

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2 State of New York is repealed and a new part 9, entitled Metropolitan Transportation Business  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. Imposition of the tax surcharge. [Tax Law, § 209-B]**

14 (a) In addition to the tax imposed by section 209 of the Tax Law, a tax surcharge is  
15 imposed on every surcharge taxpayer for the privilege of exercising its corporate franchise, or of  
16 doing business, or of employing capital, or of owning or leasing property in a corporate or  
17 organized capacity, or of maintaining an office, or of deriving receipts from activity in the  
18 Metropolitan Commuter Transportation District.

19 (b) The tax surcharge is imposed on the surcharge base that is apportioned to the  
20 Metropolitan Commuter Transportation District based on the surcharge taxpayer's business  
21 activity carried on within the Metropolitan Commuter Transportation District. (See section 9-2.1  
22 of this Part.)

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

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

31 (e) Every surcharge taxpayer that is a foreign corporation subject to tax under section 1-  
32 3.2 of this Title and is engaged within the Metropolitan Commuter Transportation District in any  
33 one or more of the activities described in subdivision (a) of this section is subject to the tax  
34 surcharge regardless of whether it is authorized to do business in New York State.

35 **Section 9-1.2. Definitions.**

36 (a)(1) The term “surcharge taxpayer” means every corporation other than a New York S  
37 corporation, as defined in section 208(1-A) of the Tax Law, that is exercising its corporate  
38 franchise or doing business, employing capital, owning or leasing property in a corporate or  
39 organized capacity, maintaining an office or deriving receipts from activity in the Metropolitan  
40 Commuter Transportation District.

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

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

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

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

57 (b) The term “surcharge base” means the tax computed pursuant to the rules for section  
58 210(1) of the Tax Law, before the deduction of any credits allowed. In the case of a combined  
59 report, the term “surcharge base” means the tax due on the combined report and also includes the  
60 amount of fixed dollar minimum tax for each member of the combined group that is itself  
61 exercising its corporate franchise or doing business, employing capital, owning or leasing  
62 property in a corporate or organized capacity, maintaining an office or deriving receipts from  
63 activity in the Metropolitan Commuter Transportation District.

64 (c) The term “Metropolitan Commuter Transportation District” (abbreviated in this Part  
65 as MCTD) includes the City of New York (New York, Bronx, Kings, Queens and Richmond  
66 Counties) and the Counties of Dutchess, Nassau, Orange, Putnam, Rockland, Suffolk and  
67 Westchester.

68 (d) The terms “doing business, employing capital, owning or leasing property in a  
 69 corporate or organized capacity or maintaining an office in the Metropolitan Commuter  
 70 Transportation District” have the same meaning as in subdivisions (b) through (e) of section 1-  
 71 3.2 of this Title, except that the definitions of such terms shall be adapted to this Part. For  
 72 example: “tax surcharge” shall be substituted for “tax”; “surcharge taxpayer” shall be substituted  
 73 for “taxpayer”; “the MCTD” shall be substituted for “New York State” and “the state”; and “any  
 74 corporation” shall be substituted for “foreign corporation”.

75 (e) The term “deriving receipts from activity” has the same meaning as in subdivision (f)  
 76 of section 1-3.2 of this Title, except that the definition of such term shall be adapted to this Part.  
 77 For example: “tax surcharge” shall be substituted for “tax”; “the MCTD” shall be substituted for  
 78 “New York State” and “the state”; “MCTD receipts” shall be substituted for “New York  
 79 receipts”; and “any corporation” shall be substituted for “foreign corporation”. In addition, the  
 80 same adjustments by the Commissioner to the receipts thresholds apply, based on an annual  
 81 year-end review of the Consumer Price Index by the Commissioner, pursuant to section 1-  
 82 3.2(f)(6) of this Title, except that the authority to make such adjustments to the MCTD receipts  
 83 thresholds is found in Tax Law section 209-B(1)(e).

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

85 **[Tax Law, § 209-B(3)]**

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

- 89 (a) the maintenance of cash balances with banks or trust companies in the MCTD;
- 90 (b) the ownership of shares of stock or securities that are kept in the MCTD if:

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

93 (2) pledged as collateral security; or

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

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

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

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

105 (f) any combination of the foregoing activities.

106 Subpart 9-2 MCTD Apportionment Percentage

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

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

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

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

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

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

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

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

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

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

127 Subpart 9-3 Property Factor of MCTD Apportionment Percentage

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

129 (a) The percentage of the surcharge taxpayer's real property and tangible personal  
130 property, whether owned by or rented to the surcharge taxpayer, that is within the MCTD is  
131 determined by dividing the average value of such property within the MCTD (without deduction  
132 of any encumbrances) by the average value of all such property within New York State (without  
133 deduction of any encumbrances). For purposes of this section, the value of real property owned  
134 by the surcharge taxpayer and the value of tangible personal property owned by the surcharge  
135 taxpayer means the adjusted basis of such properties for Federal income tax purposes. The value

136 of real and tangible personal property rented to the surcharge taxpayer is addressed in the  
137 provisions of section 9-3.3 of this Subpart.

138 (b) The term “real property” includes land, buildings, structures, and improvements  
139 thereon. In addition, it includes shares in a cooperative housing corporation in connection with  
140 the grant or transfer of a proprietary leasehold.

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

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

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

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

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

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

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

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

168 (f) Omnibuses and other rolling equipment such as construction equipment or trucks  
169 located within the MCTD and all such rolling equipment located in New York State must be  
170 apportioned to the MCTD by a fraction, the numerator of which is the surcharge taxpayer's  
171 mileage within the MCTD and the denominator of which is its total mileage throughout New  
172 York State. Miles operated while an omnibus is engaged in school bus operations must be  
173 disregarded in computing the percentage.

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

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

181 (b) The election under this section:

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

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

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

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

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

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

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

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

204 *Example 1:* A surcharge taxpayer, pursuant to the terms of a lease, pays the lessor

205                   \$1,000 per month and at the end of the year pays the lessor one percent of  
206                   its gross sales. Its gross sales were \$400,000, resulting in a gross rent of  
207                   \$16,000.

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

211                   *Example 2:* A surcharge taxpayer, pursuant to the terms of a lease, pays its lessor  
212                   \$24,000 a year. It also pays real estate taxes of \$4,000 and interest on a  
213                   mortgage in the amount of \$2,000 pursuant to the lease. The taxpayer's  
214                   gross rent is \$30,000.

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

227                   *Example 3:* A surcharge taxpayer enters into a 21-year lease of certain premises at a

228 rental of \$20,000 a year. After the expiration of one year, it installs a new  
229 store front at a cost of \$10,000 that reverts to the owner upon the  
230 expiration of the lease. Its gross rent for the first year is \$20,000.  
231 However, for subsequent years its gross rent is \$20,500 (\$20,000 annual  
232 rent plus 1/20<sup>th</sup> of \$10,000, the cost of the improvement apportioned on  
233 the basis of the unexpired term of the lease).

234 *Example 4:* A surcharge taxpayer leases a parcel of vacant land for 40 years at an  
235 annual rental of \$5,000 and erects a building on the land that costs  
236 \$600,000. The value of the land is determined by multiplying the annual  
237 rent of \$5,000 by eight. The value of the building is determined as if  
238 owned by the surcharge taxpayer.

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

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

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

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

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

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

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

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

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

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

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

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

266           (e) In exceptional cases, use of the general method described in this section may result in  
267   inaccurate valuations of rented real or tangible personal property. In such cases, any other  
268   method that properly reflects the value may be adopted by the Commissioner either on his or her  
269   own motion or at the request of the surcharge taxpayer. Another method of valuation may not be  
270   used unless approved by the Commissioner. A request for a different method of valuation must  
271   provide full information with respect to the property, including the basis for the valuation  
272   proposed by the surcharge taxpayer. Once approved or required by the Commissioner, such other

273 method of valuation must be used in subsequent taxable years unless the facts materially change.  
274 If the facts materially change, the surcharge taxpayer must report such change in facts to the  
275 Commissioner and the Commissioner may consent to or require a change from the method of  
276 valuation previously approved.

277 Subpart 9-4 Receipts Factor of MCTD Apportionment Percentage

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

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

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

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

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

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

294 (1) If a surcharge taxpayer elects to use the fixed percentage method to apportion  
295 receipts from QFIs to the State pursuant to section 210-A(5)(a)(1) of the Tax Law and

296 section 4-2.6 of this Title, the fixed percentage method applies in computing the receipts  
297 factor under this Subpart.

298 (2) If eight percent of the receipts specified in a provision of subdivision (5) of  
299 section 210-A of the Tax Law are required by such provision and Subpart 4-3 of this Title  
300 to be included in the numerator of the apportionment fraction, then 90 percent of the eight  
301 percent will be considered to be within the MCTD, and 100 percent of the eight percent  
302 will be considered to be within New York State. This rule is also applicable in  
303 determining the amount of any other receipts received by a credit card processor that are  
304 deemed to have been generated within the MCTD. (See section 4-3.10 of this Title.)

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

309 Subpart 9-5 Payroll Factor of MCTD Apportionment Percentage

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

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

317 (b) Wages, salaries and other compensation include all amounts paid for services  
318 rendered to the surcharge taxpayer by its employees, after intercorporate eliminations of such

319 amounts paid by members of a combined group, and do not include amounts paid by the  
320 surcharge taxpayer that do not have the element of compensation for personal services already  
321 rendered or to be rendered.

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

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

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

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

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

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

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

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

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

360 (b) Generally, the relationship of employer and employee exists when the surcharge  
361 taxpayer has the right to control and direct the individual not only as to the result to be  
362 accomplished by such employee but also as to the means by which such result is to be  
363 accomplished. If the relationship of employer and employee exists, the designation or description

364 of the relationship as well as the measure, method and designation of the employee's  
365 compensation are immaterial.

366 (c) A director of a corporation is not an employee. Therefore, compensation paid to  
367 directors for acting in their capacity as directors should not be included in computing the payroll  
368 factor.

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

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

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

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

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

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

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

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

390 Subpart 9-6 Other Rules

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

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

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

396 (b) For taxable years beginning on or after January 1, 2016, the Commissioner of  
397 Taxation and Finance is authorized to determine the rate, under paragraph (f) of subdivision (1)  
398 of section 209-B of the Tax Law, and the rate will be as follows:

399 (1) For taxable years beginning on or after January 1, 2016 and before January 1,  
400 2017, the rate is 28 percent.

401 (2) For taxable years beginning on or after January 1, 2017, the rate will remain  
402 the same as the rate last determined by the Commissioner, unless the Commissioner  
403 determines a new rate.

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

405 (a) In certain circumstances, use of the rules and methods described in Subparts 9-3, 9-4,  
406 and 9-5 of this Part may not properly reflect the surcharge taxpayer's business activities. Under  
407 such circumstances, where it appears that the MCTD apportionment percentage does not  
408 properly reflect the surcharge taxpayer's business activities carried on within the MCTD, the  
409 Commissioner, in his or her discretion, or at the request of the surcharge taxpayer, and pursuant

410 to the rules and standards set forth in section 4-6.1 of this Title, may adjust the MCTD  
411 apportionment percentage or require that the surcharge taxpayer use a different apportionment  
412 formula or a different apportionment method to more accurately reflect the surcharge taxpayer's  
413 business activity carried on within the MCTD.

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

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

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