

Note: The following is a summary of the revision to Regulation Part 9, *Metropolitan Transportation Business Tax Surcharge*, previously dated June 13, 2018.

The draft regulation begins below.

Section 9-1.2(f)

A new subdivision (f) has been added to emphasize that, where a corporation is engaged in any of the activities that subject it to imposition of the tax surcharge, the corporation will be subject to the tax surcharge for both the taxable year during which it first engages in any such activity and any subsequent taxable year during which it engages in any such activity. A corporation deriving receipts from activity in the Metropolitan Commuter Transportation District (the “MCTD”) will be deemed to be deriving receipts in the taxable year during which it first derives receipts from activity in the MCTD, beginning with the date of its first such receipt; and the corporation will be deemed to be deriving receipts during any subsequent taxable year, from the beginning of such subsequent taxable year. Also, a corporation doing business in the MCTD because it issues credit cards will be deemed to be doing business in the taxable year during which it first issues credit cards in the MCTD, beginning with the date it first issues a credit card in the MCTD; and the corporation will be deemed to be doing business during any subsequent taxable year, from the beginning of such subsequent taxable year. This new section 9-1.2(f) is consistent with draft regulation Subpart 1-3, *Corporations Subject to Tax*, specifically section 1-3.2(a)(6).

Section 9-3.1(f)

Subdivision (f) has been revised to be consistent with the similar provision in draft regulation Part 4, *Apportionment*, specifically section 4-2.2(a)(4).

Section 9-6.1(b)

Subdivision (b) has been updated to include the tax surcharge rate, as determined by the Commissioner, through taxable years beginning before January 1, 2021.

Other, minor revisions have been made, for consistency within this regulation and with other regulations, and for purposes of clarity.

1 Section 1. Part 9 of Subchapter A of Title 20 of the Codes, Rules and Regulations of the
2 State of New York is repealed and a new part 9, entitled Metropolitan Transportation Business
3 Tax Surcharge, is added to read as follows.

4 Part 9

5 Metropolitan Transportation Business Tax Surcharge

- 6 Subpart 9 – 1 General
7 Subpart 9 – 2 MCTD Apportionment Percentage
8 Subpart 9 – 3 Property Factor of MCTD Apportionment Percentage
9 Subpart 9 – 4 Receipts Factor of MCTD Apportionment Percentage
10 Subpart 9 – 5 Payroll Factor of MCTD Apportionment Percentage
11 Subpart 9 – 6 Other Rules

12 Subpart 9-1 General

13 **Section 9-1.1. Definitions.**

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

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

22 (2) In the case of a combined group that has at least one corporation included in the
23 combined report that is itself exercising its corporate franchise or doing business, employing

24 capital, owning or leasing property in a corporate or organized capacity, maintaining an office or
25 deriving receipts from activity in the MCTD:

26 (i) The term “surcharge taxpayer” also means every such corporation.

27 (ii) Where the surcharge taxpayer is either permitted or required by a provision of
28 this Part to take some action, such permission or requirement shall apply to the combined
29 group’s designated agent.

30 (iii) For purposes of determining the MCTD apportionment percentage, pursuant
31 to Subpart 9-2 of this Part, and of computing the property, business receipts, and payroll
32 factors, pursuant to Subparts 9-3, 9-4, and 9-5 of this Part, respectively, the term
33 “surcharge taxpayer” shall include each corporation properly includable in the combined
34 report.

35 (c) The term “surcharge base” means the tax computed pursuant to the rules for Tax Law
36 section 210(1), before the deduction of any credits allowed. In the case of a combined report, the
37 term “surcharge base” means the tax due on the combined report and also includes the amount of
38 fixed dollar minimum tax for each member of the combined group that is itself exercising its
39 corporate franchise or doing business, employing capital, owning or leasing property in a
40 corporate or organized capacity, maintaining an office or deriving receipts from activity in the
41 MCTD.

42 (d) The terms “doing business, employing capital, owning or leasing property in a
43 corporate or organized capacity or maintaining an office in the MCTD” have the same meaning
44 as in subdivisions (b) through (e) of section 1-3.2 of this Subchapter, except that the definitions
45 of such terms shall be adapted to this Part. For example: “tax surcharge” shall be substituted for
46 “tax”; “surcharge taxpayer” shall be substituted for “taxpayer”; “the MCTD” shall be substituted

47 for “New York State” and “the state”; and “any corporation” shall be substituted for “foreign
48 corporation.”

49 (e) The term “deriving receipts from activity” has the same meaning as in subdivision (f)
50 of section 1-3.2 of this Subchapter, except that the definition of such term shall be adapted to this
51 Part. For example: “tax surcharge” shall be substituted for “tax”; “the MCTD” shall be
52 substituted for “New York State” and “the state”; “MCTD receipts” shall be substituted for
53 “New York receipts”; and “any corporation” shall be substituted for “foreign corporation.” In
54 addition, the same adjustments by the Commissioner to the receipts thresholds apply, based on
55 an annual year-end review of the Consumer Price Index by the Commissioner, pursuant to
56 section 1-3.2(f)(5) of this Subchapter, except that the authority to make such adjustments to the
57 MCTD receipts thresholds is found in Tax Law section 209-B(1)(e).

58 **Section 9-1.2. Imposition of the tax surcharge. [Tax Law, § 209-B]**

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

63 (b) The tax surcharge is imposed on the surcharge base that is apportioned to the MCTD
64 based on the surcharge taxpayer’s business activity carried on within the MCTD. (See section 9-
65 2.1 of this Part.)

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

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

73 (e) Every surcharge taxpayer that is a foreign corporation subject to tax under section 1-
74 3.2 of this Subchapter and is engaged within the MCTD in any one or more of the activities
75 described in subdivision (a) of this section is subject to the tax surcharge regardless of whether it
76 is authorized to do business in New York State.

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

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

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

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

86 (ii) A corporation doing business in the MCTD because it issues credit cards, as
87 described in section 1-3.2(b)(3) of this Subchapter and adapted to this Part, is deemed to be
88 doing business for all of its taxable year or part of its taxable year from the date on which it
89 issues its first credit card in the MCTD.

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

93 (ii) A corporation doing business in the MCTD because it issues credit cards, as
94 described in section 1-3.2(b)(3) of this Subchapter and adapted to this Part, in its first taxable
95 year is deemed to be doing business in the subsequent taxable year from the beginning of the
96 subsequent taxable year.

97 **Section 9-1.3. Activities deemed insufficient to subject corporations to the tax surcharge.**

98 **[Tax Law, § 209-B(3)]**

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

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

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

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

105 (2) pledged as collateral security; or

106 (3) deposited into safekeeping or custody accounts with one or more banks, trust

107 companies or brokers who are members of a recognized security exchange;

108 (c) the taking of any action by a bank, trust company or broker in the MCTD incidental

109 to the rendering of safekeeping or custodian service to the corporation as described in

110 subdivision (b)(3) of this section;

111 (d) the maintenance of an office in the MCTD by one or more officers or directors of

112 the corporation who are not employees of the corporation, unless the corporation is otherwise

113 doing business or employing capital in the MCTD or owns or leases property in the MCTD;

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

117 (f) any combination of the foregoing activities.

118 Subpart 9-2 MCTD Apportionment Percentage

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

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

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

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

125 (a) The surcharge taxpayer's MCTD apportionment percentage is computed using a
126 formula consisting of three factors, expressed as percentages. The three factors are:

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

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

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

133 (b) The MCTD apportionment percentage is computed by adding together the surcharge
134 taxpayer's real and tangible personal property factor, business receipts factor and payroll factor,
135 and dividing by three. If a factor is missing, the other two factors will be added together and the

136 total divided by two. If two factors are missing, the remaining factor is the MCTD
137 apportionment percentage. A factor is missing only if both the numerator and the denominator
138 are zero.

139 Subpart 9-3 Property Factor of MCTD Apportionment Percentage

140 **Section 9-3.1. Computation of the property factor.**

141 (a) The percentage of the surcharge taxpayer's real property and tangible personal
142 property, whether owned by or rented to the surcharge taxpayer, that is within the MCTD is
143 determined by dividing the average value of such property within the MCTD (without deduction
144 of any encumbrances) by the average value of all such property within New York State (without
145 deduction of any encumbrances). For purposes of this section, the value of real property owned
146 by the surcharge taxpayer and the value of tangible personal property owned by the surcharge
147 taxpayer means the adjusted basis of such properties for Federal income tax purposes. The value
148 of real and tangible personal property rented to the surcharge taxpayer is addressed in the
149 provisions of section 9-3.3 of this Subpart.

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

157 (c) The term "tangible personal property" means corporeal personal property, such as
158 machinery, tools, implements, goods, wares and merchandise. It does not mean money, deposits

159 in banks, shares of stock, bonds, notes, credits or evidences of any interest in property and
160 evidences of debt.

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

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

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

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

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

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

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

182 (f) For purposes of computation of the property factor, omnibuses and other rolling
183 equipment such as construction equipment or trucks located within the MCTD and all such
184 rolling equipment located in New York State must be apportioned to the MCTD by a fraction.
185 Such fraction may be based on any of the following measures: miles operated within the MCTD
186 compared to total miles operated in New York State; time operated within the MCTD compared
187 to total time operated in New York State; the number of pickup and delivery locations within the
188 MCTD compared to the total of such locations in New York State; or any other measure that
189 fairly apportions such operations to the MCTD. Operations within the MCTD are included in the
190 numerator of the fraction, and 100 percent of operations in New York State are included in the
191 denominator. Omnibus operations while engaged in school bus operations must be disregarded in
192 determining the fraction.

193 **Section 9-3.2. Election for fair market value.**

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

201 (b) The election under this section:

202 (1) will not apply to any taxable year with respect to a combined report unless the
203 combined group's designated agent makes, or has made, a valid election pursuant to subdivision

204 (a) of this paragraph and applies such election to all corporations properly included in the
205 combined report;

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

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

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

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

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

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

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

223 *Example 1:* A surcharge taxpayer, pursuant to the terms of a lease, pays the lessor
224 \$1,000 per month and at the end of the year pays the lessor one percent of
225 its gross sales. Its gross sales were \$400,000, resulting in a gross rent of
226 \$16,000.

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

230 *Example 2:* A surcharge taxpayer, pursuant to the terms of a lease, pays its lessor
231 \$24,000 a year. It also pays real estate taxes of \$4,000 and interest on a
232 mortgage in the amount of \$2,000 pursuant to the lease. The taxpayer's
233 gross rent is \$30,000.

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

245 *Example 3:* A surcharge taxpayer enters into a 21-year lease of certain premises at a
246 rental of \$20,000 a year. After the expiration of one year, it installs a new
247 store front at a cost of \$10,000 that reverts to the owner upon the
248 expiration of the lease. Its gross rent for the first year is \$20,000.
249 However, for subsequent years its gross rent is \$20,500 (\$20,000 annual

250 rent plus 1/20th of \$10,000, the cost of the improvement apportioned on
251 the basis of the unexpired term of the lease).

252 *Example 4:* A surcharge taxpayer leases a parcel of vacant land for 40 years at an
253 annual rental of \$5,000 and erects a building on the land that costs
254 \$600,000. The value of the land is determined by multiplying the annual
255 rent of \$5,000 by eight. The value of the building is determined as if
256 owned by the surcharge taxpayer.

257 (c) The term “gross rents” does not include:

258 (1) intercorporate rents if both the lessor and the lessee are properly included in a
259 combined report under Article 9-A of the Tax Law;

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

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

264 (4) amounts payable pursuant to a capital lease;

265 (5) any portion of a rental payment payable for space subleased from the surcharge
266 taxpayer and not used by it (however, such amounts must be included in the receipts factor of the
267 MCTD apportionment percentage; see Subpart 9-4 of this Part).

268 *Example 5:* A surcharge taxpayer leases a building located in the MCTD, to be used in
269 manufacturing. The rent is \$20,000 a year. The taxpayer subleases 40
270 percent of the building to one or more subtenants. Since 40 percent of the
271 rent paid by the taxpayer is applicable to the portion of the building
272 subleased, 40 percent of the rent, or \$8,000, is excluded in computing the

273 taxpayer's gross rent for the building, for purposes of determining the
274 building's average value, regardless of the actual amount of rent received
275 by the taxpayer from the sublease.

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

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

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

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

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

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

294 Subpart 9-4 Receipts Factor of MCTD Apportionment Percentage

295 **Section 9-4.1. Computation of the receipts factor.**

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

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

301 (b) The numerator of the MCTD receipts factor is determined by applying the rules of
302 section 210-A as if those rules made reference to the MCTD rather than to New York State. The
303 percentage of the surcharge taxpayer's receipts within the MCTD will be determined after the
304 elimination of intercorporate and interentity receipts.

305 (c) In the case of a combined report, the combined group's receipts factor of the MCTD
306 apportionment percentage will be determined after the elimination of intercorporate and
307 interentity receipts.

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

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

315 (2) If eight percent of the receipts specified in a provision of Tax Law section 210-A(5)
316 are required by such provision and Subpart 4-2 of this Subchapter to be included in the
317 numerator of the apportionment fraction, then 90 percent of the eight percent will be considered
318 to be within the MCTD, and 100 percent of the eight percent will be considered to be within

319 New York State. This rule also is applicable in determining the amount of any other receipts
320 received by a credit card processor that are deemed to have been generated within the MCTD.
321 (See section 4-2.15 of this Subchapter.)

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

326 Subpart 9-5 Payroll Factor of MCTD Apportionment Percentage

327 **Section 9-5.1. Computation of the payroll factor.**

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

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

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

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

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

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

359 (ii) in the case of an employee whose compensation depends on achieving results
360 other than as described in subparagraph (i) of this paragraph, the proportion of the total
361 compensation that the value of such employee's services within the MCTD bears to the
362 value of all of the employee's services within the State;

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

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

369 **Section 9-5.2. Definition of employee.**

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

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

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

384 (d)(1) For purposes of this section, a general executive officer is an appointed or elected
385 officer of the corporation who either has company-wide authority with respect to his or her

386 assigned functions or duties or is responsible for an entire division of the company. Specifically,
387 a general executive officer:

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

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

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

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

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

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

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

405 Subpart 9-6 Other Rules

406 **Section 9-6.1. The tax surcharge rate. [Tax Law, § 209-B(1)(a) and (f)]**

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

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

411 (b) For taxable years beginning on or after January 1, 2016, the Commissioner of
412 Taxation and Finance is authorized to determine the rate, under Tax Law section 209-B(1)(f),
413 and the rate will be as follows (for succeeding taxable years, the rate will remain the same as the
414 rate last determined by the Commissioner, unless the Commissioner determines a new rate):

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

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

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

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

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

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

426 (a) In certain circumstances, use of the rules and methods described in Subparts 9-3, 9-4,
427 and 9-5 of this Part may not properly reflect the surcharge taxpayer's business activities. Under
428 such circumstances, where it appears that the MCTD apportionment percentage does not
429 properly reflect the surcharge taxpayer's business activities carried on within the MCTD, the
430 Commissioner, in his or her discretion, or at the request of the surcharge taxpayer, and pursuant
431 to the rules and standards set forth in section 4-4.1 of this Subchapter, may adjust the MCTD

432 apportionment percentage or require that the surcharge taxpayer use a different apportionment
433 formula or a different apportionment method to more accurately reflect the surcharge taxpayer's
434 business activity carried on within the MCTD.

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

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

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