in any calendar year. In the case of a qualified security officer who is employed for less than a full year, the amount of the credit is prorated to reflect the length of such employment as provided in this section.

(b) The security training tax credit shall not reduce the tax to less than the fixed dollar minimum tax. If the corporation has excess security tax training credit after reducing the tax to the fixed dollar minimum tax or the corporation otherwise pays the tax on the fixed dollar minimum, the security training tax credit shall be treated as an overpayment of tax to be credited or refunded.

(c) A corporation must submit a Claim for Security Officer Training Credit on Form CT-631 when claiming the credit.

Section 5-3.2 Definitions for purposes of the security training tax credit. (Tax Law, sections 26 and 210-B(21))

(a) The term “full year” means 1,750 qualified hours worked during the calendar year.

(b) The term “qualified hours” means hours worked, directly or indirectly, as a qualified security officer for the qualified building owner.

Section 5-3.3 Prorating the security training tax credit for security officers employed for less than a full year. (Tax Law, sections 26 and 210-B(21))

(a) In the case of a qualified security officer who is employed for less than a full year,

the amount of the security training tax credit is prorated.

(b) The prorated amount of the credit for a qualified security officer employed for less than a full year is computed as follows:

(1) ascertain the number of qualified hours worked by the qualified security officer during the calendar year (limited to 1,750 hours);

(2) divide the number of hours by 1,750; and

(3) multiply the result by three thousand dollars.

(c) This method of proration applies for purposes of the security training tax credit against the tax imposed by article 9-A as well as the taxes imposed by articles 9, 22, and 33.

PART 6 REPORTS

Subpart

SUBPART 6-1

GENERAL REQUIREMENTS

Sec.

6-1.4 Amended Federal returns

Section 6-1.1 Corporations required to file reports. (Tax Law, section 211(1))

Reports are required to be filed annually by:

(a) every corporation subject to tax, regardless of the amount of its business income, capital or receipts;

(b) every receiver, referee, trustee, assignee or other fiduciary, or other officer or agent appointed by any court that conducts the business of any corporation subject to tax under article 9-A;

(c) every corporation that continues in business after it is dissolved; and

(d) every taxable domestic international sales corporation (DISC).

Section 6-1.2 Short period reports. (Tax Law, section 211(1))

(a) Except as provided in subdivision (c), a short period report is required in the case of:

(1) a newly organized taxpayer whose first accounting period is less than 12 months;

(2) a foreign corporation that becomes subject to tax in New York State subsequent to the commencement of its Federal accounting period;

(3) a taxpayer that dissolves, merges, consolidates or ceases to be subject to tax in New York State prior to the close of its accounting period for Federal income tax purposes;

(4) a taxpayer that changes its accounting period for Federal income tax purposes;

(5) a taxpayer that becomes part of or ceases to be part of a Federal consolidated group during the year; or

(6) a taxpayer that changes from one Federal consolidated group to another Federal consolidated group during the year.

(b) (1) When any corporation meets the requirements to be included in a combined report, it must be included in the combined group starting with the date it meets the requirements to be included in that combined report.

(2) A corporation that is subject to article 9-A and is a separate filer under article 9-A prior to being included in a new combined group is required to file a short period report that ends on the day prior to the day it meets the requirements to be included in that combined group.

(3) A corporation that continues to be subject to tax as a separate filer after it leaves its existing combined group is required to file a short period report for the period starting on the day it no longer meets the combined reporting requirement with the existing combined group and ending on the last day of the corporation's taxable year.

(4) When a corporation leaves one combined group ("combined group A") because it no longer meets the requirements to be included in that combined group, and then joins a new combined group ("combined group B"), its activities, income, loss, assets and receipts are included in the calculation of tax on the combined report of combined group A from the first day of its taxable year until the day immediately preceding the day it no longer met the requirements to be included in combined group A. Its activities, income, loss, assets and receipts are included in the calculation of tax on the combined report of combined group B from the day it met the requirements to be included in combined group B until the last day of the taxable year of combined group B.

(c) A short period report is not required when one of the situations listed in paragraphs (4) through (6) of subdivision (a) of this section occurs but the corporation remains in the same New York State combined report before and after those changes.

Section 6-1.3 Reports where Federal income is changed. (Tax Law, section 211(3))

(a) General. If the amount of the taxable income of any corporation or of any shareholder of any corporation that has elected to be taxed under Subchapter S of chapter one of the IRC, as reported for Federal income tax purposes, is changed or corrected by a final determination of the Commissioner of Internal Revenue or other officer of the United States or other competent authority, or if a renegotiation of a contract or subcontract with the United States results in a change in taxable income, the corporation is required to report the changed or corrected taxable income or the results of the renegotiation within 90 days, or 120 days in the case of a corporation making a combined report for the taxable year affected, after the final determination. The corporation must concede the accuracy of the determination or explain how it is erroneous.

(b) Final determination. Any deficiency notice issued (including a notice issued pursuant to a waiver filed by a corporation) pursuant to the provisions of the IRC is a final determination unless a timely petition to redetermine the deficiency is filed in the Tax Court of the United States. If a petition is filed, the judgment of the court of last resort is the final determination. The allowance by the Commissioner of Internal Revenue of a refund of any part of the tax shown on the taxpayer's Federal return or of any deficiency thereafter assessed, whether the refund is made on the commissioner’s own motion or pursuant to the judgment of a court, is also a final determination. The allowance of a tentative carry-back adjustment in accordance with IRC section 6411 based on a net operating loss carry-back or a net capital loss carry-back must be treated as a final determination. Any settlement or closing agreement entered into between the taxpayer and the IRS or any consent to IRS audit findings signed by the taxpayer also is a final determination.

Section 6-1.4 Amended Federal return. (Tax Law, section 211(3))

Any corporation that files an amended return with the Internal Revenue Service must, within 90 days (or 120 days in the case of a corporation included in a combined report) thereafter, file an amended report with the Commissioner.

SUBPART 6-2

COMBINED REPORTS

Sec.

Section 6-2.1 General. (Tax Law, Section 210-C)

(a) A combined report covering any taxpayer and another corporation or corporations is required where:

(1) the capital stock requirement is met; and

(2) the unitary business requirement is met.

(b) A group of commonly owned or controlled corporations may elect to file a combined report when the capital stock requirement is met. This election is referred to as the commonly owned group election.

(c) Each combined group must have a designated agent to act for the combined group. The designated agent must be a taxpayer under article 9-A and must be identified annually on an original, timely filed combined report or on a timely extension of time to file a report if an extension is requested. Once identified on an extension to file, if utilized, the designated agent cannot be changed on the original report filed for that period. If the designated agent is first identified on an original report, the designated agent cannot be changed by the filing of an amended report for the taxable year. Only the designated agent may act on behalf of all the members of the combined group in all matters relating to the combined group. The actions taken by the designated agent are binding on all members of the combined group. However, the designated agent may be changed in a subsequent year on either an original, timely filed combined report or on a timely extension to file a report if an extension is requested.

(d) Each member of the combined group that is a taxpayer under article 9-A shall be jointly and severally liable for the tax due on the combined report for the combined group. The tax due on the combined report shall be the sum of (1) the highest of (i) the tax measured by the combined business income base tax, (ii) the tax measured by the combined capital base, or (iii) the fixed dollar minimum tax attributable to the designated agent of the combined group, and (2) the fixed dollar minimum tax attributable to each member of the combined group (other than the designated agent) that is a taxpayer under article 9-A. However, tax credits cannot be used to reduce the fixed dollar minimum tax of any member of the combined group that is a taxpayer other than the designated agent.

(e) For a combined group to be eligible for the preferential tax treatment available to qualified emerging technology companies, every member of the combined group must be a qualified emerging technology company.

Section 6-2.2 Capital stock requirement. (Tax Law, section 210-C)

(a) A taxpayer and another corporation meet the capital stock requirement if:

(1) the taxpayer owns or controls, either directly or indirectly, more than fifty percent of the voting power of the capital stock of another corporation; or

(2) more than fifty percent of the voting power of the capital stock of the taxpayer is owned or controlled, either directly or indirectly, by another corporation; or

(3) more than fifty percent of the voting power of the capital stock of the taxpayer and more than fifty percent of the voting power of the capital stock of one or more other corporations are owned or controlled, either directly or indirectly, by the same interests. Whether or not the same interests test is met will be determined based on the facts and circumstances of each case. The same interests include, but are not limited to, one or more alien, foreign or domestic corporations, partnerships, trusts or individuals.

(b) The term "capital stock of a corporation" means the issued and outstanding stock of the corporation.

(c) The term "ownership" means actual or beneficial ownership, rather than mere record title as shown by the stock books of the corporation. To be considered the owner, the stockholder must have the right to vote and the right to receive any dividends declared.

(d) The term "control" means all cases where one corporation directly or indirectly possesses the power to dictate or influence the management and policies of another corporation through the direct or indirect ownership of more than fifty percent of the voting power of the capital stock of that corporation. In addition, a corporation controls the voting power of capital stock if it has been given the right to vote that stock by proxy or otherwise. The determination as

to whether or not a corporation is controlled by or controls another corporation or is controlled by the same interests will be determined by the facts in each case.

(e) The term "voting power of capital stock of a corporation" means the shares of stock, under the applicable law, corporate charter, articles of incorporation, or shareholder agreements, which have the power to elect the board of directors of the corporation. In determining whether the stock owned by a person or entity possesses a certain percentage of the total combined voting power of all classes of stock of a corporation entitled to vote, consideration will be given to all the facts and circumstances of each case. A share of stock generally will be considered as possessing the voting power accorded to that share by the corporate charter, by-laws, or share certificate. If there is any agreement, whether express or implied, that a stockholder will not exercise its right to vote, the formal voting rights possessed by that stock may be disregarded in determining the percentage of the total combined voting power possessed by that stockholder in the corporation. Moreover, if a stockholder agrees to vote its stock in a corporation in the manner specified by another stockholder in the corporation, the voting rights possessed by the stock owned by the first stockholder may be considered to be possessed by the stock owned by the other stockholder. For contingent voting rights, the stock is deemed to possess voting power only when the contingency occurs, and the rights become exercisable.

(f) (1) The ownership test is applied before the control test. Direct ownership is examined before indirect ownership, and direct control is examined before indirect control. However, the capital stock requirement may be satisfied through direct or indirect ownership, direct or indirect control or through a combination of direct or indirect ownership or control.

(2) The following examples are intended to illustrate the indicia of ownership and control set forth above. Generally, the examples are meant to illustrate either ownership or control since both do not need to be met concurrently in order for the capital stock requirement to be met.

Example 1: The taxpayer, X Corporation, owns 40 percent of the capital stock with voting rights of Y Corporation. The remaining capital stock of Y Corporation with voting rights is owned by three employees of X Corporation. These employees have agreed in writing to sell their stock to X Corporation when they leave the corporation. As part of the agreement, the employees have given X Corporation their voting proxy. Thus, X Corporation controls more than fifty percent of the voting power of the capital stock of Y Corporation. X and Y Corporations satisfy the capital stock requirement to be included in a combined report.

Example 2: The taxpayer, R Corporation, has issued 900 shares of common stock with voting rights equal to one vote per share. These shares are owned by P Corporation. R Corporation has also issued 1000 shares of preferred stock. These shares possess voting rights equal to one-tenth of one vote (.10) per share of preferred stock. Those shares are owned by Q Corporation. Even though P Corporation owns less than 50 percent of the number of voting shares (900 shares out of a total of 1900 shares), it owns more than 50 percent of the voting power of the capital stock of R Corporation (900 votes out of a total of 1000 votes). Thus, P Corporation and R Corporation satisfy the capital stock requirement to be included in a combined report. While Q Corporation owns more than 50 percent of the

number of shares of R Corporation (1000 shares out of a total of 1900 shares), it only owns one-tenth of the voting power of the capital stock of R Corporation (100 votes of a total of 1000 votes). Q Corporation does not satisfy the capital stock requirement to be included in a combined report with P Corporation and R Corporation.

Example 3: The taxpayer, Corporation A, owns 51 percent of the capital stock of Corporation B. Corporation B in turn owns 51 percent of the capital stock of Corporation C. The capital stock in both corporations has voting rights. By owning 51 percent of the capital stock with voting rights of Corporation B, Corporation A controls more than 50 percent of the voting power of the capital stock of Corporation B. Because Corporation A controls more than 50 percent of the voting power of the capital stock of Corporation B, it also controls indirectly more than 50 percent of the voting power of the capital stock of Corporation C. Corporations A, B and C satisfy the capital stock requirement to be included in a combined report.

Example 4: The taxpayer, Corporation A, is a 60 percent partner of Partnership Y, and is the general partner of Partnership Y. Partnership Y owns 40 percent of the capital stock with voting rights of Corporation B. Thus, Corporation A indirectly owns only 24 percent of the voting power of the capital stock of Corporation B (60 percent multiplied by 40 percent). However, because Corporation A holds more than a 50 percent interest in Partnership Y and has the power to manage the affairs of the partnership under the operating

agreement, it can control how Partnership Y votes its stock in Corporation B. Thus, Corporation A controls indirectly the voting power of the capital stock owned by Partnership Y. In this case, because Partnership Y owns only 40 percent of the voting power of the capital stock of Corporation B, Corporation A controls indirectly only 40 percent of the voting power of the capital stock of Corporation B. Because Corporation A does not own or control, directly or indirectly, more than 50 percent of voting power of the capital stock of Corporation B, Corporation A and Corporation B do not satisfy the capital stock requirement to be included in a combined report.

Example 5: The taxpayer, Corporation A, has a 60 percent membership interest in Limited Liability Company Y, which is treated as a partnership for tax purposes. Limited Liability Company Y owns 80 percent of the capital stock with voting rights of Corporation B. Corporation A is considered a managing member of Limited Liability Company Y, since the terms of the operating agreement do not impose limitations on the corporate member's participation in the management either equivalent to or more stringent than the limitations on the participation in the control of the business of a limited partnership imposed on limited partners under article 8-A of the New York Partnership Law. Since Corporation A is a managing member of Limited Liability Company Y, which in turn has greater than 50 percent voting power of the capital stock of B, Corporation A has the authority to direct how Limited Liability Company Y uses its voting power in

Corporation B. Thus, Corporation A controls indirectly more than 50 percent of the voting power of the capital stock of Corporation B, and Corporations A and B satisfy the capital stock requirement to be included in the combined report.

Example 6: The taxpayer, Corporation A, is an 80 percent limited partner of Partnership Y. Partnership Y owns 40 percent of the capital stock with voting rights of Corporation B. Corporation A also directly owns 22 percent of the capital stock with voting rights of Corporation B. Even though Corporation A has an 80 percent interest in Partnership Y, Corporation A is a limited partner and cannot control how Partnership Y votes its stock in Corporation B. Thus, Corporation A does not control indirectly 40 percent of the voting power of the capital stock of Corporation B, and so that 40 percent is not combined with the 22 percent of the voting power of the capital stock of Corporation B that Corporation A controls directly through its ownership of Corporation B stock to determine if Corporation A controls more than 50 percent of the voting power of the capital stock of Corporation B. As a result, Corporations A and B do not meet the capital stock requirement and therefore cannot be included in a combined report.

Example 7: The taxpayer, Corporation A, is a 60 percent general partner of Partnership Y. Partnership Y owns 40 percent of the capital stock with voting rights of Corporation B. Corporation A also directly owns 30 percent of the capital stock with voting rights of Corporation B. By

combining its direct and indirect ownership of the stock of Corporation B, Corporation A owns, directly and indirectly, 54 percent of the voting power of the capital stock of Corporation B (30 percent plus 60 percent multiplied by 40 percent). Because Corporation A directly or indirectly owns more than 50 percent of the voting power of the capital stock of Corporation B, Corporations A and B satisfy the capital stock requirement to be included in a combined report.

Example 8: The taxpayer, Corporation A, owns 100 percent of the voting power of the capital stock of Corporation B. Corporation B owns 51 percent of the voting power of the capital stock of Corporation C. Corporation C owns 40 percent of the voting power of the capital stock of Corporation D. Individual X owns 100 percent of the voting power of the capital stock of Corporation A and also owns 20 percent of the voting power of the capital stock of Corporation D. Corporations A, B, C and D satisfy the capital stock requirement to be included in a combined report because they are all directly or indirectly controlled by the same interests (Individual X).

Example 9: The taxpayer, Corporation A, owns 60 percent of the capital stock with voting rights of Corporation C and 60 percent of the capital stock with voting rights of Corporation D. Corporation B, also a taxpayer, owns 40 percent of the capital stock with voting rights of Corporation C and 40 percent of the capital stock with voting rights of Corporation D. Corporations C and D each own 30 percent of the capital stock with voting rights of Corporation E. Corporation B directly owns the remaining 40

percent of the capital stock with voting rights of Corporation E. Corporation A directly owns more than 50 percent of the voting power of Corporations C and D. Corporation A, acting indirectly through its control of Corporations C and D, controls Corporation E. Corporation B directly and indirectly owns 64 percent of the voting power of the capital stock of Corporation E (B's 40 percent ownership of C multiplied by C's 30 percent ownership of E plus B's 40 percent ownership of D multiplied by D's 30 percent ownership of E plus B's direct ownership of 40 percent of E). Corporations A, B, C, D and E satisfy the capital stock requirement to be included in a combined report.

Example 10: Individuals A, B, C and D each own 25 percent of the voting stock of Corporations S and T. Because more than 50 percent of the ownership of the voting stock of both corporations is owned by the same interests, Corporations S and T satisfy the capital stock requirement to be included in a combined report.

Section 6-2.3 Unitary business requirement. (Tax Law, section 210-C)

(a) General. For purposes of this Subchapter, the term "unitary business" shall be construed to the broadest extent permitted under the U.S. Constitution as interpreted by the U.S. Supreme Court, the courts of this state and the New York State Tax Appeals Tribunal.

(b) Attributes of a unitary business.

(1) A unitary business is characterized by a flow of value as evidenced by functional integration, centralized management and economies of scale.

(i) Functional integration is characterized by transfers between, or pooling among, business activities that significantly affect the operation of the business activities. Functional integration includes, but is not limited to, transfers or pooling with respect to the business's products or services, technical information, marketing information, distribution systems, purchasing and intangibles. The use of market-based or arm's length pricing for such transactions does not negate the presence of functional integration.

(ii) Centralized management exists when directors, officers, and/or other management employees jointly participate in the management decisions that affect the respective business activities and that may also operate to the benefit of the entire economic enterprise. Centralized management may exist even when day-to-day management responsibility and accountability have been decentralized, so long as the management has an operational role with respect to the business activities, such as participation in overall operational strategy for the business.

(iii) Economies of scale refers to a relationship among and between business activities resulting in a significant decrease in the average per unit cost of operational or administrative functions due to the increase in operational size. Economies of scale may exist from the inherent cost savings that arise from the presence of functional integration or centralized management.

(2) Functional integration, centralized management and economies of scale should be analyzed in conjunction with one another for their cumulative effect. The determination of a unitary business depends on all of the facts and circumstances of each case.

(c) Presumptions. Without limiting the scope of a unitary business, a unitary business will be presumed in the following factual scenarios. The corporation or the commissioner may overcome the presumption that the corporations in question are engaged in a unitary business by the presentation of clear and convincing evidence. If the activities of the corporations do not give

rise to one of the presumptions set forth below, the presence of a unitary business will be determined based on all of the facts and circumstances of the case without the application of a presumption in favor of or against a finding of a unitary business.

(1) Horizontal integration. Corporations that satisfy the capital stock requirement are presumed to be engaged in a unitary business when their primary activities are in the same general line of business.

(2) Vertical integration. Corporations that satisfy the capital stock requirement are presumed to be engaged in a unitary business when the corporations are engaged in different steps in a vertically structured enterprise.

(3) Strong centralized management. Corporations that satisfy the capital stock requirement, and that might otherwise be considered as engaged in more than one unitary business, are presumed to be engaged in one unitary business where there is strong central management coupled with the existence of centralized departments or affiliates for such functions as financing, advertising, research and development, or purchasing.

(4) Newly-formed corporations. A newly-formed corporation is presumed to be engaged in a unitary business with its forming corporation or corporations in the taxable year of the newly-formed corporation that includes the date the corporations satisfy the capital stock requirement and starting from that date.

(5) Newly-acquired corporations. A newly-acquired corporation is presumed to be engaged in a unitary business with its acquiring corporation in the first taxable year that the corporations satisfy the capital stock requirement and starting in that year, if the corporations are engaged in a relationship described in paragraph 1, 2 or 3 of this subdivision.

(6) Holding companies. If a holding company, including a passive holding company, financial holding company, and a bank holding company, and one or more operating companies together satisfy the capital stock requirement, the holding company is presumed to be engaged in a unitary business with the operating company or companies.

(d) The following examples are intended to illustrate the presumptions set forth above. For purposes of the illustrations, the corporations referred to in the examples satisfy the capital stock requirement.

Example 11: Corporations A and B sell natural and organic foods at their retail stores located throughout the United States. Corporation C sells the same types of foods at its retail stores located in Canada. Corporations A, B and C are presumed to be engaged in a unitary business.

Example 12: Corporation A is engaged in the exploration of oil. Corporation B extracts the oil found by Corporation A. Corporation C processes the oil extracted by Corporation B. Corporation D sells the oil processed by Corporation C. Corporations A, B, C and D are presumed to be engaged in a unitary business.

Example 13: Corporations A, B and C manufacture and sell children's apparel to customers located throughout the United States. Corporations D and E operate a chain of restaurants located in New York and Florida. Corporation F provides centralized purchasing, advertising and finance services to Corporations A, B, C, D and E. The executive officers of Corporation F are also actively engaged in the operations of Corporations

A, B,C, D and E. Corporations A, B, C, D, E and F are presumed to be engaged in one unitary business.

Example 14: Corporation A contributes all of its intellectual property to Corporation B for 100 percent of Corporation B's capital stock. Corporations A and B are presumed to be engaged in a unitary business in the first taxable year in which they satisfy the capital stock requirement.

Example 15: Corporation A acquires 51 percent of the capital stock of Corporation B. Corporation B distributes the products manufactured by Corporation A such that Corporations A and B are part of a vertically structured business apart from satisfying the capital stock requirement. Corporations A and B are presumed to be engaged in a unitary business in the first taxable year that includes the acquisition.

Section 6-2.4 Combined group composition.

(a) If the commonly owned group election is not in effect, the following steps must be taken annually to determine if a combined report is required and if so, which corporations to include in the combined group:

(1) A taxpayer must first identify all of the corporations with which it is engaged in a unitary business. This includes domestic, foreign and alien corporations.

(2) Of the group of corporations determined in paragraph (1) of this subdivision, a taxpayer must exclude any corporation that does not meet the capital stock requirement.

(3) Of the corporations remaining after paragraph (2) of this subdivision, any corporation prohibited from being included in a combined report must be excluded. The corporations remaining constitute the combined group for the taxable year.

(b) If the commonly owned group election is in effect, the following steps must be taken annually to determine which corporations to include in the combined group:

(1) A taxpayer must first identify all of the corporations that meet the capital stock requirement. This includes domestic, foreign and alien corporations.

(2) Of the corporations determined in paragraph (1) of this subdivision, any corporation prohibited from being included in a combined report must be excluded. The remaining corporations constitute the combined group for the taxable year.

(3) The commonly owned group has no relationship to the taxpayer's Federal consolidated group and may in fact include corporations that are not, or cannot be, included in a Federal consolidated group with the taxpayer or corporations that are included in different Federal consolidated groups.

Section 6-2.5 Filing combined reports. (Tax Law, section 210-C)

(a)(1) As provided in this Subpart, a group of corporations may be required or, in the case of the commonly owned group election, permitted to file on a combined basis. To file on a combined basis, the designated agent of the group must file a completed combined report. The first year the designated agent of the group files on a combined basis, and each year thereafter in which the composition of the group changes, the designated agent of the group must include the following information with the report:

(i) the exact name, address, employer identification number and state of incorporation, or in the case of an alien corporation, country of incorporation, of each corporation included in the combined report, including the designated agent; and

(ii) information showing that each of the corporations meets the capital stock requirement for the taxable year.

(2) In addition, the following information may be required to be submitted for the taxable year at another time, such as in conjunction with an audit:

(i) a statement providing details as to why a filed combined report includes only the corporations listed in subparagraph (1)(i) of this subdivision that meet the capital stock requirement and the details as to why the corporations listed pursuant to subparagraph (1)(ii) of this subdivision are excluded from that combined report;

(ii) except in the case of a combined report filed using the commonly owned group election, information establishing that each of the corporations included in the report meets the unitary business requirement with respect to the other corporations in the group; and

(iii) the exact name, address, employer identification number and state of incorporation or, in the case of an alien corporation country of incorporation, of all corporations that meet the capital stock requirement for the taxable year, but are not included in the combined report.

(b) Generally, the filing of a combined report or the inclusion of a corporation in or the exclusion of a corporation from a combined report is subject to revision or disallowance on audit.

Section 6-2.6 Corporations prohibited from filing a combined report. (Tax Law, section 210-C)

(a) The following corporations are prohibited from being included in a combined report under article 9-A, including a combined report under the commonly owned group election:

(1) a corporation that is taxable under a franchise tax imposed by article 9 or article 33;

(2) a corporation that would be taxable under a franchise tax imposed by article 9 or article 33 if subject to tax;

(3) a real estate investment trust (REIT) that is not a captive REIT, provided the REIT must be included in a combined report with its qualified REIT subsidiary;

(4) a regulated investment company (RIC) that is not a captive RIC, provided the RIC must be included in a combined report with its subsidiary;

(5) a New York S corporation; or

(6) an alien corporation that under any provision of the IRC is not treated as a "domestic corporation" as defined in IRC section 7701 and has no effectively connected income for the taxable year.

(b) If a corporation is subject to tax under article 9-A solely as a result of its ownership of a limited partner interest in a limited partnership, as described in section 1-2.2(a)(7) of this Subchapter or its membership interest in a limited liability company that is equated to the interest of a limited partner, as described in section 1-2.2(a)(8) of this Subchapter, and none of the corporation's related corporations are subject to tax under article 9-A, the corporation shall not be required or permitted to file a combined report with such related corporations. For purposes of this Subpart, the term "related corporations" means corporations that meet the capital stock requirement and the unitary business requirement.

Section 6-2.7 Commonly owned group election. (Tax Law, section 210-C)

(a) (1) Subject to the restrictions in section 6-2.6 of this Subpart, a taxpayer may elect to treat as its combined group all corporations that meet the capital stock requirement (such corporations are collectively referred to as the "commonly owned group"). If the election is made, all of the corporations that are members of the commonly owned group are bound by the election and will be treated as the members of a single combined group for combined reporting purposes, regardless of whether:

(i) these corporations are included in more than one Federal consolidated return filed by more than one Federal consolidated group, or

(ii) these corporations in fact are engaged in one or more unitary businesses.

(2) Upon making the election, the commonly owned group must calculate the combined group's combined business income, and combined capital of all members of the commonly owned group, and the fixed dollar minimum base tax of all taxpayers in the commonly owned group.

(3) Upon making the election, the commonly owned group is deemed to be engaged in a single unitary business for all purposes, including for purposes of calculating business and investment capital, business and investment income and the apportionment factor.

Example 16: Corporation A is in the business of producing paper, packaging and office supplies. It has three wholly owned subsidiaries. Corporation B is in the business of producing school supplies. Corporation C is in the business of selling the paper, packaging, office and school supplies produced by Corporations A and B. Corporation D is in the business of operating an electronic legal research service that it sells to law firms. In 2015 and 2016, Corporations A, B and C properly file a combined report as a unitary business and Corporation D properly files a separate report. The dividends Corporation A receives from Corporation D are properly treated as investment income on the combined report as income received from stock in a non-unitary corporation that qualifies as investment capital. In 2017, Corporation A makes the commonly owned group election and Corporations A, B, C and D file a combined report. As Corporation D is

included in the combined report, its stock cannot be investment capital. On that report, the dividends Corporation A receives from Corporation D are properly eliminated in computing combined business income. In 2018, Corporation A sells all of its stock in Corporation D to a third-party, realizing a capital gain on the sale. Corporation A's capital gain on the sale of its stock in Corporation D is treated as a capital gain from the sale of a unitary member of the combined group and is properly reported as business income on the combined report of the commonly owned group.

(b) Mechanics of making the election. A commonly owned group election must be made by the designated agent of the combined group, acting on behalf of all the corporations in the commonly owned group. The election must be made on an original, timely filed report, determined with regard to extensions of time for filing. Any commonly owned group election made on a report that is filed late will be invalid and ineffective.

(c) Effect of election in subsequent tax years. A commonly owned group election is binding for and applicable to the taxable year for which it is made and for the next six taxable years (if the first year is not a short taxable year) or the next seven taxable years (if the first year is a short taxable year). The election is binding on all corporations that meet the capital stock requirement and continues in place regardless of whether any Federal consolidated group to which members of the combined group belong discontinues the filing of a Federal consolidated return or the designated agent of the group changes. Any corporation that enters a commonly owned group by acquisition or creation during the time that the commonly owned group election is in effect must be included in the combined group beginning with the taxable year during which the corporation enters the group, and the corporation entering the group shall be considered to

have consented to the application of the election and to have waived any objection to its inclusion in the combined group. The disposition of or the failure to meet the capital stock requirement of one or more members of a combined group will not sever an election for the remaining members of the group and the departing member or members are not bound by the election. However, reverse acquisition rules based on the Federal rules set forth in 26 CFR 1.1502-75(d)(3) will be applied in determining whether a corporation is bound by a commonly owned group election. The entrance or departure of a corporation from the commonly owned group does not change the effective periods as defined in subdivision (d) of this section.

(d) Revocation, renewal of election. A commonly owned group election, once made, cannot be revoked until after it has been effective for seven taxable years (if the election is not made on a short period return) or eight taxable years (if the election is made on a short period return), such periods hereinafter referred to as the "effective period". When an election is made, it will continue to be automatically renewed after the effective period for another effective period indefinitely, unless the designated agent of the commonly owned group, acting on behalf of all the corporations included in the commonly owned group, affirmatively revokes the election at the end of the effective period. In the case of a revocation, a new election will not be permitted in any of the three taxable years immediately following the revocation. A revocation will be effective for the first taxable year (whether or not that taxable year is a short taxable year) after the completion of the effective period for which the prior election was in place and must be made by the designated agent on an original, timely filed combined report, determined with regard to extensions of time for filing, for that first subsequent taxable year. Every corporation that is a member of the commonly owned group is bound by such revocation. If a commonly owned group election is affirmatively revoked after the effective period, the election will terminate for

the subsequent taxable year, and no commonly owned group election by any member of that commonly owned group will apply for that year and the subsequent two taxable years (if revoked on a report that is not a short period report) or the subsequent three taxable years (if revoked on a report that is a short period report). In such cases, the designated agent of that commonly owned group may make a new election beginning in the third or fourth taxable year after the revocation.

(e) In determining the effective periods described in this section, short taxable years will not be considered or counted. However, the election or revocation may be made on a report for a short taxable year.

Example 17: Corporation A is a calendar year taxpayer for Federal income tax purposes. On April 1, 2015, Corporation A, which has 25 wholly owned subsidiaries, purchases an office building in New York State. Prior to April 1, 2015, neither Corporation A nor any of its subsidiaries had nexus with New York. Thus, Corporation A's first taxable year in New York is a short taxable year (4/1/15-12/31/15). Corporation A, as the designated agent, makes the commonly owned group election on its first report and includes all of its 25 wholly owned subsidiaries in a combined report. Although the commonly owned group election can be made on the short period 2015 report, such period does not count in determining the seven-year period for which the election is in effect. As such, the commonly owned group election will apply from April 1, 2015 until the tax year ending on December 31, 2022, assuming there are no other short taxable years during this time period.

Section 6-2.8 Other rules. (Tax Law, section 210-C)

(a) For rules regarding when REITS or RICS should be included in a combined report, see Subpart 10-4 of this Subchapter.

(b) A combinable captive insurance company, as defined in section 2(11) , is required to be included in a combined report if more than 50 percent of the voting power of its capital stock is owned or controlled directly or indirectly by a corporation subject to tax under article 9-A or a corporation required to be included in a combined report under article 9-A.

SUBPART 6-3

FORM OF REPORTS

Sec.

Section 6-3.1 Form of reports. (Tax Law, sections 211(1), (2), (2-a), (3), 1085(n))

(a) Reports are required to be filed on the forms and in the manner prescribed by the commissioner. The forms and instructions are available from the Department and may be downloaded from the department’s website. To the extent allowed or required by the commissioner, reports shall be filed electronically.

(b) A change in Federal taxable income must be reported on an amended New York State report and must be accompanied by a copy of the Federal amended return or the Federal revenue agent's report, and copies of all other related information.

(c) Every taxpayer must submit such other reports and other information that the commissioner may require in the administration of article 9-A.

(d) Every report must include a certification that the statements in the report are true. The certification must be made by the president, vice-president, treasurer, assistant treasurer, chief accounting officer or any other officer of the taxpayer authorized to act in that capacity. The fact that an individual's name is signed on the certification of the report is prima facie evidence that the individual is authorized to sign and to certify the report on behalf of the corporation.

Section 6-3.2 Form of reports on combined basis. (Tax Law, section 211(1))

(a) In all cases where a combined report is required or permitted, a combined franchise tax report must be submitted by the designated agent responsible for paying the combined tax. In addition, each member of the combined group must submit such other reports and other information that the commissioner may require.

(b) It is not necessary that all corporations in the combined group have the same accounting period. (See Subpart 2-1 of this Subchapter for information relating to accounting periods.) Where a corporation’s taxable year is different from that of the designated agent, the applicable taxable year of such corporation to be included in the combined group is the taxable year that ends within the taxable year of the designated agent. Only amounts from the months included in the combined report are used in the computation of tax for the period. The commissioner may permit or require a corporation to use a different accounting period where appropriate.

(c) Each member of a combined group, including non-taxpayer members, annually must file an information return with the Department. This required form includes a detailed schedule of information needed to compute the combined group’s tax and the fixed dollar minimum base of each taxpayer member, including but not limited to the member’s business and investment

capital and business apportionment items. This required form also must include the employer identification number (EIN) of the designated agent.

SUBPART 6-4

TIME AND PLACE FOR FILING REPORTS

Sec.

Section 6-4.1 Time for filing reports[1]. (Tax Law, section 211(1))

(a) Reports must be filed at the times set forth in this section.

(1) Every calendar-year taxpayer, except a taxable DISC and a New York S corporation, must file its annual report on or before the 15th day of April following the close of its calendar year.

(2) Every fiscal-year taxpayer, except a taxable DISC, must file its annual report on or before the 15th day of the fourth month following the close of its fiscal year.

(3) Every taxpayer, except a taxable DISC, using a 52-53 week accounting period must file its report on or before the 15th day of the fourth month following the date on which its fiscal year is deemed to have ended. A 52-53 week accounting period that ends within seven days from the last day of any calendar month will be deemed to have ended on the last day of that month.

[1] Rules in this section reflect the current statutory rules and do not reflect the statute as it existed before the changes made by Part Q of Chapter 60 of the Laws of 2016 to change the filing deadlines.

(4)(i) Where a corporation that is not part of a Federal consolidated group becomes part of such a group on a day other than the first day of its Federal taxable year (determined without reference to its membership in the group), such taxpayer is required to file a Federal short period return for the period from the first day of its taxable year through the end of the day on which it becomes such a member. (26 CFR 1.1502-76[b].) Section 6-1.2 (b)(1) of this Part requires, in such an instance, that the taxpayer file a short period report for purposes of article 9-A covering the period covered by the Federal short period return (to the extent that it is subject to article 9-A during that period). Where the due date for the Federal short period return is established pursuant to 26 CFR 1.1502-76(c)(1), or where the Federal short period return is required pursuant to 26 CFR 1.1502-76(c)(2) to be filed on or before the 15th day of the fourth month following the close of what would have been the taxpayer's Federal taxable year, determined without regard to such membership, then the due date for the article 9-A short period report shall be the due date for the Federal short period return. This provision does not apply in the case of Federal amended short period returns described in 26 CFR 1.1502-76(c)(2). The due date for the article 9-A amended report, for the same short period covered by such Federal amended return (to the extent that it is subject to article 9-A during such period), is prescribed by section 6-1.4 of this Part.

(ii) Where a taxpayer ceases to be part of a Federal consolidated group, including the case where it leaves one Federal consolidated group to join another, an article 9-A short period report is required to be filed, covering the period from the beginning of its taxable year for article 9-A purposes up to the date it leaves the group. Such report shall be filed on or before the 15th day of the fourth month following the close of its taxable year under article 9-A determined without regard to its cessation of membership in such Federal consolidated group.

(iii) Notwithstanding the provisions in subparagraphs (i) and (ii) of this paragraph, no short period report is required to be filed if the corporation remains in the same New York State combined group before and after the changes mentioned in such subparagraphs.

(5) In the case of an election made pursuant to IRC section 338, the old target (within the meaning of 26 CFR 1.338-1[c][13]) may be required to file a final report that is a short period report. In such event, the corporation, if a taxpayer, must file a short period report for purposes of article 9-A covering the same period as the Federal short period return (to the extent that it is subject to article 9-A during such period). Such report shall be filed by the due date for the Federal short period return as prescribed by 26 CFR 1.338-1(e)(6), except that this provision shall not apply to an amended return described in 26 CFR 1.338-1(e)(6)(ii)(D). The due date for the article 9-A amended report, for the same short period covered by such Federal amended return (to the extent that it is subject to article 9-A during such period), is prescribed by section 6-1.4 of this Part.

(6) In the case of an S corporation termination year, the S short year and the C short year are treated as short taxable years but the due date of the report for the S short year is the same as the due date of the report for the C short year.

Section 6-4.2 Time for filing reports of corporations ceasing to exercise franchise or be subject to tax. (Tax Law, section 211(1))

(a) A domestic corporation that ceases to exercise its franchise is required to file a report on the date of cessation or at such other times as the commissioner may require covering each year or period for which no report was filed. The report is required in any such case whether the corporation continues in existence and remains subject to article 9-A or is dissolved and ceases to be subject to tax.

(b) A foreign corporation that ceases to do business in New York State or to employ capital, or to own or lease property in this State in a corporate or organized capacity, or to maintain an office in this State, or to derive receipts from activity in this State and, thus, ceases to be subject to tax under article 9-A, or any corporation that ceases to be subject to tax under article 9-A because of a change of classification, is required to file a report on the date of cessation, or date of change of classification, or at such other time as the commissioner may require, covering each year or period for which no report was filed.

(c) If a corporation that is taxed on the basis of a combined report ceases to be subject to tax under article 9-A but continues to be included in the next combined report, it need not file a separate report at the time of cessation.

Section 6-4.3 Extension of time for filing reports. (Tax Law, section 211(1))

(a) An automatic six-month extension of time for filing an annual report will be granted if an application for automatic extension is filed and a properly estimated tax is paid on or before the due date of the report for the taxable period for which the extension is requested. Failure to meet any of the requirements in this section makes the application invalid and any report filed after the due date will be treated as a late filed report.

(b) An automatic six-month extension of time for filing a combined report will be granted to a group of corporations filing a combined report provided an application for automatic extension is filed and properly estimated tax is paid on or before the due date of the report for the taxable period for which the extension is requested. Failure to meet any of the requirements in this section makes the application invalid and any report filed after the due date will be treated as a late filed report. To obtain an automatic extension, an application must be filed by the designated agent for the combined group. However, each taxpayer member corporation of a new

combined group also must file a separate application to extend the time to file for the first period for which the new combined group actually files a combined report. In addition, each taxpayer member corporation being newly added to an existing combined group must also file a separate application to extend the time to file the report for the first period for which they are actually included in the combined group's report. Corporations included in the combined report that are not subject to tax are not required to file a separate application to extend the time to file. The applicant must submit the following information:

(1) The name of each corporation included in the combined group.

(2) The employer identification number of each corporation in the combined group.

(3) For any appropriate corporation, the beginning and ending dates of any taxable year of less than 12 months.

(4) The estimated fixed dollar minimum tax for each member of the combined group that is taxable in New York State.

(5) From the report filed for the taxable year immediately preceding the taxable year for which the extension is being requested, the sum of any overpayment requested to be credited to the next period, plus any tax credits to be applied to the next period.

(6) If a corporation made any separate estimated tax installment payments for the taxable year for which the extension is being requested, the total amount for that corporation.

(7) If a payment was made on an extension filed for the taxable year for which the extension is being requested, the corporation which filed the form and the amount of payments it made, if any.

(8) Any prepayments made by the designated agent, as applicable.

The designated agent for the combined group must pay with the application the properly estimated combined tax, including the tax measured by the fixed dollar minimum for each of the other taxpayers included in the combined group.

(c) On or before the expiration of the automatic six-month extension of time for filing a report, the commissioner may grant additional three-month extensions of time for filing reports when good cause exists. No more than two additional three-month extensions of time for filing a report for any taxable year may be granted. An application for each additional three-month extension must be made in writing before the expiration of the previous extension. Additional extensions of time for filing a New York S Corporation franchise tax return will not be granted. Additional extensions of time for filing by a combined group must be requested in one application by the designated agent for the combined group. The applicant must submit the following information:

(1) its complete corporate name;

(2) its employer identification number;

(3) the reason for requesting the additional extension; and

(4) in the case of an application by a combined group, a list showing the corporate name, employer identification number, and taxable period of each of the other corporations properly included as part of the combined group.

(d) Any extension of time for filing a report granted under this Subpart will not extend the time for the payment of any tax due. (However, see section 7-1.2 of this Subchapter for extensions of time for payment of tax. Also, see section 2392.1 of this Title for provisions relating to the existence of reasonable cause for purposes of not imposing the addition to tax for

failure to pay the amount of tax shown on a report where there are valid extensions of time to file.)

Section 6-4.4 Place for filing reports.

Reports must be filed electronically or mailed to the address provided in the most recent report instructions or on the New York State Department of Taxation and Finance website. Every corporation that: (1) prepares tax documents without the assistance of a tax professional; (2) uses approved e-file tax software or a computer to prepare, document, or calculate its report, extension, mandatory first installment or estimated tax payment; and (3) has broadband internet access, must file electronically.

PART 7

PAYMENT OF TAX, DECLARATION AND PAYMENT OF ESTIMATED TAX, AND COLLECTION

SUBPART 7-1

PAYMENT OF TAX

Sec.

Section 7-1.1 Time for payment of tax. (Tax Law, sections 213(1), 1091)

(a) The tax imposed by article 9-A is payable to the department in full at the time the report is required to be filed. The time when the payment is required to be made is determined without regard to any extension of time for filing such report.

(b) Where any payment of tax that is required to be made within a prescribed period or on or before a prescribed date is mailed in accordance with the provisions of section 2399.2 of this Title, such payment, if not dishonored upon presentment, will be deemed timely made.

(c) See section 2399.3 of this Title when the last day prescribed (including any extensions of time) for making any payment falls on a Saturday, Sunday or a legal holiday in the State of New York.

Section 7-1.2 Extension of time for payment of tax. (Tax Law, section 213(3))

The Commissioner may grant a reasonable extension of time for payment of the tax upon receipt of a written request from the taxpayer giving complete information as to the reasons for its inability to make payment of the tax on or before the prescribed due date. Interest must be paid on any balance due from the original due date of the report, without regard to any extension, to the date of payment.

Section 7-1.3 Properly estimated tax. (Tax Law, section 213(2))

(a) A taxpayer applying for an automatic six-month extension for filing its tax report must pay on or before the date that its report is required to be filed, without regard to any extension of time, its properly estimated tax. The estimated tax paid, or balance thereof, will

be deemed properly estimated if the tax paid is either:

(1) not less than 90 percent of the tax as finally determined; or

(2) not less than the tax shown on the taxpayer's report for the immediately preceding taxable year, if such preceding year was a taxable year of 12 months.

(b) For purposes of paragraph (2) of subdivision (a) of this section, the amount of the tax shown on the taxpayer's report for the immediately preceding taxable year will be utilized, irrespective of the amount of the tax, if any, shown on the taxpayer's report for the second preceding taxable year.

Section 7-1.4 Cessation tax. (Tax Law, section 213(1))

Any taxpayer that ceases to exercise its franchise or to be subject to the tax imposed by article 9-A must pay the tax, or balance thereof, at the time the report is required to be filed; see section 6-4.3 of this Subchapter.

SUBPART 7-2

DECLARATION OF ESTIMATED TAX

Sec.

7-2.7 Time for filing declaration of estimated tax for short taxable year.

7-2.8 Extension of time for filing declaration of estimated tax.

Section 7-2.1 Requirement of declaration. (Tax Law, section 213-a(a))

(a) Every taxpayer subject to the tax imposed by article 9-A must make a declaration of its estimated tax for the current taxable year if such estimated tax can reasonably be expected to exceed $1,000 for the taxable year.

(b) The declaration required by this section must cover a calendar-year accounting period if the taxpayer files its report on the basis of a calendar year, or a full fiscal year if the taxpayer files its report on the basis of a fiscal year, unless a declaration for a short period is required. No declaration may be made for a period of more than 12 months.

(c) For purposes of this section, a taxable year of 52-53 weeks, in accordance with the provisions of section 2-1.4 of this Subchapter, will be deemed a period of 12 months. Such a taxable year of 52-53 weeks that has an accounting period that begins on or after December 26, 2014 and on or before December 31, 2014 will be deemed to begin on January 1, 2015 and end on December 31, 2015.

Section 7-2.2 Definition of estimated tax. (Tax Law, section 213-a(b))

The term "estimated tax" means the amount that a taxpayer estimates to be the tax imposed by article 9-A for the current taxable year, less the amount that it estimates to be the sum of any credits allowable against the tax.

Section 7-2.3 Time for filing declaration of estimated tax. (Tax Law, section 213-a(c) and (f))

A declaration of estimated tax must be filed in accordance with the following schedule:

(a) If at any time before the first day of the sixth month of the current taxable year the taxpayer's estimated tax can reasonably be expected to exceed $1,000 for such taxable year, then the declaration must be filed on or before the 15th day of the sixth month of the current taxable year.

(b) If no declaration is required to be filed pursuant to subdivision (a) of this section, and at any time after the last day of the fifth month of the current taxable year and before the first day of the ninth month of the current taxable year the taxpayer's estimated tax can reasonably be expected to exceed $1,000 for such taxable year, then the declaration must be filed on or before the 15th day of the ninth month of the current taxable year.

(c) If no declaration is required to be filed pursuant to subdivision (a) or (b) of this section, and at any time after the last day of the eighth month of the current taxable year and before the first day of the twelfth month of the current taxable year the taxpayer's estimated tax can reasonably be expected to exceed $1,000 for such taxable year, then the declaration must be filed on or before the 15th day of the twelfth month of the current taxable year.

Section 7-2.4 Amendments of declaration. (Tax Law, section 213-a(d))

In making a declaration of estimated tax, the taxpayer is required to take into account the facts and circumstances existing at the time as well as those reasonably to be anticipated that relate to the prospective article 9-A tax. Amended or revised declarations may be made if the taxpayer finds that its estimated tax differs from the estimated tax reflected in its most recent declarations of estimated tax. However, an amended declaration may only be made on an installment date (see section 7-3.4 of this Part—Other installments of estimated tax) and no further amendment may be made until a succeeding installment date. The amended declaration

must be made on form CT-400 and marked "AMENDED". No refund will be issued as a result of the filing of an amended declaration. Consideration will be given to a refund only in connection with a completed report filed by a taxpayer for the taxable year covered by its declaration (and amended declaration).

Section 7-2.5 Report as declaration or amendment. (Tax Law, section 213-a(e) and (f))

(a) If the taxpayer files its report for the calendar year on or before February 15th of the succeeding calendar year (or if the taxpayer files on a fiscal-year basis, on or before the 15th day of the second month succeeding the taxable year) and pays together with such report the balance, if any, of the full amount of the tax shown to be due on the report:

(1) Such report will be considered to be its declaration if no declaration was required to be filed on or before the 15th day of the ninth month of the calendar year or fiscal year for which the tax was imposed but a declaration was required to be filed on or before the 15th day of the twelfth month of the calendar year or fiscal year pursuant to section 7-2.3 of this Subpart.

(2) Such report will be considered as the amendment permitted by section 7-2.4 of this Subpart to be filed on or before the 15th day of the twelfth month of the calendar year or fiscal year if the tax shown on the report is greater than the estimate shown on the declaration previously made.

Example 1: A taxpayer that reports on the basis of a calendar year first meets the requirement for making a declaration of estimated tax on September 5, 2016. The taxpayer may satisfy the requirements for making a declaration of estimated tax by making and filing its report for the 2016 taxable year on or before February 15,

2017, and paying, at the time of filing, the balance, if any, of the full amount of tax shown to be payable. The report will be treated as the declaration required to be filed on or before December 15, 2016.

Example 2: The taxpayer makes and files, on or before September 15, 2016, a timely declaration of estimated tax for such year, and on or before February 15, 2017 files its 2016 tax report and pays the balance, if any, of the full amount of tax shown to be payable. If the taxpayer's report shows the tax to be greater than the estimated tax shown on the declaration, the report will be treated as the amended declaration permitted to be filed on or before December 15, 2016.

(b) The filing of a declaration or amended declaration or the payment of the last installment of estimated tax on December 15th, or the filing of a report by February 15th of the succeeding calendar year (or if on a fiscal-year basis, on the 15th day of the twelfth month of the current fiscal year and the 15th day of the second month of the succeeding fiscal year), will not relieve the taxpayer of the additional charge for underpayment of installments, under section 1085(c), if it failed to pay the estimated tax that was due earlier in its taxable year.

Section 7-2.6 Short periods. (Tax Law, section 213-a(g))

If a taxpayer is required to make a declaration of estimated tax pursuant to section 7-2.1 of this Subpart and a short taxable year is involved, a declaration for the fractional part of the year is required. No declaration is required if the short taxable year is a period of five months or less.

Section 7-2.7 Time for filing declaration of estimated tax for short taxable year. (Law, section 213-a(g))

In the case of a short taxable year of more than five months, the declaration of estimated tax must be filed in accordance with the following schedule:

(a) If at any time before the first day of the sixth month of the current taxable year the taxpayer's estimated tax can reasonably be expected to exceed $1,000 for such taxable year, then the declaration must be filed on or before the 15th day of the sixth month of the current taxable year.

(b) If no declaration is required to be filed pursuant to subdivision (a) of this section, and at any time after the last day of the fifth month of the current taxable year but before the first day of the ninth month of the current taxable year the taxpayer's estimated tax can reasonably be expected to exceed $1,000 for such taxable year, then the declaration must be filed on or before the 15th day of the ninth month or the 15th day of the last month of the current taxable year, whichever comes first.

(c) If no declaration is required to be filed pursuant to subdivision (a) or (b) of this section, and at any time after the last day of the eighth month of the current taxable year the taxpayer's estimated tax can reasonably be expected to exceed $1,000 for such taxable year, the declaration must be filed on or before the 15th day of the last month of the current taxable year.

Section 7-2.8 Extension of time for filing declaration of estimated tax. (Tax Law, section 213-a(h))

The Commissioner may grant a reasonable extension of time, not to exceed three months, for the filing of any declaration of estimated tax upon receipt of a written request from

the taxpayer giving complete information as to the reasons for its inability to file the declaration on or before the prescribed due date.

SUBPART 7-3

PAYMENTS OF ESTIMATED TAX

Sec.

Section 7-3.1 General.

The amount of estimated tax due as shown on a declaration of estimated tax may be

paid in installments or, at the election of the taxpayer, may be paid in full at the time of filing the declaration. If the estimated tax is paid in installments, one installment, following any mandatory first installment paid pursuant to section 7-3.3 of this Subpart, must accompany the declaration.

Section 7-3.2 Definitions. (Tax Law, section 213-b(f))

(a) The term "preceding year's tax" as used in this Subpart means the tax imposed by article 9-A for the immediately preceding calendar or fiscal year. It also means, for purposes of computing the first installment of estimated tax when an application has been filed for extension of the time for filing the report required to be filed for the immediately preceding calendar or fiscal year, the amount properly estimated (see section 7-1.3—Properly estimated tax) as the tax imposed upon the taxpayer for such preceding calendar or fiscal year.

(b) The term "second preceding year's tax" as used in this Subpart means the tax imposed by article 9-A for the calendar or fiscal year preceding the calendar or fiscal year described in the first sentence of subdivision (a) of this section.

(c) For purposes of determining the calendar or fiscal year used pursuant to subdivisions (a) and (b) of this section, short taxable years will be considered.

Section 7-3.3 First installment of estimated tax for certain taxpayers. (Tax Law, section 213-b(a))

(a) New York S Corporations. Every New York S corporation subject to the tax imposed by article 9-A must pay with its report required for the immediately preceding taxable year, or with an application for extension of the time for filing such report, a mandatory first installment of estimated tax equal to (1) 25 percent of such preceding year's tax, if such tax exceeded $1,000 but was equal to or less than $100,000, or (2) 40 percent of such preceding

year's tax, if such tax exceeded $100,000.

(b) New York C corporations. Every New York C corporation subject to the tax imposed by article 9-A must file form CT-300 on or before the fifteenth day of the third month following the close of its taxable year and pay with such form a mandatory first installment of estimated tax estimated tax equal to (1) 25 percent of the second preceding year's tax, if such tax exceeded $1,000 but was equal to or less than $100,000, or (2) 40 percent of the second preceding year's tax, if such tax exceeded $100,000.

(c) The mandatory first installment required to be paid pursuant to this section must be paid for a taxable year of any length, including short taxable years.

(d) Examples.

Example 1: Corporation A, a New York C corporation, is a calendar-year filer. Its tax for the 2015 taxable year is $200,000 and its tax for the 2016 taxable year is $50,000. Since the mandatory first installment of estimated tax for C corporations is based on the second preceding year's tax, Corporation A must pay a mandatory first installment of estimated tax for the 2017 taxable year equal to $80,000 (40% of $200,000). The installment must be made on form CT-300, on or before March 15, 2017.

Example 2: Corporation B, a New York S corporation, is a calendar-year filer. Its tax for the 2017 taxable year is $3,000. Since the mandatory first installment for S corporations is based on the preceding year's tax, Corporation B must pay a mandatory first installment of estimated tax for the 2018 taxable year equal to $750 (25% of

$3,000). The installment must be made with its report required for the 2017 taxable year (or with its application for extension) due on or before March 15, 2018.

Example 3: Corporation C, a New York C corporation, has two short periods for the 2017 taxable year. Its tax for the first 2017 short period, January 1, 2017 through August 31, 2017, is $710,000 and its tax for the second 2017 short period, September 1, 2017 through December 31, 2017, is $340,000. Corporation C must pay a mandatory first installment of estimated tax for the 2018 taxable year equal to $284,000 (40% of $710,000) on form CT-300, on or before March 15, 2018.

Example 4: Corporation D, a New York C corporation, is a calendar-year filer. Its tax for the 2015 taxable year is $10,000,000 and its tax for the 2016 taxable year is $16,000,000. Corporation D knows that a short period report will be required pursuant to section 6-1.2 of this Subchapterfor the period January 1, 2017 through March 31, 2017. It must still pay a mandatory first installment of estimated tax for the 2017 taxable year equal to $4,000,000 (40% of $10,000,000) on form CT-300, on or before March 15, 2017.

Example 5: Corporation E, a New York C corporation, first becomes subject to tax under article 9-A on June 1, 2016. Its first New York taxable year runs June 1, 2016 through December 31, 2016. Corporation E is not required to pay a mandatory first installment of estimated tax

for the 2017 taxable year because it was not required to file a report for the second preceding taxable year of 2015.

Section 7-3.4 Other installments of estimated tax. (Tax Law, section 213-b(b) and (h))

(a) In the case of a declaration of estimated tax for a 12-month taxable year, the other dates for filing the declaration and for installment payments are:

Dates for filing the declaration	Dates for installment payments
(1) On or before the 15th day of the sixth month:	The estimated tax must be paid in three equal installments (after deducting the amount of mandatory first installment paid, if any). One payment must be made at time of filing the declaration, one on or before the 15th day of the ninth month and one on or before the 15th day of the twelfth month of the current taxable year.
(2) On or before the 15th day of the ninth month:	The estimated tax must be paid in two equal installments (after deducting the amount of mandatory first installment paid, if any). One payment must be made at the time of filing the declaration and one on or before the 15th day of the twelfth month of the current taxable year.
(3) On or before the 15th day of the twelfth month of the current taxable year:	The estimated tax must be paid in full at the time of filing the declaration (after deducting the amount of mandatory first installment paid, if any).

(b) If a declaration is filed after the time prescribed in section 7-2.3 of this Part, or after

the expiration of any extension of time, then the provisions of paragraphs (1)-(3) of subdivision (a) of this section do not apply, and the taxpayer must pay at the time of filing the declaration all installments of estimated tax that would have been payable at or before such time if the declaration had been filed at the time prescribed in section 7-2.3 of this Part. The remaining installments must be paid at the time and in the amounts that they would have been payable if the declaration had been filed at the time prescribed in section 7-2.3 of this Part.

Example: Corporation X, a New York C corporation, was required to file a declaration of estimated tax on or before June 15, 2016, but filed its declaration for calendar year 2016 on November 18, 2016. At the time of filing its declaration, Corporation X had failed to pay two installments of its estimated tax for the 2016 taxable year (i.e., the installments due on June 15, 2016 and September 15, 2016). Upon filing the declaration on November 18, 2016, it must pay the two installments of estimated tax that it previously failed to pay.

Section 7-3.5 Impact of amendments of declaration on estimated payments. (Tax Law, section 213-b(c) and (h))

If any amendment of a declaration is filed, the remaining installments, if any, must be ratably increased or decreased (as the case may be) to reflect any increase or decrease in the estimated tax by reason of such amendment. If an amendment is made after the 15th day of the ninth month of the current taxable year, any increase in the estimated tax must be paid at the time of making such amendment.

Example: On June 15, 2016 Corporation Y files a declaration of estimated

tax of $14,000 for the 2016 taxable year. Corporation Y has already paid a mandatory first installment of $2,000 on March 15, 2016 and divides the $12,000 of remaining estimated tax by three to compute the $4,000 installment amount to be paid on June 15, on September 15, and on December 15. Corporation Y paid the required $4,000 installment on June 15, 2016. On September 15, 2016 it files an amended declaration showing an estimated tax of $20,000 for the 2016 taxable year. The balance of $14,000 ($20,000 minus $2,000 mandatory first installment and $4,000 June estimated payment) must be paid in two remaining installments: $7,000 on September 15, 2016 and $7,000 on December 15, 2016.

Section 7-3.6 Application of installments based on preceding and second preceding year's tax. (Tax Law, section 213-b(a) and (d))

Any amount of mandatory first installment paid pursuant to section 7-3.3 of this Subpart must first be applied as payment of the first installment against the estimated tax for the current taxable year shown on the declaration required to be filed pursuant to section 7-2.1 of this Part, and any amount remaining must be considered as a payment on account of the tax shown on the report required to be filed by the taxpayer for the current taxable year. If no declaration of estimated tax is required to be filed by the taxpayer pursuant to section 7-2.1 of this Part, any amount of mandatory first installment paid pursuant to section 7-3.3 of this Subpart will be considered as a payment on account of the tax shown on the report required to be filed by the taxpayer for the current taxable year.

Section 7-3.7 Interest on certain installments based on preceding and second preceding year's tax. (Tax Law, section 213-b(a) and (e))

If the amount of the mandatory first installment paid pursuant to section 213-b(a) exceeds the tax shown on the report required to be filed by the taxpayer for the taxable year for which the amount was paid, interest will be allowed and paid on the amount by which the amount paid exceeds the tax. Interest will be paid at the overpayment rate or rates set by the commissioner pursuant to section 1096(e) (see Part 2393 of this Title) or, if no rate is set, at the rate specified in section 213-b(e) from the date of payment of the amount to the 15th day of the fourth month of the succeeding taxable year. However, no interest will be allowed or paid if the excess is less than one dollar or if the interest becomes payable solely because of the carry-back of a net operating loss or capital loss from a subsequent taxable year.

Example: Corporation X, a calendar-year C corporation, pays its mandatory first installment of $1,000 for the 2017 calendar year on March 15, 2017. On April 17, 2018, Corporation X files its report for the calendar year 2017 and shows a tax due of $600. Interest will be paid on the difference of $400 from March 15, 2017 to April 15, 2018.

Section 7-3.8 Short taxable years. (Tax Law, section 213-b(g))

In the case of a short taxable year of a taxpayer for which a declaration of estimated tax is required to be made and filed, the estimated tax, after deducting the amount, if any, paid as a mandatory first installment for such period, must be paid in equal installments. One such installment must be paid at the time of filing the declaration, one on the 15th day of the ninth month of the current taxable year (unless the short taxable year closed prior to such ninth

month, in which case the installment will be eliminated), and one on the 15th day of the last month of the current taxable year.

Example: Corporation A has a short taxable year of 10 months, from January 1, 2017 to October 31, 2017. If there is a reasonable expectation before June 1, 2017 that Corporation A's estimated tax will exceed $1,000 for such short taxable year, the declaration is required to be made and filed on or before June 15, 2017. The estimated tax (after deducting the amount of mandatory first installment paid, if any) is payable in three equal installments: one on the date of filing the declaration and one each on September 15, 2017 and October 15, 2017.

If, instead, there is a reasonable expectation on or after June 1, 2017 but before September 1, 2017 that Corporation A's estimated tax will exceed $1,000, the declaration is required to be made and filed on or before September 15, 2017. The estimated tax (after deducting the amount of mandatory first installment paid, if any) is payable in two equal installments: one on the date of filing the declaration and one on October 15, 2017.

If there is a reasonable expectation on or after September 1, 2017, but not before such date, that Corporation A's estimated tax will exceed $1,000, the

declaration is required to be made and filed on or before October 15, 2017. The estimated tax (after deducting the amount of mandatory first installment paid, if any) is payable in full on the date of filing the declaration.

Section 7-3.9 Extension of time. (Tax Law, section 213-b(i))

The commissioner may grant a reasonable extension of time, not to exceed six months, for payment of any installment of estimated tax upon receipt of a written request from the taxpayer giving complete information as to the reasons for its inability to pay the installment on or before the prescribed due date. As a condition for granting an extension of time, the commissioner may require the taxpayer to furnish a bond or other security in an amount not to exceed twice the amount of the installment. Interest must be paid from the original due date of the installment, without regard to any extension, to the date of payment.

Section 7-3.10 Payments of installments in advance. (Tax Law, section 213-b(j))

At the election of the taxpayer, any installment of the estimated tax may be paid prior to the date prescribed for its payment. No interest will be allowed or paid on such prepayment.

SUBPART 7-4

COLLECTION

Sec.

7-4.6 Limitation of time.

7-4.7 Closing agreements.

Section 7-4.1 Action to collect tax. (Tax Law, section 1092(h))

An action may be brought at any time by the Attorney General in the name of the State of New York, at the request of the commissioner, to recover the amount of any unpaid taxes, additions to tax, penalties and interest due that have been assessed under article 9-A or 27 within six years prior to the date the action is commenced.

Section 7-4.2 Lien of tax. (Tax Law, section 1092(j)(1) and (3))

(a) The tax (including additions to tax, penalties and interest) imposed by article 9-A becomes a lien from the date on which the report is required to be filed (without regard to any extension of time for filing such report), except that the tax becomes a lien no later than the date the taxpayer ceases to be subject to the tax imposed by article 9-A or the date the taxpayer ceases to exercise its franchise, or do business, employ capital, own or lease property in a corporate or organized capacity, maintain an office, or derive receipts from activity in this State.

(b) Each such tax is a lien and binding on the real and personal property of the taxpayer, or of a transferee liable to pay the tax, until the tax is paid in full, or until the expiration of 20 years from the date such taxes became due and payable, whichever occurs first, subject to the following exceptions:

(1) The lien of such taxes after the expiration of 10 years from the date they became due and payable is no longer a lien as to the following:

(i) owners of real estate who would be purchasers in good faith but for such taxes,

additions to tax, penalties or interest; and

(ii) mortgagees of real estate who would be holders in good faith but for such taxes, additions to tax, penalties or interest.

These limitations do not apply to any transfer from a corporation subject to tax to a person or corporation subject to tax with intent to avoid payment of any taxes, or where with like intent the transfer is made to a grantee corporation subject to tax, or any subsequent grantee corporation subject to tax, controlled by such grantor or that has any community of interest with it, either through stock ownership or otherwise.

(2) The lien of each such tax is subject to the lien of any mortgage indebtedness existing against real property prior to the time when the tax became a lien, where such mortgage indebtedness was incurred in good faith and was not given, directly or indirectly, to any officer or stockholder of the corporation subject to tax owning such real property, whether as a purchase money mortgage or otherwise, and is also subject to the lien of local taxes and assessments, without regard to when the lien for such taxes and assessments has accrued.

(3) If the report is filed and the tax shown on the report to be due is paid on or before the date on which the report is required to be filed, without regard to any extension of time for filing such report, the lien is not enforceable against the interest of any purchaser or mortgagee in property that is thereafter, but prior to the issuance to the taxpayer of a notice of deficiency under section 1081, transferred to a bona fide purchaser for value, or mortgaged where the mortgage indebtedness is incurred in good faith and the mortgage is not given directly or indirectly to any officer or stockholder of the corporation subject to tax.

(4) In any action to foreclose any mortgage where the mortgage indebtedness is incurred in good faith, or to foreclose the lien of local taxes or assessments, to which the

people of the State of New York are made a party defendant by reason of the existence of a lien for any such tax, or if no such tax was due or a lien at the time of the commencement of such action and the filing of a notice of pendency thereof but such a tax becomes due or becomes a lien subsequent to the time of the commencement of such action and the filing of a notice of pendency thereof, such real property is to be sold and conveyed in such action free from any such tax lien, and any such tax lien becomes a lien on any surplus moneys that may result from such sale, to be determined in the proceedings for the distribution of such surplus moneys.

(5) Where title to mortgaged real property passes from an individual, or from another corporation owing no franchise tax, to a corporation that is in default for such tax, the lien of any such tax is not enforceable except as to the equity, if any, after the prior mortgage or purchase money mortgage encumbrance.

(6) Where an additional tax is assessed in accordance with the provisions of article 27, no lien for such additional tax is enforceable against property that prior to the issuance to the taxpayer of a notice of deficiency under section 1081, had been transferred in good faith to a bona fide transferee for value.

Section 7-4.3 Release of lien. (Tax Law, section 1092(j)(2))

The commissioner may, upon application made pursuant to procedures and on a form prescribed by the commissioner, release any real property from the lien of any tax due or to become due under article 9-A, provided that:

(a) such application includes an accurate description of the property to be released, together with such other information as the commissioner may require; and

(b) payment of the statutory fee is made together with such application, as the

commissioner may prescribe; and

(c) payment is made to the commissioner of a sum that the commissioner deems to be adequate as consideration for release of the lien, or a security deposit is made or a bond filed that the commissioner deems to be sufficient to secure payment of the tax due.

The release of a lien pursuant to this section may be recorded in the same office where conveyances of real estate are entitled to be recorded.

Section 7-4.4 Liability of transferees. (Tax Law, section 1093(a))

The liability, at law or in equity, of a transferee of property of a taxpayer for any tax, additions to tax, penalty or interest due the commissioner under article 9-A or 27, is to be assessed, paid and collected in the same manner and subject to the same provisions and limitations as in the case of the tax to which the liability relates, except that the period of limitations for assessment against the transferee will be extended by one year for each successive transfer, in order, from the original taxpayer to the transferee involved, but not by more than three years in the aggregate. The term "transferee" includes, in case of successive transfers, donee, heir, legatee, devisee, distributee, and successor by merger, consolidation or other reorganization.

Section 7-4.5 Service of process. (Tax Law, section 216)

Every foreign corporation subject to the provisions of article 9-A, except a corporation having a certificate of authority under General Corporation Law section 212 or having authority to do business by virtue of Business Corporation Law section 1305, is required to file with the Department of State a certificate of designation in its corporate name, signed and acknowledged by its president or a vice-president or its secretary or treasurer, under its corporate seal, designating the Secretary of State as its agent upon whom process in any action

provided for by article 9-A may be served within this State, and setting forth an address to which the Secretary of State shall mail a copy of any such process against the corporation that may be served upon the Secretary of State. In case any such corporation fails to file such certificate of designation, it is deemed to have designated the Secretary of State as its agent upon whom such process against it may be served; and until a certificate of designation is filed the corporation is deemed to have directed the Secretary of State to mail copies of process served upon the Secretary of State to the corporation at its last known office address within or without the State. When a certificate of designation has been filed by such corporation the Secretary of State must mail copies of process thereafter served upon the Secretary of State to the address set forth in such certificate. Any such corporation, from time to time, may change the address to which the Secretary of State is directed to mail copies of process, by filing a certificate to that effect executed, signed and acknowledged in like manner as a certificate of designation as provided in this section. Service of process upon any such corporation or upon any corporation having a certificate of authority under General Corporation Law section 212 or having authority to do business by virtue of Business Corporation Law section 1305, in any action commenced at any time pursuant to the provisions of article 9-A, may be made by either:

(a) personally delivering to and leaving with the Secretary of State, a deputy Secretary of State or with any person authorized by the Secretary of State to receive such service, duplicate copies thereof at the office of the Department of State in the City of Albany, in which event the Secretary of State must immediately send by registered mail, return receipt requested, one of such copies to the corporation at the address designated by it or at its last known office address within or without the State; or

(b) personally delivering to and leaving with the Secretary of State, a deputy Secretary of State or with any person authorized by the Secretary of State to receive such service, a copy thereof at the office of the Department of State in the City of Albany and by delivering a copy thereof to, and leaving such copy with the president, vice-president, secretary, assistant secretary, treasurer, assistant treasurer or cashier of such corporation, or the officer performing corresponding functions under another name, or a director or managing agent of such corporation, personally outside the State. Proof of such personal service outside the State must be filed with the clerk of the court in which the action is pending within 30 days after such service, and such service shall be complete 10 days after proof thereof is filed.

Section 7-4.6 Limitation of time. (Tax Law, section 219)

The provisions of the Civil Practice Law and Rules relative to the limitation of time of enforcing a civil remedy do not apply to any proceeding or action taken to levy, appraise, assess, determine or enforce the collection of any tax or penalty prescribed by article 9-A.

Section 7-4.7 Closing agreements. (Tax Law, section 171(18))

The commissioner is authorized to enter into a written agreement with any taxpayer, relative to the liability of such taxpayer with respect to any tax imposed by article 9-A, which agreement is final and conclusive, and except upon a showing of fraud, malfeasance or misrepresentation of a material fact:

(a) the case may not be reopened as to the matters agreed upon nor may the agreement be modified, by any officer, employee or agent of the State of New York; and

(b) in any suit, action or proceeding, such agreement, or any determination, assessment, collection, payment, cancellation, refund or credit made in accordance therewith, shall not be annulled, modified, set aside or disregarded.

PART 8

ASSESSMENT, REVISION, REFUND AND REVIEW

Subpart 8-1 Assessment

Subpart 8-2 Limitation of Time on Credit or Refund

Subpart 8-3 Review of Determinations and Decisions

SUBPART 8-1

ASSESSMENT

Section

Section 8-1.1 General. (Tax Law section 1082(a))

The amount of tax due as shown on a report, or the amount of tax due that would have been shown on a report but for a mathematical or clerical error, is deemed to be assessed on the date of filing of the report. This includes an increase of tax as shown on any amended report, or that would have been shown on any amended report but for a mathematical or clerical error. Any amount paid as a tax or with respect to a tax, other than amounts paid as estimated tax, is deemed to be assessed upon the date of receipt of payment.

Section 8-1.2 Limitation of time on assessment. (Tax Law, section 1083)

(a) Except as otherwise provided in this section, any tax imposed by article 9-A must be assessed within three years after the report was filed. The report is deemed to be filed on the prescribed due date or the actual date filed, whichever is later.

(b) Exceptions to the limitation in subdivision (a) of this section are as follows:

(1) The tax may be assessed at any time if:

(i) no report is filed;

(ii) a false or fraudulent report is filed with intent to evade tax; or

(iii) the taxpayer fails to file a report or an amended report as required by section 211(3) with respect to an increase or a decrease in Federal taxable income or Federal tax, or with respect to a change, correction or renegotiation of tax that is treated in the same manner as if it were a deficiency for Federal income tax purposes, or with respect to a computation or re-computation of tax that is treated in the same manner as if it were a deficiency for Federal income tax purposes.

(2) If both the commissioner and the taxpayer have consented in writing to an extension of time for the assessment of tax before the expiration of the time prescribed in this section for such assessment, the tax may be assessed at any time prior to the expiration of the period agreed upon. The time for the assessment of tax may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon.

(3) If the taxpayer files a report or an amended report as required by section 211(3) with respect to an increase or a decrease in Federal taxable income or Federal tax, or with respect to a change, correction or renegotiation of tax that is treated in the same manner as if it were a deficiency for Federal income tax purposes, or with respect to a computation or re-computation of tax that is treated in the same manner as if it were a deficiency for Federal income tax purposes, the assessment (if not deemed to have been made upon the filing of the report or amended report) may be made at any time within two years after the report or amended report was filed. The assessment of tax may be made for an amount up to but not exceeding the amount of the increase in tax attributable to the Federal change, correction or renegotiation of tax, or the

computation or re-computation of tax. The amount of tax attributable to the Federal change, correction or renegotiation, or the computation or re-computation means the amount determined by recomputing each of the alternative tax bases for measuring the tax imposed under article 9-A, taking into account the item or items resulting in the Federal change, correction or renegotiation, or the computation or re-computation for the taxable year. This limitation does not affect other limitations.

(4) If a deficiency of tax is attributable to the application of a net operating loss carryback or a net capital loss carryback, it may be assessed within the period of limitation on assessment for the loss year.

(5) An erroneous refund is considered an underpayment of tax as of the date of the refund. The assessment of deficiency may be made within two years of the erroneous refund, or within five years of the refund if it appears that any part of the refund was induced by fraud or the misrepresentation of a material fact.

(6) After the report has been filed, the taxpayer or a fiduciary representing the taxpayer may make a written request that the tax be assessed within 18 months, if one of the following conditions is met:

(i) the written request notifies the commissioner that the taxpayer contemplates dissolution on or before the expiration of the 18-month period, the dissolution is in good faith begun before the end of the 18-month period, and the dissolution is completed;

(ii) the written request notifies the commissioner that a dissolution has begun in good faith and the dissolution is completed; or

(iii) a dissolution has been completed at the time of the written request. The assessment made pursuant to the written request must not be made more than three years after the report was filed, except as otherwise provided in this subdivision and subdivision (c) of this section.

(7) The apportionment factor, as determined under section 210-A and pursuant to Part 4 of this Subchapter, upon which the taxpayer's report (or any additional assessment) was based must not be changed during the additional period of limitation allowed in the case of non-filing of a report of a Federal change, correction or renegotiation of tax, or a computation or re-computation of tax; or in the case of a report of a Federal change, correction or renegotiation of tax, or a computation or re-computation of tax; or in the case of a deficiency based on a net operating loss carryback or a net capital loss carryback. Both the commissioner and the taxpayer are precluded from adjusting the apportionment factor in such cases. Under the same circumstances, a petition for the redetermination of a deficiency or a notice of deficiency does not open the apportionment factor. The apportionment factor upon which the taxpayer's report was based may always be changed within the three-year period described in subdivision (a) of this section, or within the additional one-year period described in paragraph (9) of this subdivision, if such change to the apportionment factor is related to or would be the result of the change or correction on the amended report.

(8) The tax may be assessed within three years after:

(i) the filing of the report containing information reporting the change in use of an industrial waste treatment facility or of an air pollution control facility during the taxable year that the change in use occurs;

(ii) the filing of the report for the taxable year during which the industrial waste treatment facility or air pollution control facility is completed and the taxpayer fails to obtain a permanent certificate of compliance;

(iii) the commissioner receives notice of the revocation of a certificate of compliance with respect to an air pollution control facility, either from the taxpayer or as required by Environmental Conservation Law section 19-0309, whichever notice is received earlier; or

(iv) the commissioner receives notice of revocation of the taxpayer's certification under General Municipal Law article 18-B as required by General Municipal Law section 959(a) with respect to an empire zone or an empire zone equivalent area, to the extent that the tax is attributable to such decertification.

(9) If the taxpayer files an amended report on or after April 12, 2018, other than an amended report as required by section 211(3) and further described in paragraph (3) of this subdivision, the assessment (if not deemed to have been made upon the filing of the amended report) attributable to a change or correction on the amended report from a prior report may be made at any time within one year after filing the amended report or within three years after filing the original report, whichever is later. The assessment of tax includes the recovery of a refund paid to the taxpayer. This limitation does not affect other limitations.

(c) Tax may be assessed at any time within six years after filing the report if the taxpayer omits from gross income an amount properly includible that is in excess of 25 percent of the amount of gross income stated in the report.

(d) Tax may be assessed at any time within one year after the revocation of a certificate of completion issued pursuant to Environmental Conservation Law section 27-1419 by a

determination issued pursuant to section 27-1419, after the determination is final and is no longer subject to judicial review.

(e) For any of the transactions defined in section 1085(p)(3), if the taxpayer fails to file, disclose or provide any statement, report or other information as required by section 25(a), tax may be assessed at any time within the later of:

(1) one year after the commissioner is provided with the required statement, report or other information or one year after the date upon which the requirements of section 25(c) are met for any such transaction, whichever is earlier; or

(2) six years after the taxpayer's report was filed, if the deficiency is attributable to an abusive tax avoidance transaction, as that term is defined in section 1083(c)(11)(C), including but not limited to the transactions described in section 1085(k-1)(5).

(f) After the mailing of the notice of deficiency, the running of the period of limitation on assessment or collection of tax or other amount (or a transferee's liability) is suspended for the period between the date of filing a timely petition with the Division of Tax Appeals under section 1089 or a timely request for a conciliation conference with the Bureau of Conciliation and Mediation Services pursuant to section 4000.3 of this Title and the date upon which the petition or request is no longer subject to administrative review pursuant to Part 3000 of this Title.

Section 8-1.3 Assessment of tax on combined reports.

(a) Where the tax is computed on the basis of a combined report, the commissioner may assess the entire amount of the tax and the Metropolitan Transportation Business Tax Surcharge, as imposed under section 209-B and pursuant to Part 9 of this Subchapter, against any one or

more of the taxpayers covered by the combined report, in such proportions as the commissioner determines, but every such taxpayer is liable for the entire amount.

(b) In the case of a taxpayer that computes its tax on the basis of a combined report where the requirements for filing a combined report are not met or in the case of the inclusion of one or more corporations where the requirements for inclusion of the corporation or corporations are not met, the tax assessed is:

(1) for the corporations that do not meet the requirements to file on a combined basis, the amount that would have been required to be shown on the taxpayer's report if the taxpayer had filed on a separate company basis; and

(2) for the corporations that meet the requirements to file on a combined basis, the amount that would have been required to be shown if the reports had been filed in combination only with those corporations that meet the requirements for filing on a combined basis.

SUBPART 8-2

LIMITATION OF TIME ON CREDIT OR REFUND

Section

Section 8-2.1 General. (Tax Law, section 1087(a))

(a) If the taxpayer has filed a report for the taxable year:

(1) a claim for credit or refund of an overpayment of tax must be filed by the taxpayer within three years from the time such report was filed or two years from the time the tax was paid, whichever is later;

(2) in the case of any overpayment arising from an erroneous denial by the Department of Environmental Conservation of a certificate of completion pursuant to Environmental Conservation Law section 27-1419, a claim for credit or refund of an overpayment of tax must be filed by the taxpayer two years from the time a final determination to the effect that such denial was erroneous is made and is no longer subject to judicial review, if later than the time periods described in paragraph (1) of this subdivision.

(b) If no report has been filed, a claim for credit or refund of an overpayment of tax must be filed by the taxpayer within two years from the time the tax was paid.

(c) The following limitations apply with respect to the amount of the credit or refund filed by the taxpayer pursuant to subdivision (a) or subdivision (b) of this section:

(1) If the taxpayer's claim is filed within the three-year period from the time the report was filed pursuant to subdivision (a)(1) of this section, the amount of credit or refund cannot exceed the portion of the tax paid within the three years immediately preceding the filing of the claim plus the period of any extension of time for filing the report.

(2) If the taxpayer's claim is filed within the two-year period from the time the tax was paid pursuant to subdivision (a)(1) of this section, the amount of the credit or refund cannot exceed the portion of the tax paid during the two years immediately preceding the filing of the claim.

(3) If the taxpayer's claim is filed within the two-year period from the time a final determination is made pursuant to subdivision (a)(2) of this section, the amount of the credit or refund may exceed the portion of the tax paid during the two years immediately preceding the claim, but only to the extent of the amount of the overpayment attributable to the denial of the certificate of completion, as described in subdivision (a)(2).

(4) If no claim is filed by the taxpayer, the amount of a credit or refund cannot exceed the amount that would be allowed if a claim had been filed on the date the credit or refund is allowed.

(d) Special restrictions apply to proceedings on a claim for refund of tax paid as a result of an increase or a decrease in Federal taxable income or Federal tax, or a change, correction or renegotiation of tax treated in the same manner as if it were a deficiency for Federal income tax purposes, or a computation or re-computation of tax treated in the same manner as if it were a deficiency for Federal income tax purposes or as a result of a net operating loss carryback or a net capital loss carryback. These restrictions are the same as those set forth in section 8-1.2(b)(7) of this Part, and such restrictions apply both to the commissioner and to the taxpayer.

Section 8-2.2 Extension of time by agreement. (Tax Law, section 1087(b))

(a) If there is an extension by agreement under section 1083(c)(2) of the time for assessment, the period for filing a claim for credit or refund, or for making a credit or refund if no claim is filed, does not expire prior to six months after the expiration of the extended period.

(b) The amount of any credit or refund, as described in subdivision (a) of this section, cannot exceed the portion of the tax paid after the execution of the agreement and before the date of filing the claim or the making of the credit or refund, plus the portion of tax paid within the applicable period as if the claim had been filed on the date the agreement was executed.

Section 8-2.3 Notice of change or correction of Federal income. (Tax Law, sections 211(3), 1087(c))

(a) If the taxpayer is required to file a report or an amended report with respect to a decrease or an increase in Federal taxable income or Federal tax, or with respect to a Federal change, correction or renegotiation of tax treated in the same manner as if it were an overpayment for Federal income tax purposes, or a computation or re-computation of tax treated in the same manner as if it were an overpayment for Federal income tax purposes, a report or amended report is required to be filed:

(1) within 90 days of the final Federal determination; or

(2) in the case of a combined report, within 120 days of the final Federal determination.

(b) If the report or amended report is not filed within the period specified in subdivision (a) of this section, interest on any resulting credit or refund ceases to accrue after such period has expired.

(c) The claim for credit or refund of any resulting overpayment of tax must be filed by the taxpayer within two years from the end of the period specified in subdivision (a) of this section.

(d) The amount of refund or credit is limited to the reduction in tax attributable to the Federal change, correction or renegotiation, or the computation or re-computation, and must be computed without change in the apportionment factor, as determined under section 210-A and pursuant to Part 4 of this Subchapter upon which the taxpayer's report (or any additional assessment) was based.

Section 8-2.4 Overpayment attributable to net operating loss carryback or net capital loss carryback. (Tax Law, section 1087(d))

(a) A claim for credit or refund of so much of an overpayment as is attributable to the application to the taxpayer of a net operating loss carryback or a net capital loss carryback must be filed within whichever of the times prescribed below expires the latest:

(1) within three years from the time the report was due for the taxable year of the loss, determined with regard to any extension of time for filing such report; or

(2) within the time prescribed by section 8-2.2 of this Subpart—that is, within six months after the expiration of the period within which an assessment may be made pursuant to the agreement or any extension of the agreement, with respect to the taxable year of the loss; or

(3) where applicable, within the time prescribed in section 8-2.3 of this Subpart—that is, within two years from the 90th day (or 120th day, in the case of a combined report) after the final Federal determination, with respect to the taxable year to which the net operating loss or the net capital loss is being carried back where the net operating loss or the net capital loss is attributable to the Federal change, correction or renegotiation, or the computation or re-computation.

(b) If the claim for credit or refund is filed after the time prescribed in section 8-2.1 of this Subpart, or after the time prescribed in section 8-2.2 of this Subpart, if applicable, with respect to the taxable year to which the net operating loss or the net capital loss is being carried back, the amount of the credit or refund must be computed without changing the apportionment factor, as determined under section 210-A and pursuant to Part 4 of this Subchapter, upon which the taxpayer's report (or any additional assessment) was based.

Section 8-2.5 Failure to file claim within prescribed period. (Tax Law section 1087(e))

No credit or refund will be allowed or made, except as provided in section 8-2.6 of this Subpart or section 8-3.4 of this Part, after the expiration of the applicable period of limitation specified in this Part, unless a claim for credit or refund is filed by the taxpayer within the period

of limitation. Any later credit will be void and any later refund will be erroneous. No period of limitation specified in any other law or regulation will apply to the recovery by a taxpayer of moneys paid with respect to taxes under article 9-A.

Section 8-2.6 Effect of administrative review. (Tax Law section 1087(f))

If a notice of deficiency for a taxable year has been mailed to the taxpayer under section 1081, and if the taxpayer either files a timely petition with the Division of Tax Appeals under section 1089 or files a timely request for a conciliation conference with the Bureau of Conciliation and Mediation Services pursuant to section 4000.3 of this Title, a determination may be made pursuant to the administrative review following such filing that the taxpayer has made an overpayment for that year (whether or not a determination has been made that there was a deficiency for that year). No separate claim for credit or refund for that year may be filed, and no credit or refund for that year will be allowed or made, except:

(a) as to overpayments that are the subject of such a determination that has become final; and

(b) as to any amount collected in excess of an amount computed in accordance with such a determination that has become final; and

(c) as to any amount collected after the expiration of the period of limitation upon levying; and

(d) as to any amount claimed as a result of a change or correction described in section 8-2.3 of this Subpart.

Section 8-2.7 Limit on amount of credit or refund. (Tax Law section 1087(g))

(a) The amount of overpayment described in section 8-2.6 of this Subpart will, when the determination of the overpayment has become final, be credited or refunded in accordance with

section 1086(a), and must not exceed the amount of tax determined as part of the final determination to have been paid:

(1) after the mailing of the notice of deficiency; or

(2) within the period that would be applicable under section 8-2.1, 8-2.2 or 8-2.3 of this Subpart if, on the date of the mailing of the notice of deficiency, a claim has been filed stating the grounds upon which the overpayment has been determined.

(b) Special restrictions apply to proceedings on a petition for redetermination of a deficiency where the notice of deficiency is issued as a result of an increase or a decrease in Federal taxable income or Federal tax, or a change, correction or renegotiation of tax treated in the same manner as if it were a deficiency for Federal income tax purposes, or a computation or re-computation of tax treated in the same manner as if it were a deficiency for Federal income tax purposes (see section 8-1.2(b)(3) of this Part); or as a result of a net operating loss carryback or a net capital loss carryback (see section 8-1.2(b)(4) of this Part). These restrictions are the same as those set forth in section 8-1.2(b)(7) of this Part, and such restrictions apply both to the commissioner and to the taxpayer.

Section 8-2.8 Early filing or prepayment by taxpayer. (Tax Law section 1087(h) and (i))

For purposes of the limitations specified in this Subpart:

(a) Any report filed by the taxpayer before the last day prescribed for its filing is deemed to have been filed on such last day, without regard to any extension granted to the taxpayer.

(b) Any tax paid by the taxpayer before the last day prescribed for its payment (including any amount paid by the taxpayer as estimated tax for a taxable year), without regard to any extension granted to the taxpayer, is deemed to have been paid on the 15th day of the third month following the close of the taxable year, for taxable years beginning before January 1,

2016, and on the 15th day of the fourth month following the close of the taxable year, for taxable years beginning on or after January 1, 2016.

SUBPART 8-3

REVIEW OF DETERMINATIONS AND DECISIONS

Sec

Section 8-3.1 General. (Tax Law section 1090(a))

A decision of the Tax Appeals Tribunal is subject to judicial review sought by any taxpayer affected by the decision. A taxpayer seeking such review must do so pursuant to Civil Practice Law and Rules article 78. An application for judicial review must be made within four months of notice of the decision being sent to the taxpayer by certified or registered mail.

Section 8-3.2 Judicial review exclusive remedy of taxpayer. (Tax Law section 1090(b))

The review of a decision of the commissioner provided for by this Subpart is the only remedy available to a taxpayer for judicial review of the taxpayer's tax liability under article 9-A.

Section 8-3.3 Assessment pending review; review bond. (Tax Law section 1090(c))

Irrespective of any restrictions on the assessment and collection of deficiencies (see Subpart 8-1 of this Part and Subpart 7-4 of this Subchapter—Collection), the commissioner may

assess a deficiency after the expiration of the four-month period specified in section 8-3.1 of this Subpart, even if an application for judicial review with respect to that deficiency has been duly made by the taxpayer. The commissioner may not assess the deficiency if the taxpayer, at or before the time the taxpayer's application for review is made, has done one of the following:

(a) paid the deficiency;

(b) deposited the amount of the deficiency with the commissioner; or

(c) filed with the commissioner a bond (which may be a jeopardy bond under section 1094(h)) in the amount of the portion of the deficiency, including interest and other amounts, for which the application for review is made. The bond must also secure all costs and charges that may accrue against the taxpayer in the prosecution of the proceeding, including costs of all appeals, and with surety approved by a New York Supreme Court justice. The bond must be conditioned upon the payment of the deficiency, including interest and other amounts, as finally determined and such costs and charges. If as a result of a waiver of the restrictions on the assessment and collection of a deficiency any part of the amount determined by the commissioner is paid after the filing of the review bond, the bond will be proportionately reduced, upon the request of the taxpayer.

Section 8-3.4 Credit, refund or abatement after review. (Tax Law section 1090(d))

If the amount of a deficiency determined by the commissioner is disallowed in whole or in part by the court of review, the amount so disallowed will be credited or refunded to the taxpayer. It is not necessary for the taxpayer to make a claim for the credit or refund. If the taxpayer has not made payment, the amount will be abated.

Section 8-3.5 Date of finality of Division of Tax Appeals determination or Tax Appeals Tribunal decision. (Tax Law section 1090(e))

(a) A determination of an administrative law judge in the Division of Tax Appeals is final unless any party to the hearing takes exception by timely requesting a review by the Tax Appeals Tribunal as provided by section 2006.

(b) A decision of the Tax Appeals Tribunal becomes final upon:

(1) the expiration of the four-month period prescribed in section 8-3.1(a) of this Subpart, if no application for review has been made within the four-month period;

(2) the expiration of the time for all further judicial review, if an application for review has been duly made; or

(3) the rendering by the Tax Appeals Tribunal of a decision in accordance with the mandate of the court on review.

(c) Notwithstanding the provisions of subdivision (b) of this section, for the purpose of making an application for review, the decision of the Tax Appeals Tribunal is deemed final on the date the notice of decision is sent by certified or registered mail to the taxpayer.

PART 9

METROPOLITAN TRANSPORTATION BUSINESS TAX SURCHARGE

Subpart 9 – 1	General
Subpart 9 – 2	MCTD Apportionment Percentage
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Subpart 9 – 6	Other Rules

SUBPART 9-1

GENERAL

Sec.

Section 9-1.1. Definitions.

(a) The term "Metropolitan Commuter Transportation District" (abbreviated in this Part as MCTD) is defined in Public Authorities Law section 1262 and includes the City of New York (New York, Bronx, Kings, Queens and Richmond Counties) and the Counties of Dutchess, Nassau, Orange, Putnam, Rockland, Suffolk and Westchester.

(b)(1) The term "surcharge taxpayer" means every corporation other than a New York S corporation, as defined in section 208(1-A), that is exercising its corporate franchise or doing business, employing capital, owning or leasing property in a corporate or organized capacity, maintaining an office or deriving receipts from activity in the MCTD.

(2) In the case of a combined group that has at least one corporation included in the combined report that is itself exercising its corporate franchise or doing business, employing capital, owning or leasing property in a corporate or organized capacity, maintaining an office or deriving receipts from activity in the MCTD:

(i) The term "surcharge taxpayer" means every such corporation.

(ii) Where the surcharge taxpayer is either permitted or required by a provision of this Part to take some action, such action shall be taken by the combined group's designated agent.

(iii) For purposes of determining the MCTD apportionment percentage, pursuant

to Subpart 9-2 of this Part, and of computing the property, business receipts, and payroll factors, pursuant to Subparts 9-3, 9-4, and 9-5 of this Part, respectively, the term "surcharge taxpayer" shall include each corporation properly includable in the combined report.

(c) The term "surcharge base" means the tax imposed on the surcharge taxpayer due on such taxpayer's corporate franchise tax report, before the deduction of any credits allowed. In the case of a combined report, the term "surcharge base" means the tax due on the combined report before the deduction of any credits allowed, and also includes the amount of fixed dollar minimum tax for each member of the combined group that is itself exercising its corporate franchise or doing business, employing capital, owning or leasing property in a corporate or organized capacity, maintaining an office or deriving receipts from activity in the MCTD.

(d) The terms "doing business, employing capital, owning or leasing property in a corporate or organized capacity or maintaining an office in the MCTD" have the same meaning as in subdivisions (b) through (e) of section 1-2.2 of this Subchapter, except that the definitions of such terms shall be adapted to this Part. For example: "tax surcharge" shall be substituted for "tax"; "surcharge taxpayer" shall be substituted for "taxpayer"; "the MCTD" shall be substituted for "New York State" and "the state"; and "any corporation" shall be substituted for "foreign corporation."

(e) The term "deriving receipts from activity" has the same meaning as in subdivision (f) of section 1-2.2 of this Subchapter, except that the definition of such term shall be adapted to this Part. For example: "tax surcharge" shall be substituted for "tax"; "the MCTD" shall be substituted for "New York State" and "the state"; "MCTD receipts" shall be substituted for "New York receipts"; and "any corporation" shall be substituted for "foreign corporation." If a surcharge taxpayer elects to use the fixed percentage method to apportion receipts from qualified

financial instruments to the State pursuant to section 210-A(5)(a)(1) and section 4-2.4(c) of this Subchapter, and further described in section 9-4.1(d) of this Part, then 90 percent of the eight percent specified pursuant to such election shall be used to determine whether the taxpayer is deriving receipts from activity in the MCTD. In addition, the same adjustments by the commissioner to the receipts thresholds apply, based on an annual year-end review of the Consumer Price Index by the commissioner, pursuant to section 1-2.2(f)(5) of this Subchapter, except that the authority to make such adjustments to the MCTD receipts thresholds is found in section 209-B(1)(e).

Section 9-1.2. Imposition of the tax surcharge. (Tax Law, section 209-B)

(a) In addition to the tax imposed by section 209, a tax surcharge is imposed on every surcharge taxpayer for the privilege of exercising its corporate franchise, or of doing business, or of employing capital, or of owning or leasing property in a corporate or organized capacity, or of maintaining an office, or of deriving receipts from activity in the MCTD.

(b) The tax surcharge is imposed on the surcharge base that is apportioned to the MCTD based on the surcharge taxpayer's business activity carried on within the MCTD.

(c) The tax surcharge will not be allowed as a deduction in the computation of any tax imposed under the Tax Law; and the credits otherwise allowable under article 9-A will not be allowed against the tax surcharge.

(d) Every surcharge taxpayer that continues to do business, employ capital, own or lease property in a corporate or organized capacity, or derive receipts from activity in the MCTD after it has been dissolved by the filing of a certificate of dissolution, by proclamation or otherwise, or after it surrenders its authority to do business is subject to the tax surcharge.

(e) Every surcharge taxpayer that is a foreign corporation subject to tax under section 1-2.2 of this Subchapter and is engaged within the MCTD in any one or more of the activities described in subdivision (a) of this section is subject to the tax surcharge regardless of whether it is authorized to do business in New York State.

(f)(1) A corporation engaged within the MCTD in any of the activities described in subdivision (a) of this section is subject to the tax surcharge:

(i) for any taxable year or part of a taxable year during which it engages in any of the activities described in subdivision (a) of this section; and

(ii) for any subsequent taxable year during which it engages in any of the activities described in subdivision (a) of this section.

(2)(i) A corporation deriving receipts from activity in the MCTD is deemed to be deriving receipts for all of its taxable year or part of its taxable year from the date in such taxable year of its first receipt derived from activity in the MCTD.

(ii) A corporation doing business in the MCTD because it issues credit cards, as described in section 1-2.2(b)(3) of this Subchapter and adapted to this Part, is deemed to be doing business for all of its taxable year or part of its taxable year from the date in such taxable year on which it issues its first credit card in the MCTD.

(3)(i) A corporation deriving receipts from activity in the MCTD in its first taxable year, if also deriving receipts in the subsequent taxable year, is deemed to be deriving receipts from the beginning of the subsequent taxable year.

(ii) A corporation doing business in the MCTD because it issues credit cards, as described in section 1-2.2(b)(3) of this Subchapter and adapted to this Part, in its first taxable

year, if also doing business in the subsequent taxable year, is deemed to be doing business from the beginning of the subsequent taxable year.

Section 9-1.3. Activities deemed insufficient to subject corporations to the tax surcharge. (Tax Law, section 209-B(3))

A corporation shall not be deemed to be doing business, employing capital, owning or leasing property, maintaining an office or deriving receipts from activity within the MCTD because of:

(a) the maintenance of cash balances with banks or trust companies in the MCTD;

(b) the ownership of shares of stock or securities that are kept in the MCTD if:

(1) kept in a safe deposit box, safe, vault or other receptacle rented for such purpose;

(2) pledged as collateral security; or

(3) deposited into safekeeping or custody accounts with one or more banks, trust companies or brokers who are members of a recognized security exchange;

(c) the taking of any action by a bank, trust company or broker in the MCTD incidental to the rendering of safekeeping or custodian service to the corporation as described in subdivision (b)(3) of this section;

(d) the maintenance of an office in the MCTD by one or more officers or directors of the corporation who are not employees of the corporation, unless the corporation is otherwise doing business or employing capital in the MCTD or owns or leases property in the MCTD;

(e) the keeping of books or records of the corporation in the MCTD, unless such books or records are kept by employees of the corporation or if such corporation otherwise does business, employs capital, owns or leases property, maintains an office, or derives receipts from activities within in the MCTD;

(f) the acquisition of one or more security interests in real or tangible personal property located in the MCTD;

(g) the acquisition of title to property located in the MCTD through the foreclosure of a security interest;

(h) the holding of meetings of the board of directors in the MCTD, where such directors are not employees of the corporation and if the corporation is not otherwise doing business, employing capital, owning or leasing property, maintaining an office, or deriving receipts from activities within the MCTD; or

(i) any combination of the foregoing activities.

SUBPART 9-2

MCTD APPORTIONMENT PERCENTAGE

Sec.

Section 9-2.1. Apportionment of surcharge base to the MCTD.

(a) A surcharge taxpayer must apportion its surcharge base by multiplying such surcharge base by its MCTD apportionment percentage.

(b) The MCTD apportionment percentage is determined by a three-factor formula, as described in section 9-2.2 of this Subpart.

Section 9-2.2. Computation of the MCTD apportionment percentage.

(a) The surcharge taxpayer's MCTD apportionment percentage is computed using a

formula consisting of three factors, expressed as percentages. The three factors are:

(1) real and tangible personal property that is located within the MCTD and all such property that is located in New York State, including real and tangible personal property that is rented to the surcharge taxpayer;

(2) business receipts from within the MCTD and all business receipts from New York State; and

(3) payroll within the MCTD and all payroll from New York State.

(b) The MCTD apportionment percentage is computed by adding together the surcharge taxpayer's real and tangible personal property factor, business receipts factor and payroll factor, and dividing by three. If a factor is missing, the other two factors will be added together and the total divided by two. If two factors are missing, the remaining factor is the MCTD apportionment percentage. A factor is missing only if both the numerator and the denominator are zero.

SUBPART 9-3

PROPERTY FACTOR OF MCTD APPORTIONMENT PERCENTAGE

Sec.

Section 9-3.1. Computation of the property factor.

(a) The percentage of the surcharge taxpayer's real property and tangible personal property, whether owned by or rented to the surcharge taxpayer, that is within the MCTD is

determined by dividing the average value of such property within the MCTD (without deduction of any encumbrances) by the average value of all such property within New York State (without deduction of any encumbrances). For purposes of this section, the value of real property owned by the surcharge taxpayer and the value of tangible personal property owned by the surcharge taxpayer means the adjusted basis of such properties for Federal income tax purposes. The value of real and tangible personal property rented to the surcharge taxpayer is addressed in the provisions of section 9-3.3 of this Subpart.

(b) The term "real property" includes land, buildings, structures, and improvements thereon. In addition, it includes shares in a cooperative housing corporation, as defined in IRC section 216(b), in connection with the grant or transfer of a proprietary leasehold. Such shares in a cooperative housing corporation will be deemed to be owned within New York State if the property owned or leased by such corporation, as described in IRC section 216(b)(1)(B), is located in New York State, and such shares will be deemed to be owned within the MCTD if such property is located within the MCTD.

(c) The term "tangible personal property" means corporeal personal property, such as machinery, tools, implements, goods, wares and merchandise. It does not mean money, deposits in banks, shares of stock, bonds, notes, credits or evidences of any interest in property and evidences of debt.

(d)(1) The average value of real property owned by the surcharge taxpayer and tangible personal property owned by the surcharge taxpayer is determined in accordance with the provisions of section 3-2.4 of this Subchapter applicable to the valuation of assets included in business capital. The same method of valuation must be used consistently with respect to property located within the MCTD and all property located in New York State.

(2) For purposes of paragraphs (3) and (4) of subdivision (e) of this section, the average value of tangible personal property owned by the surcharge taxpayer that is in transit and is considered to be within the MCTD will be determined based on the value of such property during the time that it is in transit.

(e) For purposes of computation of the property factor, tangible personal property owned by the surcharge taxpayer:

(1) is considered to be within the MCTD for as long as it remains physically situated or located within the MCTD, even though it may be stored in a bonded warehouse;

(2) is considered to be situated or located within the MCTD if held within the MCTD by an agent or other such person or entity acting on behalf of the surcharge taxpayer, or by a consignee;

(3) that is in transit between locations of the surcharge taxpayer, is considered to be within the MCTD if its final destination is within the MCTD;

(4) that is in transit between a buyer and a seller, is considered to be within the MCTD if its final destination is within the MCTD and the property is included by the surcharge taxpayer in the denominator of its property factor in accordance with its regular accounting practices.

(f) For purposes of computation of the property factor, omnibuses and other rolling equipment such as construction equipment or trucks located within the MCTD and all such rolling equipment located in New York State must be apportioned to the MCTD by a fraction. Such fraction may be based on any of the following measures: miles operated within the MCTD compared to total miles operated in New York State; time operated within the MCTD compared to total time operated in New York State; the number of pickup and delivery locations within the MCTD compared to the total of such locations in New York State; or any other measure that

fairly apportions such operations to the MCTD. Operations within the MCTD are included in the numerator of the fraction, and 100 percent of operations in New York State are included in the denominator. Omnibus operations while engaged in school bus operations must be disregarded in determining the fraction.

(g) For purposes of the property factor, the underlying asset of a capital lease between the surcharge taxpayer and another party (the lessor) is considered owned by the surcharge taxpayer.

Section 9-3.2. Election for fair market value.

(a) On or before the due date for filing its original report (determined with regard to extensions of time for filing) for its first taxable year beginning on or after January 1, 2015, the surcharge taxpayer may make a one-time revocable election to use fair market value, as defined in section 3-2.3 of this Subchapter, as the value of all its real property and tangible personal property owned. Such election must be made on the surcharge taxpayer's original report for its first taxable year beginning on or after January 1, 2015, and shall not be made on an amended report.

(b) The election under this section:

(1) will not apply to any taxable year with respect to a combined report unless the combined group's designated agent makes, or has made, a valid election pursuant to subdivision (a) of this paragraph and applies such election to all corporations properly included in the combined report;

(2) will continue to be in effect until revoked by the surcharge taxpayer or the combined group's designated agent, if applicable, on a report for a subsequent taxable year, and will be deemed to have been revoked starting with such subsequent taxable year.

(c) In no event shall the election under this section or the revocation of the election be for a part of a taxable year.

Section 9-3.3. Real and tangible personal property rented to the surcharge taxpayer.

(a)(1) Real and tangible personal property rented to the surcharge taxpayer must be included for purposes of computation of the property factor under section 9-3.1 of this Subpart.

(2) The value of real and tangible personal property in New York State that is rented to the surcharge taxpayer is determined by multiplying the gross rents payable during the period covered by the report by eight.

(b) The term "gross rents" as used in this section means the actual sum of money or other consideration payable, directly or indirectly, either by the surcharge taxpayer or for its benefit for the use or possession of the property and includes:

(1) Any amount payable for the use or possession of real and tangible personal property, or any part of such property, whether designated as a fixed sum of money or as a percentage of sales, profits or otherwise.

Example 1: A surcharge taxpayer, pursuant to the terms of a lease, pays the lessor $1,000 per month and at the end of the year pays the lessor one percent of its gross sales. Its gross sales were $400,000, resulting in a gross rent of $16,000.

(2) Any amount payable as additional rent or payable in lieu of rent, such as interest, taxes, insurance, repairs or any other amount made payable by the terms of a lease or other arrangement.

Example 2: A surcharge taxpayer, pursuant to the terms of a lease, pays its lessor

$24,000 a year. It also pays real estate taxes of $4,000 and interest on a mortgage in the amount of $2,000 pursuant to the lease. The taxpayer's gross rent is $30,000.

(3) The proportionate part of the cost of any improvement to real and tangible personal property made by or on behalf of the surcharge taxpayer that reverts to the owner or lessor upon termination of a lease or other arrangement. The amount to be included in gross rents is based on the unexpired term of the lease commencing with the date the improvement is completed (or the life of the improvement if its life expectancy is less than the unexpired term of the lease). However, where a building is erected on land leased by or on behalf of the surcharge taxpayer, the value of the land is determined by multiplying the gross rent by eight, and the value of the building is determined in the same manner as if owned by the surcharge taxpayer. The proportionate part of the cost of an improvement (other than a building on leased land) is generally equal to the amount of amortization allowed in computing entire net income, regardless of whether the lease contains an option for renewal.

Example 3: A surcharge taxpayer enters into a 21-year lease of certain premises at a rental of $20,000 a year. After the expiration of one year, it installs a new store front at a cost of $10,000 that reverts to the owner upon the expiration of the lease. Its gross rent for the first year is $20,000. However, for subsequent years its gross rent is $20,500 ($20,000 annual rent plus $1/20^{th}$ of $10,000, the cost of the improvement apportioned on the basis of the unexpired term of the lease).

Example 4: A surcharge taxpayer leases a parcel of vacant land for 40 years at an annual rental of $5,000 and erects a building on the land that costs

$600,000. The value of the land is determined by multiplying the annual rent of $5,000 by eight. The value of the building is determined as if owned by the surcharge taxpayer.

(c) The term "gross rents" does not include:

(1) intercorporate rents if both the lessor and the lessee are properly included in a combined report under article 9-A;

(2) amounts payable as separate charges for water and electric service furnished by the lessor;

(3) amounts payable for storage, unless the storage space is designated for the surcharge taxpayer or under its control;

(4) amounts payable pursuant to a capital lease;

(5) any portion of a rental payment payable for space subleased from the surcharge taxpayer and not used by it. However, the amount of rent received by the surcharge taxpayer from the sublease must be included in the receipts factor of the MCTD apportionment percentage, if required to be included pursuant to Subpart 9-4 of this Part.

Example 5: A surcharge taxpayer leases a building located in the MCTD, to be used in manufacturing. The rent is $20,000 a year. The taxpayer subleases 40 percent of the building to one or more subtenants. Since 40 percent of the rent paid by the taxpayer is applicable to the portion of the building subleased, 40 percent of the rent, or $8,000, is excluded in computing the taxpayer's gross rent for the building, for purposes of determining the building's average value, regardless of the actual amount of rent received by the taxpayer from the sublease.

(d) For purposes of subdivision (c) of this section, the term “capital lease” means any lease that meets at least one of the following:

(1) The present value of the minimum lease payments is 90 percent of the fair value of the property to the lessor.

(2) The lease term is 75 percent or more of the leased property's estimated economic life.

(3) The lease contains a bargain (less than fair value) purchase option.

(4) Ownership is transferred to the lessee by the end of the lease term.

(e) In exceptional cases, use of the general method described in this section may result in inaccurate valuations of rented real or tangible personal property. In such cases, any other method that properly reflects the value may be adopted either on the commissioner’s own motion or at the request of the surcharge taxpayer. Another method of valuation may not be used unless approved by the commissioner. A request for a different method of valuation must provide full information with respect to the property, including the basis for the valuation proposed by the surcharge taxpayer. Once approved or required by the commissioner, such other method of valuation must be used in subsequent taxable years unless the facts materially change. If the facts materially change, the surcharge taxpayer must report such change in facts to the commissioner and the commissioner may consent to or require a change from the method of valuation previously approved.

SUBPART 9-4

RECEIPTS FACTOR OF MCTD APPORTIONMENT PERCENTAGE

Section 9-4.1. Computation of the receipts factor.

The percentage of a surcharge taxpayer's receipts within the MCTD is determined pursuant to the apportionment rules described in section 210-A and the provisions of Part 4 of this Subchapter, with the following exceptions:

(a) The numerator of the apportionment fraction under section 210-A is the denominator for purposes of the MCTD receipts factor.

(b) The numerator of the MCTD receipts factor is determined by applying the rules of section 210-A as if those rules made reference to the MCTD rather than to New York State.

(c) In the case of a combined report, the combined group's receipts factor of the MCTD apportionment percentage will be determined after the elimination of intercorporate and inter-entity receipts.

(d) Adjustment must be made for qualified financial instruments (QFIs), as defined in section 210-A and Part 4 of this Subchapter, and other statutorily imposed apportionment percentages for purposes of the MCTD receipts factor, as follows:

(1) If a surcharge taxpayer elects to use the fixed percentage method to apportion receipts from QFIs to the State pursuant to section 210-A(5)(a)(1) and section 4-2.4(c) of this Subchapter, the fixed percentage method applies in computing the receipts factor under this Subpart.

(2) If eight percent of the receipts specified in a provision of section 210-A(5) are required by such provision and Subpart 4-2 of this Subchapter to be included in the numerator of the apportionment fraction under section 210-A(5), then 90 percent of the eight percent will be considered to be within the MCTD, and 100 percent of the eight percent will be considered to be within New York State. This rule also is applicable in determining the amount of any other receipts received by a credit card processor that are deemed to have been generated within the MCTD. (See section 4-2.15 of this Subchapter.)

(e) If the receipts specified in a provision of section 210-A are not includable in the numerator of the apportionment fraction, pursuant to such provision and Part 4 of this Subchapter, then such receipts will not be included in determining the MCTD apportionment percentage.

SUBPART 9-5

PAYROLL FACTOR OF MCTD APPORTIONMENT PERCENTAGE

Sec.

Section 9-5.1. Computation of the payroll factor.

(a) The percentage of the surcharge taxpayer's payroll apportioned to the MCTD is determined by dividing the wages, salaries and other personal service compensation of the surcharge taxpayer's employees within the MCTD, except general executive officers, during the period covered by the report by the total amount of such compensation of all of the surcharge taxpayer’s employees within the State, except general executive officers, during the period covered by the report.

(b) Wages, salaries and other compensation include all amounts paid for services rendered to the surcharge taxpayer by its employees, after intercorporate eliminations of such amounts paid by members of a combined group, and do not include amounts paid by the surcharge taxpayer that do not have the element of compensation for personal services already rendered or to be rendered.

(c) Wages, salaries and other compensation are computed either on the cash or the accrual basis, in accordance with the method of accounting used in computing the entire net income of the surcharge taxpayer.

(d)(1) Employees within the MCTD include all employees regularly connected with or working out of an office or place of business of the surcharge taxpayer within the MCTD, and irrespective of where the services of such employees were performed, including if performed by telecommuting from outside the MCTD. However, the commissioner may permit or require the surcharge taxpayer to instead compute the payroll factor on the basis of the amount of compensation paid for services performed within the MCTD if both of the following are established: (i) that a substantial part of the surcharge taxpayer's payroll was paid to employees either attached to an office in the MCTD but who performed a substantial part of their services outside the MCTD or attached to an office outside the MCTD but who performed a substantial part of their services within the MCTD; and (ii) that the computation of the payroll factor according to the general rule stated above would not properly reflect the amount of the surcharge taxpayer's business done within the MCTD by its employees.

(2) Services performed within the MCTD will be deemed to be:

(i) in the case of an employee whose compensation depends directly on the volume of business secured by such employee, for example, a salesperson on a commission basis, the amount received by such employee for such business attributable to the employee's efforts within the MCTD;

(ii) in the case of an employee whose compensation depends on achieving results other than as described in subparagraph (i) of this paragraph, the proportion of the total compensation

that the value of such employee's services within the MCTD bears to the value of all of the employee's services within the State;

(iii) in the case of an employee compensated on a time basis, the proportion of the total amount received by such employee that such employee's working time within the MCTD bears to the employee's total working time within the State; and

(iv) in the case of an employee compensated by a combination of the bases of subparagraphs (i) through (iii) of this paragraph, the aggregate of the amounts arrived at pursuant to (i) through (iii).

Section 9-5.2. Definition of employee.

(a) For purposes of computing the payroll factor, the term "employee" means any individual whose relationship with respect to the surcharge taxpayer is that of employer and employee, as described in subdivision (b) of this section. The wages, salaries and other personal service compensation of every such individual, except general executive officers, will be included in the computation of the payroll factor of the MCTD apportionment percentage.

(b) Generally, the relationship of employer and employee exists when the surcharge taxpayer has the right to control and direct the individual not only as to the result to be accomplished by such employee but also as to the means by which such result is to be accomplished. If the relationship of employer and employee exists, the designation or description of the relationship as well as the measure, method and designation of the employee's compensation are immaterial.

(c) A director of a corporation is not an employee. Therefore, compensation paid to directors for acting in their capacity as directors should not be included in computing the payroll factor. In addition, a partner in a partnership cannot be an employee of that partnership.

(d)(1) For purposes of this section, a general executive officer is an appointed or elected officer of the corporation who either has company-wide authority with respect to the officer's assigned functions or duties or is responsible for an entire division of the company. Specifically, a general executive officer:

(i) will have been elected by the shareholders of the corporation;

(ii) will have been elected or appointed by the board of directors of the corporation; or

(iii) if initially appointed by another officer, will have had such appointment ratified by the board of directors of the corporation.

(2) If the jurisdiction of incorporation is other than New York State, the officer of the corporation must be elected or appointed in accordance with the laws of the state or country of incorporation.

(3) General executive officers include the chairperson, president, vice-president, secretary, assistant secretary, treasurer, assistant treasurer, comptroller, and any other officer charged with and performing general executive duties of the corporation.

(4) Any person who has merely been designated as an officer but who is not an appointed or elected officer, as described in paragraph (1) of this subdivision, is not a general executive officer.

(5) Personal service compensation paid to general executive officers of the taxpayer for acting in the role of a general executive officer should not be included in the computation of the payroll factor.

SUBPART 9-6

OTHER RULES

Sec.

Section 9-6.1. The tax surcharge rate. (Tax Law, section 209-B(1)(a) and (f))

To compute the tax surcharge, the surcharge base is multiplied by the MCTD apportionment percentage and the following applicable rate:

(a) For taxable years or portions of taxable years beginning on or after January 1, 2015 and before January 1, 2016, the rate is 25.6 percent.

(b) For taxable years beginning on or after January 1, 2016, the Commissioner of Taxation and Finance is authorized to determine the rate, under section 209-B(1)(f), and the rate will be as follows. For succeeding taxable years, the rate will remain the same as the rate last determined by the commissioner, unless the commissioner determines a new rate, as specified in this section.

(1) For taxable years beginning on or after January 1, 2016 and before January 1, 2017, the rate is 28 percent.

(2) For taxable years beginning on or after January 1, 2017 and before January 1, 2018, the rate is 28.3 percent.

(3) For taxable years beginning on or after January 1, 2018 and before January 1, 2019, the rate is 28.6 percent.

(4) For taxable years beginning on or after January 1, 2019 and before January 1, 2020, the rate is 28.9 percent.

(5) For taxable years beginning on or after January 1, 2020 and before January 1, 2021, the rate is 29.4 percent.

(6) For taxable years beginning on or after January 1, 2021 and before January 1, 2023, the rate is 30.0 percent.

Section 9-6.2. Discretionary adjustment to the MCTD apportionment percentage.

(a) In certain circumstances, use of the rules and methods described in Subparts 9-3, 9-4, and 9-5 of this Part may not properly reflect the surcharge taxpayer’s business activities. Under such circumstances, where it appears that the MCTD apportionment percentage does not properly reflect the surcharge taxpayer's business activities carried on within the MCTD, the commissioner, in his or her discretion, or at the request of the surcharge taxpayer, and pursuant to the rules and standards set forth in section 4-4.1 of this Subchapter, may adjust the MCTD apportionment percentage or require that the surcharge taxpayer use a different apportionment formula or a different apportionment method to more accurately reflect the surcharge taxpayer's business activity carried on within the MCTD.

(b) If the MCTD apportionment percentage for a taxable year has been adjusted, or a different apportionment formula or method has been used for a taxable year, pursuant to subdivision (a) of this section, the surcharge taxpayer may not employ another apportionment percentage, or another apportionment formula or method for such year, without the prior written consent of the commissioner.

Section 9-6.3. Applicability of rules on administration of tax.

All of the procedural provisions concerning the administration of the tax imposed by section 209, in law and in regulation, including the provisions of article 27 and the regulations promulgated thereunder, shall apply to the tax surcharge.

PART 10 – SPECIAL ENTITIES

SUBPART 10-1

QUALIFIED NEW YORK MANUFACTURERS

Sec.

Section 10-1.1 General Definitions. (Tax Law, section 210(1)(a)(vi) and 210(1)(b)(2))

For purposes of this Subpart, the following terms have the following meaning.

(a) "Adjusted basis" means the adjusted basis determined for federal tax purposes for taxable years beginning before January 1, 2018 and means New York state adjusted basis for taxable years beginning on or after January 1, 2018. "New York state adjusted basis" means the adjusted basis of such property for federal income tax purposes at the close of the taxable year plus the accumulated amount of the federal depreciation deductions disallowed under section 208(9)(b)(17) for such property (including the depreciation deductions for the current taxable year) minus the accumulated amount of the subtractions from federal taxable income allowed under section 208(9)(a)(17) for such property (including the subtractions for the current taxable year).

(b) " Qualified manufacturing property" means tangible personal property and other tangible property, including buildings and structural components of buildings, owned by the corporation and principally used by the corporation or, in the case of combined report,

principally used by the corporation or another member of the combined group, in the production of goods by manufacturing, processing, assembling, refining, mining, extracting, farming, agriculture, horticulture, floriculture, viticulture or commercial fishing, that (i) are depreciable pursuant to IRC section 167, (ii) have a useful life of four years or more, (iii) are acquired by purchase as defined in IRC section 179(d), and (iv) have a situs in New York State. It does not include tangible personal property and other tangible property qualifying under clauses (B) through (G) of section 210-B(1)(b)(i).

(c) "Goods" mean tangible movable personal property having intrinsic value.

(d) "Qualified manufacturing employees" means employees of the corporation or a member of a combined group who are engaged in manufacturing, processing, assembling, refining, mining, extracting, farming, agriculture, horticulture, floriculture, viticulture, or commercial fishing in New York.

Section 10-1.2 Definition of qualified New York manufacturer. (Tax Law, section 210(1)(a)(vi) and 210(1)(b)(2))

(a) A corporation or, in the case of a combined report, a combined group, engaged in the production of goods by manufacturing, processing, assembling, refining, mining, extracting, farming, agriculture, horticulture, floriculture, viticulture, or commercial fishing during the taxable year will be a qualified New York manufacturer if the criteria in paragraph (1) or (2) of this subdivision are met.

(1) (i) The corporation or combined group derives more than 50 percent of its gross receipts during the taxable year from its sale of goods produced by manufacturing, processing, assembling, refining, mining, extracting, farming, agriculture, horticulture, floriculture, viticulture, or commercial fishing (hereinafter referred to as the "principally engaged test") and

has qualified manufacturing property that has an adjusted basis of at least one million dollars at the end of the taxable year or has all its real and personal property in New York State for the entire taxable year.

(ii) The corporation's sale of goods requires that title be transferred from the taxpayer to another party, except in instances of contracts covering more than one taxable year for the ultimate sale of goods. Any receipts earned pursuant to such contracts in each taxable year shall be deemed a sale of goods even though transfer of title has not yet occurred. The sale of a good shall not include (a) the licensing of goods, (b) the sale of a warranty, (c) the sale of an insurance contract, (d) or the sale of advertising related to the good.

(iii) To determine whether the corporation or the combined group has satisfied the principally engaged test, the total everywhere receipts of the corporation, or in the case of a combined report, the combined group, shall be multiplied by a fraction. The denominator of the fraction used to compute the principally engaged test is the corporation's or combined group's everywhere receipts, except that any global intangible low-taxed income as defined in IRC section 951A must be excluded. The numerator of the fraction is the portion of such everywhere receipts derived from the sale, by the taxpayer or combined group, of goods produced by manufacturing, processing, assembling, refining, mining, extracting, farming, agriculture, horticulture, floriculture, viticulture, or commercial fishing. Receipts from the foregoing activities are combined when determining the numerator of the fraction for the principally engaged test. Everywhere receipts has the same meaning for this purpose as in subdivision (a) of section 4-1.1 of this Subchapter.

(iv) In the case of a combined report, intercorporate receipts are eliminated in the computation of the principally engaged test.

(2) A corporation or a combined group, in the case of a combined report, that does not satisfy the principally engaged test will be a qualified New York manufacturer if the corporation or combined group employs at least 2,500 qualified manufacturing employees on the last day of the taxable year and has qualified manufacturing property that has an adjusted basis of at least 100 million dollars at the close of the taxable year.

(b) In determining whether goods are produced by manufacturing, processing, assembling, refining, mining, extracting, farming, agriculture, horticulture, floriculture, viticulture, or commercial fishing (hereinafter referred to as manufacturing activities), the following will not be considered manufacturing activities:

(1) A process that makes a good more attractive for sale without substantially altering the good.

(2) A process that does not affect a material change in the good.

(3) Market research, research and development, and design and creation of a prototype.

(4) The manipulation of information.

(5) The transmission of information.

(6) The performance of a service.

(7) Cooking, baking and other preparation of food for on-site consumption.

(8) The generation and distribution of electricity, the distribution of natural gas, and the production of steam, ice, or any other good associated with the generation of electricity.

(9) The creation of a digital product.

(10) Heating, cooling, regulating, cleaning, purifying, blending, and distributing activities.

(c) The determination of whether a corporation or a combined group is a qualified New York manufacturer is done on an annual basis.

(d) For purposes of computing the capital base tax, a qualified New York manufacturer includes a corporation that is defined as a qualified emerging technology company under Public Authorities Law Section 3102-e(1)(c) regardless of the $10 million limitations expressed in subparagraph one of that paragraph (c). In the case of a combined report, all members of the combined group must be qualified emerging technology companies for the combined group to be considered a qualified New York manufacturer under this subdivision.

Section 10-1.3 Contract Manufacturing.

(a) For purposes of this section, a corporation that contracts out its production activities is referred to as “the contracting company”. The entity to whom the production activities are contracted is referred to as “the production company”.

(b) (1) In determining if the contracting company is a qualified New York manufacturer, it may include the assets and employees used in the production activities in that determination only if the contracting company owns the assets being used by the production company in the production activities and only its employees operate or use those assets.

(2) Receipts earned by the contracting company from the sale of goods produced by the production company on behalf of the contracting company are not receipts from the sale of goods produced by manufacturing activities and, thus, would not be included in the numerator of the fraction used in the computation of the principally engaged test.

(c) (1) In determining if a production company is a qualified New York manufacturer, it may include the assets and employees used in the production activities in that determination only

if the production company owns the assets being used and only its employees operate or use those assets.

(2) Receipts paid by the contracting company to the production company for the manufacture of the goods produced by the production company on behalf of the contracting company are not receipts from the sale of goods produced by manufacturing activities unless the production company in fact is selling those goods (that is transferring title to those goods) to the contracting company. The receipts received by the production company from the contracting company would be included in the numerator of the fraction used in the computation of the principally engaged test only if the receipts are from the sale of goods as described in the previous sentence.

Section 10-1.4 Corporate Partners.

(a) A corporation that is a partner in a partnership filing under the aggregate method must combine its distributive share of receipts from the partnership with its own receipts in the computation of the principally engaged test.

(b) A corporation that is a partner in a partnership filing under the aggregate method must combine its proportionate part of the partnership's qualified manufacturing property and qualified manufacturing employees with its own qualified manufacturing property and qualified manufacturing employees to determine if it is a qualified New York manufacturer.

(c) Under the aggregate method, the property, receipts, and employees of the partnership are deemed to be that of the corporate partner. As such, the rules of contract manufacturing do not apply to any partnership/corporate partner agreement regarding manufacturing.

(d) In determining whether a corporation that is a partner in a partnership filing under the entity method is a qualified New York manufacturer, the corporation does not consider any of

the partnership's property or employees in that determination. In addition, it would not include any of the partnership's receipts in the numerator of the fraction used in the computation of the principally engaged test.

SUBPART 10-2

CORPORATE PARTNERS

Sec.

Section 10-2.1 General. (Tax Law section 210(3))

(a) A corporation that is a partner in a partnership must compute its tax with respect to its interest in such partnership under the aggregate method or entity method, whichever applies.

(b) Under the aggregate method, a corporate partner is viewed as having an undivided interest in the partnership's assets, liabilities and items of receipts, income, gain, loss, and deduction. Under the aggregate method, the partner is treated as participating in the partnership's transactions and activities.

(c) Under the entity method, a partnership is treated as a separate entity and a corporate

partner is treated as owning an interest in the partnership entity. The partner's interest in the partnership is an intangible asset.

Section 10-2.2 Determination of applicable methodology.

(a) A corporation must use the aggregate method in determining its tax with respect to its interest in a partnership if the corporation has access to the information necessary to compute its tax using such method. A corporation is presumed to have access to the information if any one of the following is met:

(1) it is conducting a unitary business with the partnership;

(2) it is a general partner of the partnership or is a managing member of a limited liability company that is treated as a partnership for Federal income tax purposes;

(3) it has a five percent or more interest in the partnership determined in the manner provided in section 1-2.2(a)(8)(i)(a) of this Subchapter;

(4) it has reported information from the partnership in a prior taxable year using the aggregate method;

(5) its partnership interest constitutes more than 50 percent of its total assets;

(6) its basis in its interest in the partnership pursuant to IRC section 705 and 26 CFR 1.705-1 on the last day of the partnership year that ends within or with the corporation's taxable year is more than $5,000,000;

(7) any member of its affiliated group or New York combined group has the information necessary to perform such computation; or

(8) it is claiming a tax credit based upon the activities of the partnership or claiming a

tax credit computed at the partnership level that flows through from the partnership to the corporation.

(b) (1) If a corporation does not meet any of the presumptions set forth in subdivision (a) of this section and does not and will not have access to the information necessary to compute its tax using the aggregate method within the time period allowed for filing a report, determined with regard to all available extensions of time to file, and certifies these facts to the Commissioner, the corporation must use the entity method.

(2) If a corporation meets one or more of the presumptions set forth in subdivision (a) of this section but the corporation establishes to the satisfaction of the Commissioner that it, any member of its affiliated group, or any member of its New York combined group does not and will not have access to the information necessary to compute the corporation's tax using the aggregate method within the time period allowed for filing a report, determined with regard to all available extensions of time to file, and certifies these facts to the Commissioner, then the corporation must use the entity method.

(c) If a corporation is a partner in a partnership ("upper tier partnership") and such partnership is a partner in another partnership ("lower tier partnership") and the corporation has the necessary information to use the aggregate method with respect to the items of receipts, income, gain, loss, deduction, assets and liabilities, and activities of the upper tier partnership that are not attributable to the lower tier partnership, but does not have the necessary information to use the aggregate method with respect to such items that are attributable to the lower tier partnership, then such corporation must use the aggregate method with respect to the items of receipts, income, gain, loss, deduction, assets and liabilities, and activities of the upper tier partnership that are not attributable to the lower tier partnership and

must use the entity method with respect to such items that are attributable to the lower tier partnership. If there are additional tiers of partnerships, this methodology must be employed at each tier. The corporation will be presumed to have access to the necessary information with respect to a lower tier partnership and will be subject to the provisions of paragraph (2) of subdivision (b) of this section with respect to a lower tier partnership if one or more of the presumptions set forth in subdivision (a) of this section are met at each tier. If the corporation does not meet any of the presumptions set forth in subdivision (a) of this section and does not have access to the necessary information with respect to a lower tier partnership the provisions of paragraph (1) of subdivision (b) of this section will apply.

(d)(1) For purposes of this section, the term "affiliated group" will have the same meaning as such term has in IRC section 1504, except that the term "common parent corporation" will be deemed to mean any person as defined in IRC section 7701(a)(1). Such section 1504 must be read without regard to the exclusions provided for in section 1504(b).

(2) For purposes of this section, a partnership interest constitutes more than 50 percent of a corporation's total assets if its interest in the partnership is more than 50 percent of the corporation's total assets. In determining its interest in the partnership and its total assets, the corporation may elect to use ending amounts, the average of the beginning and ending amounts as reported on the corporation's balance sheet included in its Federal income tax return, or average amounts determined on a more frequent basis as determined in a manner consistent with the corporation's balance sheet included in its Federal income tax return. Whichever method a corporation elects to use, it must use that method for all of its assets. If the corporation is not required to include a balance sheet in its Federal income tax return, it must use a method that it would have used if it had been required to include a balance sheet in its

Federal income tax return. Provided, an alien corporation must use only amounts that are effectively connected with its United States trade or business.

Section 10-2.3 Computation of tax under the aggregate method.

(a)(1) Under the aggregate method, the corporation's distributive share (see IRC section 704) of each partnership item of receipts, income, gain, loss, and deduction and the corporation's proportionate part of each partnership asset and liability and each partnership activity are included in the computation of the corporation's business income base, capital base, and the fixed dollar minimum tax and will have the same source and character in the hands of the corporate partner for article 9-A purposes as such item has in the hands of the partnership for Federal income tax purposes. Where an item, amount or activity of the partnership is not characterized for Federal income tax purposes or is not required to be taken into account for Federal income tax purposes, the source and character of each item, amount or activity of the partnership will be determined as if such item, amount or activity realized, incurred or experienced by the partnership were realized, incurred or experienced directly by the corporate partner.

(2) A corporation's proportionate part of the partnership's assets and liabilities and activities is determined in accordance with the corporation's capital interest in the partnership. If using a corporation's capital interest in a partnership to determine the corporation's share of partnership items constituting business capital and investment capital does not properly reflect the corporation's share of partnership items constituting business income, investment income, and other exempt income, then the corporation's proportionate part of the partnership's assets and liabilities and activities is determined using the percentage resulting from the manner in

which the partners divide the partnership's profits in a profit year and losses in a loss year.

Example: Corporations A and B are partners in Partnership P. A will perform services for a 40% interest in the profits and losses of Partnership P and B will contribute $1,000 for a 60% interest in the profits and losses of Partnership P. B's capital interest is 100% and A's capital interest is zero. Partnership P's only asset is $500 of stock, which pays dividends of $30 during the taxable year.

Based on capital interests, A's proportionate part of P's stock is zero ($500 x 0%) and B's proportionate part of P's stock is $500 ($500 x 100%). In this case, using capital interests does not properly reflect A's share of P's stock. This is because A receives 40% of P's dividends and using capital interests attributes none of P's stock to A. Likewise, B receives 60% of P's dividends and using capital interests attributes all of P's stock to B.

In this case, both A and B must determine their proportionate part of P's assets and liabilities in accordance with their profits and loss interest (40% and 60%, respectively) in P. As a result, A's distributive share of the dividends is $12 ($30 multiplied by 40%) and B's distributive share is $18 ($30 multiplied by 60%).

(3)(i) An allocation of an item, amount or activity, even if recognized for Federal income tax purposes, will not be recognized where it has as a principal purpose the avoidance

or evasion of any tax imposed on the corporation, or the combined group of which the corporation is a member, by New York State or any of its political subdivisions. Where an allocation is not recognized, the corporation's distributive share will be determined in accordance with the partner's interest in the partnership (determined by taking into account all facts and circumstances).

(ii) The determination of whether a principal purpose of an allocation of an item, amount or activity is the avoidance or evasion of any tax imposed on the corporation, or the combined group of which the corporation is a member, by New York State or any of its political subdivisions depends on all the surrounding facts and circumstances. Among the relevant circumstances to be considered are the following:

(a) whether the allocation has substantial economic effect;

(b) whether the related items of partnership income, gain, loss, and deduction from the same source are subject to the same allocation;

(c) whether the allocation was made without recognition of normal business factors and only after the amount of the allocated item could reasonably be estimated;

(d) the duration of the allocation; and

(e) the overall tax consequences of the allocation.

(iii) A special allocation to a corporate partner of a New York tax credit that is computed at the partnership level may be allowed only if the following conditions are satisfied:

(a) the sole component in the calculation of the tax credit is a partnership expenditure;

(b) the tax credit is allocated in the same way as that expenditure is allocated among the partners;

(c) the allocation of the tax credit does not have as a principal purpose the avoidance or evasion of any tax imposed on the corporation, or the combined group of which the corporation is a member; and

(d) the allocation of the expenditure has substantial economic effect.

(4) Where a corporation is a partner in an upper tier partnership that is a partner in a lower tier partnership, the source and character of such corporation's distributive share or proportionate part, as the case may be, of each partnership item of receipts, income, gain, loss, deduction, asset, liability, and activity of the upper tier partnership that is attributable to the lower tier partnership retains the source and character determined at the level of the lower tier partnership. Such source and character are not changed by reason of the fact that such item flows through the upper tier partnership to such partner.

(b) Business income base. The corporation's distributive share of each partnership item of income, gain, loss, and deduction must be taken into account in the computation of entire net income and the business income base. These amounts must be taken into account in determining the corporation's business income, investment income, and other exempt income.

(c) Capital base. The corporation's proportionate part of each asset and liability of the partnership must be taken into account in the computation of the capital base. These amounts must be taken into account when determining business capital and investment capital. The capital base does not include any amount with respect to the corporation's interest in the partnership itself.

(d) Fixed dollar minimum. In determining the tax measured by the fixed dollar minimum, the corporation must use its New York receipts determined in subdivision (f) of this section.

(e) Small business taxpayer. For purposes of the reduced rate of tax provided in section 210(1)(a) or the exemption from the tax measured by the capital base provided in section 210(1-c) for a small business taxpayer, a corporation must meet the definition of a small business taxpayer in section 210(1)(f). In determining whether the corporation qualifies, it must take into account its distributive share or proportionate part, as the case may be, of partnership amounts of items described in section 210(1)(f).

(f) Business Apportionment Factor. (1) A corporation must include its distributive share of the partnership's business receipts when computing its business apportionment factor. Its distributive share of the partnership's business receipts during the applicable partnership year should be combined with the corporation's own receipts for the taxable year. The corporation must apportion such combined amounts using the rules specified in section 210-A and Part 4 of this Subchapter. To the extent an apportionment rule uses a fraction to determine the amount of New York receipts, a corporation must include the distributive share or proportionate parts of any partnership amounts with the corporation's own amounts in such fraction. In addition, netting of gains and losses must be computed on the combined corporation and partnership amounts.

(2) Where a corporation has receipts from sales to a partnership in which it is a partner, the corporation must reduce its receipts from its sales to the partnership by its distributive share of such purchases by the partnership. Where a partnership has receipts from sales to a corporation that is a partner in the partnership, the corporation does not include its distributive share of the partnership receipts from sales to the corporation in its business apportionment factor.

(3) Examples. In the following examples, Partnership P has two partners, Corporation A and Corporation B. Corporation A has a 20 percent interest in the partnership and Corporation B has an 80 percent interest. There are no allocations of an item, amount or activity.

Example 1: Corporation A's sales are $20,000,000 for the year, $5,000,000 of which are made to Partnership P. Partnership P makes sales of $10,000,000 during the same year, none of which are to A or other partners. Corporation A determines its everywhere receipts of $21,000,000 as follows:

Sales by Corporation A to other entities		$15,000,000
Sales by Corporation A to Partnership P	$5,000,000	
Less its distributive share of Partnership P's purchases from Corporation A (20% x $5,000,000)	($1,000,000)	
Corporation A's total sales to Partnership P ($5,000,000 - $1,000,000)		$4,000,000
Corporation A's distributive share of Partnership P's total sales (20%*$10,000,000)		$2,000,000
Corporation A's everywhere receipts		$21,000,000

Example 2: The sales made by Corporation A, Corporation B, and Partnership P are as follows:

Corporation A		$20,000,000
Corporation B		$80,000,000
Partnership P sales to Corporation A	$3,000,000	
Partnership P sales to Corporation B	$6,000,000	
Partnership P sales to unrelated Corporation X	$1,000,000	
Partnership P's total sales		$10,000,000

Corporation A determines its everywhere receipts of $21,400,000 as follows:

Sales by Corporation A		$20,000,000
Corporation A's distributive share of Partnership P's total sales (20%*$10,000,000)	$2,000,000	
Less Corporation A's distributive share of Partnership P's sales to Corporation A (20% * $3,000,000)	$600,000	
Corporation A's distributive share of Partnership P's sales		$1,400,000
Corporation A's everywhere receipts		$21,400,000

Corporation B determines its everywhere receipts of $83,200,000 as follows:

Sales by Corporation B		$80,000,000
Corporation B's distributive share of Partnership P's total sales (80%*$10,000,000)	$8,000,000	
Less Corporation B's distributive share of Partnership P's sales to Corporation B (80% * $6,000,000)	$4,800,000	
Corporation B's distributive share of Partnership P's sales		$3,200,000
Corporation B's everywhere receipts		$83,200,000

(4) In instances where an apportionment rule requires the use of a fraction to compute New York receipts, the corporation must use the sum of its own amounts for the taxable year and its distributive share or proportionate part, as the case may be, of partnership amounts during the applicable partnership year when computing such fractions.

(g) Metropolitan Transportation Business Tax Surcharge. (1) The corporation takes into account its distributive share of the partnership's receipts and payroll within the Metropolitan Commuter Transportation District (MCTD) and New York State and its distributive share or proportionate part, as the case may be, of the partnership's property within the MCTD and New York State in computing its MCTD apportionment percentage as required by section 209-B(2). For purposes of section 209-B (2), a corporation that is a partner in a

partnership computes its MCTD apportionment percentage by computing the property, receipts and payroll factors as follows:

(i) The average value of the corporation's real and tangible personal property, owned or rented, within the MCTD plus the average value of the corporation's distributive share or proportionate part, as the case may be, of the partnership's real and tangible personal property, owned or rented, within the MCTD during the applicable partnership year is divided by the average value of the corporation's real and tangible personal property, owned or rented, within New York State plus the average value of its distributive share or proportionate part, as the case may be, of the partnership's real and tangible personal property, owned or rented, within New York State during the applicable partnership year. Where a corporation has leased or rented real or tangible personal property to a partnership in which it is a partner, the corporation includes only the average value of such property in its property factor. The corporation does not include eight times its distributive share of the partnership's rental expense because the average value of the property is included by the corporate partner as the owner of the property. Where a corporation has leased or rented real or tangible personal property from a partnership in which it is a partner, the corporation includes both its proportionate part of the average value of such property and eight times the amount of rental expense that is deemed to have been paid to the other partners with respect to such property. The amount of rental expense deemed paid to other partners is the corporation's total rental expense paid to the partnership less the corporation's distributive share of the partnership's rental income from such property.

(ii) The corporation's business receipts within the MCTD plus the taxpayer's distributive share of the partnership's business receipts within the MCTD during the applicable partnership

year (MCTD receipts) is divided by the corporation's New York receipts determined in subdivision (f) of this section. The MCTD receipts are determined using the rules in subdivision (f) of this section but substituting MCTD for New York State.

(iii) The wages, salaries and other personal service compensation of the corporation's employees, except general executive officers, within the MCTD plus the corporation's distributive share of the wages, salaries and other personal service compensation paid by the partnership to its employees, except employees of the partnership having partnership-wide authority or having responsibility for an entire division of the partnership, within the MCTD during the applicable partnership year is divided by the wages, salaries and other personal service compensation of the corporation's employees, except general executive officers, within New York State plus the corporation's distributive share of the wages, salaries and other personal service compensation paid by the partnership to its employees, except employees of the partnership having partnership-wide authority or having responsibility for an entire division of the partnership, within New York State during the applicable partnership year.

(2) Examples. In the following examples regarding the computation of the property factor of the MCTD apportionment percentage, Partnership P has two partners, Corporation A and Corporation B. Corporation A has a 20 percent interest in the partnership and Corporation B has an 80 percent interest. There are no allocations of an item, amount or activity.

Example 1: Partnership P rents a building in the MCTD owned by corporate partner A (average value of $100,000) for $12,000 per year.

Corporation A must include the average value of $100,000 for the building in both the numerator and denominator of its property factor. No portion

of the property's rental value is included in Corporation A's property factor.

Corporation B must include $76,800 in the numerator and denominator of its property factor, which is its distributive share of the average value of the property rented in the MCTD by Partnership P (80% x $12,000 x 8)

Example 2: Partnership P owns a building in the MCTD and rents it to Corporation A for $12,000 per year. Corporation A must include its proportionate part of the average value of the building, $20,000 (20% X $100,000), in the numerator and denominator of its property factor. In addition, Corporation A must include eight times the amount of rental expense that is deemed to have been paid to Corporation B with respect to such property in the numerator and denominator of its property factor. Such expense of $9,600 is computed by reducing Corporation A's rental expense of $12,000 paid to Partnership P by its distributive share of the partnership's rental income of $2,400 (20% x $12,000). Thus, the value of the building to be used in the numerator and denominator of Corporation A's property factor is $96,800 ($20,000 + (8 X $9,600)). Corporation B must include its proportionate part of the average value of the building, $80,000 (80% X $100,000) in the numerator and denominator of Corporation B's property factor.

(h) In the case of a corporation included in a combined report that is filing under the aggregate method with respect to a partnership interest and such partnership engages in transactions with another member of the partner's combined group, the distributive share and proportionate amounts from such partnership are subject to the same intercorporate eliminations as if such transactions occurred directly between the partner and the member of the partner's combined group.

(i) The term "applicable partnership year" means any taxable year of the partnership ending within or with the taxable year of the partner.

Section 10-2.4 Computation of tax under the entity method.

(a) Under the entity method, for purposes of determining the taxes measured by the business income base, capital base, and the fixed dollar minimum, a corporate partner is treated as owning an interest in the partnership entity. The partner's interest in the partnership is an intangible asset that is business capital.

(b) Business income base. (1) To the extent a corporation's entire net income includes its distributive share of partnership items of income, gain, loss and deduction, such items will be treated as business income. The corporation's distributive share of such partnership items must be apportioned as provided in subdivision (e) of this section and included in the corporation's apportioned business income.

(2) While a corporation may have the information concerning one or more of the modifications set forth in section 208(9), such as state bond interest, a corporation using the entity method does not have all the information necessary to properly compute its article 9-A tax using the aggregate method. Therefore, no modifications should be made with respect to any partnership items.

(c) Capital base. The corporation's interest in a partnership is business capital and is apportioned as provided in subdivision (e) of this section. The corporation's interest in the partnership is the value shown on its books and records kept in accordance with generally accepted accounting principles. If the interest is a marketable security, it is valued at fair market value. The capital base does not include any other amounts that the corporation may have included on its balance sheet with respect to its interest in the partnership.

(d) Fixed dollar minimum. The corporation does not take into account any partnership items in determining its fixed dollar minimum tax.

(e) A corporation must apportion its distributive share of partnership items of income, gain, loss and deduction included in its business income and its interest in the partnership included in its business capital by its business apportionment factor determined under Part 4 of this Subchapter, computed without regard to its distributive share of any partnership items of income, gain, loss or deduction.

(f) Because the corporation is treated as owning an intangible asset, it is not entitled to claim any portion of any tax credit that would be computed at the partnership level.

(g) Example. Corporation X is a partner in Partnership P. For state tax purposes, the only information Corporate Partner X receives from Partnership P is a statement that lists its proportionate share of New York State income (loss), as well as state source income for other states in which Partnership P operates. The statement does not specify how the state source amounts were computed nor does it confirm that the New York article 9-A rules were used to compute the New York amount. Therefore, Corporate Partner X does not have the necessary information to properly compute its article 9-A tax using the aggregate method, and it must compute its tax using the entity method. As such, the specific information provided by

Partnership P about New York State income (loss) must be disregarded. To compute its tax under article 9-A, Corporate Partner X must include its total distributive share of income, gain, loss and deduction from Partnership P as business income. The amount of such amounts from Partnership P are then multiplied by a BAF computed without regard to the amounts from Partnership P.

Section 10-2.5 Treatment of gain or loss from the sale of a partnership interest. Where a corporation is a partner in a partnership, any gain or loss that is recognized from the sale of the corporation's interest in such partnership and included in entire net income is business income or loss.

Section 10-2.6 Election by certain foreign limited partners. (Tax Law, § 209(1)(f))

(a) (1) A foreign corporation which is a limited partner in one or more limited partnerships, that is subject to tax under article 9-A of the Tax Law solely as a result of the application of section 1-2.2(a)(8) of this Title and which does not file on a combined basis for article 9-A purposes, may elect to compute its tax bases by taking into account only its distributive share of each partnership item of receipts, income, gain, loss and deduction (including any modifications relating thereto) and its proportionate part of each partnership asset and liability, and each partnership activity, of all such limited partnerships which are doing business, employing capital, owning or leasing property, maintaining an office, or deriving receipts in New York State, whether or not such share is actually distributed. However, such election may not be made with respect to a partnership if the limited partnership and corporate group are engaged in a unitary business wherever conducted. The election shall be applicable to all of those limited partnership interests that are not engaged in a unitary business with the corporate group ("election partnerships"). The term *corporate group* means the corporate limited

partner itself or, if it is a member of an affiliated group, the corporate limited partner and all other members of such affiliated group. The term *affiliated group* shall have the same meaning as provided in section 10-2.2(d)(1) of this Subpart.

(2) If the foreign corporation makes the election allowed under this section, the foreign corporation's distributive share of such partnership's items of income, gain, loss and deduction shall be presumed to be business income and its proportionate part of such partnership's assets and liabilities shall be deemed to be business capital and be apportioned entirely to New York, unless the foreign corporation proves otherwise.

(3) If the separate accounting election has been made and the foreign corporation has an interest in more than one election partnership, a separate business income base, capital base, and New York receipts amount (used for purposes of computing the tax measured by the fixed dollar minimum) must be computed for each limited partnership interest. Each amount is then aggregated, with negative amounts limited to zero, to determine the foreign corporation's business income base tax, capital base tax, and fixed dollar minimum tax. Where such negative amounts are limited to zero in determining the business income base tax of the foreign corporation, the corporation may generate an NOL for the taxable year equal to the negative business income base computed for such partnership interest. Such NOL may only be applied against the apportioned business income of the partnership generating such loss in accordance with Subpart 3-9.

(b) The election is made at the time of filing the original, timely filed return, determined with regard to valid extensions. Once an election is made, it may not be revoked by filing an

amended report and is binding with respect to all election partnerships for all future taxable years as long as the criteria in subdivision (a)(1) still applies.

(c) Where a corporation makes such an election, but is not allowed to make such an election with respect to one or more other such partnerships as those partnerships and the corporate group are engaged in a unitary business wherever conducted ("nonelection partnerships"), then, subdivision (a) of this section to the contrary notwithstanding, the taxpayer shall compute its tax bases with respect to nonelection partnerships by reducing its receipts, income, gain, loss and deductions by the amounts which are directly and indirectly attributable to such election partnerships.

SUBPART 10-3

NEW YORK S CORPORATIONS

Sec.

Section 10-3.1 Apportionment rules for New York S corporations. (Tax Law, section 210-A)

A New York S corporation as defined in section 208(1-A) determines the amount of business receipts included in New York receipts or everywhere receipts using the rules in section 210-A and Part 4 of this Subchapter, except as provided in this Subpart.

(a) The term" business receipts for a New York S corporation" means all receipts, net income (not less than zero), net gains (not less than zero), and other items described in section 210-A and the applicable regulations that are included in the New York S corporation's nonseparately computed income and loss or in the New York S corporation's separately stated items of income and loss, determined pursuant to subdivision (a) of IRC section 1366. Business receipts for New York S corporations include amounts that otherwise would have been characterized as investment income from investment capital or other exempt income for New York C corporations.

(b) Because a New York S corporation does not have any investment capital or other exempt income, stock that otherwise would have been investment capital or could generate other exempt income for a New York C corporation as defined in section 208(1-A) may be a qualified financial instrument for a New York S corporation. For purposes of applying the rules in section 4-2.4 of this Subchapter, the term qualified financial instrument shall have the same meaning as in section 4-2.4, except that the instruments excluded from qualified financial instruments in the case of New York S corporations shall be limited to the following:

(1) loans secured by real property;

(2) loans not secured by real property, if the only loans the taxpayer has marked to market are loans secured by real property; and

(3) partnership interests that do not meet the definition of security in IRC section 475(c).

(c) Global intangible low-taxed income (GILTI) is included in everywhere receipts only in instances where the GILTI inclusion amount is computed at the entity level under IRC section 951A. GILTI is not included in New York receipts.

Section 10-3.2 Nonresident and part-year resident shareholders of New York S Corporations. (Tax Law, sections 631 and 632)

(a) To determine the amounts derived from New York sources for purposes of article 22, a nonresident shareholder of a New York S corporation multiplies its pro-rata share of the New York S corporation's items of income, gain, loss, and deduction (and any related section 612 modifications) that are included in the nonresident shareholder's New York adjusted gross income by a fraction, the numerator of which is the New York S corporation's New York receipts and the denominator of which is the New York S corporation's everywhere receipts. Such fraction is hereinafter referred to as the apportionment factor.

(b) For part-year resident shareholders, the rule in subdivision (a) applies only to the New York S corporation's items received during the nonresident period of the taxable year (and any related section 612 modifications) that are included in the part-year resident's New York adjusted gross income.

Section 10-3.3 Examples.

Example 1: Corporation A is a New York S corporation that has the following types of receipts:

- dividends from stock of unitary corporations (that would have been characterized as other exempt income for a New York C corporation);
- dividends from stock of non-unitary corporations (that would have been characterized as investment income for a New York C corporation);

- net gains from sales of stock of non-unitary corporations (that would have been characterized as investment income for a New York C corporation);
- interest from loans secured by real property;
- interest from corporate bonds; and
- net gains from sales of corporate bonds.

Corporation A marks to market stock of non-unitary corporations only. No other assets are marked to market.

All of these receipts are considered business receipts for Corporation A. The amount of such receipts included in Corporation A's New York receipts or everywhere receipts is determined in accordance with section 4-3.1 of this Subchapter.

Corporation A did not make the fixed percentage election. Therefore, dividends and net gains from stock are not included in its New York receipts or everywhere receipts pursuant to section 210-A.5(a)(2)(G) and the amount of interest from loans secured by real property, interest from corporate bonds, and net gains from the sale of corporate bonds included in New York receipts or everywhere receipts is determined in accordance with section 210-A.5(a)(2) and Part 4 of this Subchapter.

To determine the amounts derived from New York sources for purposes of article 22, nonresident shareholder X of Corporation A must multiply its pro-rata share of Corporation A's items of income, gain, loss, and deduction that are included in shareholder X's New York adjusted gross income, including all income, gain, and loss from Corporation A's stocks, loans, and corporate bonds by Corporation A's apportionment factor.

Example 2: Same facts as Example 1 except that Corporation A makes the fixed percentage election. Since one stock has been marked to market, all stock are qualified financial instruments. The result is that eight percent of the dividends and net gains (not less than zero) from stocks are included in Corporation A's New York receipts and one hundred percent of dividends and net gains (not less than zero) from stock are included in everywhere receipts. The loans and corporate bonds are not qualified financial instruments as none of these assets have been marked to market. The amount of interest from the loans secured by real property, interest from corporate bonds, and net gains from the sales of corporate bonds included in New York receipts or everywhere receipts is determined in accordance with section 210-A and the applicable regulations.

To determine the amounts derived from New York sources for purposes of article 22, nonresident shareholder X of Corporation A must multiply its pro-rata share of Corporation A's items of income, gain, loss, and

deduction that are included in shareholder X's New York adjusted gross income, including all income, gain, and loss from Corporation A's stock, loans, and corporate bonds by Corporation A's apportionment factor.

SUBPART 10-4

REAL ESTATE INVESTMENT TRUSTS (REITs) AND REGULATED INVESTMENT COMPANIES (RICs)

Sec.

Section 10-4.1. General treatment of REITs and RICs. (Tax Law, sections 209(4), (5) and (7), 210, 210-C, 1515(f)(4))

(a)(1) For any taxable year in which a REIT is subject to tax for Federal income tax purposes under IRC section 857, the REIT will be subject to tax under article 9-A unless it is a captive REIT required to be included in a combined report under article 33.

(2) For any taxable year in which a RIC is subject to tax for Federal income tax purposes under IRC section 852, the RIC will be subject to tax under article 9-A, unless it is a captive RIC required to be included in a combined report under article 33.

(b) For purposes of article 9-A, REITs and RICs, other than REITs and RICs required to be included in a combined report, are subject to tax computed on either the business income base or the fixed dollar minimum tax, whichever is greater.

(c) In the event that a REIT pays dividends after the close of a taxable year, pursuant to IRC section 858, and such dividends were declared before the date its federal report for such year must be filed (including extensions), such REIT may treat the dividends as having been paid during the taxable year.

(d) For any taxable year during which a REIT does not qualify for taxation under IRC section 857, or a RIC does not qualify for taxation under IRC section 852, such REIT or such RIC will be treated in the same manner as any other taxpayer subject to tax under article 9-A.

Section 10-4.2 Computation of income. (Tax Law, sections 209(5) and (7))

(a)(1) In the case of a REIT, "federal taxable income" means real estate investment trust taxable income as defined in IRC section 857(b)(2), as modified by IRC section 858 and, where applicable, by IRC section 965(m)(1)(B).

(2) If a REIT is subject to IRC section 965(m) and makes the election provided for by IRC section 965(m)(1)(B), the amount of any federal deduction allowed pursuant to IRC section 965(c) will be determined with reference to IRC section 965(m)(2)(B)(i), for purposes of the adjustments required by sections 208(9)(b)(23) and 1503(b)(2)(W).

(b)(1) In the case of a RIC, "federal taxable income" means investment company taxable income as defined in IRC section 852(b)(2), as modified by IRC section 855, plus any amount taxable under IRC section 852(b)(3).

(2)(i) A RIC that has received or accrued interest from federal, state, municipal or other obligations must add back the amount of such interest in computing its entire net income, to the extent such interest is exempt from federal income tax and is not included in federal taxable income. The amount to be added back may be reduced by any expenses attributable to such interest that are denied deductibility under IRC section 265, as well as any related amortizable bond premium that is denied deductibility under IRC section 171(a)(2).

(ii) Any amount added back pursuant to this paragraph must not be subtracted in computing entire net income.

Section 10-4.3. Qualified financial instrument apportionment rules for non-captive REITs and non-captive RICs. (Tax Law, section 210-A)

When computing the business apportionment factor, non-captive REITs and non-captive RICs must use the following rules regarding qualified financial instruments in lieu of the rules specified in section 4-2.4 of this Subchapter.

(a) For purposes of this section, a "qualified financial instrument" means a financial instrument, other than a financial instrument listed in subdivision (b) of this section, that is of a type described in one of the following clauses of section 210-A(5)(a)(2): clause (A)—loans; clause (B)—federal, state, and municipal debt; clause (C)—asset backed securities and other government agency debt; clause (D)—corporate bonds; clause (G)—dividends and net gains from sales of stock or partnership interests; clause (H)—other financial instruments; clause (I)—commodities.

(b) The following financial instruments are not qualified financial instruments, even if they are of a type described in subdivision (a) of this section:

(1) a loan secured by real property;

(2) a financial instrument that is investment capital; and

(3) stock that generates other exempt income.

(c) Except as provided in subdivision (d) of this section, the amount of receipts, net income (not less than zero) and net gains (not less than zero) from qualified financial instruments included in New York receipts or everywhere receipts is determined using the customer sourcing method contained in section 210-A(5)(a)(2), and further described in this section.

(d)(1) Non-captive REITs and non-captive RICs may elect the fixed percentage method to include eight percent of net income (not less than zero) from qualified financial instruments in New York receipts and one hundred percent of net income (not less than zero) from qualified financial instruments in everywhere receipts. The election may be made whether or not such net income would otherwise be included in New York receipts or everywhere receipts pursuant to the provisions of section 210-A(5)(a)(2).

(2) Net income from qualified financial instruments is the sum of (i) net gains (not less than zero) from each type of qualified financial instrument that would be subject to the same customer sourcing method in section 210-A(5)(a)(2), and the applicable regulations, if not for the fixed percentage method; (ii) net income (not less than zero) from each type of qualified financial instrument that would be subject to the same customer sourcing method in section 210-A(5)(a)(2), and the applicable regulations, if not for the fixed percentage method; and (iii) receipts from each type of qualified financial instrument.

(3) The fixed percentage method election must be made annually and must be made on an original, timely filed report, determined with regard to extensions for time for filing. Any fixed percentage method election made on a report that is filed late will be invalid and ineffective.

(4) Once the fixed percentage method election has been made in the manner required in paragraph (3) of this subdivision for a taxable year, it is binding on the taxpayer and the Department for such taxable year and cannot be revoked or overridden.

(e) Example: Corporation X is a non-captive RIC. It elects to use the fixed percentage method in the manner required by paragraph (3) of subdivision (d) of this section to determine the amount of its net income (not less than zero) from qualified financial instruments to include in New York receipts and everywhere receipts. Its income does not qualify as other exempt income or income from investment capital.

Corporation X has $1,000 in dividends from Stock A; ($200) loss from the sale of Stock B; $750 gain from the sale of corporate bond C, which was sold through a licensed exchange; $25,000 gain from the sale of corporate bond D, which was not sold through a registered securities broker or dealer or through a licensed exchange; $5,000 gain from the sale of debt obligation E, which was issued by Country Y; ($2,000) loss from the sale of debt obligation F, which was issued by Country Z; and $2,000 of interest from deposit accounts.

Corporation X has $31,750 of net income (not less than zero) from qualified financial instruments included in everywhere receipts broken down as follows:

- $1,000 of dividends from stock;

- $0 of gains from sales of stock (as the loss is limited to zero);
- $750 of gains from sales of bonds sold through a licensed exchange or registered securities broker or dealer;
- $25,000 of gains from sales of bonds not sold through a licensed exchange or registered securities broker or dealer;
- $3,000 of gains from one type of other financial instrument (debt obligations issued by a country, or political subdivision thereof, other than the United States); and
- $2,000 of interest from one type of other financial instrument (deposit accounts).

Corporation X includes $2,540 (8 percent multiplied by $31,750) from qualified financial instruments in its New York receipts. Since Corporation X only has receipts and net gains (not less than zero) from qualified financial instruments, the result is a business apportionment factor of eight percent.

Section 10-4.4. Combination rules for REITs and RICs.

(a) Captive REITs and captive RICs will always be included in a combined report under article 9-A, unless they are required to be included in a combined report under article 33.

(1)(i) For purposes of determining under which article of the Tax Law a captive REIT or a captive RIC is to be combined, the rules in section 1515 will be applied first. If such captive REIT or such captive RIC is not required to be included in a combined report under article 33,

then it will be included in a combined report pursuant to the rules included in section 210-C, and further described in Subpart 6-2 of this Subchapter.

(ii) A captive REIT or captive RIC is required to be included in a combined return under article 33 in either of these circumstances:

(A) When the corporation that directly owns or controls more than fifty percent of the voting power of the capital stock of the captive REIT or captive RIC is a life insurance corporation subject to tax or required to be included in a combined return under article 33; or, if this condition in this clause is not satisfied, then

(B) When the closest controlling stockholder of the captive REIT or captive RIC is a life insurance corporation subject to tax or required to be included in a combined return under article 33.

(C) The term "closest controlling stockholder" means the corporation that indirectly owns or controls over fifty percent of the voting power of the capital stock of a captive REIT or captive RIC, is subject to tax under section 1501 or article 9-A or is required to be included in a combined return under article 33 or a combined report under article 9-A, and is the fewest tiers of corporations away in the ownership structure from the captive REIT or captive RIC.

(D) Examples.

Example 1: Insurance Company X, which is licensed as a life insurance company in New York State and subject to tax under section 1501, owns 100 percent of the voting power of the capital stock of Corporation Y, a general business corporation subject to tax under article 9-A. Corporation Y owns 75 percent of the voting stock of a captive REIT. Because over 50 percent of the voting power of the capital stock of the captive REIT is not directly

owned or controlled by a life insurance corporation subject to tax or required to be included in a combined return under article 33 and the closest controlling stockholder of the captive REIT is a life insurance company, the captive REIT must be included in a combined return with Insurance Company X.

Example 2: Insurance Company X, which is licensed as a life insurance company in New York and subject to tax under section 1501, owns 100 percent of the voting power of the capital stock of Corporation Y, a general business corporation subject to tax under article 9-A. Corporation Y owns 100 percent of the voting power of the capital stock of Corporation Z, also a general business corporation subject to tax under article 9-A. Corporations Y and Z are engaged in a unitary business. Corporation Z owns 100 percent of the voting power of the capital stock in a captive RIC. Corporation Y is the closest controlling stockholder in the captive RIC. Because over 50 percent of the voting power of the capital stock of the captive RIC is not directly owned or controlled by Insurance Company X, and the closest controlling stockholder in the captive RIC is not a life insurance corporation subject to tax under article 33, the captive RIC is required to be included in a combined report under article 9-A with Corporations Y and Z.

Example 3: Same facts as in Example 2 except that Corporations Y and Z are not engaged in a unitary business. In this case, the captive RIC is required to be included in a combined report with Corporation Z.

(2) If a captive REIT owns the stock of a qualified REIT subsidiary (QRS), as defined in IRC section 856(i)(2), then the QRS must be included in any combined report required to be made by such REIT.

(b) A non-captive REIT must be included in a combined report under article 9-A with its qualified REIT subsidiary. All other non-captive REITs are prohibited from being included in a combined report under article 9-A.

(c) In the case of a combined report including a captive REIT, or a captive RIC:

(1) such captive REIT or such captive RIC must be included in the computation of the combined capital base;

(2) intercompany dividends paid by such captive REIT to another member of the combined group are not eliminated in the computation of combined federal taxable income if the combined group is utilizing the subtraction for small thrifts and qualified community banks that maintain a captive REIT under section 208(9)(t);

(3) the adjustments required by section 1503 will not include the deduction for dividends paid by such captive RIC to any member of the affiliated group that includes the corporation that directly or indirectly owns over 50 percent of such RIC's voting stock; and

(4) federal taxable income shall be computed without regard to the deduction for dividends paid by such captive REIT or such captive RIC to any member of the affiliated group

that includes the corporation that directly or indirectly owns over 50 percent of such captive REIT's or such captive RIC's voting stock.

For purposes of this subdivision, "affiliated group" has the same meaning as in IRC section 1504, but without regard to the exceptions provided for in IRC section 1504(b).

SUBPART 10-5

DOMESTIC INTERNATIONAL SALES CORPORATION (DISC)

Sec.

Section 10-5.1. General. (Tax Law, sections 208(1) and (9)(i), 209(6))

(a) For purposes of article 9-A, a corporation will be treated as a Domestic International Sales Corporation (hereinafter called a "DISC") if it meets the requirements of IRC section 992(a).

(b) For purposes of article 9-A, a DISC is either a "tax exempt DISC" or a "taxable DISC." For any taxable year during which a corporation does not meet the requirements for treatment as a DISC, it will be treated in the same manner as any other taxpayer subject to tax under article 9-A.

(c) The term "former DISC" refers, with respect to any taxable year, to a corporation that is not a DISC during such year but was (or was treated as) a DISC for a prior taxable year. However, a corporation will not be considered a former DISC for a taxable year unless such corporation has, at the beginning of such taxable year, undistributed previously taxed income or accumulated DISC income.

Section 10-5.2. Taxable DISC. (Tax Law, sections 209(6), 211(1))

A taxable DISC is a DISC that is not a tax exempt DISC. A taxable DISC is subject to tax measured by the capital base or the fixed dollar minimum tax, whichever is greater. A taxable DISC is not subject to tax measured by the business income base. A taxable DISC must file its report on or before the 15th day of the ninth month following the close of its taxable year, and must identify itself as a DISC on such report.

Section 10-5.3. Tax exempt DISC. (Tax Law, sections 208(9)(i), 211(1))

(a) A tax exempt DISC is a DISC that during a taxable year:

(1) receives more than five percent of its gross receipts from the sale of inventory or other property that it purchased from its stockholders; or

(2) receives more than five percent of its gross rentals from the rental of property that it purchased or leased from its stockholders; or

(3) receives more than five percent of its total receipts other than from sales or rentals from its stockholders.

(b) A tax exempt DISC has no filing requirement under article 9-A, although its corporate stockholders may have a filing requirement (see section 10-5.4 of this Subpart).

Section 10-5.4. Corporate stockholders of tax exempt DISC. (Tax Law, section 208(9)(i))

(a) A taxpayer that is subject to tax under article 9-A and is a stockholder of a tax exempt DISC must do the following on its report required to be filed under article 9-A:

(1) adjust its receipts, expenses, assets and liabilities to include its attributable share of the DISC's receipts, expenses, assets and liabilities;

(2) eliminate any deemed or actual distributions received from the DISC to the extent already included in entire net income; and

(3) eliminate intercorporate transactions between the stockholder and the tax exempt DISC.

(b) A taxpayer required to file a report pursuant to this section also must file the affiliated entity information schedule.

Section 10-5.5. Corporate stockholder's treatment of distribution and capital of a DISC. (Tax Law, section 208(8-A))

(a) Since a DISC is not subject to tax on its earnings and profits, no deduction is allowed for the dividends distributed to a corporation owning stock of a DISC.

(b) Deemed distributions from a DISC or a former DISC that are taxable as dividends pursuant to IRC section 995(b) must be treated as business income.

(c) Actual distributions from a DISC or a former DISC must be treated as business income, unless such distributions meet the requirements of subdivision (d) of this section.

(d) Actual distributions from a DISC or a former DISC will be treated as investment income if:

(1) such distributions are treated as being made out of "other earnings and profits" for Federal income tax purposes, under IRC section 996; and

(2) the stock of the DISC meets the definition of investment capital.

(e) Any gain or loss recognized for Federal income tax purposes on the disposition of stock in a DISC or a former DISC must be treated as business income, whether or not the stock of the DISC meets the definition of investment capital.

(f) The corporate stockholder's distributive share of the DISC's investments in the stocks, bonds or other securities or indebtedness from a DISC must be treated as business capital.

Section 10-5.6. Combined reports. (Tax Law, section 210-C)

(a)(1) If both the capital stock requirement and the unitary business requirement are met with respect to a taxpayer that is a stockholder of a taxable DISC and such DISC, the taxpayer is required to make a combined report with the taxable DISC.

(2) If the capital stock requirement is met, but the unitary business requirement is not met, with respect to a taxpayer that is a stockholder of a taxable DISC and such DISC, the taxable DISC will be included in a combined report with the taxpayer only if the taxpayer is part of a combined group that has made the commonly owned group election.

(b) In filing a combined report pursuant to subdivision (a) of this section, intercorporate dividends from a taxable DISC or a taxable former DISC are treated as business income and shall not be eliminated.

Section 10-5.7. Rules for treatment of earnings and profits.

(a) For purposes of article 9-A, the earnings and profits of a DISC or of a former DISC are deemed to be divided into the following three categories:

(1) accumulated DISC income, which includes the earnings and profits of the corporation that have been deferred from taxation, as defined in 26 CFR 1.996-3[b];

(2) previously taxed income, which includes the earnings and profits of the DISC that have been previously taxed by reason of having been deemed distributed, as defined in 26 CFR 1.996-3[c]; and

(3) other earnings and profits, which includes the earnings and profits of the DISC that were derived by the corporation in taxable years when it was not qualified as a DISC, as defined in 26 CFR 1.996-3[d].

(b) Any actual distribution to a stockholder that is made out of the earnings and profits of a DISC or a former DISC shall be treated as made in the following order:

(1) first, out of previously taxed income, as described in paragraph (2) of subdivision (a) of this section;

(2) second, out of accumulated DISC income, as described in paragraph (1) of subdivision (a) of this section; and

(3) third, out of other earnings and profits, as described in paragraph (3) of subdivision (a) of this section.

(c) If for any taxable year a DISC, or a former DISC, incurs a deficit in earnings and profits, such deficit shall be charged in the following order:

(1) first, to other earnings and profits, as described in paragraph (3) of subdivision (a) of this section;

(2) second, to accumulated DISC income, as described in paragraph (1) of subdivision (a) of this section; and

(3) third, to previously taxed income, as described in paragraph (2) of subdivision (a) of this section.

SUBPART 10-6

Real Estate Mortgage Investment Conduit (REMIC)

Sec.

Section 10-6.1 General.

Under IRC section 860E(a)(1), the federal taxable income of any holder of a residual interest in a real estate mortgage investment conduit (REMIC) shall not be less than the amount

of excess inclusion (EI) for such taxable year. Following the principles in that section, the business income base of any holder of a residual interest in a REMIC shall not be less than the product of EI and the business apportionment factor. In computing the business income base, the rules in this section shall apply.

Section 10-6.2 Computation of the business income base when the federal taxable income limit to EI in IRC section 860E applies to a holder of a residual interest in a REMIC.

In any taxable year that such federal taxable income is limited to EI pursuant to IRC section 860E(a)(1), subdivisions (a) through (c) of this section shall apply.

(a) The following modifications, subtractions and deductions are not allowed in computing the business income base:

(1) the addition and subtraction modifications provided for in section 208(9) and Subpart 3-3 of this Subchapter;

(2) the deduction of investment income;

(3) the deduction of other exempt income;

(4) the prior net operating loss conversion (PNOLC) subtraction; and

(5) the net operating loss deduction (NOLD).

As a result, total business income in such year is the sum of EI and the amount of income from presumed investment capital from the immediately preceding tax year required to be added back pursuant to section 3-4.4(a)(2) of this Subchapter. The business income base is such total business income multiplied by the business apportionment factor for the year determined under the rules in Part 4 of this Title.

(b) In a taxable year that federal taxable income is limited to EI pursuant to IRC section 860E(a)(1), a corporation may still generate a net operating loss (NOL) for the taxable year. The

amount of NOL generated is the NOL computed under Subpart 3-9 of this Subchapter, but computed without regard to EI.

(c) Any NOL generated pursuant to subdivision (b) of this section can be carried forward or carried back and deducted as provided in section 210(1)(a)(ix) and Subpart 3-9 of this Subchapter. Provided, such NOL cannot be deducted in computing the business income base in any taxable year that such federal taxable income is limited to EI pursuant to IRC section 860E(a)(1).

Section 10-6.3. Computation of the business income base when the federal taxable income limit to EI in IRC section 860E does not apply to a holder of a residual interest in a REMIC.

(a) In any taxable year in which federal taxable income is not limited to EI pursuant to IRC section 860E(a)(1), the business income base is computed using the principles in Part 3 of this Title, except in no event shall the business income base be less than the product of EI and the business apportionment factor

Section 10-6.4. Computation of the capital base of a holder of a residual interest in a REMIC.

In computing the capital base of a corporation that is the holder of a residual interest in a REMIC, a corporation is allowed a deduction for investment capital, even in a taxable year that such federal taxable income is limited to EI pursuant to IRC section 860E(a)(1).

Section 10-6.5 Combined groups that include a holder of a residual interest in a REMIC.

In the case of a combined report that includes any holder of a residual interest in a REMIC, the rules provided for in this Subpart shall apply as if all the corporations in the combined group are a single corporation. References to federal taxable income, business income

base, net operating loss, and investment capital shall mean the amounts computed for the combined group.

Section 10-6.6. Examples

"Example 1:" This example is intended to highlight how a separate taxpayer that is a residual interest holder in a REMIC computes its NOL in a year when federal taxable income is limited to EI pursuant to IRC section 860E(a)(1).

Taxpayer R is a residual interest holder in a REMIC and has FTI of ($1,000,000) before the application of IRC section 860E and $20,000,000 of EI. It has New York addition modifications of $4,000,000 pursuant to section 208(9)(b) and New York subtraction modifications of $6,000,000 pursuant to section 208(9)(a). Corporation R does not have investment income, other exempt income, excess interest deductions attributable to investment or other exempt income, addback of income previously reported as investment income, or PNOLC subtraction available for use. The business income base in 2016 is computed as follows:

FTI when IRC §860E applies	20,000,000
Additions to FTI	0
Subtractions to FTI	0
ENI	20,000,000
Investment and other exempt income	0
Total business income	20,000,000
BAF	25%
Business income base	5,000,000
Business income base tax rate	6.50%
Business income base tax	325,000

As the federal taxable income limit to EI in IRC section 860E applies in 2016, Corporation R may generate an NOL if the business income base computed without regard to EI is less than zero. The NOL is computed as follows:

FTI computed without the limitation provided for in IRC § 860E(a)(1	(1,000,000)
Additions to FTI	4,000,000
Subtractions to FTI	(6,000,000)
ENI	(3,000,000)
Investment and other exempt income	-
Total business income	(3,000,000)
BAF	25%
NOL generated	(750,000)

"Example 2:" This example is intended to highlight how a combined group with a member that is a residual interest holder in a REMIC deducts an NOLD in a year the federal taxable income limit to EI in IRC section 860E does not apply.

In 2016, Corporations ABC file a combined report and generate an NOL of $750,000. The group elects to waive the entire carryback period so the NOL is available to carryforward to future tax years.

Corporation A is a residual interest holder in a REMIC and included in a combined group in 2017 with Corporations B and C. Corporation A's EI in 2017 is $3,000,000. As the combined group is treated as a single entity, Group ABC is deemed to have EI of $3,000,000. In 2017, ABC are included in a consolidated return and the federal taxable income is $7,000,000, which exceeds the EI amount so the federal taxable income limit to EI in IRC section 860E does not apply. In addition, combined group ABC has

$1,400,000 of New York addition modifications pursuant to section 208(9)(b), New York subtraction modifications of $2,300,000 pursuant to section 208(9)(a), and other exempt income of $2,500,000. The group does not have investment income, excess interest deductions attributable to investment or other exempt income, addback of income previously reported as investment income, or PNOLC subtraction available for use. The combined business income base is computed as follows:

FTI	7,000,000
Combined additions to FTI	1,400,000
Combined subtractions to FTI	2,300,000
Combined ENI	6,100,000
Combined investment and other exempt income	2,500,000
Combined total business income	3,600,000
BAF	30%
Combined apportioned business income	1,080,000
Business income base tax rate	6.50%
Product of combined apportioned business income and the business income base tax rate	70,200

Combined group ABC may use an NOLD to reduce the tax on business income to the higher of the combined capital base tax or the fixed dollar minimum of the designated agent. The combined group computes the NOLD to be utilized as follows:

Combined capital base	24,000
FDM of the designated agent	1,500
Greater of capital base tax and the FDM	24,000
Difference between (a) product of combined apportioned business income and the business income base tax rate and (b) greater of the capital base tax and FDM	46,200
Business income base tax rate	6.50%
NOLD required to be utilized	710,769

As the NOLD required to be utilized (if available) is less than the NOL carryforward available to the combined group, it must utilize an NOLD of $710,769 in 2017. The combined group has a remaining NOL carryforward of $39,231 ($750,000 NOL carryforward from 2016 minus $710,769 NOLD used in 2017). The combined business income base tax is computed as follows:

Combined apportioned business income	1,080,000
NOLD	710,769
Combined business income base	369,231

Following the principles of IRC section 860E, the combined business income base cannot be less than $900,000, which is the product of $3,000,000 of EI and the BAF of 30%. Therefore, the combined group ABC's business income base tax is computed as follows:

EI	3,000,000
BAF	30%
Combined apportioned business income	900,000
Business income base tax rate	6.50%
Business income base tax	58,500