



23 (New York, Bronx, Kings, Queens and Richmond Counties) and the Counties of Dutchess,  
24 Nassau, Orange, Putnam, Rockland, Suffolk and Westchester.

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

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

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

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

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

40 (c) The term “surcharge base” means the tax computed pursuant to the rules for section  
41 210(1), before the deduction of any credits allowed. In the case of a combined report, the term  
42 “surcharge base” means the tax due on the combined report and also includes the amount of  
43 fixed dollar minimum tax for each member of the combined group that is itself exercising its  
44 corporate franchise or doing business, employing capital, owning or leasing property in a

45 corporate or organized capacity, maintaining an office or deriving receipts from activity in the  
46 MCTD.

47 (d) The terms “doing business, employing capital, owning or leasing property in a  
48 corporate or organized capacity or maintaining an office in the MCTD” have the same meaning  
49 as in subdivisions (b) through (e) of section 1-3.2 of this Subchapter, except that the definitions  
50 of such terms shall be adapted to this Part. For example: “tax surcharge” shall be substituted for  
51 “tax”; “surcharge taxpayer” shall be substituted for “taxpayer”; “the MCTD” shall be substituted  
52 for “New York State” and “the state”; and “any corporation” shall be substituted for “foreign  
53 corporation.”

54 (e) The term “deriving receipts from activity” has the same meaning as in subdivision (f)  
55 of section 1-3.2 of this Subchapter, except that the definition of such term shall be adapted to this  
56 Part. For example: “tax surcharge” shall be substituted for “tax”; “the MCTD” shall be  
57 substituted for “New York State” and “the state”; “MCTD receipts” shall be substituted for  
58 “New York receipts”; and “any corporation” shall be substituted for “foreign corporation.” If a  
59 surcharge taxpayer elects to use the fixed percentage method to apportion receipts from qualified  
60 financial instruments to the State pursuant to section 210-A(5)(a)(1) and section 4-2.4(c) of this  
61 Subchapter, and further described in section 9-4.1(d) of this Part, then 90 percent of the eight  
62 percent specified pursuant to such election shall be used to determine whether the taxpayer is  
63 deriving receipts from activity in the MCTD. In addition, the same adjustments by the  
64 Commissioner to the receipts thresholds apply, based on an annual year-end review of the  
65 Consumer Price Index by the Commissioner, pursuant to section 1-3.2(f)(5) of this Subchapter,  
66 except that the authority to make such adjustments to the MCTD receipts thresholds is found in  
67 section 209-B(1)(e).

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

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

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

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

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

82 (e) Every surcharge taxpayer that is a foreign corporation subject to tax under section 1-  
83 3.2 of this Subchapter and is engaged within the MCTD in any one or more of the activities  
84 described in subdivision (a) of this section is subject to the tax surcharge regardless of whether it  
85 is authorized to do business in New York State.

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

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

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

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

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

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

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

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

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

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

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

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

114 (2) pledged as collateral security; or

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

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

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

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

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

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

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

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

123 (e) the keeping of books or records of the corporation in the MCTD, unless such books

124 or records are kept by employees of the corporation or if such corporation otherwise does

125 business, employs capital, owns or leases property, or maintains an office in the MCTD;

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

127 located in the MCTD;

128 (g) the acquisition of title to property located in the MCTD through the foreclosure of a

129 security interest;

130 (h) the holding of meetings of the board of directors in the MCTD, where such directors

131 are not employees of the corporation and if the corporation is not otherwise doing business or

132 employing capital in the MCTD and does not own or lease property in the MCTD; or

133 (i) any combination of the foregoing activities.

134 Subpart 9-2 MCTD Apportionment Percentage

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

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

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

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

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

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

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

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

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

155 Subpart 9-3 Property Factor of MCTD Apportionment Percentage

156 Section 9-3.1. Computation of the property factor.

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

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

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

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

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

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

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

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

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

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

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

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

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

209 Section 9-3.2. Election for fair market value.

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

217 (b) The election under this section:

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

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

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

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

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

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

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

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

239 Example 1: A surcharge taxpayer, pursuant to the terms of a lease, pays the lessor  
240 \$1,000 per month and at the end of the year pays the lessor one percent of  
241 its gross sales. Its gross sales were \$400,000, resulting in a gross rent of  
242 \$16,000.

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

246 Example 2: A surcharge taxpayer, pursuant to the terms of a lease, pays its lessor  
247 \$24,000 a year. It also pays real estate taxes of \$4,000 and interest on a  
248 mortgage in the amount of \$2,000 pursuant to the lease. The taxpayer’s  
249 gross rent is \$30,000.

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

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

268           Example 4:    A surcharge taxpayer leases a parcel of vacant land for 40 years at an  
269                            annual rental of \$5,000 and erects a building on the land that costs  
270                            \$600,000. The value of the land is determined by multiplying the annual  
271                            rent of \$5,000 by eight. The value of the building is determined as if  
272                            owned by the surcharge taxpayer.

- 273 (c) The term “gross rents” does not include:
- 274 (1) intercorporate rents if both the lessor and the lessee are properly included in a
- 275 combined report under Article 9-A;
- 276 (2) amounts payable as separate charges for water and electric service furnished by the
- 277 lessor;
- 278 (3) amounts payable for storage, unless the storage space is designated for the surcharge
- 279 taxpayer or under its control;
- 280 (4) amounts payable pursuant to a capital lease;
- 281 (5) any portion of a rental payment payable for space subleased from the surcharge
- 282 taxpayer and not used by it. However, the amount of rent received by the surcharge taxpayer
- 283 from the sublease must be included in the receipts factor of the MCTD apportionment
- 284 percentage, if required to be included pursuant to Subpart 9-4 of this Part.

285 Example 5: A surcharge taxpayer leases a building located in the MCTD, to be used in

286 manufacturing. The rent is \$20,000 a year. The taxpayer subleases 40

287 percent of the building to one or more subtenants. Since 40 percent of the

288 rent paid by the taxpayer is applicable to the portion of the building

289 subleased, 40 percent of the rent, or \$8,000, is excluded in computing the

290 taxpayer’s gross rent for the building, for purposes of determining the

291 building’s average value, regardless of the actual amount of rent received

292 by the taxpayer from the sublease.

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

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

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

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

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

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

311 Subpart 9-4 Receipts Factor of MCTD Apportionment Percentage

312 Section 9-4.1. Computation of the receipts factor.

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

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

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

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

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

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

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

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

340 Subpart 9-5 Payroll Factor of MCTD Apportionment Percentage

341 Section 9-5.1. Computation of the payroll factor.

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

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

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

356 (d)(1) Employees within the MCTD include all employees regularly connected with or  
357 working out of an office or place of business of the surcharge taxpayer within the MCTD,  
358 including by telecommuting and irrespective of where the services of such employees were  
359 performed. However, the Commissioner may permit or require the surcharge taxpayer to instead  
360 compute the payroll factor on the basis of the amount of compensation paid for services  
361 performed within the MCTD if both of the following are established: (i) that a substantial part of  
362 the surcharge taxpayer's payroll was paid to employees either attached to an office in the MCTD  
363 but who performed a substantial part of their services outside the MCTD or attached to an office

364 outside the MCTD but who performed a substantial part of their services within the MCTD; and  
365 (ii) that the computation of the payroll factor according to the general rule stated above would  
366 not properly reflect the amount of the surcharge taxpayer's business done within the MCTD by  
367 its employees.

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

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

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

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

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

383 Section 9-5.2. Definition of employee.

384 (a) For purposes of computing the payroll factor, the term "employee" means any  
385 individual whose relationship with respect to the surcharge taxpayer is that of employer and  
386 employee, as described in subdivision (b) of this section. The wages, salaries and other personal

387 service compensation of every such individual, except general executive officers, will be  
388 included in the computation of the payroll factor of the MCTD apportionment percentage.

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

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

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

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

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

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

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

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

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

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

#### 418 Subpart 9-6 Other Rules

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

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

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

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

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

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

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

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

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

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

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

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

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

455 All of the procedural provisions concerning the administration of the tax imposed by

456 section 209, in law and in regulation, including the provisions of Article 27 and the regulations

457 promulgated thereunder, shall apply to the tax surcharge.