Parts 32 and 33 of title 20 NYCRR are repealed and new Part 33 is added to read as follows:

PART 33

COMBINED RETURNS

Sec.

33.1 General

33.2 Capital stock requirement

33.3 Substantial intercorporate transactions generally

33.4 Substantial intercorporate transactions receipts and expenditures tests

33.5 Substantial intercorporate transactions based on asset transfers

33.6 Combined group composition

33.7 Filing combined returns

33. 8 Corporations not required or permitted to file a combined return

33.9 Examples

Section 33.1. General. (Tax Law, Section 1515(f))

(a) Every corporation is a separate taxable entity and shall file its own return. However, certain taxpayers subject to tax under article 33 are required to file on a combined basis with related corporations where:

(1) the capital stock requirement is met; and

(2) there are substantial intercorporate transactions among the related corporations.

(b) Where the capital stock requirement is met and substantial intercorporate transactions are absent, a combined return covering corporations may be permitted or required if the commissioner deems such a return necessary because of inter-company transactions or some

23 agreement, understanding, arrangement, or transaction referred to in Tax Law section 1515(g), in
24 order to properly reflect the tax liability under article 33.

25 Section 33.2 Capital stock requirement.

26 To determine if the capital stock requirement is met, the rules in section 6-2.2 of this Title
27 shall be used, except that any reference to "fifty %" shall be substituted by "eighty %."
28 Corporations that meet the capital stock requirement are "related corporations" for purposes of
29 this Part.

30 Section 33.3. Substantial intercorporate transactions generally.

31 (a) In determining whether substantial intercorporate transactions among the related
32 corporations exist, the facts and circumstances of all activities and transactions will be
33 considered regardless of the transfer price for such intercorporate transactions. It is not necessary
34 that there be substantial intercorporate transactions between any one corporation and every other
35 related corporation. However, it is necessary that there be substantial intercorporate transactions
36 between the taxpayer and a related corporation or collectively a group of such related
37 corporations.

38 (b) (1) In determining whether there are substantial intercorporate transactions, the
39 commissioner will consider and evaluate all activities and transaction of a taxpayer and its
40 related corporations, including but not limited to:

41 (i) manufacturing, acquiring goods or property, or performing services for related
42 corporations;

43 (ii) selling goods acquired from related corporations;

44 (iii) financing sales of related corporations;

45 (iv) performing related customer services using common facilities and employees for
46 related corporations;
47 (v) selling policies or contracts of insurance for related corporations;
48 (vi) reinsuring risks for related corporations;
49 (vii) collecting premiums or other consideration for any policy or contract of
50 insurance for related corporations;
51 (viii) incurring expenses that benefit, directly or indirectly, one or more related
52 corporations; and
53 (ix) transferring assets, including assets such as accounts receivable, patents, or
54 trademarks from one or more related corporations.
55 (2) For purposes of determining whether substantial intercorporate transactions exist,
56 dividends are not considered in the measure of intercorporate receipts, total receipts,
57 intercorporate expenditures, or total expenditures described in section 33.4 of this Part. Interest
58 paid and received on loans between corporations is considered in determining if there are
59 substantial intercorporate transactions, including interest on loans that constitute subsidiary
60 capital pursuant to Tax Law section 1500(h). Taxes paid or reimbursed will not be considered in
61 determining if there are substantial intercorporate transactions. Similar transactions must be
62 treated in a consistent manner from taxable year to taxable year. Service functions will not be
63 considered when they are incidental to the business of the corporation providing such service and
64 expenditures for service functions are not considered expenditures benefiting a related corporation
65 or a group of related corporations described in paragraph (3) of subdivision (a) of section 33.4 of
66 this Part. Service functions include, but are not limited to, accounting, legal, payroll processing,
67 and personnel services. Where a corporation makes expenditures that benefit a related corporation

68 or a group of related corporations and allocates these costs to the related corporation or a group of
69 related corporations, the intercorporate cost allocations are not considered receipts or expenditures
70 described in subdivision (a) of section 33.4 of this Part; the expenditures benefiting the related
71 corporation or group of related corporations are included in such expenditures described in
72 paragraph (3) of subdivision (a) of section 33.4 of this Part.

73 (c) In determining whether the substantial intercorporate transaction requirement has
74 been met, the Department will consider the materiality of the transactions and whether the
75 transactions have economic substance, including the extent to which the motivation of the
76 taxpayer in undertaking the transactions was to affect membership of the combined group.

77 Section 33.4 Substantial intercorporate transactions receipts and expenditures tests.

78 (a) Subject to subdivision (b) of this section, the substantial intercorporate transactions
79 requirement based on a corporation's receipts or expenditures is met where:

80 (1) during the taxable years, 50% or more of a corporation's receipts includable in the
81 computation of entire net income (excluding nonrecurring receipts) are from a related corporation
82 or a group of related corporations;

83 (2) During the taxable year, 50% or more of a corporation's expenditures includable in
84 the computation of entire net income, including expenditures for inventory but excluding
85 nonrecurring expenditures, are to a related corporation or a group of related corporations; or

86 (3) during the taxable year

87 (i) 50% or more of a corporation's expenditures includable in the computation of entire
88 net income (excluding nonrecurring expenditures) directly or indirectly benefit a related
89 corporation or a group of related corporations or

90 (ii) a corporation's expenditures includable in the computation of entire net income
91 (excluding nonrecurring expenditures) directly or indirectly benefitting a related corporation or a
92 group of related corporations are equal to 50% or more of the sum of such expenditures and the
93 expenditures (excluding nonrecurring expenditures) of the beneficiary corporation or
94 corporations.

95 (b) If, in a particular taxable year, a corporation's intercorporate receipts or expenditures
96 described in paragraph (1), (2) or (3) of subdivision (a) of this section, are between 45% and 55%
97 of the total of the corporation's receipts or expenditures, as the case may be, then the test will be
98 satisfied only if the corporation's receipts or expenditures, as the case may be, from one or more
99 related corporations during the taxable year and the prior two taxable years in aggregate equals or
100 exceeds 50% of its total receipts or expenditures, as the case may be, during the taxable year and
101 the prior two taxable years in aggregate. If the corporation or one or more of the related
102 corporations involved in the intercorporate transactions did not exist for all of the two prior
103 taxable years, then the 50% measure for each corporation will be computed using the number of
104 months that it existed.

105 Section 33.5. Substantial intercorporate transactions based on asset transfers.

106 The substantial intercorporate transactions requirement based on a corporation's asset
107 transfers is met where a corporation transfers assets (including through incorporation) to a related
108 corporation and 20% or more of the transferee's gross income, including any dividends received,
109 in the taxable year of the transfer or in taxable years subsequent to the year the asset or assets
110 were transferred, is derived directly from the transferred assets. This applies to assets transferred
111 on or after January 1, 2007. For purposes of this test, the following apply:

112 (a) Generally, only assets to the extent that they are transferred in exchange for stock or
113 paid in capital are considered “qualifying assets". Transfers of assets other than in exchange for
114 stock or paid in capital, including transfers of assets through a nonmonetary property dividend,
115 are not considered unless the principal purpose of the transfer is the avoidance or evasion of
116 the franchise tax imposed on the taxpayer or the combined group by New York State.

117 (b) Transfers of cash to a related corporation in exchange for stock or paid in capital are
118 not considered.

119 (c) For purposes of determining whether the substantial intercorporate transactions
120 requirement based on a corporation’s asset transfers is met, the term gross income means life
121 insurance gross income or gross income as defined by section 803 or 832 of the Internal Revenue
122 Code, whichever is applicable.

123 (d) Gross income is derived directly from an asset if the asset or the use of the asset by
124 the transferee produces gross income. Gross income from transferred assets that generate income
125 only when used in combination with other assets is not gross income derived directly from the
126 assets. The gain from a sale of any transferred asset is considered gross income derived directly
127 from the asset. Assets that may directly produce gross income include, but are not limited to, real
128 property, accounts receivable, and intangibles such as patents, copyrights, trademarks, and
129 partnership interests.

130 (e) Gross income from the sale of items produced from transferred production equipment
131 would not by itself, be considered gross income derived directly from the transferred assets.
132 However, gross income from the sale of items produced from the transferred assets constituting
133 substantially all of the productions process, including associated intangibles, such as might occur

134 in the transfer of an operating division, would constitute gross income derived directly from the
135 transferred assets.

136 (f) Gross income received by the transferee as a result of the reinvestment of income
137 attributable to the transferred asset is not gross income derived directly from the transferred asset.

138 (g) The test must be applied for each year of an asset's normal depreciation recovery
139 period under sections 167 or 168(c) of the Internal Revenue Code or amortization period under
140 section 197(a) of the Internal Revenue Code. In the case of an asset that is not required to be
141 depreciated or amortized for Federal income tax purposes, such as accounts receivable, the test
142 must be applied for each year the asset is reflected on the books and records of the transferee
143 under generally accepted accounting principles.

144 (h) If the asset transferred is an interest in another entity including a partnership, an entity
145 treated as a partnership or a disregarded entity, the income distributed or deemed distributed to
146 the transferee by such entity is gross income derived directly from the transferred asset.

147 (i) Where more than one asset is transferred, the gross income from all qualifying assets
148 is used in determining whether the test is met.

149 (j) The determination of whether a transaction or series of transactions constitutes an
150 asset transfer is based on the facts and circumstances of the transaction. The form of a transaction
151 will not be respected if the transaction lacks economic substance or if the taxpayer intended a
152 series of actions to be part of a single integrated transaction, or where it had as a principal purpose
153 the avoidance or evasion of the franchise tax imposed on the taxpayer, or the combined group, by
154 New York State.

155 (k) The following example illustrates when gross income is or is not derived directly
156 from a transferred asset: Rental income derived from a transferred asset is considered gross

157 income derived directly from a transferred asset. However, if the rental income is deposited in a
158 bank account, interest earned on the bank account is not gross income derived directly from the
159 asset.

160 Section 33.6 Combined group composition.

161 The following steps should be used to determine whether a combined return is required
162 and, if so, which corporations are included in that combined return:

163 (a) Every taxpayer must identify all of the corporations to which it is related, regardless
164 of the franchise tax imposed by the Tax Law the corporation is subject to (or would be taxable
165 under if subject to tax). Where one or more of the related corporations are taxpayers, identify all
166 of the corporations related to these taxpayers. Do this until all related corporations have been
167 identified. If a taxpayer has no related corporations, it must file on a separate basis. This
168 constitutes the step 1 group of related corporations.

169 (b) Identify all of the related corporations that have substantial intercorporate transactions
170 with a taxpayer identified in step 1. These related corporations and the taxpayer with which they
171 have substantial intercorporate transactions constitute the step 2 tentative combined group.

172 (c) Add to the step 2 tentative combined group every related corporation that has
173 substantial intercorporate transactions with any corporation identified in step 2. This constitutes
174 the step 3 tentative combined group.

175 (d) Add to the step 3 tentative combined group every related corporation that has
176 substantial intercorporate transactions with any corporation identified in step 3. Repeat this
177 process until it adds no more corporations to the group. This constitutes the step 4 tentative
178 combined group.

179 (e) Identify each related corporation not in the step 4 tentative combined group that has
180 substantial intercorporate transactions with another related corporation not in the step 4 tentative
181 combined group. Compare all such groups and combine into one group those with common
182 members (unattached related group). There may be more than one unattached related group.

183 (f) If there are substantial intercorporate transactions between any one corporation in an
184 unattached related group and the step 4 tentative combined group, then all corporations in that
185 unattached related group are included in the combined group. Do this for each unattached related
186 group. As unattached related groups are included in the combined group, do this analysis between
187 the expanded group and each unattached related group. The resulting group is the step 6 tentative
188 combined group.

189 (g) If there are substantial intercorporate transactions between any one corporation in the
190 step 6 tentative combined group and an unattached related group, then all corporations in the
191 unattached related group are included in the combined group. Do this for each unattached related
192 group. As unattached related groups are included in the combined group, do this analysis between
193 the expanded group and each unattached related group. The resulting group is the step 7 tentative
194 combined group.

195 (h) Add to the step 7 tentative combined group each related corporation that has
196 substantial intercorporate transactions with the step 7 tentative combined group.

197 (i) Repeat the process set forth in steps 4, 6, 7, and 8 in subdivisions (d) through (i) of this
198 section until no more corporations can be added to the tentative combined group.

199 (j) Eliminate from the tentative combined group those corporations that are taxable under
200 another franchise tax imposed by the Tax Law (or would be taxable under another franchise tax if
201 subject to tax) or that are subject to the tax imposed by section 1502-a or Tax Law section 1502-b.

202 Also eliminate any captive REIT or captive RIC as defined in subdivisions 9 and 10 of section 2
203 of the Tax Law, respectively, that is required to be included in a combined return under Tax Law
204 section 210-C. If two or more corporations are eliminated, it is possible that they will constitute a
205 combined group if they have substantial intercorporate transactions.

206 Section 33.7 Filing Combined Returns.

207 (a)(1) As provided in this Part, a group of related corporations may be required or
208 permitted to file on a combined basis. To file on a combined basis the group must file a completed
209 combined return. The first year the group files on a combined basis, and each year thereafter in
210 which the composition of the group changes, the group must include the following information,
211 with the return:

212 (i) the exact name, address, employer identification number and the state of incorporation
213 of each corporation included in the combined return;

214 (ii) information showing that each of the corporations meets the capital stock requirement
215 for the taxable year; and

216 (iii) the exact name, address, employer identification number and the state of
217 incorporation of all corporations (except alien corporations) that meet the capital stock
218 requirement for the taxable year but are not included in the combined return.

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

221 (i) a statement providing details as to why a combined return which includes only the
222 corporations listed in subparagraph (1)(i) of this subdivision that meet the capital stock
223 requirement and the details as to why the corporations listed pursuant to subparagraph (1)(iii) of
224 this subdivision are excluded; and

225 (ii) information establishing that each corporation included in the return meets the
226 substantial intercorporate transactions test.
227 (b) The filing of a combined return or the inclusion of a corporation in or the exclusion of
228 a corporation from a combined return is subject to revision or disallowance on audit.
229 (c) If a corporation properly reports on a combined basis, the corporation must continue
230 to file its returns on a combined basis until the facts relevant to section 33.1 of this Part materially
231 change.
232 Section 33.8. Corporations not required or permitted to file a combined return.
233 The following corporations may not be included in a combined return:
234 (a) A corporation which is taxable under another franchise tax imposed by the Tax Law
235 (or would be taxable under another franchise tax if subject to tax).
236 (b) insurance corporations subject to the tax imposed by Tax Law section 1502-a.
237 (c) captive insurance corporations subject to the tax imposed by Tax Law section 1502-b.
238 Section 33.9 Examples.
239 Unless otherwise provided, assume the following facts for all examples: Corporation A
240 owns all of the stock of corporations B, C, D, E, F, G, H, I, L, M, N, O, P, Q, and R. All of the
241 corporations are calendar year taxpayers for Federal income tax purposes. Corporation I is taxable
242 under Article 9-A. Corporations B and C are taxable under sections 1501 and 1502 of Article 33.
243 All remaining corporations would be subject to tax under sections 1501 and 1502 of Article 33 if
244 they had nexus with New York. None of the corporations are taxable under section 1502-a. Only
245 Corporation D is a corporation organized under the laws of a country other than the United States.
246 To the extent that the conclusion of the example is filing on a separate basis, it is assumed that the
247 Commissioner did not find that a combined report would be required to properly reflect tax

248 liability as a result of some inter-company transaction, agreement, understanding or arrangement
249 or transaction.

250 Example 1: 90% of B's receipts are from D. Therefore, there are
251 substantial intercorporate transactions between B and D. B
252 and D are a tentative combined group and must file a
253 combined return.

254 Example 2: B's receipts are: 22% from A, 20% from C, 30% from D,
255 10% from E and the rest are from unrelated entities. 40% of
256 C's expenses are to B. No other substantial intercorporate
257 transactions occur between the corporations. Since there is
258 no tentative combined group among the related
259 corporations, corporations B and C file on a separate basis.

260 Example 3: 90% of B's receipts are from D and 100% of D's receipts
261 are from E. D is an alien corporation. There are substantial
262 intercorporate transactions between B and D, and D and E.
263 B, D and E must file a combined return.

264 Example 4: A is the only taxpayer and 50% of A's receipts are from B,
265 with another 4% from E. 30% of E's expenditures are to A
266 and 20% to D. C has no transactions with anyone in the
267 group. 50% of D's receipts are from A. 50% of F's receipts
268 are from A. 100% of H's receipts are from F. 100% of R's
269 receipts are from H. 20% of B's receipts are from L, 20%
270 from M, and 20 % from N. 100% of L's receipts are from

271 M. 100% of M's receipts are from N. 40% of O's receipts
272 are from R and 30% are from D. 60% of P's receipts are
273 from O. 80% of L's expenditures are to Q. All of these
274 corporations are in the step 1 group of related corporations
275 because they meet the stock ownership test. The step 2
276 tentative combined group consists of A, B, D, and F. As a
277 result of step 3, H is added to the tentative combined group.
278 As a result of step 4, R is added to the tentative combined
279 group. As described in step 5, L, M, N and Q is an
280 unattached related group and O and P is an unattached
281 related group. Corporations O and P are added to the
282 tentative group pursuant to step 6 because 70% of O's
283 receipts are from R and D. The step 6 tentative combined
284 group is A, B, D, F, H, R, O and P. The corporations in the
285 unattached unrelated group of L, M, N and Q are all added
286 to the tentative combined group pursuant to step 7 because
287 B has substantial intercorporate transactions with the
288 unattached related group of L, M, N and Q. The step 7
289 tentative combined group is A, B, D, F, H, R, O, P, L, M, N
290 and Q. Pursuant to step 8, E is added to the step 7 tentative
291 combined group because 30% of its expenditures are from
292 A and 20% are from D. The step 9 tentative combined
293 group is the same as the step 8 tentative combined group.

294 Since no corporations will be excluded from the step 9
295 tentative combined group pursuant to step 10, the group of
296 corporations that must file a combined return are A, B, D,
297 F, H, R, O, P, L, M, N, Q and E.

298 Example 5: A's only activity is to receive dividends from its wholly
299 owned subsidiaries. B sells stocks, C sells municipal bonds
300 and D sells corporate bonds. B, C and D each have their
301 own employees. However, the employees of one
302 corporation are authorized to and do sell extensively the
303 securities sold by the other corporations. 80% of the
304 receipts of B, 70% of the receipts of C and 60% of the
305 receipts of D are generated by sales made by the common
306 pool of employees of B, C, and D. All three corporations
307 carry on their activities at or using common facilities.
308 Because there are substantial intercorporate transactions
309 using common facilities and employees among B, C and D,
310 they are a combined group and must file a combined return.
311 A is not included in the combined group because it has no
312 substantial intercorporate transactions with a related
313 corporation.

314 Example 6: 90% of B's receipts are from I and 100% of I's receipts are
315 from E. C has no transactions with anyone in the group. I is
316 taxable under Article 9-A. There are substantial

317 intercorporate transactions between B and I, and I and E. B,
318 I and E are a tentative combined group. However, since I is
319 taxable under another franchise tax imposed by the Tax
320 Law, it cannot be included in a combined return. Therefore,
321 B and E must file a combined return. C files on a separate
322 basis.

323 Example 7: A, B, C, D, and E are parties to an intercompany
324 reinsurance pooling agreement. In accordance with the
325 terms and conditions of this agreement, the member
326 companies cede 100% of their direct and assumed business
327 to Company A, the lead company pool participant. In turn,
328 each pool participant assumes their percentage share of the
329 pooled business ceded from Company A. The capital stock
330 requirement is met but substantial intercorporate
331 transactions are absent. However, the Commissioner
332 deems a combined report including A. B, C, D and E is
333 necessary to properly reflect tax liability because of inter-
334 company agreements between the corporations.