NEW YORK STATE
TAXATION OF GILTI

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NEW YORK STATE BAR ASSOCIATION
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New York State Taxation of GILTI

I. BACKGROUND

- The Tax Cuts and Jobs Act transitioned the U.S. federal corporate income taxation regime from one of deferral by taxing foreign earnings when repatriated, to one of a territorial type with current taxation. One provision enacted to accomplish this transition is Global Intangible Low Taxed Income ("GILTI") under the IRC §§ 951A and 250.

II. GILTI

- GILTI is the excess of net tested controlled foreign corporation ("CFC") income over the net deemed tangible income return ("NDTIR") for that year. NDTIR is essentially a 10% average rate of return on a CFC's average basis of qualified tangible property, which is called Qualified Business Asset Investment ("QBAI").
    - A U.S. shareholder is a U.S. person that owns at least 10% of the stock of the foreign corporation by vote or by value.
    - A CFC is a foreign corporation over 50% owned, by vote or by value, by U.S. shareholders.
- For U.S. corporate income tax purposes, and subject to significant limitations, 80% of foreign tax credits are allowed to offset GILTI. IRC §§ 901 and 904.
- Most state corporate income tax regimes begin with federal taxable income or specifically adopt the Internal Revenue Code. These states are likely to conform to IRC § 951A unless they have legislatively decoupled.
- States may not conform to the GILTI deduction under IRC § 250. IRC § 250(a)(1)(b) provides a deduction for 50% of GILTI (plus amounts under IRC § 78) for U.S. shareholders that are corporations. This may increase the difference between the federal and state GILTI amounts.
- For New York State corporate income tax purposes, GILTI is included in the tax base and is apportioned to New York by including the GILTI inclusion (net of the Section 250 deduction) in the denominator of the apportionment fraction. Unlike GILTI, Subpart F income is removed from the tax base when calculating New York taxable income.

III. CONSTITUTIONAL CONSIDERATIONS

- Article I, Section 8, Clause 3 of the United States Constitution provides that "Congress shall have the Power to Regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes." (Emphasis added.)
- Under the Supreme Court's "Dormant Commerce Clause" jurisprudence, state authority over interstate and foreign commerce is restricted even in the absence of an express, conflicting federal

statute.[1] A state law violates the Dormant Commerce Clause when it treats in-state and out-of-state economic interests differently to the benefit of in-state activity.

- State taxes may apply to interstate commerce, but they may not discriminate against interstate commerce in favor of intrastate commerce. Under *Complete Auto Transit v. Brady,*[2] in order to withstand scrutiny under the Commerce Clause, the tax must: (i) be applied to activity which has substantial nexus to the state; (ii) be fairly apportioned among the states where the activity occurs; (iii) ***not discriminate against interstate commerce;*** and (iv) be fairly related to the services provided by the state.

- In *Japan Lines, Ltd. v. County of Los Angeles*,[3] the Court extended the *Complete Auto* test to foreign commerce and added two additional tests: (i) the tax cannot create a substantial risk of international multiple taxation; and (ii) the tax must not prevent the federal government from speaking with one voice when regulating commercial relations with foreign governments.

- In *Kraft General Foods v. Iowa Department of Revenue*,[4] the taxpayer operated a unitary business throughout the U.S. and in several foreign countries. Kraft deducted dividends it received from six subsidiaries, each of which was incorporated and conducted business in a foreign country. The Iowa Department of Revenue disallowed the dividend received deduction ("DRD") claimed by Kraft for its foreign dividends because Iowa's tax statutes permitted taxpayers to claim a DRD only for dividends from domestic subsidiaries.

    - The Supreme Court struck down the Iowa tax as being facially discriminatory against foreign commerce. The Court held that: (1) the statute impacted foreign commerce;[5] (2) the statute favored domestic interests over foreign interests; and (3) the statute did not advance a legitimate local purpose that could not be adequately served by reasonable nondiscriminatory alternatives.

    - The Court held that administrative convenience (i.e., conforming to the federal tax code with respect to DRDs) did not justify Iowa's unlawful discrimination.

- Does state taxation of GILTI violate *Kraft* by favoring domestic corporations over foreign corporations?

    - Separate company states v. unitary filing states
    - Is factor representation required in combined reporting states?

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[1] *Comptroller of the Treasury v. Wynne*, 135 S.Ct 1787 (2015).
[2] 430 U.S. 274.
[3] 441 U.S. 434 (1981).
[4] 505 U.S. 71, 72 (U.S. 1992).
[5] *Id.* at 76. Both parties stipulated that the dividends constituted foreign commerce.

New York State Bar Association

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NYSBA

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March 4, 2019

The Honorable Andrew M. Cuomo
Governor of New York State
NYS State Capitol Building
Albany, NY 12224

Re: Report No. 1413 – Comments on 2019-2020 New York State Executive Budget

Dear Governor Cuomo:

I am submitting herewith for your consideration materials developed by the New York State Bar Association's Tax Section, relating to the above-referenced issue.

Thank you for your attention to this matter.

Sincerely,

Ronald F. Kennedy

Ronald F. Kennedy

cc:

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Report No. 1413
March 4, 2019

Ronald F. Kennedy
Director of Governmental Relations
New York State Bar Association
One Elk Street
Albany, NY 12207

Re: *Report No. 1413 – Comments on 2019-2020 New York State Executive Budget*

Dear Mr. Kennedy:

I am pleased to submit this Report of the Tax Section of the New York State Bar Association commenting on the 2019-2020 New York State Executive Budget.

The Report focuses on certain technical, administrative and conceptual issues raised by selected provisions of the Budget Bill with reference to the New York Tax Law and the New York City Administrative Code and identifies aspects we think should be clarified or reconsidered prior to adoption by the Legislature.

We appreciate consideration of our Report. If there are any questions or comments, we will be glad to discuss and assist in any way.

Respectfully submitted,

Deborah L. Paul
Chair

Enclosure

Report No. 1413

New York State Bar Association
Tax Section
Comments on 2019-2020 New York State Executive Budget[1]

Introduction

This report on selected tax provisions of the 2019-2020 New York State Executive Budget (the "Budget Bill") was prepared by the Tax Section of the New York State Bar Association. It focuses on certain technical, administrative and conceptual issues raised by selected provisions of the Budget Bill with reference to the New York Tax Law (the "Tax Law") and the New York City Administrative Code (the "Code") and identifies aspects we think should be clarified or reconsidered prior to adoption by the Legislature.

This report offers comments and recommendations on the following parts of the Budget Bill:

Part C:	Provide a Sourcing Rule for Global Intangible Low-Taxed Income ("GILTI") Apportionment
Part D:	Decouple from Internal Revenue Code ("IRC") Federal Basis for NYS Manufacturing Test
Part F:	Extend the Three-Year Gift Addback Rule
Part G:	Eliminate Internet Tax Advantage

[1] The principal drafters of this report were: Jack Trachtenberg, Jennifer S. White, Megan L. Brackney, Paul R. Comeau, Maria Eberle, Joshua E. Gewolb, Jeremy P. Gove, Elizabeth Kessenides, Lindsay M. LaCava, Dennis Rimkunas, Irwin M. Slomka. Helpful comments were received from Kim Blanchard, Austin Bramwell, Robert Cassanos, Jeremy P. Gove, Alan S. Halperin, Stephen B. Land, Deborah L. Paul, Arthur R. Rosen, Michael Schler, and Gordon E. Warnke. This report reflects solely the views of the Tax Section and not those of its individual members, the NYSBA Executive Committee or House of Delegates, or any other party.

Part O:	Permanently Extend the Tax Shelter Provisions and Update Tax Preparer Penalties
Part X:	Exclude from Entire Net Income Certain Contributions to the Capital of a Corporation
Part Y:	Close the Carried Interest Loophole
Part Z:	Make Technical Corrections to Various Provisions of the Tax Law and the Code
Part VV:	Enact the Cannabis Regulation and Taxation Act

Discussion

I. Part C: Provide a Sourcing Rule for GILTI Apportionment

A. Current Law

Under Article 9-A of the Tax Law, a corporation's business income is defined as its entire net income minus investment income and "other exempt income."[2] For a corporation other than a foreign corporation, the computation of entire net income starts with federal taxable income, with certain adjustments not relevant to this discussion.[3]

A corporation apportions its business income to New York State using a single apportionment factor that is composed of prescribed receipts, net income, net gains, and other items of income or gain included in business income, with the portion attributable to New York

[2] Tax Law § 208.8.

[3] *Id.* at § 208.9.

based generally on customer-based sourcing.[4] Similar rules apply under the New York City business corporation tax.[5]

B. Proposed Changes

Part C, Section 1 of the Budget Bill would add a new category of receipts for inclusion in the apportionment factor, denominated "net global intangible low-taxed income" ("net GILTI"). Net GILTI is defined as global intangible low-taxed income included in federal gross income pursuant to IRC § 951A ("GILTI"), less the allowable IRC § 250(a)(1)(B)(i) deduction. The proposal would include net GILTI in the apportionment factor by including this net amount in the denominator of the fraction but no portion of GILTI in the numerator. The proposal is predicated on the assumption that the stock of the controlled foreign corporation ("CFC") that generates GILTI is business capital, and thus the amount of a corporation's net GILTI from that CFC is includable in the corporation's business income. It would apply to taxable years beginning on or after January 1, 2018.[6]

C. Comments

We begin by noting that New York has multiple options for addressing GILTI under Article 9-A, including, but not limited to: (i) decoupling from the IRC, and therefore excluding net GILTI from the taxable income base; (ii) including net GILTI in the taxable income base, but not in the apportionment factor; (iii) including net GILTI in the taxable income base and the apportionment factor, as the Budget Bill proposes, by including net GILTI in the denominator, but not the numerator of the apportionment factor; or (iv) including net GILTI (or some other amount) in the

[4] Tax Law § 210-A.

[5] New York City Admin. Code, Subch. 3-A.

[6] Part C, Section 2 of the Budget Bill would also apply to the New York City business corporation tax. Our comments apply equally to that section.

taxable income base, and including the gross receipts of the CFC that generated the net GILTI (or other amount) in the apportionment factor as if the CFC generating the GILTI were a domestic affiliate.[7] At this time, we take no position as to New York coupling or decoupling from the IRC in respect of GILTI but rather assume, for purposes of this Report, that New York does not decouple.[8] As well, on the assumption that New York does not decouple, at this time, we neither

[7] Presumably, if gross receipts are used in the apportionment factor, only those gross receipts relating to the income included in the taxable income base should be so included. For example, in Case1(C) discussed in the text below, all gross receipts giving rise to GILTI are included in the apportionment factor because gross (rather than net) GILTI is included in the taxable income base. Even in Case 1(C), however, if there were net deemed tangible income return under IRC § 951A((b)(2) ("NDTIR") that reduced the gross GILTI inclusion, arguably the portion of the gross receipts attributable to that NDTIR should be excluded from the apportionment factor or NDTIR should be added back to the taxable income base,

[8] In April 2018 the Legislature passed legislation to address some provisions of the Tax Cuts and Jobs Act of 2017 (the "TCJA"). The legislation did not address GILTI. As a result, because the computation of entire net income under Article 9-A starts with federal taxable income, both GILTI and the 50% GILTI deduction are includable in the computation of a corporation's entire net income. Such income is presumably business income under Article 9-A if the stock of the CFC that generates GILTI constitutes business capital. In June 2018, legislation to decouple from the federal treatment of GILTI was introduced and passed in the New York State Senate. The legislation, however, did not pass in the New York State Assembly. As such, GILTI remains includable in the computation of a corporation's entire net income. We note that a few states (e.g., Georgia and South Carolina) have enacted legislation to decouple from GILTI altogether. Other states (e.g., Connecticut, Illinois, Kentucky, Michigan, North Dakota, and Oklahoma) have administratively determined that they will treat GILTI in the same manner that they treat Subpart F income and, therefore, in those states, it is treated as dividend income eligible for full or partial state dividend received deductions. New Jersey, on the other hand, has issued administrative guidance under which GILTI will not be treated as a foreign dividend or deemed dividend income, and instead provides for a direct allocation of GILTI based generally on the state's share of GDP over GDP in all states with which the taxpayer has economic nexus. We note that under New York's pre-2015 corporate tax regime, the New York State Department of Taxation and Finance took the position that Subpart F income qualified as dividends, thus qualifying under Article 9-A for either full exclusion from the tax base as a dividend from subsidiary capital or a partial exclusion pursuant to the 50% deduction allowed for dividends received from entities owned 50% or less by the shareholder. *See, e.g.*, Advisory Opinion, *American International Group, Inc.*, TSB-A-87(23.1)C, TSB-A-88(7.1)C (N.Y.S. Dep't of Taxation & Fin., Nov. 2, 1992).

object to, nor endorse, the Budget Bill's approach, but rather seek to highlight issues that we believe may merit continued study. Further, we take no position on any constitutional issues that may be raised in connection with New York's approach to GILTI. We would be open to providing a report on the above issues.

The initial key question then is, on what basis should New York, which employs customer-based apportionment under Article 9-A, include GILTI in the computation of the apportionment factor, which is used to apportion all of a corporation's business income? We agree with the underlying principle in the Budget Bill that if GILTI is to be includable in a corporation's business income under Article 9-A, it should be reflected in the corporation's apportionment factor in some manner in order to properly reflect the corporation's business income and capital. The Budget Bill proposes to include 100% of GILTI (net of the IRC § 250 deduction) in the denominator of the apportionment fraction, but zero in the numerator of the fraction. This appears to be based on the view that GILTI constitutes foreign source income, and therefore no portion of it should be included in the numerator of the fraction.

For tax years beginning after 2014, New York shifted to a market-based apportionment approach. The Budget Bill's approach to factor representation of GILTI, however, could be considered inconsistent with the principles upon which market-based apportionment is based. If a CFC were, instead, a domestic entity included in the taxpayer's Article 9-A combined return, the apportionment would take into account the entity's New York receipts, and the denominator would include all of the entity's relevant business receipts. Including "net GILTI" in the denominator is a very different approach from including all of the receipts related to the generation of GILTI. The example below indicates the potentially substantial difference in a corporation's New York tax liability if net GILTI is included in the allocation factor, as compared to the CFC's receipts.

Example 1: Assume that a corporation subject to Article 9-A has the following items of income and receipts:

- $1,000,000 of business income on total business receipts of $10,000,000. Under the relevant customer sourcing apportionment rules, assume that 50% of the receipts are attributable to customers in New York and are includable in the numerator of the apportionment factor, while the entire $10,000,000 would be included in the denominator; and
- $1,000,000 of gross GILTI (before the IRC § 250 deduction), associated with $10,000,000 of receipts attributable to non-New York customers, and $500,000 of net GILTI.

Case 1(A) - Taxing GILTI Consistent with the Budget Bill's Proposal: Under the Budget Bill's proposal, the total income included in the corporation's business income, before apportionment, is $1,500,000 ($1,000,000 plus net GILTI of $500,000). The apportionment factor would be computed by including $5,000,000 in the numerator (50% of $10,000,000) and $10,500,000 in the denominator, resulting in an apportionment factor of 47.62% and apportioned business income to NYS of $714,286.

Case 1(B) – Removing GILTI from the Apportionment Factor: If GILTI, although included in the tax base, were not included in the denominator of the receipts factor, the apportionment factor would be computed by including $5,000,000 in the numerator and $10,000,000 in the denominator, resulting in an apportionment factor of 50% and an apportioned business income of $750,000. This would result in greater taxable income in NYS, as compared to the Budget Bill proposal.

Case 1(C) – Including the CFC's Receipts in the Apportionment Factor: Had the CFC that generated the GILTI been a domestic affiliate, with full inclusion of the entity's receipts in the apportionment factor denominator, the result could be dramatically different than the results under the Budget Bill proposal. While the total income included in the corporation's business income, before apportionment, would arguably be $2,000,000 (because there would be no Section 250 deduction if this were earned by a domestic corporation), the apportionment factor would be computed by including $5,000,000 in the numerator and $20,000,000 in the denominator. Accordingly, there would be an apportionment factor of 25% and apportioned business income of $500,000. This assumes, though, that none of the CFC's gross receipts would have been apportioned to NYS; to the extent the CFC's customers were in NYS, the result would differ.

This example illustrates that the inclusion of net GILTI in the denominator offers some factor representation relief but potentially much less than if inclusion of the CFC's factors were allowed, as would be the case if the CFC had been a domestic subsidiary. This impact is most evident where the CFC does not have receipts attributable to New York customers. If the CFC did have such receipts attributable to NY customers, they should be included in the numerator of the apportionment factor, which could ultimately result in a larger tax liability than including just net GILTI. However, such approach, again, would be consistent with inclusion of a domestic subsidiary.

Example 1 compares the results of the Budget Bill's proposal to a full look-through approach. However, it is also worth comparing the results of the Budget Bill approach to an approach whereby New York State decouples from the federal tax rules and excludes GILTI altogether. The following example goes to this point:

Example 2: Take the same facts as above, but also assume that the corporation in the example has $1,000,000 of other income from domestic sources. In addition, assume none of the items relating to this $1,000,000 of other income are includible in either the numerator or the denominator of the apportionment factor because such income represents dividends and net gains from sales of stock:

Case 2(A) - Decoupling from GILTI: If New York decoupled from the federal GILTI provisions, the corporation's apportionment factor would be: $5,000,000/$10,000,000, or 50%. The taxpayer in this example has $2,000,000 of domestic taxable income, and half ($1,000,000) would be apportioned to New York. GILTI would not be taxed.

Case 2(B) - Taxing GILTI Consistent with the Budget Bill's Proposal: As described in Case 1(A) above, under the Budget Bill, net GILTI is included in the denominator of the apportionment factor. This means the corporation's apportionment factor becomes $5,000,000/$10,500,000 or 47.62%. Applying this apportionment factor to the corporation's total business income of $2,500,000 ($1,000,000 of domestic business income, plus $1,000,000 of dividends and net gains from sales of stock, plus $500,000 of net GILTI) results in $1,190,476 being taxable in NYS.

Effectively, $190,476 of incremental income is being taxed in NYS, as compared to de-coupling from the federal rules.

Under the facts in this Case 2(B), the amount of incremental income subject to NYS tax increases as the net GILTI increases. For example, if the corporation's net GILTI were $1,500,000 rather than $500,000, the corporation's income subject to NYS tax would increase from $1,190,476 to $1,521,739.

The Budget Bill proposes an approach which appears to make certain assumptions. The first assumption is that net GILTI is a unique and special category of income in and of itself, and should be reflected in the apportionment factor, but without looking through to where the CFC's own income is earned using a market-based approach. In some respects, the Budget Bill's approach is taxpayer-favorable. While only net GILTI is included in the denominator, 100% of the income is considered not to be derived from New York sources (i.e., it is excluded from the numerator). On the other hand, the Budget Bill's approach is generally less taxpayer-favorable than decoupling.

The Budget Bill proposal seemingly attempts to apply a "rough justice" approach. We do believe there are major challenges with this approach. Apart from the potential distortions noted above, the fact that the states are taking altogether different approaches from one another to GILTI could lead to distortive results overall.

Further, we acknowledge that, as with the other sourcing rules included in Article 9-A, there is unlikely to be a single methodology that will result in the fair apportionment of income to New York for all taxpayers. To account for this systematic reality, the Tax Law provides that the Commissioner may require, and that taxpayers may request, an alternative apportionment method in limited circumstances. Specifically, N.Y. Tax Law § 210-A states that

> [i]f it shall appear that the apportionment fraction… does not result in a proper reflection of the taxpayer's business income or capital within the state, the commissioner is authorized in his or her discretion to adjust it, or the taxpayer may request that the commissioner adjust it, by (a) excluding one or more items in such determination, (b) including one or more other items in such determination, or (c) any other similar or different method calculated to effect a fair and proper apportionment of the business income and capital reasonably attributed to the state. The party seeking the adjustment shall bear the burden of proof to demonstrate that the apportionment fraction determined pursuant to this section does not result in a proper reflection of the taxpayer's business

> income or capital within the state and that the proposed adjustment
> is appropriate.

This alternative apportionment provision remains available to address any potential distortive effects of the Budget Bill proposal on a taxpayer's business income and business capital.

If the Budget Bill's proposal is adopted, one could argue that the New York State Department of Taxation and Finance (the "Department') should be amenable to taxpayers employing the existing alternative apportionment authority when the statutory apportionment formula's inclusion of net GILTI in the denominator of the apportionment factor does not properly reflect the taxpayer's New York business income or business capital. Under this view, the Department could consider incorporating into its existing alternative apportionment draft regulations examples to guide taxpayers seeking alternative apportionment arising from the net GILTI inclusion proposed by the Budget Bill. On the other hand, given that GILTI is taxable in the hands of minority shareholders, this approach could lead to an uneven playing field in that minority shareholders would not likely find themselves in a position to prove and take advantage of alternative apportionment.

II. Part D: Decouple from the IRC Federal Basis for NYS Manufacturing Test

A. Current Law

Under Article 9-A of the Tax Law, a "qualified New York manufacturer" is subject to tax at a rate of zero percent on its business income base and to other beneficial rates for purposes of the tax on business capital and the fixed dollar minimum tax.[9] A "qualified New York manufacturer" is a manufacturer that (i) has property in New York that is described in section 210-B.1(b)(i)(A) of the Tax Law (*i.e.*, property that qualifies for the New York Investment Tax Credit)

[9] *See* Tax Law §§ 210(1)(a)(vi), (b).

and either (a) the adjusted basis of such property for federal income tax purposes at the close of the tax year is at least $1,000,000 ("NYS Property Basis Test"), or (b) all of its real and personal property is located in New York; and (ii) is principally engaged in qualifying activities (the "NYS Principally Engaged Test").[10] A taxpayer or, in the case of a combined report, a combined group, shall be "principally engaged" in qualifying activities for purposes of the NYS Principally Engaged Test if, during the taxable year, more than 50% of the gross receipts of the taxpayer or combined group, respectively, are derived from receipts from the sale of goods produced by such qualifying activities.[11] A taxpayer, or in the case of a combined report, a combined group, that does not satisfy the NYS Principally Engaged Test may still be a qualified New York manufacturer if the taxpayer or combined group employs at least 2,500 employees in manufacturing in New York during the tax year and has property in the state used in manufacturing with an adjusted basis for federal income tax purpose at the close of the tax year of at least $100,000,000.[12]

For purposes of the New York City business corporation tax, a "qualified New York manufacturing corporation" is subject to tax on its business income at rates ranging from 4.425% to 8.85%, depending on the amount of its business income.[13] A "qualified New York manufacturing corporation" is (i) a manufacturing corporation principally engaged in the manufacturing and sale of tangible personal property (the "NYC Principally Engaged Test"), and (ii) has property in the state described in Code § 11-654(1)(k)(5) and either (a) the adjusted basis of such property for federal income tax purposes at the close of the tax year is at least $1,000,000

[10] *Id*.

[11] Tax Law §§ 210(1)(a)(vi), (b).

[12] *Id.*

[13] *See* New York City Admin. Code § 11-654(1)(k).

("NYC Property Basis Test") (collectively, with the NYS Property Basis Test above, the "Property Basis Tests"), or (b) more than 50% of its real and personal property is located in the state.[14] A taxpayer or, in the case of a combined report, a combined group, shall be "principally engaged" in the manufacturing and sale of tangible personal property for purposes of the NYC Principally Engaged Test if, during the tax year, more than 50% of the gross receipts of the taxpayer or combined group, respectively, are derived from receipts from the sale of goods produced by such activities.

B. Proposed Changes

Part D of the Budget Bill would amend the definitions of "qualified New York manufacturer" and "qualified New York manufacturing corporation" by changing the measure of property located in the state for purposes of the Property Basis Tests from adjusted basis for federal income tax purposes to adjusted basis for New York State tax purposes. Specifically, Part D proposes to amend sections 210(a)(vi) and 210(b)(2) of the Tax Law, and 11-654(1)(k)(4)(ii) of the Code to use the adjusted basis of property for "New York State tax purposes" instead of the adjusted basis of property for "federal income tax purposes."

C. Comments

The proposed changes to decouple the Property Basis Tests from adjusted basis for federal income tax purposes are necessary as a result of the TCJA. Under the TCJA, IRC § 168(k) was amended to allow taxpayers to immediately expense 100% of the cost of certain newly acquired property. This immediate expensing reduces the adjusted basis of such property for federal income tax purposes to zero in the year of purchase. Accordingly, it would be virtually impossible for

[14] *See id.* at §§ 11-654(1)(k)(4)(i), (ii).

New York State or City taxpayers to utilize the advantages offered by IRC § 168(k) for federal income tax purposes, while also using that same property to satisfy the Property Basis Tests.

The Budget Bill proposes to use the adjusted basis that is used for New York State tax purposes. However, we note that neither the Tax Law nor the Code include a definition of New York-specific "adjusted basis." We recommend that a taxpayer's adjusted basis for New York State tax purposes be reduced by the amount of any depreciation deductions allowed under the Tax Law rather than being reduced by the amount of any depreciation or expense deductions allowed under the IRC.. Because Tax Law § 208(9)(b) and Code § 11-652(8)(b)(16) decouple from IRC § 168(k), the Tax Law does not incorporate the concept of immediate expensing. Thus, any adjusted basis of newly acquired property under this definition would not be zero in the year of purchase. For clarity and avoidance of doubt, we recommend that the Budget Bill be amended to include an explicit definition of adjusted basis for New York State tax purposes as proposed above.

III. Part F: Extend the Three-Year Gift Addback Rule

A. Current Law

i. *Lifetime Gifts*

New York does not have a gift tax, and its estate tax exclusion has lagged behind the federal exclusion. Part X of Chapter 59 of the Laws of 2014 (Chapter 59) instituted broad estate tax reform, including a new requirement applicable to certain gifts made on or after April 1, 2014, by a decedent who was a New York resident at the time of the gift. The new provision said if a New York decedent died within 3 years of making a taxable gift, such gift had to be included in the decedent's New York gross estate. This requirement was added to deter New York residents from transferring large amounts of wealth shortly before death solely to take advantage of the higher federal estate tax thresholds, while at the same time reducing their otherwise taxable New York estate. This gift addback provision was made inapplicable to decedents dying on or after January 1, 2019, because on that date the New York and federal estate tax exemption thresholds were expected to coincide, eliminating the incentive for deathbed gifts.

B. Proposed Changes

i. *Lifetime Gifts*

The New York and federal estate tax exclusions did not coincide on January 1, 2019 due to a provision in the TCJA which doubled the federal exclusion as of January 1, 2018. As a result, there is a difference of more than $5 million per individual between federal and state estate tax thresholds. This gap revives the need for the limited gift add back in order to prevent revenue losses from deathbed gifts. Part F of the Budget Bill would extend the sunset to decedents dying on or after January 1, 2026, the date the estate tax amendments made by the TCJA are set to expire.[15]

C. Comments

The New York State Executive Budget Memorandum in Support of the Governor's Fiscal Year 2020 Executive Budget (the "Support Memorandum") claims that the Budget Bill's proposed extension of the three-year "add-back" provisions under Tax Law § 954(a)(3) is necessary due to the difference between the current gift and estate tax basic exclusion amount available under the IRC and the applicable credit amount available for New York State estate tax purposes.[16] For calendar year 2019, the basic exclusion amount for federal gift and estate tax purposes is $11.4 million, and the applicable credit amount available for New York estate tax purposes is

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[15] *See* FY 2020 Executive Budget Memorandum in Support, p. 13.

[16] *Id.*

$5.74 million. According to the Support Memorandum, because New York does not impose a gift tax, absent the three-year add-back, residents are incentivized to take advantage of the increased federal gift tax exemption by making up to $11.4 million in tax-free gifts prior to death.[17] Therefore, New York State loses out on the estate tax that would have been payable on the $11.4 million had the gift not been made.[18] By enacting the Budget Bill's proposal, New York State hopes to deter residents from making such gifts by drawing them back into the New York gross estate.[19] The three-year add-back under the Budget Bill's proposal would expire in 2026, when the federal basic exclusion amount is expected to align with the applicable credit for New York estate tax purposes.[20]

While the Support Memorandum is correct in its assertion that the three-year add-back will deter New York residents from making certain lifetime gifts, the tax incentive to make lifetime gifts is not driven by the excess of the federal basic exclusion amount over the New York applicable credit amount. Indeed, even if an individual makes a gift that is limited to the New York applicable credit amount, the individual will save on New York estate tax by making a gift if there is no add-back rule. Likewise, gifts beyond the federal basic exclusion amount may lead to substantial estate tax savings absent the add-back. Simply put, the misalignment of the federal basic exclusion amount and the New York State applicable credit amount does not appear to rationalize the three-year add-back. The perceived abuse addressed by the three-year add-back relates to so-called "deathbed gifts." Because New York has no gift tax, prior to the enactment of

[17] FY 2020 Executive Budget Memorandum in Support, p. 13.

[18] *Id*.

[19] *Id*.

[20] FY 2020 New York State Executive Budget, Revenue, Article VII Legislation, Subpart F, Section 1.

the three-year add-back, a New York domiciliary could reduce his or her aggregate estate and gift tax by making a gift immediately prior to death. The add-back rule closes off this planning strategy by including such gifts within the New York gross estate.

Though the three-year add-back rule prevents individuals from avoiding New York estate tax via deathbed gifts, the add-back causes additional federal estate tax. Under Section 2058 of the IRC, a federal estate tax deduction is allowed for any estate taxes paid to any state, but only to the extent the property taxed at the state level is included in the decedent's gross estate for federal estate tax purposes.[21] Because the gift is not otherwise includible in the decedent's gross estate for federal estate tax purposes,[22] the amount of New York estate tax incurred on a gift that is added back to the decedent's gross estate for New York estate tax purposes will not be deductible at the federal level.[23] Given the period covered by the add-back – three years – and the adverse estate

[21] *See* I.R.C. § 2058(a).

[22] The New York three-year add-back applies only to gifts not otherwise included in the decedent's federal gross estate. *See* Tax Law § 954(a)(3).

[23] Section 2053(a)(3) allows a deduction for claims against the estate; however, as the deduction is not available for tax on the three-year add-back, as a claim, to be deductible, it would have to be a personal obligation of the decedent existing at the time of the decedent's death. The chart below depicts the difference in the combined effective gift and estate tax rate (assuming a 16% New York estate tax rate and a 40% federal gift and estate tax rate) with respect to (i) a testamentary disposition, (ii) a lifetime gift which is subject to add-back, and (iii) a lifetime gift which is not subject to add-back:

	No Lifetime Gift; Testamentary Disposition	Lifetime Gift with Add-back	Lifetime Gift without Add-back
Combined Effective Gift & Estate Tax Rate on Transfer	49.6%	56.0%	40.0%

tax consequences, there is a negative effect on persons who might make gifts absent the three-year add-back. Yet, the absence of a New York gift tax suggests that, as a policy matter, New York does not want to discourage residents from making gifts.

We recommend that, in determining how best to formulate tax legislation, New York focus on the underlying policy considerations. The add-back was designed to discourage "deathbed" transfers which would reduce the New York Estate Tax, and there is no suggestion that New York intended to increase the total federal and New York estate tax above what would be due absent the gift. The goal of discouraging "deathbed" transfers should be balanced against the negative effect on individuals who otherwise would make gifts. Accordingly, we recommend that New York consider limiting the add-back to gifts made within one year prior to death to target gifts that are more likely intended to avoid New York estate tax on the eve of an expected death.[24] Alternatively, if New York maintains an add-back which extends beyond one year prior to death, we recommend that New York consider reducing the estate tax inclusion with respect to gifts made more than one year prior to death. For example, New York may consider including in a resident's gross estate

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The interplay between the New York add-back and Section 2058 of the IRC results in a combined effective gift and estate tax rate of 56.0% on the added-back lifetime gift, as compared to a 49.6% combined effective gift and estate tax rate had the individual not made the lifetime gift.

[24] There are instances in the tax law where the measuring period is one year. For example, under Section 1014(e) of the IRC, if appreciated property is transferred to a decedent by gift within one year of death and such property passes from the decedent to the donor at the decedent's death, there is no step up in basis at death. *See* I.R.C. § 1014(e). Additionally, some states that include gifts in contemplation of death in the decedent's gross estate for state tax purposes have adopted rules with lookbacks of less than three years. *See*, e.g., Me. Rev. Stat. tit. 36 § 4102(7)(C) and Pa. Stat. § 9107(c)(3), applying a one-year lookback; Md. Code, Tax-Gen § 7-201(d)(1)(iii) and Vt. Stat. tit. 32 § 7402(14)(C), applying a two-year lookback. Five states other than New York have adopted a three-year lookback. *See*, e.g., Iowa Code § 450.3(2); Ky. Rev. Stat. § 140.020(2); Minn. Stat. § 291.016, subd.2; Neb. Rev. Stat. § 77-2002(2); N.J. Rev. Stat. § 54:34-1.c.

100% of the value of gifts made within one year prior to death, while including only 50% of the value of gifts made between one and two years prior to death and 25% of the value of gifts made between two and three years prior to death. By limiting the add-back to one year prior to death (or limiting the adverse tax consequences for gifts that occur more than one year prior to death), the rule would continue to deter individuals from making deathbed gifts solely to avoid New York estate tax, while mitigating the relatively harsh tax consequences for those who make gifts followed by death beyond one year after the gift.

Finally, for the reasons discussed, we do not see a policy rationale for sunsetting the add-back rule, as the potential advantages of deathbed gifts are created by the lack of New York gift tax and exist regardless of the relative sizes of the federal and New York exclusion amounts. Consequently, we recommend that consideration be given to eliminating the expiration date of the add-back rule.

IV. Part G: Eliminate Internet Tax Advantage

Part G of the Budget Bill proposes a major change to the way sales and use taxes would be collected for sales made through so-called "marketplace providers." The marketplace proposal would shift the burden of collecting sales tax from the retailer to the "marketplace provider" that "facilitates sales of tangible personal property." The Budget Bill's proposal also has the effect of increasing the reach of New York's authority to require the collection of sales tax on online sales made by out-of-state sellers through marketplace providers with New York State nexus. Additionally, it would shift responsibility for the collection of sales tax for sales by an in-state seller to the marketplace provider in regard to particular sales.

A. Current Law

Under current law, the responsibility to collect and remit sales taxes on taxable sales is limited to "vendors."[25] A vendor is defined as a person "making sales" that has a sufficient connection to New York State to require the vendor to collect and remit sales tax on sales to customers in the State.[26] In certain circumstances, an agent of the vendor can be treated as a "co-vendor," with joint responsibility for collecting and remitting the sales tax.[27] When sales tax is not collected by the vendor on a taxable sale, the purchaser is obligated to remit use tax with respect to the use of the purchased property.[28]

Because vendors are defined as the persons actually making sales, a party that merely facilitates a sale between a seller and a buyer through a physical or online marketplace forum is not a vendor and does not have tax collection responsibilities, even if such party has nexus with New York. The responsibility for collecting sales tax lies with the seller itself. Critically, an out-of-state seller that does not otherwise have nexus with New York does not establish nexus by selling goods through an online marketplace with nexus in New York, and is not required to collect and remit sales tax on sales made through an online marketplace.[29] This does not relieve New York purchasers from liability for use tax, however,[30] and use tax is generally acknowledged to be

[25] Tax Law §§ 1131(1), 1132(a)(1).

[26] Tax Law § 1101(b)(8).

[27] *Id.* at § 1101(b)(8)(ii)(A).

[28] *Id.* at § 1110.

[29] *Id*. at § 1101(b)(8)(v)(A).

[30] *Id.* at § 1110.

underreported.[31] In an effort to increase use tax compliance, and in lieu of having purchasers compute the use tax on each individual purchase, New York offers a simplified method whereby residents can elect on their personal income tax return to pay an estimated aggregate use tax on all purchases costing less than $1,000 each, which estimate is based on the residents' taxable income.[32]

B. Proposed Changes

Part G of the Budget Bill would alter the structure of the current law by placing the burden of collecting tax on sales facilitated through an online or physical marketplace on the "marketplace provider." Under the proposal, a "marketplace provider" is defined as any person who "facilitates a sale of tangible personal property" by a "marketplace seller." A marketplace provider facilitates sales when it (i) "provides the forum" in which, or by means of which, the sale takes place, and (ii) such person or an affiliate of such person either collects the receipts paid by a customer to a marketplace seller for the sale of tangible personal property or contracts with a third party to collect such receipts.[33] A "forum" includes an internet website, catalog or similar forum, or a physical forum, such as a "shop, store, or booth." The proposal would apply to sales made on or after September 1, 2019.

C. Comments

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[31] *See* Memorandum in Support, Part G, stating that the proposal will increase revenues by $125,000,000 in 2020 and $250,000,000 annually thereafter.

[32] NYS Form IT-201i (2018), p. 27

[33] Persons are affiliated if one person has an ownership interest of more than 5%, whether directly or indirectly, or where a greater than 5% ownership interest is held directly or indirectly in each of such persons by another person or group of other persons that are affiliated. Budget Bill, Part G § 1.

At the outset we note that in June of last year, the U.S. Supreme Court issued its decision in the matter of *South Dakota v. Wayfair, Inc.* 138 S. Ct. 2080, which fundamentally changed the underlying constitutional jurisprudence that had resulted in New York's inability to directly impose sales tax on many Internet sales. New York now treats as a vendor responsible for sales tax collection any person that for the immediately preceding four sales tax quarters satisfied the following:

1. The cumulative total of the person's gross receipts from sales of tangible personal property delivered into the state exceeded $300,000, and
2. Such person made more than 100 sales of tangible personal property delivered in the state.[34]

The proposals contained in Section G of the Budget Bill were originally introduced in earlier budget bills prior to the *Wayfair* decision, which expanded nexus to include certain out-of-state sellers making sales into New York.[35] Given the recent seismic shift in the application of the U.S. Constitutional limitations to taxation, we recognize that the landscape in which this proposal is being made has changed substantially.

i. *Marketplace Provider Rules Generally*

Though we note that the number of states with marketplace statutes is growing, the proposed approach in the Budget Bill would nevertheless significantly differ from the general nationwide practices as to the party responsible for collecting sales tax on sales facilitated through third-

[34] NYS N-19-1 (January 2019) (citing Tax Law §§ 1101(b)(8)(i)(E), 1101(b)(8)(iv)).

[35] *See* New York State FY 2015-2016 Executive Budget, Part X.

parties.[36] The proposal would impose significant compliance obligations and potential tax liabilities on marketplace providers. Marketplace providers will be required to undertake a greater administrative burden, as under the proposal the designation of collection responsibility is mandatory—if a marketplace provider facilitates sales, the marketplace provider will be responsible for sales tax compliance for those sales.[37] Specifically, marketplace providers will be tasked with determining the taxability of each sale. This may be especially difficult in the case of goods excluded from the tax base and transactions involving purchasers providing exempt certificates. We note that administering the casual sale rules also may be particularly difficult. Indeed, this may be analogized to imposing a sales tax collection responsibility on in-state co-vendors (discussed below).[38] The Tax Section expresses no opinion on this provision as a policy matter, although we note that it would represent a substantial change.

The shifting of responsibility for collecting tax from the marketplace seller to the marketplace provider appears to have two major effects. First, with respect to sellers that already have nexus in New York, it would appear to relieve them of the responsibility of collecting sales tax and shift that responsibility to the marketplace provider.[39] Second, it appears to provide a mechanism for the collection of sales tax for sales by sellers that do not have any nexus with New

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[36] For states with similar statutes, see Cal. Civ. Code § 1739.7; Iowa Code § 423.14A; Minn. Stat. § 297A.66; S.D. Codified Laws § 10-65-1 to §10-65-8.

[37] Budget Bill, Part G § 3.

[38] *See, e.g.*, TSB-A-86(13)S (N.Y.S. Dep't of Taxation & Fin., Mar. 26, 1986) (ruling that a household appliance telephone ordering service is responsible for collecting and remitting sales tax as a co-vendor on sales made on behalf of out-of-state suppliers).

[39] We note that under the proposal, in order to be relieved of responsibility for collecting sales tax, the seller must obtain a "completed certificate of collection" from the marketplace provider which states that the marketplace provider will collect the sales tax. *See* Budget Bill, Part G § 3.

York because the marketplace provider would be responsible for collecting and remitting the tax on sales made by both in-state and out-of-state sellers.

ii. *Nexus*

New York's recently issued *Wayfair* guidance discussed above applies to "vendors." The Department finds support for its position in Tax Law § 1101(b)(8)(i)(e), which includes within the definition of a vendor a person systematically soliciting business in New York to the extent that "solicitation satisfies the nexus requirements of the [U.S.] Constitution." The Budget Bill does not seek to impose collection obligations on marketplace providers by including them within the definition of a vendor. Rather, the proposal creates the new classification of persons (i.e. "marketplace providers") that are included within the definition of "persons required to collect tax." As such, the current guidance as applied to vendors does not explicitly apply to marketplace providers. The Budget Bill's proposal does not include any language to establish when a marketplace provider will be deemed to have nexus with New York. We urge the Department to amend the definition of a marketplace provider to include applicable nexus standards. We suggest that the same nexus standards described above that are applicable to vendors be adapted to this situation. Specifically, the marketplace provider would have nexus when the cumulative total of the person's receipts from sales of tangible personal property delivered into the state exceeded $300,000, and such person made more than 100 sales of tangible personal property delivered in the state.

To the extent the Department wishes to impose the same nexus standards that it does on out-of-state vendors, we also request clarity as to how the $300,000 in gross receipts and 100 transactions tests would apply to marketplace providers. Specifically, it is unclear whether the economic nexus standard would apply to the receipts and sales of the marketplace provider itself, or would be based on the cumulative receipts and sales of the marketplace sellers, including the sales of third parties the marketplace provider helps to facilitate.

Further, we note the deletion of language from prior proposals that would have stated that a person who facilitates sales exclusively by means of the Internet is not a marketplace provider if its annual sales have been no more than $150,000,000 for every calendar year after 2016.[40] We note that the Support Memorandum references that the tax will apply to "large" marketplace providers, but no such limitation appears in the statute.

iii. *Scope of Application*

The proposed marketplace requirements are limited to sales of tangible personal property. We note that for purposes of New York's sales and use tax, tangible personal property includes computer software,[41] therefore bringing within the ambit of the marketplace provider provisions those online marketplaces that sell software applications and computer games. Prior versions of proposed marketplace reporting requirements also included sales of occupancies or admissions, which are not part of the Budget Bill's proposal.[42]

Under the proposed definition, an entity is a "marketplace provider" only if it collects the receipts paid by a customer. We understand that there are "peer-to-peer" online marketplaces where the buyer has the ability to pay the seller directly, resulting in the marketplace provider not collecting such receipts. It appears that such sales are excluded from the application of this section, especially in light of the deletion of language that has been present in former marketplace

[40] New York State FY 2017-2018 Executive Budget, Part AA.

[41] Tax Law § 1101(b)(6).

[42] New York State FY 2015-2016 Executive Budget, Part X.

reporting proposals that provided that the term "marketplace provider" included organizations that arrange for exchange of messages between customers and sellers.[43]

We also understand that there are companies that create and manage websites that are branded in the name of the selling business and may provide the types of services identified in the definition of a "marketplace provider." For example, in addition to creating a website for the seller, such companies may also collect the receipts from the seller's customers through the website and remit them to the seller. If the intent of the proposal is to treat as a "marketplace provider" an entity that facilitates sales through a website address that is specific to a single business, rather than a website address that identifies a marketplace, then we recommend that the proposal make that clear.

iv. *Other Matters*

The Budget Bill states that a marketplace seller would generally be relieved from its duties to collect tax if it has received in good faith a properly completed certificate of collection from the marketplace provider certifying its compliance. It then goes on to provide that the Department may (i) develop a contractual provision or approve a contractual provision developed by the marketplace provider which, if included in the contract, will have the same effect as the certificate of collection, and (ii) provide by regulation or otherwise that inclusion of such provision in the publicly available agreement between the marketplace provider and the marketplace seller will have the same effect as the certificate of collection. We note that this provision differs from the rules applicable for other sales tax exemptions. For example, a certificate of exemption must be obtained from a non-profit organization; it is not sufficient to recite in the contract that the organization is non-profit. We are unclear as to the meaning and scope of the prong requiring

[43] *Id*.

inclusion of the contractual provision in a publicly available agreement and suggest that this be clarified.

The Budget Bill also states that the Department may provide by regulation or otherwise that a marketplace seller will be relieved of duty to collect tax for sales facilitated by a marketplace provider only if such marketplace provider is not on a list on the department's website of marketplace providers whose certificates of authority have been revoked at the commencement of the applicable quarterly period. We are concerned about the potential burden on smaller sellers of needing to check this list on such a frequent basis and would suggest that an annual period be considered to account for the potential burden on small sellers.

v. *Alternative Co-Vendor Approach*

One alternative to the Budget Bill's approach that could achieve the apparent policy objectives would be to amend the Tax Law to permit a marketplace provider to be treated as a co-vendor under Tax Law § 1101(b)(8)(ii). Under existing law, the Department has the authority to treat any "salesman, representative, peddler or canvasser" as the seller's agent, and thus as jointly liable for collecting and remitting the sales tax.[44] By allowing the Department to treat the marketplace provider as a co-vendor, the marketplace seller would remain the party primarily responsible for collecting and remitting the tax, but where the Department determines it would be efficient for administration of the tax, the marketplace provider could be held jointly responsible. Under this approach, whether or not a marketplace seller has New York nexus, the marketplace provider could be treated as responsible for collecting the sales tax upon reasonable notice by the Department.

vi. *Effective Date*

[44] Tax Law § 1101(b)(8)(ii).

We note that the 30-day amendments to the Budget Bill accelerate the effective date of the proposal from September 1, 2019, to June 1, 2019. We do not comment on whether such acceleration would impose an undue compliance burden on affected marketplace providers, but we urge that consideration be given to that question before proceeding with the accelerated effective date.

V. Part O: Permanently Extend the Tax Shelter Provisions and Update Tax Preparer Penalties

A. Current Law

i. *Tax Shelter Provisions*

Tax Law § 25 contains New York's tax shelter penalty and reporting requirements. These requirements are modelled after the federal rules for disclosure of a reportable transaction. The Tax Law requires that any taxpayer who enters into a reportable or listed transaction, as those terms are defined by IRC § 6011 and corresponding treasury regulations, must attach a duplicate of the taxpayer's federal reportable transaction disclosure statement to the taxpayer's New York return for the taxable year at issue.[45] Additional disclosure requirements are provided for taxpayers, and material advisors, who have participated in "New York reportable transactions", *i.e.*, New York listed transactions, New York confidential transactions, and New York transactions with contractual protection.[46] Failure to properly report any of these transactions subjects taxpayers and certain advisors to enhanced penalties and extended statutes of limitations for assessment.[47]

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[45] Tax Law § 25(a)(1).

[46] *Id.* at § 25(a)(2); 20 NYCRR § 2500.3.

[47] *See, e.g.,* Tax Law §§ 683(c)(11); 685(p), (q), and (r); Tax Law §§ 25(f)(1)-(3).

ii. *Tax Preparer Penalties*

The current tax preparer penalties, found in Tax Law § 685(aa), are scheduled to expire on July 1, 2019. The provisions provide for penalties of $1,000 per violation against the tax return preparer if there is an understatement of liability due to (i) a position for which there was not a reasonable belief that the tax treatment in that position was more likely than not the proper treatment, (ii) the income tax preparer knew or reasonably should have known of such position, and (iii) the position was not adequately disclosed. The Tax Law also provides for penalties of $5,000 per violation if the tax return preparer acted willfully or with reckless or intentional disregard of rules or regulations.

Tax Law § 658 also requires tax return preparers to sign returns and claims for refund and to furnish certain identifying information on returns and claims for refund. The Tax Law previously had penalty provisions for tax return preparers who failed to comply with these requirements, but those penalty provisions were repealed in 2009.[48]

B. Proposed Changes

i. *Tax Shelter Provisions*

Part O, section 1 of the Budget Bill would make the tax shelter penalty and reporting requirements currently in effect permanent.

ii. *Tax Preparer Penalties*

Part O of the Budget Bill would amend the preparer penalty provisions of Tax Law §§ 685(aa) and (u) to strengthen the Department's ability to enforce the Tax Laws by imposing penalties against tax return preparers who take return positions that (i) cause the understatement

[48] *See* L. 2009, c. 59 legislation; pt. VV, § 3.

of tax or improperly increase a claim for refund, (ii) fail to sign a return or claim for refund, or (iii) fail to furnish the tax return preparer's identifying number on tax returns.

Specifically, Part O, section 2 of the Budget Bill would replace the current version of Tax Law § 685(aa) to provide for penalties of between $100 and $1,000 for every return on which an understatement of liability or increased claim for refund is due to a position where the preparer "knew, or reasonably should have known, that said position was not proper, and such position was not adequately disclosed on the return or in a statement attached to the return." The Budget Bill further provides for a penalty of between $500 and $5,000 if the tax return preparer takes a position on an income tax return that understates the tax liability or increases a claim for refund resulting from the preparer's reckless or intentional disregard of the law, rules, or regulations.[49]

Next, Part O, section 3 would add a new section to Tax Law § 685(u) providing for penalties for failure to sign a return or claim for refund. Preparers would be subject to a penalty of $250 for each failure to sign a return or claim for refund (unless such failure was due to reasonable cause and not willful neglect). The maximum amount of penalties for each year is $10,000, unless the taxpayer was penalized under this provision in the preceding calendar year, in which case the penalty is increased to $500 per violation with no cap.

Part O, section 3 would also add a new section to Tax Law § 685(u) providing for penalties against tax return preparers who fail to furnish identifying numbers. The penalty would be $100 for each failure, up to a total of $2,500 each year. If the tax return preparer has been penalized under this provision in the preceding calendar year, the penalty is increased to $250 per violation with no cap.

[49] Please note that the text of proposed § 658(aa)(4) says "tax return prepared," but this appears to be a typographical error and should say "tax return preparer."

C. Comments

i. *Tax Shelter Provisions*

We support making Tax Law § 25, and related penalty and statute of limitations provisions, permanent. The transactions covered by these provisions are those that have the most potential for abuse. The disclosure requirements, penalties, and extended statutes of limitations provide the Department with the tools that it needs to identify and examine these transactions, and where appropriate, curtail abusive transactions.

We note, however, that in 2005, along with Tax Law § 25, New York enacted a provision imposing penalties for promoting abusive tax shelters. This provision is also schedule to expire and be deemed repealed as of July 1, 2019. Specifically, Tax Law § 685(bb) provides for a penalty of 50% of the gross income derived (or to be derived) by a person who promotes an abusive tax shelter. These penalties apply when a person organizes a tax shelter, makes or furnishes a statement regarding a tax benefit that the person knows or has reason to know is false or fraudulent as to any material matter, or makes or furnishes a gross valuation overstatement.

Tax Law § 685(bb) is another important enforcement tool for the Department and is not duplicated by other penalty provisions. Tax Law § 685(bb) applies to a broader category of transactions than Tax Law § 25, and it is not limited to tax return preparers, like Tax Law § 685(aa) (discussed below). In addition, the penalties under Tax Law § 685(bb), which are 50% of the fees derived from the activity, may be much greater than those under Tax Law § 685(aa), which are only up to $5,000 per violation if the tax return preparer's conduct was willful. We are unsure whether maintaining the July 1, 2019 expiration date for the penalties under Tax Law § 685(bb) was intentional. If not, we suggest that the Department consider making permanent Tax Law §

685(bb)'s powerful enforcement tool to discourage and penalize the most egregious cases of the promotion of abusive tax shelters.

ii. *Tax Preparer Penalties*

The purpose of the proposed provisions is to clarify and enhance penalties against tax return preparers who take positions that are not supported by the Tax Law, and to ensure that penalties for failing to sign returns (or claims for refund) and failing to furnish identification numbers apply to all tax preparers (and not only those required to be registered with the Department under Tax Law § 32).

Through the enactment of Tax Law § 32, New York has already taken significant action to improve tax preparation services for New Yorkers. A task force report issued by the Department cited "serious problems within the tax preparer industry and the impact of these problems on consumers of tax preparation and related services."[50] The report pointed to studies by the Office of the Treasury Inspector General for Tax Administration and the General Accounting Office finding that returns prepared by unlicensed tax return preparers "often contained inaccuracies with significant tax consequences such as sizable unjustifiable refunds," and that many of these errors were due to "willful or reckless omissions or misstatements."[51] In response, New York created a registered return preparer program in 2014, and issued regulations governing standards for conduct for all tax return preparers pursuant to Tax Law § 32.

The proposed legislation will further aid the Department in enforcing the Tax Law and ensuring that New York taxpayers receive high quality tax return preparation services and are not

[50] New York State, *Report of the Task Force on Regulation of Tax Return Preparers*, for submission to the Department of Taxation and Finance, the Governor, and the Legislature (Sept. 28, 2011), at p. 3.

[51] *Id.* at pp. 3-4.

taken advantage of by unscrupulous preparers. We support this effort, but have a few comments regarding the proposed tax preparer penalties in Part O, section 1 of the Budget Bill (to be codified at Tax Law § 685(aa)).

First, the proposed statute penalizes tax return preparers for taking positions that are "unreasonable," a standard which is met if the preparer "knew, or reasonably should have known, that said position was *not proper*."[52] We have concerns as to whether this is an administrable standard for penalties. It does not indicate the level of certainty that is required before a preparer can take a position on a tax return, and suggests that anytime a position is disallowed, the preparer could be subject to penalties. We do not believe that this is the standard that the Legislature should impose, as there can be good faith disagreements regarding the interpretation of the Tax Law or the particular facts and circumstances supporting a return position.

Tax Law § 685(aa) is modelled after IRC § 6644. Under IRC § 6694, the general definition of an "unreasonable position," is:

> (A) In general.--Except as otherwise provided in this paragraph, a position is described in this paragraph unless there is or was substantial authority for the position.
> (B) Disclosed positions.--If the position was disclosed . . . and is not a position to which subparagraph (C) applies [tax shelters and reportable transactions], the position is described in this paragraph unless there is a reasonable basis for the position.[53]

Similarly, Circular 230, which contains regulations governing practice before the Internal Revenue Service, cross-references this definition of "unreasonable position," in 31 C.F.R. § 10.34, "Standards with respect to tax returns and documents, affidavits and other papers."

[52] Budget Bill, Part O, § 2; Proposed Tax Law § 685(aa)(1) (emphasis added).

[53] IRC § 6694(a)(2)(A) and (B).

For tax return preparers who are certified public accountants, the American Institute of Certified Public Accountants ("AICPA") describes a similar standard in its Statements on Standards for Tax Services.[54] Statement 1, Tax Return Positions, provides that "a member may prepare or sign a tax return that reflects a position if (i) the member concludes there is a reasonable basis for the position and (ii) the position is appropriately disclosed."

The concepts of substantial authority, reasonable basis, and adequate disclosure found in these provisions have been developed by the courts and taxing authorities under New York and federal law. As noted above, New York has already issued regulations governing tax return preparers under Tax Law § 32. Those regulations provide that

> [a] tax return preparer may not willfully, recklessly, or through gross incompetence… advise a client to take a position on a tax return or claim for refund, or prepare a portion of a tax return or claim for refund containing a position that: (a) lacks a reasonable basis; (b) is an unreasonable position; or (c) is a willful attempt by the tax return preparer to understate the liability for tax or a reckless or intentional disregard of rules or regulations by the tax return preparer.[55]

The proposed standard found in the Budget Bill that the preparer knew or reasonably should have known that the position was "not proper" is inconsistent with 20 NYCRR § 2600-4.3(h), as well as the federal and industry standards. Moreover, there is no guidance as to whether "not proper" is intended to be a higher or lower standard than that described in the New York regulations. In order to avoid confusion as to both the applicable standard for return positions, and in the enforcement of the preparer penalties, we recommend that the "not proper" language be removed from the proposed statute, and instead, language similar to IRC § 6694 be included to the

[54] http://www.aicpa.org/InterestAreas/Tax/Resources/StandardsEthics/StatementsonStandardsforTaxServices/DownloadableDocuments/SSTS,%20Effective%20January%201,%202010.pdf

[55] 20 NYCRR § 2600-4.3(h)(1)(ii).

effect that the position either must be supported by substantial authority, or have a reasonable basis and be adequately disclosed.

Second, although the definition of "tax return preparer" encompasses preparers of all New York tax returns, including income tax, estate tax, sales tax and use tax, and other tax returns,[56] the proposed statute only appears to provide for penalties for unreasonable positions on *income* tax returns. We recommend that the reference to "income tax" be eliminated so that the provision applies to all returns, as it is in the interest of the Department and the public to ensure the standards for return positions are satisfied on all returns, not only income tax returns. This would be consistent with federal law. Specifically, IRC § 6694 was amended in 2007 to expand its application to all tax return preparers, and not just income tax preparers.[57]

VI. Part X: Exclude from Entire Net Income Certain Contributions to the Capital of a Corporation

A. Current Law

As part of the TCJA certain changes were made to IRC §118, which generally provides that the gross income of a corporation does not include any contribution to its capital. Prior to the change in law, there was an exclusion from this provision where contributions in aid of construction or any other contribution from a customer or potential customer were not considered a contribution to capital and thus were included in the receiving corporation's gross income.

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[56] Part O, § 3 of the Budget Bill defines "tax return preparer," by reference to Tax Law § 658(g), which states, in relevant part, that "the term 'tax return preparer' means any person who prepares for compensation, or who employs or engages one or more persons to prepare for compensation any return or claim for refund. The preparation of a substantial portion of a return or claim for refund shall be treated as if it were the preparation of such return or claim for refund. . . Tax Law § 658(g)(5).

[57] *See* Small Business and Work Opportunity Act of 2007, Pub L No 110-28, 121 Stat. 190, § 8246(a)(2)(F)(i)(I) & (II) (May 25, 2007); IRC § 6694.

The TCJA added a new exclusion from the general rule, whereby any contribution by any governmental entity or civic group (other than a contribution made by a shareholder as such) is also not considered a contribution to capital and is included in the receiving corporation's gross income.

Currently, corporations follow IRC §118 when determining their Article 9-A or Article 33 tax liability and their New York City business corporation tax, general corporation tax, or banking corporation tax liability because the starting point for the computation of these tax bases is federal gross income. Accordingly, the federal limitations specifying that a contribution by a governmental entity or a civic group to a corporation is included in gross income will apply for New York State and City purposes. As a result, this provision results in certain state and local tax incentives awarded to corporations being subject to tax.

B. Proposed Changes

Part X of the Budget Bill would decouple Article 9-A and Article 33 taxes, as well as New York City general corporation tax from IRC § 118, resulting in the capital contributions a corporation receives from a governmental entity or a civic group being excluded from a taxpayer's gross income subject to tax in New York.

C. Comments

The Tax Section does not take a position on whether decoupling from IRC §118 is advisable. However, if this provision passes, it would be advisable for the exclusion from gross income to be applied not just for purposes of Article 9-A and Article 33 taxes and the New York City general corporation tax. The decoupling from this provision should also be applied to the definitions of entire net income in the New York City business corporation tax (Code § 11-652 et seq.) and the New York City banking corporation tax (Code § 11-641 et seq.).

VII. Part Y: Close the Carried Interest Loophole

A. Current Law

The Tax Law has no special provisions dealing with income from a carried interest. In general, partnership income that is taxed to the partners has the same character in the hands of the partners as it had in the hands of the partnership, regardless of how the partner acquired his or her partnership interest. For example, partnership investment income, including long-term capital gains, flows through to the partners and is treated the same in their hands even if one or more partners acquired their partnership interest in exchange for services rendered to the partnership or other partners.[58]

A carried interest is an interest in a partnership that is disproportionately high relative to the partner's capital contribution. It is common for the organizers of an investment partnership to contribute a small amount of the partnership's capital but to receive a much higher interest in partnership profits. Arguably, this disproportionate interest is received in exchange for services rendered in organizing and/or operating the partnership. Nevertheless, New York State, mirroring the federal income tax treatment, has treated income from a carried interest just like any other partnership income that is taxed to the partners.

Until the enactment of the TCJA, the IRC contained no special provisions for carried interest income and the Internal Revenue Service treated the income as retaining the character that it had in the hands of the partnership. The TCJA amended IRC § 1061 to provide, in general, that

[58] References to partnerships and partners include limited liability companies and their members to the extent that they are treated as partnerships and partners for income purposes.

a partner who received a partnership interest in connection with the performance of substantial services would not treat long-term capital gains realized by the partnership as long-term capital gains unless the property sold by the partnership had been held by the partnership for more than three years. IRC § 1061 does not treat carried interest income as income received in exchange for services or as business income; its only effect is to convert what otherwise might have been long-term capital gains to short-term capital gains.

B. Proposed Changes

Part Y of the Budget Bill would add a new section 44 to the Tax Law and would amend sections 208.6(a), 617(b), 631(d), and 632(b) to change the treatment of carried interest income. The provisions are intended to "close the carried interest loophole" by treating carried interest income as income from a trade or business and not as capital gains. One consequence of this recharacterization would be that carried interest income would be taxable to a nonresident of New York to the extent that the partnership's income was attributable to New York sources. In addition, the Budget Bill would impose a 17% "carried interest fairness fee" on a portion of carried interest income. The fee would remain in effect until the IRC is amended to treat the provision of investment management services for federal tax purposes substantially the same as under the Tax Law.

C. Comments

An identical proposal was included in New York's FY 2018-2019 Executive Budget.[59] The Tax Section again takes no position with respect to whether carried interest income should be

[59] *See* New York State FY 2018-2019 Executive Budget, Part M.

treated as business income or should be given favorable tax treatment. For the benefit of the reader, we have restated our comments regarding this proposal.[60]

The Budget Bill applies the new regime to income that a partner is deemed to have received from "investment management services." Section 44 defines this phrase as including investment advice regarding the purchase or sale of securities as defined in section 475(c)(2) of the IRC, real estate held for rental or investment, and certain partnership interests, including managing, acquiring, or disposing of such assets, arranging financing with respect to the acquisition of such assets, and related activities.

The operative provision of section 44 indicates that a partner who performs investment management services for a partnership will not be treated as a partner with respect to the partner's distributive share of income, gain, loss, and deduction, including guaranteed payments, "that is in excess of the amount such distributive share would have been if the partner had performed no investment management services for the partnership." That excess amount will be treated as a business receipt for services and for purposes of the personal income tax as income attributable to a trade, business, profession, or occupation. Similar provisions would apply to an S corporation shareholder. An exception would be provided for certain real estate businesses. A partner or shareholder will not be deemed to be providing investment management services if at least 80% of the average fair market value of the partnership's assets consists of real estate held for rental or investment.

It may be difficult to determine whether a partner received all or part of a partnership interest in exchange for investment management services. It does not automatically follow that an interest that is disproportionate to a partner's capital contribution is received in exchange for

[60] *See* Report of the Tax Section of the New York State Bar Association, Report No. 1391 (Mar. 9, 2018) at 12-16.

investment management services or, for that matter, for any services. For example, the organizers of a partnership might be willing to give a particularly prestigious individual a disproportionately high partnership interest because the person's name may enhance the partnership's reputation or ability to attract other investors or otherwise assist in relations with private or public organizations. Other partners might simply strike a hard bargain and succeed in negotiating for a partnership interest that is disproportionately high relative to their capital contributions.

The new regime applies to income received by a partner for services performed by that partner. As written, it would not apply to income received by a partner who received a partnership interest as a gift from a person who performed services for the partnership (*e.g.*, the service provider's spouse or children).

Section 44(c) provides for "an additional tax, referred to as the 'carried interest fairness fee'." This fee is equal to 17% of the amount treated as business income under section 44(b). This fee will remain in effect until "federal legislation has been enacted that treats the provision of investment management services for federal tax purposes substantially the same as provided in this section." It is not clear what kind of federal legislation would be needed to result in a termination of the fee. The bill converts investment income to business income. If Congress wanted to completely eliminate favorable treatment for capital gains realized by partnerships that had partners with carried interests, it could do so by expanding on the approach taken by the TCJA and simply providing that all long-term capital gains realized by a partnership will be treated as short-term capital gains to the extent that they are passed through to carried interests. That would eliminate any federal preference for carried interest income, but it would not treat that income as business income as the New York statute does. It would still be investment income for other purposes of the federal tax laws. That would arguably not result in treatment "substantially the same as provided" in the New York law.

The carried interest provisions take effect only if Connecticut, New Jersey, Massachusetts, and Pennsylvania all adopt legislation "having substantially the same effect as this act." It is unclear what this phrase means. In the unlikely event that all four states adopt some kind of legislation dealing with carried interest income, they could take different approaches. They could recharacterize carried interest income as business income but not impose a punitive "fairness fee", or they could impose a "fee" that was much lower than New York's fee.

Our only new comment regarding the proposed carried interest provision pertains to the proposal's effective date, which is contingent upon similar proposals being enacted by Connecticut, New Jersey, Massachusetts, and Pennsylvania. Since the original proposition of the carried interest provision in the fiscal year 2018-2019 Executive Budget, New Jersey has enacted a similar tax on carried interest. New Jersey's law will levy a 17% carried interest tax on general partners of investment funds once New York, Connecticut and Massachusetts have enacted legislation having the same effect. It is unclear whether New Jersey's legislation has "substantially the same effect" as the carried interest proposal in the Executive Budget. No similar proposal has yet been enacted by Connecticut, Massachusetts, or Pennsylvania.

VIII. Part Z: Various Technical Changes to the Tax Law and the New York City Administrative Code

Part Z of the Budget Bill includes a number of proposed technical changes intended to clarify various provisions of the Tax Law and the Code. The provisions are intended to ensure that tax statutes are clear, accurate and up to date with the most recent provisions in corresponding federal, state, and city tax provisions. The corrections are also intended to ensure that the language conforms to legislative intent. We welcome the added clarity that these changes bring to the Tax Law and the Code. We suggest additional changes to ensure complete clarification of the application of that provision.

A. Current Law

Tax Law § 213-b(a) relates to estimated payments of franchise tax and metropolitan transportation business tax surcharge for S-corporations. Further, Tax Law § 213-b(e) states that if an estimated payment exceeds the taxpayer's corresponding liability, interest shall be paid from the date of payment to the fifteenth day of the third month following the close of the taxable period.

B. Proposed Changes

Part Z, § 4 of the Budget Bill proposes to remove provisions in Tax Law § 213-b(a) related to the requirements for S-corporations to make estimated payments of metropolitan transportation business tax surcharge. The provisions would be removed because S-corporations are not subject to the metropolitan transportation business tax surcharge. Part Z, § 5 of the Budget Bill also proposes to amend Tax Law § 213-b(e) for purposes of determining the end date for interest paid to taxpayers on estimated tax overpayments from the third month to the fourth month following the close of the taxable period. This amendment conforms to changes in related return due dates.

C. Comments

In order to further clarify the franchise tax estimated payment requirements for S-corporations, we recommend that Tax Law §213-b(a) is further amended to state that "[p]rovided, however, that every taxpayer that <u>is subject to the tax imposed by section two hundred nine of this chapter that</u> is <u>a New York</u> S corporation must pay with the report . . ." This will ensure clarification that the estimated payments are related to the franchise tax.

IX. Part VV: Enact the Cannabis Regulation and Taxation Act

A. Current Law

The use of cannabis for *recreational* purposes is currently illegal in the state of New York. The use of *medical* cannabis, however, is legal in New York under § 3362 of the Compassionate Care Act.[61] To obtain medical cannabis, a patient must be diagnosed with one of several serious conditions, and the patient must receive certification from a medical professional.[62] Additionally, the patient must register with the Department of Health's Medical Marijuana Program and obtain a Registry Identification Card.[63]

The current excise tax on medical cannabis is seven percent of the gross receipts from medical marijuana sold or furnished by a registered organization to a certified patient or designated caregiver.[64] The law defines "gross receipt" as the amount charged for the provision of medical cannabis, without any deduction for: the cost of materials, labor, or services; other costs, interest, or discount paid; or any other expenses.[65]

B. Proposed Changes

Part VV of the Budget Bill proposes to legalize the recreational use of cannabis, and Article 20-C of the Tax Law would impose a number of requirements on prospective cannabis businesses, including taxation, registration and renewal, and keeping returns secret. Additionally, Article 20-C enumerates penalties in the case that a person violates one of the provisions.

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[61] Pub. Health Law § 3362.

[62] *Id.* at § 3361.

[63] *Id.* at § 3363.

[64] Tax Law § 490(2).

[65] *Id.* at § 490(1).

Under Taw Law § 493, New York would impose a tax on the cultivation of cannabis flower and cannabis trim at the rate of one dollar per dry-weight gram of cannabis flower, and twenty-five cents per dry-weight gram of cannabis trim. The tax distinguishes between cultivators and wholesalers. If the wholesaler is not the cultivator, the wholesaler collects the tax from the cultivator at the time of transfer to the wholesaler. If the wholesaler is the cultivator, the wholesaler pays the tax at the time of sale or transfer to the retail dispensary. If the cultivator is the retail dispensary, the tax accrues at the time of sale to the retail customer.

A twenty percent excise tax would also be imposed on a wholesaler for the transfer of cannabis from a wholesaler to a retail dispensary. If the wholesaler is not a retail dispensary, the tax is computed based on the invoice price charged by the wholesaler to a retail dispensary. If the wholesaler is a retail dispensary, the tax is twenty percent of the price charged to the retail customer, and it accrues at the time of sale to the customer. The transfer by wholesaler to the retailer is also subject to an additional two percent county tax. Lastly, as in the case of medical cannabis, recreational cannabis is exempt from sales tax.

As discussed in more detail below, the Budget Bill also proposes to modify the taxpayer secrecy provisions under Article 20-B, Excise Tax on Medical Marihuana, by removing any references to the sharing of information with the federal government. Similarly, § 496 of Article 20-C, as proposed by the Budget Bill, does not address whether New York intends to share the information it obtains with the federal government.

C. Comments

i. *Interaction of IRC § 280E with the Proposed Cannabis Legislation*

IRC § 280E states:

> No deduction or credit shall be allowed for any amount paid or incurred during the taxable year in carrying on any trade or business

> if such trade or business (or the activities which comprise such trade or business) consists of trafficking in controlled substances (within the meaning of schedule I and II of the Controlled Substances Act) which is prohibited by Federal law or the law of any State in which such trade or business is conducted.

Currently, New York law follows IRC § 280E through its conformity to the IRC. As a result, cannabis businesses may not claim the same deductions that other businesses may because the federal government continues to list cannabis as a Schedule I drug. New York's conformity with the IRC puts an additional fiscal burden on cannabis businesses, which appears inconsistent with New York's position that cannabis is a legitimate business undertaking. The Legislature may therefore want to consider following in the footsteps of some other states, such as Washington and Colorado, that have decoupled from IRC § 280E.

ii. *Taxpayer Secrecy Provisions in Regard to the Federal Government*

The current taxpayer secrecy statute contained in Article 20-B, the excise tax on medical marihuana, gives the Department discretion not to share such taxpayer information with the Internal Revenue Service. The statute also explicitly prohibits the Department from sharing any of the taxpayer information with the Internal Revenue Service, unless the Internal Revenue Service agrees "not to divulge or make known in any manner the information so supplied."[66] Presumably, this language is designed to prevent the Internal Revenue Service from sharing this information with any law enforcement agencies.

Notably, the Budget Bill seeks to remove from § 491 of Article 20-B references to the Internal Revenue Service. The taxpayer secrecy provisions under the proposed Article 20-C also make no mention of the Internal Revenue Service. The proposed language is, therefore, silent as to what happens if the Internal Revenue Service requests New York tax returns pertaining to

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[66] Tax Law § 491.

medical and recreational cannabis. This ambiguity raises two issues. On the one hand, the silence could be interpreted as New York's Commissioner *not* having the discretion to share tax return information with the federal government. On the other hand, the implication could be that restrictions on sharing tax return information do not apply with respect to the Internal Revenue Service at all. Given that cannabis—in all forms—remains illegal under federal law, this distinction might be of critical importance to cannabis businesses. We recommend that the Legislature provide additional clarity regarding the proposed omission of the reference to the Internal Revenue Service in the context of taxpayer secrecy.

iii. *The Imposition of the Twenty Percent Tax*

In the Budget Bill, the tax base amount subject to the twenty percent tax depends on whether a wholesaler and a retailer are two separate entities or a single entity. In the separate entity context, the twenty percent tax is imposed on the wholesale price and in the single entity context, the twenty percent tax is imposed on the retail price.

We assume that the difference in timing and the tax base amount subject to the twenty percent tax is because a wholesale price may not be available where a wholesaler and a retailer are one and the same. We note that the proposal would likely result in materially different tax amounts collected due to the margins built into the retail price. Possibly, the proposed statute would treat similarly situated taxpayers differently, resulting in a future constitutional challenge.

It is unclear whether any such potential arrangements would create arm's-length pricing issues. In any event, to avoid any disparity in the imposition of the tax, the Legislature may want to consider imposing an excise tax at a lower rate on the retail price regardless of the operating structure of the cannabis business. Further, given the relatively new nature of the proposed taxes, we welcome the Department promulgating regulations to further clarify the Department's position.

STATE OF NEW YORK

S. 1509 A. 2009

SENATE - ASSEMBLY

January 18, 2019

IN SENATE -- A BUDGET BILL, submitted by the Governor pursuant to article seven of the Constitution -- read twice and ordered printed, and when printed to be committed to the Committee on Finance

IN ASSEMBLY -- A BUDGET BILL, submitted by the Governor pursuant to article seven of the Constitution -- read once and referred to the Committee on Ways and Means

AN ACT to amend part U of chapter 61 of the laws of 2011, amending the real property tax law and other laws relating to establishing standards for electronic tax administration, in relation to making permanent provisions relating to mandatory electronic filing of tax documents; and repealing certain provisions of the tax law and the administrative code of the city of New York relating thereto (Part A); to amend the economic development law, in relation to the employee training incentive program (Part B); to amend the tax law and the administrative code of the city of New York, in relation to including in the apportionment fraction receipts constituting net global intangible low-taxed income (Part C); to amend the tax law and the administrative code of the city of New York, in relation to the adjusted basis for property used to determine whether a manufacturer is a qualified New York manufacturer (Part D); to amend part MM of chapter 59 of the laws of 2014 amending the labor law and the tax law relating to the creation of the workers with disabilities tax credit program, in relation to extending the effectiveness thereof (Part E); to amend the tax law in relation to the inclusion in a decedent's New York gross estate any qualified terminable interest property for which a prior deduction was allowed and certain pre-death gifts (Part F); to amend the tax law, in relation to requiring marketplace providers to collect sales tax (Part G); to amend the tax law, in relation to eliminating the reduced tax rates under the sales and use tax with respect to certain gas and electric service; and to repeal certain provisions of the tax law and the administrative code of the city of New York related thereto (Part H); to amend the real property tax law, in relation to the determination and use of state equalization rates (Part I); to amend the real property tax law and local finance law, in relation to local option disaster assessment relief (Subpart A); to amend the real property tax law, in relation to authorizing agreements

EXPLANATION--Matter in ***italics*** (underscored) is new; matter in brackets [-] is old law to be omitted.

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for assessment review services (Subpart B); to amend the real property tax law, in relation to the training of assessors and county directors of real property tax services (Subpart C); to amend the real property tax law, in relation to providing certain notifications electronically (Subpart D); to amend the real property tax law, in relation to the valuation and taxable status dates of special franchise property (Subpart E); and to amend the real property tax law, in relation to the reporting requirements of power plants (Subpart F) (Part J); to repeal section 3-d of the general municipal law, relating to certification of compliance with tax levy limit (Part K); to amend the tax law, in relation to creating an employer-provided child care credit (Part L); to amend the tax law, in relation to including gambling winnings in New York source income and requiring withholding thereon (Part M); to amend the tax law, in relation to the farm workforce retention credit (Part N); to amend the tax law, in relation to updating tax preparer penalties; to amend part N of chapter 61 of the laws of 2005, amending the tax law relating to certain transactions and related information and relating to the voluntary compliance initiative, in relation to eliminating the expiration thereof; and to repeal certain provisions of the tax law, relating to tax preparer penalties (Part O); to amend the tax law, in relation to extending the top personal income tax rate for five years (Part P); to amend the tax law and the administrative code of the city of New York, in relation to extending for five years the limitations on itemized deductions for individuals with incomes over one million dollars (Part Q); to amend the tax law, in relation to extending the clean heating fuel credit for three years (Part R); to repeal subdivision (e) of section 23 of part U of chapter 61 of the laws of 2011 amending the real property tax law and other laws relating to establishing standards for electronic tax administration (Part S); to amend the cooperative corporations law and the rural electric cooperative law, in relation to eliminating certain license fees (Part T); to amend the tax law, in relation to a credit for the rehabilitation of historic properties for state owned property leased to private entities (Part U); to amend the tax law, in relation to exempting from sales and use tax certain tangible personal property or services (Part V); to amend the mental hygiene law and the tax law, in relation to the creation and administration of a tax credit for employment of eligible individuals in recovery from a substance use disorder (Part W); to amend the tax law and the administrative code of the city of New York, in relation to excluding from entire net income certain contributions to the capital of a corporation (Part X); to amend the tax law, in relation to establishing a conditional tax on carried interest (Part Y); to amend the tax law, the administrative code of the city of New York, and chapter 369 of the laws of 2018 amending the tax law relating to unrelated business taxable income of a taxpayer, in relation to making technical corrections thereto (Part Z); to amend the real property tax law, in relation to tax exemptions for energy systems (Part AA); to amend the racing, pari-mutuel wagering and breeding law, in relation to employees of the state gaming commission (Part BB); to amend the racing, pari-mutuel wagering and breeding law, in relation to the thoroughbred and standardbred breeding funds (Part CC); to amend the racing, pari-mutuel wagering and breeding law, in relation to the office of the gaming inspector general; and to repeal title 9 of article 13 of the racing, pari-mutuel wagering and breeding law relating to the gaming inspector general (Subpart A); to amend the racing, pari-mutuel wager-

~~(e) sections twenty-one and twenty-one-a of this act shall expire and be deemed repealed December 31, 2019~~].

§ 6. This act shall take effect immediately.

PART B

Section 1. Subdivision 3 of section 441 of the economic development law, as amended by section 1 of part L of chapter 59 of the laws of 2017, is amended to read as follows:

3. "Eligible training" means (a) training provided by **the business entity or** an approved provider that is:

(i) to upgrade, retrain or improve the productivity of employees;

(ii) provided to employees in connection with a significant capital investment by a participating business entity;

(iii) determined by the commissioner to satisfy a business need on the part of a participating business entity;

(iv) not designed to train or upgrade skills as required by a federal or state entity;

(v) not training the completion of which may result in the awarding of a license or certificate required by law in order to perform a job function; and

(vi) not culturally focused training; or

(b) an internship program in advanced technology [~~or~~]**,** life sciences**, software development or clean energy** approved by the commissioner and provided by **the business entity or** an approved provider, on or after August first, two thousand fifteen, to provide employment and experience opportunities for current students, recent graduates, and recent members of the armed forces.

§ 2. Paragraph (b) of subdivision 1 of section 442 of the economic development law, as amended by section 2 of part L of chapter 59 of the laws of 2017, is amended to read as follows:

(b) The business entity must demonstrate that it is **conducting eligible training or** obtaining eligible training from an approved provider;

§ 3. Paragraph (a) of subdivision 2 of section 443 of the economic development law, as added by section 1 of part O of chapter 59 of the laws of 2015, is amended to read as follows:

(a) provide such documentation as the commissioner may require in order for the commissioner to determine that the business entity intends to **conduct eligible training or** procure eligible training for its employees from an approved provider;

§ 4. This act shall take effect immediately.

PART C

Section 1. Section 210-A of the tax law is amended by adding a new subdivision 5-a to read as follows:

5-a. Net global intangible low-taxed income. Notwithstanding any other provision of this section, net global intangible low-taxed income shall be included in the apportionment fraction as provided in this subdivision. Receipts constituting net global intangible low-taxed income shall not be included in the numerator of the apportionment fraction. Receipts constituting net global intangible low-taxed income shall be included in the denominator of the apportionment fraction. For purposes of this subdivision, the term "net global intangible low-taxed income" means the amount required to be included in the taxpayer's federal gross income pursuant to subsection (a) of section 951A of the

internal revenue code less the amount of the deduction allowed under clause (i) of section 250(a)(1)(B) of such code.

§ 2. Section 11-654.2 of the administrative code of the city of New York is amended by adding a new subdivision 5-a to read as follows:

5-a. Notwithstanding any other provision of this section, net global intangible low-taxed income shall be included in the receipts fraction as provided in this subdivision. Receipts constituting net global intangible low-taxed income shall not be included in the numerator of the receipts fraction. Receipts constituting net global intangible low-taxed income shall be included in the denominator of the receipts fraction. For purposes of this subdivision, the term "net global intangible low-taxed income" means the amount required to be included in the taxpayer's federal gross income pursuant to subsection (a) of section 951A of the internal revenue code less the amount of the deduction allowed under clause (i) of section 250(a)(1)(B) of such code.

§ 3. This act shall take effect immediately and shall apply to taxable years beginning on or after January 1, 2018.

PART D

Section 1. Subparagraph (vi) of paragraph (a) of subdivision 1 of section 210 of the tax law, as amended by section 11 of part T of chapter 59 of the laws of 2015, is amended to read as follows:

(vi) for taxable years beginning on or after January first, two thousand fourteen, the amount prescribed by this paragraph for a taxpayer [~~which~~] **that** is a qualified New York manufacturer, shall be computed at the rate of zero percent of the taxpayer's business income base. The term "manufacturer" shall mean a taxpayer [~~which~~] **that** during the taxable year is principally engaged in the production of goods by manufacturing, processing, assembling, refining, mining, extracting, farming, agriculture, horticulture, floriculture, viticulture or commercial fishing. However, the generation and distribution of electricity, the distribution of natural gas, and the production of steam associated with the generation of electricity shall not be qualifying activities for a manufacturer under this subparagraph. Moreover, in the case of a combined report, the combined group shall be considered a "manufacturer" for purposes of this subparagraph only if the combined group during the taxable year is principally engaged in the activities set forth in this paragraph, or any combination thereof. A taxpayer or, in the case of a combined report, a combined group shall be "principally engaged" in activities described above if, during the taxable year, more than fifty percent of the gross receipts of the taxpayer or combined group, respectively, are derived from receipts from the sale of goods produced by such activities. In computing a combined group's gross receipts, intercorporate receipts shall be eliminated. A "qualified New York manufacturer" is a manufacturer [~~which~~] **that** has property in New York [~~which~~] **that** is described in clause (A) of subparagraph (i) of paragraph (b) of subdivision one of section two hundred ten-B of this article and either (I) the adjusted basis of such property for [~~federal income~~] **New York state** tax purposes at the close of the taxable year is at least one million dollars or (II) all of its real and personal property is located in New York. A taxpayer or, in the case of a combined report, a combined group, that does not satisfy the principally engaged test may be a qualified New York manufacturer if the taxpayer or the combined group employs during the taxable year at least two thousand five hundred employees in manufacturing in New York and the taxpayer or the combined

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MEMORANDUM IN SUPPORT

A BUDGET BILL submitted by the Governor in Accordance with Article VII of the Constitution

AN ACT to amend part U of chapter 61 of the laws of 2011, amending the real property tax law and other laws relating to establishing standards for electronic tax administration, in relation to making permanent provisions relating to mandatory electronic filing of tax documents; and repealing certain provisions of the tax law and the administrative code of the city of New York relating thereto (Part A); to amend the economic development law, in relation to the employee training incentive program (Part B); to amend the tax law and the administrative code of the city of New York, in relation to including in the apportionment fraction receipts constituting net global intangible low-taxed income (Part C); to amend the tax law and the administrative code of the city of New York, in relation to the adjusted basis for property used to determine whether a manufacturer is a qualified New York manufacturer (Part D); to amend part MM of chapter 59 of the laws of 2014 amending the labor law and the tax law relating to the creation of the workers with disabilities tax credit program, in relation to extending the effectiveness thereof (Part E); to amend the tax law in relation to the inclusion in a decedent's New York gross estate any qualified terminable interest property for which a prior deduction was allowed and certain pre-death gifts (Part F); to amend the tax law, in relation to requiring marketplace providers to collect sales tax (Part G); to amend the tax law, in relation to eliminating the reduced tax rates under the sales and use tax with respect to certain gas and electric service; and to repeal certain provisions of the tax law and the administrative code of the city of New York related thereto (Part H); to amend the real property tax law, in relation to the determination and use of state equalization rates (Part I); to amend the real property tax law and local finance law, in relation to local option disaster assessment relief (Subpart A); to amend the real property tax law, in relation to authorizing agreements for assessment review services (Subpart B); to amend the real property tax law, in relation to the training of assessors and county directors of real property tax services (Subpart C); to amend the real property tax law, in relation to providing certain notifications electronically (Subpart D); to amend the real property tax law, in relation to the valuation and taxable status dates of special franchise property (Subpart E); and to amend the real property tax law, in relation to the reporting requirements of power plants (Subpart F) (Part J); to repeal section 3-d of the general municipal law, relating to certification of compliance with tax levy limit (Part K); to amend the tax law, in relation to creating an employer-provided child care credit (Part L); to amend the tax law, in relation to including gambling winnings in New York source income and requiring withholding thereon (Part M); to amend the tax law, in relation to the farm workforce retention credit (Part N); to amend the tax law, in relation to updating tax preparer penalties; to amend part N of chapter 61 of the laws of 2005, amending the tax law relating to certain transactions and related information and relating to the voluntary compliance initiative, in relation to eliminating the expiration thereof; and to repeal certain provisions of the tax law, relating to tax preparer penalties (Part O); to amend the tax law, in relation to extending the top personal income tax rate for five years (Part P); to amend the tax law and the administrative code of the city of New York, in relation to extending for five years the limitations on itemized deductions for individuals with incomes over one million dollars (Part Q); to amend the tax law, in relation to extending the clean heating fuel credit for three years (Part R); to repeal subdivision (e) of section 23 of part U of chapter 61 of the laws of 2011 amending the real property tax law and other laws relating to establishing standards for electronic tax administration (Part S); to amend the cooperative corporations law and the rural electric cooperative law, in relation to eliminating certain license fees (Part T); to amend the tax law, in relation to a credit for the rehabilitation of historic properties for state owned property leased to private entities (Part U); to amend the tax law, in relation to exempting from sales and use tax certain tangible personal property or services (Part V); to amend the mental hygiene law and the tax law, in relation to the creation and administration of a tax credit for employment of eligible individuals in recovery from a substance use disorder (Part W); to amend the tax law and the administrative code of the city of New York, in relation to excluding from entire net income certain contributions to the capital of a corporation (Part X); to amend the tax law, in relation to establishing a conditional tax on carried interest (Part Y); to amend the tax law, the administrative code of the city of New York, and chapter 369 of the laws of 2018 amending the tax law relating to unrelated business taxable income of a taxpayer, in relation to making technical corrections thereto (Part Z); to amend the real property tax law, in relation to tax exemptions for energy systems (Part AA); to amend the racing, pari-mutuel wagering and breeding law, in relation to employees of the state gaming commission (Part BB); to amend the racing, pari-mutuel wagering and breeding law, in relation to the thoroughbred and standardbred breeding funds (Part CC); to amend the racing, pari-mutuel wagering and breeding law, in relation to the office of the gaming inspector general; and to repeal title 9 of article 13 of the racing, pari-mutuel wagering and breeding law relating to the gaming inspector general (Subpart A); to amend the racing, pari-mutuel wagering and breeding law, in relation to appointees to the thoroughbred breeding and development fund (Subpart B); to amend the public officers law and the racing, pari-mutuel wagering and breeding law, in relation to the Harry M. Zweig memorial fund (Subpart C); and to amend the tax law, in relation to the prize payment amounts and revenue distributions of lottery game sales, and use of unclaimed prize funds (Subpart D)(Part DD); to amend the tax law, in relation to commissions paid to the operator of a video lottery facility; to repeal certain provisions of such law relating thereto; and providing for the repeal of certain provisions upon expiration thereof (Part EE); to amend the racing, pari-mutuel wagering and breeding law, in relation to the deductibility of promotional credits (Part FF); to amend the racing, pari-mutuel wagering and breeding law, in relation to the operations of off-track betting corporations (Part GG); to amend the racing, pari-mutuel wagering and breeding law, in relation to licenses for simulcast facilities, sums relating to track simulcast, simulcast of out-of-state thoroughbred races, simulcasting of races run by out-of-state harness tracks and distributions of wagers; to amend chapter 281 of the laws of 1994 amending the racing, pari-mutuel wagering and breeding law and other laws relating to simulcasting and chapter 346 of the laws of 1990 amending the racing, pari-mutuel wagering and breeding law and other laws relating to simulcasting and the imposition of certain taxes, in relation to extending certain provisions thereof; and to amend the racing, pari-mutuel wagering and breeding law, in relation to extending certain provisions thereof (Part HH); to amend the racing, pari-mutuel wagering and breeding law, in relation to equine drug testing standards (Part II); to amend part EE of chapter 59 of the laws of 2018, amending the racing, pari-mutuel wagering and breeding law, relating to adjusting the franchise payment establishing an advisory committee to review the structure, operations and funding of equine drug testing and research, in relation to the date of delivery for recommendations; and to amend the racing, pari-mutuel wagering and breeding law, in relation to the advisory committee on equine drug testing, and equine lab testing provider restrictions removal (Part JJ); to amend the racing, pari-mutuel wagering and breeding law, in relation to state gaming commission occupational licenses (Part KK); to amend the real property tax law and the tax law, in relation to the determination of STAR tax savings (Part LL); to amend the tax law, in relation to cooperative housing corporation information returns (Part MM); to amend the tax law, in relation to making a technical correction to the enhanced real property tax circuit breaker credit (Part NN); to amend the tax law, in relation to mobile home reporting requirements (Part OO); to amend the real property tax law and the tax law, in relation to eligibility for STAR exemptions and credits (Part PP); to amend the real property tax law and the tax law, in relation to authorizing the disclosure of certain information to assessors (Part QQ); to amend the real property tax law and the tax law, in relation to the income limits for STAR benefits (Part RR); to amend the real property tax law, in relation to clarifying certain notices on school tax bills (Part SS); to amend the real property tax law and the tax law, in relation to making the STAR program more accessible to taxpayers (Part TT); to amend the public health law, in relation to increasing the purchasing age for tobacco products and electronic cigarettes from eighteen to twenty-one; prohibiting sales of tobacco products and electronic cigarettes in all pharmacies; prohibiting the acceptance of price reduction instruments for both tobacco products and electronic cigarettes; prohibiting the display of tobacco products or electronic cigarettes in stores; clarifying that the department of health has the authority to promulgate regulations that restrict the sale or distribution of electronic cigarettes or electronic liquids that have a characterizing flavor, and the use of names for characterizing flavors; prohibiting smoking inside and on the grounds of all hospitals licensed or operated by the office of mental health; taxing electronic liquid; and requiring that electronic cigarettes be sold only through licensed vapor products retailers; to amend the general business law, in relation to the packaging of vapor products; to amend the tax law, in relation to imposing a supplemental tax on vapor products; to amend the state finance law, in relation to adding revenues from the supplemental tax on vapor products to the health care reform act resource fund; and repealing paragraph (e) of subdivison 1 of section 1399-cc of the public health law relating to the definitions of nicotine, electronic liquid and e-liquid (Part UU); relating to constituting a new chapter 7-A of the consolidated laws, in relation to the creation of a new office of cannabis management, as an independent entity within the division of alcoholic beverage control, providing for the licensure of persons authorized to cultivate, process, distribute and sell cannabis and the use of cannabis by persons aged twenty-one or older; to amend the public health law, in relation to the description of cannabis; to amend the vehicle and traffic law, in relation to making technical changes regarding the definition of cannabis; to amend the penal law, in relation to the qualification of certain offenses involving cannabis and to exempt certain persons from prosecution for the use, consumption, display, production or distribution of cannabis; to amend the tax law, in relation to providing for the levying taxes on cannabis; to amend the criminal procedure law, the civil practice law and rules, the general business law, the state finance law, the executive law, the penal law and the vehicle and traffic law, in relation to making conforming changes; to repeal sections 221.10 and 221.30 of the penal law relating to the criminal possession and sale of cannabis; to amend chapter 90 of the laws of 2014 amending the public health law, the tax law, the state finance law, the general business law, the penal law and the criminal procedure law relating to medical use of marihuana, in relation to the effectiveness thereof; to repeal paragraph (f) of subdivision 2 of section 850 of the general business law relating to drug related paraphernalia; and making an appropriation therefor (Part VV); and to amend the tax law, in relation to imposing a special tax on passenger car rentals outside of the metropolitan commuter transportation district (Part WW)

PURPOSE:

This bill contains provisions needed to implement the Revenue portion of the FY 2020 Executive Budget.

This memorandum describes Parts A through WW of the bill which are described wholly within the parts listed below.

Part A – Make the e-File Mandate Permanent

Purpose:

This bill would consolidate and make permanent current electronic filing and payment mandates.

Summary of Provisions and Statement in Support:

Section 29 of the Tax Law was added in 2008 to consolidate and improve the administration of the Tax Department's various electronic filing and payment mandates. These provisions are currently set to expire on December 31, 2019, after which the Tax Law would revert to several similar legacy e-filing requirements that remain on the books. This bill would make Tax Law § 29 permanent and would repeal the other legacy e-filing statutes.

By making the § 29 electronic filing and payment mandates permanent, this bill would ensure that the State and its taxpayers can continue to benefit from the efficiencies and cost savings that e-file and e-pay allow. Notably, with e-file, return errors can be detected and corrected before the return is submitted, and taxpayers can receive an official acknowledgement when their returns have been received. Moreover, e-filed tax returns and electronic payments can be processed more efficiently and cost-effectively than paper filings, often resulting in faster refunds and payment postings.

Budget Implications:

Enactment of this bill would be necessary to implement the FY 2020 Executive Budget.

Effective Date:

The bill would take effect immediately.

Part B – Expand the Employee Training Incentive Program (ETIP) Credit

Purpose:

This bill would amend the Employee Training Investment Program ("ETIP") in the Economic Development Law to expand the definition of eligible training.

Summary of Provisions and Statement in Support:

The bill would amend Economic Development Law §§ 441, 442, and 443, respectively, to allow business entities to receive the tax credit associated with ETIP if they conduct training and are otherwise eligible. It also would expand the definition of eligible training to include an internship program in software development or the development of renewable or clean energy.

To date, ETIP has been underutilized by the business community because of the limitations associated with the requirement that applicants must procure training services from a third-party provider to be eligible to receive tax credits. The proposed legislation would remove this requirement, allowing business entities to become eligible for the ETIP tax credit if they conduct otherwise eligible training activities.

Budget Implications:

Enactment of this bill is necessary to implement the FY 2020 Executive Budget because it would allow the Employee Training Incentive Program to be better utilized.

Effective Date:

This bill would take effect immediately.

Part C - Provide a Sourcing Rule for GILTI Apportionment

Purpose:

This bill would codify a receipts factor rule for the net amount of global intangible low-taxed income ("GILTI") included in business income.

Summary of Provisions and Statement in Support:

Internal Revenue Code ("IRC") § 951A(a) requires GILTI, as defined in IRC § 951A(b)(1), to be included in federal gross income. IRC § 250(a)(1)(B)(i) allows certain taxpayers a deduction for part of this income. (For real estate investment trusts, regulated investment companies and New York S corporations the income is included, but the deduction is not available; therefore, the net amount equals the total amount of GILTI.)

The net amount of GILTI is included in entire net income under Article 9-A. Where such amount is taxable business income, it should be included in the business apportionment factor to properly reflect the taxpayer's business income and capital in the state. Since the apportionment statute currently has no sourcing rule for this income, the Commissioner has authorized a discretionary adjustment to the apportionment rules so that 100% of the net amount of GILTI be included in the denominator of the apportionment fraction, with zero in the numerator, and has required that this amount be reported on the receipts factor discretionary adjustment line.

This legislation would codify the Commissioner's discretionary adjustment to establish a permanent statutory sourcing rule for GILTI by adding a new subdivision 5-a to Tax Law § 210-A, and to New York City Administrative Code § 11-654.2, to define "net global intangible low-taxed income" and require that the net amount be added to the denominator of the apportionment fraction, with zero added to the numerator.

Budget Implications:

Enactment of this bill is necessary to implement the FY 2020 Executive Budget because it would codify current tax treatment of GILTI.

Effective Date:

This bill would take effect immediately and apply to taxable years beginning on or after January 1, 2018.

Part D - Decouple from IRC Federal Basis for NYS Manufacturing Test

Purpose:

This bill would decouple New York State from the federal adjusted basis for property used to determine whether a manufacturer is a qualified New York manufacturer.

Summary of Provisions and Statement in Support:

The test for determining whether a manufacturer is a qualified New York manufacturer—for purposes of the reduced corporate business income base tax rate, the reduced tax rate and cap on the capital tax base, lower fixed dollar minimum tax amounts, and the manufacturer's real property tax credit—includes thresholds set at the amount of the taxpayer's basis in its property in New York State.

Currently, the statutory test uses the federal adjusted basis of the taxpayer's property in the state. Recent federal law has increased the limitation on the amount expended on property that taxpayers may elect to treat as an expense under the Internal Revenue Code, potentially reducing the federal adjusted basis of such property. As a result, the basis amount used for purposes of the manufacturing test may not properly reflect the extent of the taxpayer's ownership of manufacturing property in New York State.

This legislation would amend Tax Law § 210(1)(a)(vi) and (b)(2); and New York City Administrative Code § 11-654(1)(k)(4)(ii) to use the New York State adjusted basis, instead of the federal adjusted basis:

Budget Implications:

Enactment of this bill is necessary to implement the 2020 Executive Budget. It has no impact on the State's Financial Plan.

Effective Date:

This bill would take effect immediately and apply to taxable years beginning on or after January 1, 2018.

Part E - Extend the Workers with Disabilities Tax Credit for Three Years

Purpose:

This bill would extend the sunset dates for the corporate and personal income tax credits for qualified employers that employ individuals with developmental disabilities. until January 1, 2023.

Summary of Provisions and Statement in Support:

The bill would amend section 5 of part MM of Chapter 59 of the Laws of 2014 to extend the repeal date for the corporate and personal income tax credits provided for in Tax Law §§ 210-B and 606, respectively, for qualified employers that employ individuals with developmental disabilities until January 1, 2023.

The current corporate and personal income tax credits for qualified employers that employ individuals with developmental disabilities expire January 1, 2020.

Budget Implications:

Enactment of this bill is necessary to implement the FY 2020 Executive Budget because it would decrease All Funds revenue by $4 million annually in FY 2022 through FY 2024.

Effective Date:

This bill would take effect immediately.

Part F – Extend Three-Year Gift Addback Rule & Require Binding NYS QTIP Election

Purpose:

This bill would amend the estate tax to require an executor to make a qualified terminable interest property (QTIP) election on a decedent's New York State estate tax return in order to claim a marital deduction for such property passing to the decedent's spouse, whether or not a federal estate tax return was required to be filed. The bill would expressly require inclusion of the value of QTIP property remaining in the surviving spouse's New York estate if a previous marital deduction was allowed on a New York return with respect to the transfer of such property to the spouse.

The bill would also extend to January 1, 2026, the expiration of the requirement that gifts that are taxable for federal gift tax purposes and that are made within three years of death are to be added back when calculating the decedent's New York gross estate.

Summary of Provisions and Statement in Support:

Generally, as a result of a QTIP election in the estate of the first spouse to die, the QTIP property that passes in trust to a surviving spouse is eligible for the marital deduction and excluded from the estate of the first spouse, and subsequently included in the estate of the surviving spouse.

Part X of Chapter 59 of the Laws of 2014 (Chapter 59) instituted broad estate tax reform, including the addition of new Tax Law § 955(c), which specifies the manner by which a QTIP election is made by the transferring spouse's estate for New York estate tax purposes. The election must be reflected directly on the New York estate tax return and must match the election taken on a required federal estate tax return or, if no federal return is required, it may be independently taken on the New York return.

Historically, New York has determined whether a QTIP election has been made by looking at the actual federal estate tax return filed for the estate of the first spouse to die or, if a federal estate tax return is not required to be filed, by looking to a pro forma federal return that is required to be filed with a New York estate tax return. However, in a recent Surrogate's court decision (*Matter of Evelyn Seiden*, Surrogate's Court, NY County, October 9, 2018), the court ignored the election made on the pro forma federal return filed for the estate of the first spouse because the first spouse died in 2010, when there was no federal estate tax in effect (The federal estate tax for the year 2010 was repealed by Section 501 of the Economic Growth and Tax Relief Reconciliation Act of 2001). Under Tax Law § 954(c)'s cross referencing provisions, a resident decedent's New York gross estate is defined by the decedent's federal gross estate, which under IRC § 2044 includes property for which a marital deduction was previously allowed. However, the Surrogate's court found that, since there was no federal estate tax in 2010, there could be no previously allowed marital deduction to trigger IRC § 2044's inclusion of the property in the surviving spouse's New York gross estate as per Tax Law § 954. As a result, New York estate tax was not paid by either estate on the property that would have been covered by the QTIP election.

In light of the fact that New York's estate tax will continue to diverge from the federal estate tax in effect in future years, it is important to clarify the manner by which a QTIP election must be reflected on a transferring spouse's New York estate tax return, in order to avoid inconsistent elections and potential revenue loss to the State. This bill would address this issue first by amending Tax Law § 954 to require that any QTIP property that benefited from a previous New York marital deduction must be included in the surviving spouse's New York gross estate, whether the QTIP election was made on the transferring spouse's New York estate tax return or via a federal pro forma return if an actual federal return was not otherwise required. In addition, this bill would amend Tax Law § 955 to require that the QTIP election for New York estate tax purposes be made on the New York estate tax return of the transferring spouse.

Chapter 59 also required certain gifts made on or after April 1, 2014, by a decedent who was a New York resident at the time of the gift to be included in the decedent's New York gross estate. This requirement was added to deter New York residents from transferring large amounts of wealth shortly before death solely to take advantage of the higher federal estate tax thresholds, while at the same time reducing their otherwise taxable New York estate. This gift addback provision was made inapplicable to decedents dying on or after January 1, 2019, because on that date the New York and federal estate tax thresholds were expected to coincide, eliminating the incentive for deathbed gifts. However, due to the enactment of the federal Tax Cuts and Jobs Act of 2017, there is a difference of approximately $5 million per individual between federal and state estate tax thresholds. This gap revives the need for the limited gift add back in order to prevent revenue losses from deathbed gifts. This bill would extend the sunset to decedents dying on or after January 1, 2026, the date the estate tax amendments made by the federal act are set to expire.

<u>Budget Implications</u>:

Enactment of this bill is necessary to implement the FY 2020 Executive Budget because it would preserve estate tax revenue.

<u>Effective Date</u>:

This bill would take effect immediately; provided however that section 1 would apply to estates of decedents dying on or after January 1, 2019 and sections 2 and 3 would apply to estates of decedents dying on or after April 1, 2019.

Part G – Eliminate Internet Tax Advantage

<u>Purpose</u>:

This bill would amend the Tax Law to require marketplace providers to collect sales tax on taxable sales of tangible personal property that they facilitate.

Summary of Provisions and Statement in Support:

This bill would require marketplace providers to collect sales tax on taxable sales of tangible personal property that they facilitate. It would ease sales tax collection burdens for many small businesses in the State, streamline the tax collection process, improve taxpayer compliance, and result in a level playing field for New York's "Main Street" retailers that compete with out-of-state sellers that do not collect tax on sales to New York customers made through marketplace providers.

The sales tax is a tax on the customer that is collected by the seller. The Department has long had the authority to impose a tax-collection responsibility on a party that facilitates a sale by, among other things, collecting the sales price and tax due from the customer, such as auctioneers, consignment shops and stores with leased departments. This bill builds on that concept by treating large marketplace providers that facilitate sales of tangible personal property as persons required to collect tax on such sales, thereby requiring them to perform all the duties of a vendor, including collecting the tax, filing a tax return, and remitting the tax collected. The bill defines a "marketplace provider" as a person who collects the purchase price, and provides the forum, physical or virtual, where the transaction occurs. To minimize the number of persons who have tax collection responsibilities, the bill relieves sellers using marketplace providers of any such responsibilities, as long as the seller receives in good faith a certification from the marketplace provider on a form authorized by the Department that the marketplace provider is collecting the tax on such transactions. In fact, a seller of tangible personal property that makes all of its sales through marketplace providers who certify that they will collect the tax would have no New York sales tax collection and remittance responsibilities.

Sales tax collection by the marketplace provider would reduce the number of small sellers that need to register for tax, improve tax compliance by reducing the number of persons who handle sales tax payments before they are remitted to the Department, and reduce the compliance burden of small registered vendors.

The bill would be effective immediately and apply to sales made on or after September 1, 2019.

Budget Implications:

Enactment of this bill is necessary to implement the FY 2020 Executive Budget because it would increase All Funds receipts by $125 million in FY 2020 and $250 million annually thereafter.

Effective Date:

This bill would take effect immediately and would apply to sales made on September 1, 2019.

Part H – Discontinue the Energy Services Sales Tax Exemption

Purpose:

This bill would repeal the exemption from sales and use taxes for receipts from transportation, transmission, or distribution of gas or electricity when provided by someone other than the vendor of the gas or electricity.

Summary of Provisions and Statement in Support:

Tax Law §§ 1101(b) and 1105(b) impose sales tax on the transportation, transmission, or distribution of gas or electricity. Tax Law § 1105-C reduces the rate of tax on the transportation, transmission or distribution of gas and electricity to zero where it is sold separately from the commodity. This provision was enacted to promote competition after the utility deregulation of the late 1990s by providing an incentive for customers to purchase gas and electricity from third-party energy service companies, often referred to as energy service companies (ESCOs). Consequently, customers who purchase gas or electric service from a utility company pay sales tax on the transportation, transmission or delivery, while customers who purchase from an ESCO do not.

Today, competition among ESCOs is well developed. New York utilities offer multiple alternative ESCO gas and electricity suppliers. This exemption perpetuates unequal treatment among utility customers. For example, a business purchasing its electricity from a local utility company will pay sales tax on its total electric or gas bill, while another business purchasing gas or electricity from an ESCO will pay sales tax only on the gas or electricity, and not on the transportation, transmission or distribution of that gas or electricity.

This bill would remove this disparity by repealing the exemption for transportation, transmission and distribution charges associated with gas and electricity purchased from an ESCO. As a result, sales tax would apply to charges for transporting, transmitting, or distributing taxable gas or electricity, whether the commodity is purchased from an ESCO or a utility company. The bill would also clarify that transportation, transmission and distribution charges are taxable even if sold separately from gas or electricity.

New York City de-coupled from the State's exemption in 2009 and currently imposes its 4.5% sales tax on the transportation, transmission or distribution of taxable gas and electricity, regardless of the type of entity from which the commodity is purchased. This would remain unchanged. Although the bill would repeal New York City's separate authorization and imposition of sales tax on these services, they would remain taxable because the New York City local sales tax follows the state sales tax except where specific exceptions are authorized and adopted.

Budget Implications:

Enactment of this bill is necessary to implement the 2020 Executive Budget because it would increase All Funds receipts by $96 million in FY 2020 and $128 million annually thereafter.

Effective Date:

This bill would take effect June 1, 2019, and would apply to sales made and services rendered on or after that date, whether or not under a prior contract.

Part I – Continue efforts to avoid large, unexpected tax shifts due to equalization rate changes

Purpose:

This bill would provide additional tools for school districts and local governments to avoid large, unexpected tax shifts due to equalization rate changes.

Summary of Provisions and Statement in Support:

A series of measures were recently enacted into law in response to situations where there had been large and unexpected increases in school tax bills due to equalization rate changes (*see* Chapters 115, 116, 132 of the Laws of 2018). This bill would recognize the value of those efforts and supplement them in several respects.

Section 1 of this bill would make a technical correction to the recent law that requires assessors to provide notice to various local officials when the equalization rate differs from the locally stated level of assessment (LOA) by "five percentage points" or more (Real Property Tax Law §1204(3), as amended by L.2018, c.115). This is appropriate and effective where the LOA is at or close to 100%, but less so when the LOA is low. For example, where the LOA is 10%, the "five percentage points" standard means that a notice would only be required where the equalization rate was below 5% or above 15%, representing a net disparity of 50%. The intent was presumably to require notice in such an instance where the rate is less than 9.5% or above 10.5%, a net disparity of 5%. To achieve this, this bill would replace "five percentage points" with "five percent."

Section 2 of the bill would provide that when the Commissioner of Taxation and Finance has confirmed the locally stated level of assessment, he or she shall establish it as the final State equalization rate for the city, town or village as soon thereafter as is practicable. When the State and the local assessor agree up front as to what the local level of assessment is, as they do in the vast majority of cases, there is no need for a tentative rate or administrative review period. However, the law was never updated to recognize the collaborative approach the Department now takes, so these cumbersome and time-consuming mandates are still on the books. Eliminating them will make it possible for the vast majority of equalization rates to be finalized in May or June or each year, allowing school authorities to see the impacts on their tax bills much earlier and giving them time to look for ways to ameliorate those impacts.

Section 3 would allow a school district to ameliorate equalization rate impacts by directing school taxes to be apportioned based upon average property values over either a three-year or a five-year period. Current law requires the calculation to be based solely on current values, which under certain circumstances can cause dramatic tax shifts within the school district. This averaging option would enable school districts to avoid these sudden shifts, reducing or eliminating the "sticker shock" their taxpayers might otherwise experience.

Budget Implications:

Enactment of this bill is necessary to implement the FY 2020 Executive Budget.

Effective Date:

This bill would take effect immediately.

Part J – Make real property tax administration more effective and efficient

Purpose:

This bill would make real property tax administration more effective and efficient in various respects. In particular, it would:

A. Allow local governments to provide real property tax assessment relief when a disaster is declared without the State Legislature having to pass special legislation.
B. Allow a county and an assessing unit to agree that the local legislative body of a count shall appoint the members of the Board of Assessment Review that will hear and resolve assessment complaints within that assessing unit.
C. Allow the Tax Department to approve assessor and county director training courses for credit without obliging the State to pay for the expenses of attendees, when the provider so requests.
D. Allow the Tax Department to send certain statutory notices by email and/or by a website posting, rather than by postal mail.
E. Changes the valuation date and taxable status date for special franchise property to eliminate the need for mid-year reporting.
F. Require electric generating facilities to annually report inventory, revenue, and expense data to the Tax Department to assist the Department in valuing these highly complex properties.

Each of these objectives is embodied in a separate subpart of this bill, resulting in six subparts in total. A detailed description of each follows.

SUBPART A: Authorize Local Option Assessment Relief Upon the Declaration of a State Disaster Emergency

Summary of Provisions and Statement in Support:

In the past several years, an unusual number of powerful storms have caused widespread damage to properties in New York. These storms, and the resulting damage, have prompted the legislature to adopt special legislation allowing local governments to reduce the assessed value of damaged properties. For example, Superstorm Sandy resulted in the Superstorm Sandy Assessment Relief Act (Chapter 424 of the Laws of 2013); severe weather led to the enactment of the Mohawk Valley and Niagara County Assessment Relief Act (Part T of Chapter 55 of the Laws of 2014); and extensive flooding resulted in the enactment of the Lake Ontario and Connected Waterways Assessment Relief Act (Part B of Chapter 85 of the Laws of 2017). This proposal would allow local governments to provide real property assessment relief as soon as a disaster emergency is declared. The State Legislature would no longer need to enact special legislation for this purpose, so impacted property owners could obtain relief sooner, especially when a disaster occurs after the end of the legislative session.

Under existing law, real property is valued by local governments as of a specific "valuation date" – generally the date the prior year's final assessment roll was finalized, *i.e.* July 1. A property's value can be adjusted by the local assessor to account for a disaster emergency after the valuation date until the "taxable status date" – generally March 1. However, after the taxable status date, an assessor can only adjust property values to correct certain specific factual or clerical errors: even if a disaster results in a 100% loss of all improvements to a property, if it occurs after the taxable status date a property owner would still have to pay tax on the parcel as it was valued on the taxable status date.

Under this proposal, counties, cities, towns, assessing villages, and school districts could, at local option, grant assessment relief to properties that are damaged as a result of a disaster emergency even if the damage occurs after the taxable status date. An eligible municipality that opts in has the further option of offering relief to those whose buildings and other property improvements lost less than 50% of their value. If the municipality opts into the legislation without opting to offer relief at levels below 50%, the relief would only be available to those whose buildings and other property improvements lost 50% or more of their value.

Budget Implications:

Enactment of this bill is necessary to implement the FY 2020 Executive Budget.

Effective Date:

This subpart would take effect immediately.

SUBPART B: Authorize the creation of county-level Boards of Assessment Review at local option

Summary of Provisions and Statement in Support:

Each assessing unit has a Board of Assessment Review (BAR) that is responsible for hearing and resolving assessment complaints for that assessing unit. County Directors of Real Property Tax Services provide training and support to BAR members. They report that staffing issues commonly afflict BARs, particularly in small towns, where it can be difficult to find enough qualified people willing to devote the time that the position requires. If a BAR is short-staffed and/or some of its members have personal conflicts, then, in the worst case scenario, Grievance Day could not be held due to the lack of a quorum.

Under Real Property Tax Law (RPTL) § 579, counties are authorized to provide assessment-related services to assessing units by entering into an inter-municipal agreement for that purpose pursuant to Article 5-G of the General Municipal Law. Specifically, where the county and the assessing unit have an inter-municipal agreement so providing, the county may value property (appraisal services), may process exemption applications (exemption services), and may even fully assume the assessing function (assessment services).

County Directors have recommended that counties be permitted to set up BARs for assessing units at local option, in the belief it will make BARs more professional and greatly reduce the problems they commonly encounter. This bill would expand RPTL § 579 to allow a county and an assessing unit to agree to do so.

Budget Implications:

Enactment of this bill is necessary to implement the FY 2020 Executive Budget.

Effective Date:

This subpart would take effect immediately.

SUBPART C: Allow assessor training courses to be approved for credit without obliging the State to pay for the expenses of attendees, at the provider's request

Summary of Provisions and Statement in Support:

Assessors and county directors of real property tax services are required by law to take courses of training as approved by the Tax Department. The State must reimburse them for the travel and other actual and necessary expenses associated with the courses that they successfully complete.

Since the funds available for this purpose are limited, the Department must ensure that these dollars go as far as possible. As a practical matter, this means that the Department does not grant credit for courses offered to assessors during the Annual Meeting of the Association of Towns in New York City each February. The content of these courses is not the obstacle. The obstacle is that State reimbursement would be required if the courses were approved for credit, and the cost of travel, lodging and meals associated with this event make State reimbursement unfeasible.

Some assessors, recognizing the State's fiscal concerns, but believing this training is worthwhile nonetheless, informally asked the Department if it could find a way to provide credit for this particular program without also providing reimbursement. As much as the Department might like to do so, it cannot under the law as it currently reads. This bill would modify the law to allow the Department to approve assessor training courses for credit only, without committing the State to reimburse attendees for their expenses, where the provider asks the Department to do so.

The bill would also clarify that persons who have been appointed to serve as assessors, but whose term of office has not yet begun, may receive reimbursement for successfully completing training. The law explicitly allows reimbursement for training taken by elected assessors prior to the start of their terms (Real Property Tax Law § 318(4)). It similarly provides reimbursement to appointees to the position of county director of real property tax services prior to the start of their terms (RPTL § 1530(3)(f)). In context, then, the failure of the law to provide for reimbursement to appointed assessors prior to the start of their terms is clearly an oversight.

Budget Implications:

Enactment of this bill is necessary to implement the FY 2020 Executive Budget.

Effective Date:

This subpart would take effect immediately.

SUBPART D: Allow certain statutory notices to be sent by email and/or by a website posting, rather than by postal mail

Summary of Provisions and Statement in Support:

Upon the determination of tentative equalization rates, tentative special franchise assessments, tentative telecommunications ceilings and the like, the Tax Department is required to mail notice of the determination to the affected assessing unit and, if applicable, to the affected property owner. This bill would provide that, as of January 1, 2020, these notices could be provided by email or by a website posting, rather than by postal mail. Assessors who prefer to receive these notices by postal mail would be entitled to continue receiving postal mail, as long as they so notify the Commissioner in writing. The Commissioner would be required to prescribe a form for this purpose.

The Commissioner would also be required to send a notice by postal mail to assessors, municipal CEOs and special franchise and railroad property owners by November 30, 2019, advising them of the provisions of this new law. The copy to be sent to assessors would include a copy of the opt-out form.

The enactment of this bill would largely relieve the Department of a costly and labor-intensive printing and mailing mandate that, in this day and age, serves no purpose. Most assessors, and all special franchise, telecommunications and railroad companies, have ready access to email and consistently use it to conduct business. However, those assessors who do not have the ability or desire to switch to a fully electronic notification system would not be obliged to do so.

Budget Implications:

Enactment of this bill is necessary to implement the FY 2020 Executive Budget.

Effective Date:

This subpart would take effect immediately.

SUBPART E: Change Special Franchise Taxable Status Date

Summary of Provisions and Statement in Support:

Under RPTL § 302(4), utility companies that own special franchise property generally have their special franchise property valued as of July 1 of the prior year. This valuation date results in companies reporting their inventory data (used to assist in the valuation of property) to the Tax Department in the middle of the year. This mid-year reporting is not only burdensome, but can be problematic for both utility companies and the Tax Department because mid-year data is often incomplete and must be supplemented at a later date. Furthermore, RPTL § 606(2) arguably conflicts with RPTL § 302(4) by providing that, in any assessing unit that has completed a revaluation since 1953, special franchise property is valued based on the valuation date of the assessing unit.

This bill would amend both of the above-referenced RPTL provisions to provide that special franchise property is to be inventoried and valued as of January 1 of the prior year. This would eliminate the complications caused by mid-year reporting, and would resolve any conflict between the valuation dates contained in RPTL §§ 302(4) and 606(2).

Budget Implications:

Enactment of this bill is necessary to implement the FY 2029 Executive Budget.

Effective Date:

This subpart would take effect on January 1, 2020.

SUBPART F: Require Filing of Electric Generating Facility Inventory and Income Report

Summary of Provisions and Statement in Support:

Under existing law, no real property transfer report (RP-5217) is required to be filed when electric generating facilities (power plants) are sold because those transactions almost universally involve equity sales, i.e., a purchase of the business entity that owns the power plant, not the power plant itself. Since no real property is conveyed, no deed is required to be filed, and therefore the only indication of the sales price is on a tax return subject to secrecy provisions.

The Tax Department is required by law to provide advisory appraisals to local governments in certain situations. It is not uncommon for local governments to ask for assistance in valuing electric generating facilities. Due to a lack of publicly available information about power plant sales prices and inventory, it is exceedingly difficult for both local assessors and the Tax Department to value power plants. This legislation would provide the Tax Department with the information needed to accurately value electric generating facilities.

Budget Implications:

Enactment of this bill is necessary to implement the FY 2020 Executive Budget.

Effective Date:

This subpart would take effect on January 1, 2020.

Part K – Technical cleanup related to repeal of tax freeze credit program

Purpose:

This bill would repeal certain tax cap compliance reporting requirements that were left in place when the obsolete tax freeze credit statutes were repealed in 2018.

Summary of Provisions and Statement in Support:

Former Tax Law § 606(bbb), former General Municipal Law § 3-d and former Education Law § 2023-b collectively constituted the enabling legislation for the tax freeze credit program. Since the program was applicable only to taxable years 2014, 2015 and 2016, these statutes were repealed by sections 1, 1-a and 1-b of part E of Chapter 59 of the Laws of 2018, effective April 15, 2020.

At the same time, sections 2 and 3 of part E of Chapter 59 of the Laws of 2018 enacted a new General Municipal Law § 3-d and Education Law § 2023-b, also effective April 15, 2020, in order to preserve the reporting requirements that had been contained within the original statutes. It has been determined that the reporting requirement preserved by the new General Municipal Law § 3-d serves no statutory purpose. Therefore, this bill would repeal that statute, retroactive to the date on which it was initially enacted

Budget Implications:

Enactment of this bill is necessary to implement the FY 2020 Executive Budget.

Effective Date:

This bill would take effect immediately and be deemed to have been in full force and effect on and after April 12, 2018, the date on which Chapter 59 of the Laws of 2018 took effect.

Part L – Create the NYS Employer-Provided Child Care Credit

Purpose:

This bill would create the NYS Employer-Provided Child Care Credit to assist employers in providing quality child care services to their employees.

Summary of Provisions and Statement in Support:

Under Internal Revenue Code § 45F, employers are allowed a credit for qualifying expenditures paid or incurred in providing child care alternatives for their employees. This bill would provide a similar state tax credit for New York employers to provide child care for their employees located in New York. The credit would be equal to 25% of qualified child care expenditures related to a child care facility located in New York, plus 10% of qualified child care resources and referral expenditures, attributable to employees working in New York, and, like the federal credit, would be capped at $150,000 per taxable year. Qualified child care expenditures include operating costs of a qualified child care facility of the taxpayer or under contract with another taxpayer, as well as amounts paid or incurred to acquire, construct, rehabilitate, or expand property used as part of a care facility of the taxpayer. Qualified child care resource and referral expenditures are amounts paid or incurred under a contract to provide child care resource and referral services to an employee of the taxpayer.

Budget Implications:

Enactment of this bill is necessary to implement the FY 2020 Executive Budget because it would decrease All Funds revenue by $1 million annually beginning in FY 2022.

Effective Date:

This bill would take effect immediately and apply to taxable years beginning on or after January 1, 2020.

Part M – Include Certain NYS Gambling Winnings in Nonresident NYS Income

Purpose:

This bill would include gambling winnings in excess of $5,000 from wagering transactions within New York State in the definition of nonresident New York Source income, and add a requirement that withholding occur on gambling winnings when such withholding is required at the federal level.

Summary of Provisions and Statement in Support:

The bill would amend Tax Law § 631(b) to add gambling winnings from wagering transactions within New York State in excess of $5,000 to the categories of New York source income that are taxable to nonresidents of New York State. The statute also amends Tax Law § 671(b) to require withholding on gambling winnings from wagering transactions occurring in New York State when such proceeds are subject to withholding under I.R.C. § 3402.

Most other states include gambling winnings from within their states as source income for nonresidents. By taxing these winnings, New York would garner revenue that is currently exported to other states.

Budget Implications:

Enactment of this bill is necessary to implement the FY 2020 Executive Budget because it would increase All Funds revenue by $1 million annually beginning FY 2021.

Effective Date:

This bill would take effect immediately and apply to taxable years beginning on or after January 1, 2019.

Part N – Make Technical Changes to the Farm Workforce Retention Credit

Purpose:

This bill would amend to the farm workforce retention credit to allow the credit for the same farming activities eligible for the farmers school tax credit.

Summary of Provisions and Statement in Support:

Tax Law § 42 provides a farm workforce retention credit to individuals and corporations that is equal to $250–$600 per employee depending on the taxable year for which the credit is claimed. This bill would expand the credit to additional farming operations that are currently eligible to receive the farmers' school tax credit (Tax Law § 606[n]), such as cider production and Christmas tree farming, by conforming the definition of "federal gross income from farming" in Tax Law § 42 to the definition used in Tax Law § 606(n). Additionally, because licensed "farm cideries" and "farm wineries" may have operations in urban, non-agricultural areas of the state, the bill would also allow the farm workforce retention credit to be available to these entities, but only for those employees who are employed on qualified agricultural property as defined in Tax Law § 606(n). These amendments recognize the increasing diversity of agriculture and the growing significance of certain value-added enterprises in New York State. This bill would encourage economic development and job creation and retention in rural communities.

Budget Implications:

Enactment of this bill is necessary to implement the FY 2020 Executive Budget because it will promote equitable treatment of farm businesses.

Effective Date:

This bill would take effect immediately and apply to taxable years beginning on or after January 1, 2019.

Part O – Permanently Extend the Tax Shelter Provisions and Update Tax Preparer Penalties

Purpose:

This bill would make permanent the current tax shelter reporting and penalty provisions and would update the tax preparer penalties for preparers who do not sign returns or who take unreasonable positions on returns.

Summary of Provisions and Statement in Support:

New York's tax shelter penalty and reporting requirements, which are modeled after the federal tax shelter provisions in the Internal Revenue Code, were first added to the Tax Law as temporary provisions in 2005, and have been renewed several times thereafter on a temporary basis. This bill would make these tax shelter penalty and reporting requirements permanent.

This bill would also update the Tax Law provisions governing penalties for tax preparers to 1) clarify the penalties against preparers who take positions on returns or claims that are not properly supported by the Tax Law; and 2) ensure that the penalties for failing to sign a return and for failing to provide a required identification number on a return apply to all tax preparers, regardless of whether they are required to be registered with DTF pursuant to Tax Law § 32.

Budget Implications:

Enactment of this bill is necessary to implement the FY 2020 Executive Budget.

Effective Date:

This bill would take effect immediately.

Part P – Extend Higher PIT Rates for Five Years

Purpose:

This bill would extend the top tax bracket under the personal income tax law for five years.

Summary of Provisions and Statement in Support:

This bill would amend the Tax Law to extend for five years the top tax bracket under the personal income tax. Currently the top tax bracket, with a rate of 8.82%, is scheduled to expire for taxable years beginning after 2019. This bill would extend the higher bracket for taxable years 2020, 2021, 2022, 2023 and 2024.

Budget Implications:

Enactment of this bill is necessary to implement the 2020 Executive Budget because it would increase All Funds revenue by $771 million in FY 2020, $3.6 billion in FY 2021, $4.8 billion in FY 2022, and $5.5 billion in FY 2023.

Effective Date:

This bill would take effect immediately.

Part Q – Extend PIT Limitation on Charitable Contributions for Five Years

Purpose:

This bill would extend, for five years, the charitable deduction limitation under the NYS and NYC personal income tax for individuals with adjusted gross income of more than $10 million.

Summary of Provisions and Statement in Support:

This bill would amend Tax Law § 615(g) to extend, for five years, the current limitation on the itemized charitable contribution deduction for individuals with adjusted gross income of more than $10 million. Under current law, the NY itemized charitable deduction is limited to 50% of the federal deduction for individuals with adjusted gross income between $1 million and $10 million, and to 25% of the federal deduction for individuals with adjusted gross income over $10 million. The 25% limitation is set to expire at the end of 2019, after which all individuals with adjusted gross income over $1 million will be subject to the 50% limitation.

This bill will extend the current 50%/25% limitation structure through 2024 and make conforming amendments to NYC Administrative Code §11-1715(g).

Budget Implications:

Enactment of this bill is necessary to implement the FY 2020 Executive Budget because it would increase All Funds revenue by $86 million in FY 2021, $175 million in FY 2022, and $180 million in FY 2023.

Effective Date:

This bill would take effect immediately.

Part R – Extend the Clean Heating Fuel Credit for three years

Purpose:

This bill would extend the sunset dates for the corporate and personal income tax credits for purchasing bioheating fuel for residential purposes until January 1, 2023.

Summary of Provisions and Statement in Support:

The bill would amend Tax Law §§ 210-B and 606 to extend the sunset date for the corporate and personal income tax credits, respectively, for purchasing bioheating fuel for residential purposes until January 1, 2023. The credit is equal to $.01 per percent of biodiesel fuel not to exceed 20 cents per gallon, purchased by the taxpayer.

The current corporate and personal income tax credits for the purchase of bioheating fuel expire January 1, 2020. This extension supports the use of clean energy in homes.

Budget Implications:

Enactment of this bill is necessary to implement the FY 2020 Executive Budget because it would decrease All Funds revenue by $6 million annually in FY 2022 through FY 2024.

Effective Date:

This bill would take effect immediately.

Part S – Extend Authorization to Manage Delinquent Sales Tax Vendors Permanently

Purpose:

This bill would make permanent certain provisions concerning the segregated sales tax account program.

Summary of Provisions and Statement in Support:

Vendors are required by law to collect, truthfully account for, and pay over sales tax moneys, and to file returns. Where the Tax Commissioner deems it necessary to protect sales tax revenues, a noncompliant vendor may be required to deposit the sales tax it collects into a segregated account, in trust for the State, until otherwise notified.

Part U of Chapter 61 of the Laws of 2011 expanded the Commissioner's authority with respect to the segregated accounts program by amending Tax Law § 1137 to authorize the Commissioner to debit segregated accounts, to require a vendor to deposit the sales tax moneys at least weekly, and to require the vendor to obtain a bond if the vendor failed to comply. Part U also amended Tax Law § 1134 to authorize the Commissioner to suspend or revoke a vendor's sales tax certificate of authority if the vendor did not comply with the segregated accounts program's requirements.

The segregated account provisions added by Part U expire on December 1, 2019. Since their implementation in 2011, these provisions have improved vendor compliance and reduced the need to pursue costly collection actions when sales tax collected by vendors is not remitted timely to the Department. This bill would repeal the sunset date to allow the current provisions to remain in place and ensure the Department may continue to safeguard sales tax revenues collected by noncompliant vendors.

Budget Implications:

Enactment of this bill is necessary to implement the FY 2020 Executive Budget because it preserves the cost savings from the segregated account program.

Effective Date:

This bill would take effect immediately.

Part T – Repeal License Fees on Certain Co-Ops

Purpose:

This bill would amend the cooperative corporations law and the rural electric cooperative law to eliminate a ten-dollar annual fee paid by cooperative corporations and rural electric cooperatives.

Summary of Provisions and Statement in Support:

The bill would amend Cooperative Corporations Law § 77(3) and Rural Electric Cooperative Law § 66, respectively, to make the ten-dollar annual fee in lieu of franchise or license or corporation taxes, in the case of a cooperative corporation, and the ten-dollar annual fee in lieu of franchise, excise, income, corporation, and sales and compensating use taxes, in the case of a rural electric cooperative, not payable after January 1, 2020.

These fees are not cost-effective as DTF incurs costs to perpetuate and process the forms and filings, but has collected only $250 in fees in the last two years.

Budget Implications:

Enactment of this bill is necessary to implement the 2020 Executive Budget to reduce the administrative burden on DTF.

Effective Date:

This bill would take effect immediately.

Part U – Expand the Current Historic Rehabilitation Credit

Purpose:

This bill would allow the credit for rehabilitation of historic properties to be claimed for qualified rehabilitation projects undertaken within a state park, state historic site, or other land owned by the state, that is under the jurisdiction of and leased to private entities by the Office of Parks, Recreation and Historic Preservation (OPRHP), regardless of the census tract location of the rehabilitation project.

This bill, therefore, would incentivize private sector investment in unused and underutilized historic properties owned by the State in such locations.

Summary of Provisions and Statement in Support:

This bill would amend Tax Law §§ 210-B(26)(e), 606(oo)(5) and 1511(y)(5) to allow a taxpayer subject to tax under Article 9A, the Business Corporation Franchise Tax, Article 22, the Personal Income Tax and Article 33, the Insurance Corporation Franchise Tax, to claim a tax credit for the rehabilitation of historic properties under the jurisdiction of OPRHP that is a qualified rehabilitation project, regardless of the property's census tract location.

Under current law, one of the requirements to qualify for the rehabilitation of historic properties tax credit is that the property must be located within an eligible census tract. Presently, many properties under OPRHP jurisdiction could benefit from rehabilitation through private sector investment using tax credit incentives but the properties are located outside of qualified census tracts. This amendment would allow properties across the State leased to businesses, such as at the Gideon Putnam Hotel in Saratoga Spa State Park, the bathhouses at Jones Beach, and the historic estate buildings at Knox Farm State Park outside of Buffalo, to be eligible for the tax credit which, in turn, would spur interest in investing in their rehabilitation. Promoting investment to rehabilitate and reuse historic properties is the best way to preserve them for future generations.

Budget Implications:

Enactment of this bill is necessary to implement the 2020 Executive Budget.
Effective Date:

This bill would take effect immediately and apply to taxable years beginning on or after January 1, 2020.

Part V – Extend certain sales tax exemption related to the Dodd-Frank Protection Act.

Purpose:

To extend for two years the exemption from sales and use tax certain sales or services transacted between certain financial institutions and their subsidiaries.

Summary of Provisions and Statement in Support:

This bill would extend the sales tax exemption provided to financial institutions that are required under the Dodd-Frank Wall Street Reform and Consumer Protection Act to create subsidiaries and then transfer the property or services to those subsidiaries without the transfer being considered a taxable sale. The bill would extend the date by which transfers must be made, or a binding contract entered into, from June 30, 2019 to June 30, 2021.

Budget Implications:

Enactment of this bill is necessary to implement the FY 2019-20 Executive Budget because it continues the date by which transfers can occur until June 30, 2021.

Effective Date:

This bill would take effect immediately.

Part W – Employer Recovery Hiring Tax Credit

Purpose:

This bill would amend the Mental Hygiene Law and the Tax Law in relation to the creation and administration of a tax credit for the employment of eligible individuals in recovery from a substance use disorder.

Summary of Provisions and Statement in Support:

Individuals with a history of substance use disorder face many obstacles in sustaining their recovery. Understanding that a significant barrier to maintaining their recovery is access to employment opportunities, this tax credit would incentivize businesses to hire individuals with such a history. New York's investment through a tax credit would also assist the State by creating a recovery-oriented culture in businesses and local communities.

The bill would add a new Mental Hygiene Law § 32.38 and amend Tax Law §§ 210-B, 606, and 1511 to establish the Recovery Tax Credit program to provide tax incentives to certified employers for employing eligible individuals in recovery from a substance use disorder in part-time and full-time positions in New York State. The credit would be administered by the Office of Alcoholism and Substance Abuse Services. The bill would authorize the allocation of $2 million in refundable tax credits computed on a 1 dollar per hour worked per eligible employee basis, with a minimum requirement for each employee of 500 creditable hours worked and a cap for each employee of 2000 creditable hours worked. Qualifying employers must have a formal working relationship with a local recovery community organization and eligible employees must demonstrate they have completed a course of treatment for a substance use disorder and are in a state of wellness. The credit may be claimed only one time for each eligible employee.

Budget Implications:

Enactment of this bill is necessary to implement the FY 2020 Executive Budget because it would decrease All Funds revenue by $2 million annually beginning in FY 2022.

Effective Date:

This bill would take effect immediately and apply to taxable years beginning on and after January 1, 2020 and apply with respect to those eligible individuals hired after the act takes effect.

Part X – Exclude from Entire Net Income Certain Contributions to the Capital of a Corporation

Purpose:

This bill would amend the Tax Law and the New York City Administrative Code to exclude from entire net income certain contributions to the capital of a corporation.

Summary of Provisions and Statement in Support:

As part of the federal Tax Cuts and Jobs Act, effective December 22, 2017, Internal Revenue Code § 118(b) was amended to include contributions by a governmental entity or civic group to the capital of a corporation in federal gross income. Because of New York's federal conformity, in New York, this resulted in the inclusion of entire net income. Government grants treated as contributions to capital under the Internal Revenue Code are a useful economic development tool. This bill would restore New York's favorable non-tax treatment of these contributions by amending Tax Law §§ 208(9)(a) and 1503(b) and New York City Administrative Code § 11-602(8)(a) to exclude from entire net income any contributions to the capital of a corporation by any governmental entity or civic group.

Budget Implications:

Enactment of this bill is necessary to implement the 2020 Executive Budget. It has no impact on the State's Financial Plan.

Effective Date:

This bill would take effect immediately and apply to taxable years beginning on or after January 1, 2018.

Part Y – Close the carried interest loophole

Purpose:

This bill would close the carried interest tax loophole at the State level by taxing the carried interest income of hedge fund and private equity investors as ordinary earned income.

Summary of Provisions and Statement in Support:

Currently, the carried interest tax loophole in the Internal Revenue Code ("IRC") allows hedge fund investment managers and private equity investors to classify their distributive share of partnership or S corporation income received in exchange for investment management services as capital gains. As capital gains, these investment management fees, which can be sizeable, typically qualify as long-term capital gains for federal income tax purposes and are therefore taxed at a much lower rate than ordinary income. (This is typically referred to as carried interest.) Further, as a result of the federal characterization of these fees as capital gains from intangible assets, non-resident partners are not taxed on that income at the state level. (H.R. 1, enacted as Public Law 115-97, did not adequately address this problem because it only recharacterizes some of these gains as short term capital gains rather than ordinary income.)

This bill would recharacterize for New York State purposes the investment management income earned by partners and shareholders of hedge funds and private equity firms and would subject the amount of that income in excess of what the partner or shareholder would have received if it had not provided investment management services to tax as income earned from a trade or business.

In addition, the excess amount of income that is treated as income from a trade or business would be subject to a special 17 percent carried interest fairness fee. The fee would remain in effect until the IRC is amended to treat the provision of investment management services for federal tax purposes substantially the same as under this legislation. This bill would take effect only if Connecticut, New Jersey, Massachusetts and Pennsylvania enact legislation having substantially the same effect as this bill.

The recharacterization of the investment management income earned by partners and shareholders of hedge funds from capital gains to income earned from a trade or business would correct this inequity in the tax system at the State level until the problem is addressed at the federal level.

Budget Implications:

Enactment of this bill is necessary to implement the FY 2020 Executive Budget because it represents the first step necessary to achieve tax treatment parity between carried interest and other forms of earned income.

Effective Date:

This bill would take effect when the states of Connecticut, New Jersey, Massachusetts and Pennsylvania enact legislation having substantially the same effect as this act, and the enactments by such states have taken effect in each state and shall apply for taxable years beginning on or after such date; provided, however, if such enactments are already in effect in the states of Connecticut, New Jersey, Massachusetts and Pennsylvania, this act shall take effect immediately and shall apply for taxable years beginning on or after January 1, 2019; provided the Commissioner of Taxation and Finance shall notify the Legislative Bill Drafting Commission upon enactment of such legislation by the states of Connecticut, New Jersey, Massachusetts and Pennyslvania in order that such commission may maintain an accurate and timely effective database of the official text of the laws of the state of New York in furtherance of effectuating the provisions of section 44 of the Legislative Law and section 70-b of the Public Officers Law.

Part Z – Make technical corrections to various provisions of the Tax Law and the New York City Administrative Code

Purpose:

This bill would make technical corrections to various provisions of the Tax Law and the New York City Administrative Code.

Summary of Provisions and Statement in Support:

This bill would make needed technical corrections to various provisions of the Tax Law and the New York City Administrative Code.

- Section 1 would amend Tax Law § 43(a)(3) to clarify that if a taxpayer is a partner in a partnership that is a life sciences company or a shareholder of a New York S corporation that is a life sciences company, then the life sciences research and development tax credit is applied at the level of the entity. This bill would also correct two erroneous references in Tax Law § 43(c)(2) and (5).

- Section 2 would amend Tax Law § 209(5) to remove an outdated reference to the Internal Revenue Code (“IRC”). As part of the Tax Cuts and Jobs Act (TCJA), IRC § 857(b)(3) was amended to remove subparagraph (A), the *alternative tax on capital gains*, for real estate investment trusts (“REITs”). This bill would remove a reference to this now non-existent amount from the Tax Law § 209(5) definition of entire net income for REITs.

- Section 3 would amend Tax Law § 211(8)(a) to remove a reference to a provision of law, in Tax Law § 210, that was repealed by New York's corporate tax reform, effective 1/1/15, and also a reference to the *issuer's allocation percentage*, which is no longer used.

- Sections 4 and 5 would amend Tax Law § 213-b to remove an unnecessary provision related to estimated payments of the tax imposed under Tax Law § 209-B (the "MTA surcharge") that refers to S corporations, since the MTA surcharge does not apply to S corporations; to correct a reference to *New York S corporations*; and to correct *third month* to *fourth month* for the end date for interest paid to taxpayers on estimated tax overpayments, consistent with the change in return due dates enacted by Chapter 60 of the Laws of 2016.

- Section 6 would amend Tax Law § 1503 to revise the treatment of *policyholders surplus accounts*, reflecting changes to federal law, under TCJA, for taxable years 2018-2025.

- Sections 7 and 8 would amend New York City Administrative Code §§ 11-525 and 11-676 to replace *preceding* with *second preceding*, consistent with the change made by Chapter 60 of the Laws of 2016 to use the second preceding year's tax for purposes of estimated tax payments.

- Section 9 would amend the effective date of Chapter 369 of the Laws of 2018. TCJA amended the federal unrelated business income tax (UBIT) to include amounts paid by a non-profit to its employees for certain commuter transportation benefits in the non-profit's unrelated business taxable income. This change applies to amounts paid on or after December 31, 2017. Because New York's UBIT is federally conformed, Chapter 369 of the Laws of 2018 was enacted to decouple from the federal requirement to include these fringe benefits in taxable income. However, the Chapter 369 applies only to taxable years beginning on or after January 1, 2018. Thus, if a non-profit has a taxable year that begins after January 1, (eg. June 1), without this change in the Chapter 369 effective date, fringe benefits payments made by the non-profit between January 1, 2018 and the beginning of its next taxable year will be required to be included in New York unrelated business taxable income.

<u>Budget Implications</u>:

Enactment of this bill is necessary to implement the 2020 Executive Budget. It has no impact on the State's Financial Plan.

<u>Effective Date</u>:

This bill would take effect immediately.

Corrections would be deemed to have been in full force and effect as of the effective date of the following legislation: for section one, Part K of Chapter 59 of the Laws of 2017; for sections two and six, Part KK of Chapter 59 of the Laws of 2018; for section three, Part A of Chapter 59 of the Laws of 2014; for sections four, five, seven and eight, Part Q of Chapter 60 of the Laws of 2016; and for section 9, Chapter 369 of the Laws of 2018.

Part AA – Allow an Exemption from Real Property Taxation for Qualified Energy Systems

Purpose:

The purpose of this bill is to exempt certain energy systems from local taxation requirement that the owner of property that comprises or includes an energy system enter into a PILOT agreement, if the property meets the eligibility requirements.

Summary of Provisions and Statement in Support:

Section 1 of this bill would amend Real Property Tax Law § 487 to add a new subdivision 10 that would, beginning April 1, 2019, exempt specified energy systems – specifically, a solar or wind energy system, farm waste energy system, microhydroelectric energy system, fuel cell electric generating system, microcombined heat and power generating equipment system, and electric energy storage system as such terms are defined in paragraphs (b), (f), (h), (j), (l) and (n) of RPTL § 487(1), respectively, (collectively, "energy system") – from local taxation, and any requirement that the owner of property that comprises or includes an energy system enter into a PILOT agreement, if:

> (1) the energy system is installed on real property that is owned or controlled by the State or a State Entity; and
> (2) the State or a State Entity has agreed to purchase the energy produced by such energy system, or the environmental credits or attributes created by virtue of such energy system's operation, in accordance with a written agreement with the owner or operator of such energy system.

The project owners would need to file applications with the local assessor.

Section 2 of the bill contains the bill's effective date clause, which provides that the act would take effect immediately.

Budget Implications:

Enactment of this bill is necessary to implement the FY 2020 Executive Budget.

Effective Date:

This bill would take effect immediately.

Part BB – Gaming Commission Employment Restrictions

Purpose:

This bill would allow the Gaming Commission to waive the existing pre-employment restriction in certain cases.

Summary of Provisions and Statement in Support:

This bill would amend section 107 of the Racing, Pari-Mutuel Wagering and Breeding Law to add that the Gaming Commission may waive for good cause any pre-employment restriction of a prospective employee, by adopting a resolution at a properly noticed public meeting. Under current law, applicants who have held a gaming occupational license are disqualified from Gaming Commission employment for three years from the date the license is terminated.

Budget Implications:

Enactment of this bill is necessary to implement the FY 2020 Executive Budget because it would allow the Gaming Commission to hire the most talented candidates.

Effective Date:

This bill would take effect immediately.

Part CC – Retired Racehorse Aftercare

Purpose:

This bill would authorize the Thoroughbred and Standardbred Breeding Funds to make contributions for the ongoing care of retired horses.

Summary of Provisions and Statement in Support:

This bill amends sections 254 and 332 of the Racing, Pari-Mutuel Wagering and Breeding Law, to allow the Thoroughbred and Standardbred Breeding Funds to voluntarily contribute monies for the support and promotion of ongoing care of retired racehorses.

Budget Implications:

Enactment of this bill is necessary to implement the FY 2020 Executive Budget.

Effective Date:

This bill would take effect immediately.

Part DD – Make Technical Changes to Gaming Provisions

Purpose:

This bill would make technical changes to the Racing, Pari-Mutuel, Wagering and Breeding Law, the Public Officer's Law, and the Tax Law, in order to clarify existing laws.

Summary of Provisions and Statement in Support:

This bill would:

- Move the Gaming Inspector General Statute from Article 13 of the Racing, Pari-Mutuel Wagering and Breeding Law to Article 1 (Subpart A);
- Allow for an alternative form of designation for Gaming Commission members to the Thoroughbred Breeding Fund (Subpart B);
- Clarify that Cornell University's Harry M. Zweig Memorial Fund for Equine Research can accept gifts from donors, and ensures the fund's board members are indemnified under the Public Officers Law (Subpart C); and
- Expand the allowable use of the lapsed prized fund to allow supplemental prizes on more games, allow continuing promotional campaigns, and align the prize payment amounts and revenue distributions for all lottery games (Subpart D).

Budget Implications:

Enactment of this bill is necessary to implement the FY 2020 Executive Budget because it makes technical changes to gaming provisions, such as preserving the revenue stream for education generated from promotions supported through the lapsed prize fund.

Effective Date:

This bill would take effect immediately.

Part EE – Simplify Video Lottery Gaming (VLG) Rates and Eliminate Additional Commission Provisions

Purpose:

This bill would simplify the current VLG distribution structure and eliminate the current additional commission provisions and instead offer an additional commission rate commensurate to the operator commission loss for those impacted VLG facilities.

Summary of Provisions and Statement in Support:

This bill would repeal and replace subparagraphs (ii) and (iii) of paragraph 1 of subdivision b of §1612 of the Tax Law and add three new paragraphs, 1-a, 1-b, and 1-c. Clauses (A) through (D) of paragraph 1 would simplify the VLG rate structure; Subparagraph (iii) would provide an additional commission rate for those qualifying VLG facilities. Paragraph 1-a would simplify the capital awards distribution; Paragraph 1-b would include the free play allowance language; and Paragraph 1-c would clarify that marketing would now be funded out of the vendor's fee.

Currently, VLG revenues are distributed for gaming administration, operator commission, racing support payments, marketing allowance, capital awards and the remaining amount is directed to education. The distribution formulas change based on certain net machine income (NMI) levels (which vary by facility). Under this bill, the VLT rates would now be based on four categories (VLTs impacted by gaming facilities, those impacted by Native American casinos, those facilities or machines run by OTBs and the larger VLTs). The distribution formulas would no longer change based on NMI levels.

Under current law, there is a separate distribution for capital award monies and for marketing allowance. Marketing allowance is set at either eight or ten percent of NMI and most facilities receive four percent of NMI (capped at $2.5 million) for capital awards. Under this bill, the marketing allowance and capital awards will now be included as part of the operator commission. The amount spent on marketing would shift from Commission directive to operator discretion. For capital awards, the Commission would simply approve projects and the reimbursement process would be eliminated. Up to $2 million could be used for constructing a turf course at the Finger Lakes racetrack.

Three VLG facilities (Finger Lakes, Saratoga and Monticello) are currently eligible to receive an additional commission to be "held harmless" from the impact of a nearby competing casino. However, based on current law, the Finger Lakes and Saratoga facilities will receive an amount in excess of being held harmless. The proposed language would eliminate these provisions and instead offer these facilities an additional commission rate that would reduce their current windfalls, while ensuring they still have an incentive to perform. This part would also extend current financial relief for Vernon Downs via an additional commission rate.

Budget Implications:

Enactment of this bill is necessary to implement the FY 2020 Executive Budget because it would increase State VLG revenue by $5 million in FY 2020 and annually thereafter.

Effective Date:

This bill would take effect immediately, provided, however, that the additional commission rates shall expire and be deemed repealed on March 31, 2023.

Part FF – Impose a Statutory Cap on Casino Free Play.

Purpose:

This bill would establish a statutory cap on free play for casinos.

Summary of Provisions and Statement in Support:

The Commission and the four upstate casinos have reached agreements that limit casino free play allowance to 19 percent per year. If the casino free play exceeds 19 percent, the amount in excess is deemed taxable gross gaming revenue (GGR) and the casino must remit the tax due to the State. This bill would codify existing practice into law until FY 2023. Beginning FY 2024, the casino and video lottery facilities free play disparity would be reconciled to 15 percent.

Section 1 would amend Racing, Pari-Mutuel Wagering and Breeding Law (PML) §1301(25) to eliminate a reference to unrestricted promotional gaming credits not being taxable for the purposes of determining gross gaming revenue.

Section 2 would amend PML § 1351 by adding a new subdivision 2 to accomplish the following:

- Establish a 19 percent cap on casino free play for fiscal years 2019 through 2023. For fiscal years 2019 and 2020, the nineteen percent would be an aggregate amount.
- Beginning FY 2024 and annually thereafter the free play cap would be reduced to 15 percent to align with that of the Video Lottery Gaming (VLG) facilities.
- Free play would be excluded from the calculation of GGR and any tax owed on free play above the cap would be due within 30 days of fiscal year end.
- Only free play credits issued pursuant to a written plan approved by the Gaming Commission shall be not taxable and the Gaming Commission may suspend the approval of any plan when it is jointly determined with the Budget Director that the use of free play credits under such plan is not effectively increasing revenue.

Budget Implications:

Enactment of this bill is necessary to implement the 2020 Executive Budget because it would preserve casino tax revenues that are directed to education and certain localities.

Effective Date:

This bill would take effect immediately.

Part GG – Impose Off-Track Betting Reforms

Purpose:

This bill would improve operations of regional off-track betting (OTB) corporations by enhancing board oversight, allowing combined operations, and authorizing an additional tele-theater in certain locations.

Summary of Provisions and Statement in Support:

This bill amends sections 502, 503 and 1009 of the Racing, Pari-Mutuel Wagering and Breeding Law to strengthen the oversight responsibilities of regional off-track betting corporation board members, authorize regional off-track betting corporation to combine pari-mutuel wagering operations, and permits an OTB to operate a tele-theater at a casino.

This bill would require the preparation of detailed financial information for the review of the members of any regional off-track betting corporation board of directors at least seven days prior to a meeting and require the board to meet at least quarterly. The bill would also allow for operational efficiencies by authorizing OTBs to combine pari-mutuel wagering operations. Finally, the bill would allow a tele-theater at a destination resort.

Budget Implications:

Enactment of this bill is necessary to implement the FY 2020 Executive Budget because it improves off-track betting corporate management and increases operational efficiencies.

Effective Date:

This bill would take effect immediately.

Part HH – Extend certain tax rates and certain simulcasting provisions for five years.

Purpose:

This bill would extend for five years various provisions of the Racing, Pari-Mutuel Wagering and Breeding Law.

Summary of Provisions and Statement in Support:

Section 1 would amend Racing, Pari-Mutuel Wagering and Breeding Law (PML) § 1003(a) to extend the June 30, 2019 expiration date for in-home simulcasting.

Section 2 would amend PML § 1007(3)(d) to extend the current percentage of total pools allocated to purses that a track located in Westchester County receives from a franchised corporation, which currently is scheduled to expire on June 30, 2019.

Section 3 would amend the opening paragraph of PML § 1014, to continue the provisions allowing simulcasting of out-of-state thoroughbred races on any day the Saratoga thoroughbred track is operating, which currently are scheduled to expire on June 30, 2019.

Section 4 would amend PML § 1015(1) to extend the provisions governing the simulcasting of races conducted at out-of-state harness tracks, which currently are scheduled to expire on June 30, 2019.

Section 5 would amend the opening paragraph of PML §1016(1) to continue the provisions governing the simulcasting of out-of-state thoroughbred races on any day the Saratoga thoroughbred track is closed, which currently are scheduled to expire on June 30, 2019.

Section 6 would amend the opening paragraph of PML §1018 to extend the current distribution of revenue from out-of-state simulcasting during the Saratoga meet, which expired on September 8, 2018.

Section 7 would amend § 32 of chapter 281 of the Laws of 1994 to extend the current amount of off-track betting wagers on New York Racing Association, Inc. (NYRA) pools dedicated to purse enhancement, which currently are scheduled to expire on June 30, 2019.

Section 8 would amend § 54 of chapter 346 of the Laws of 1990 to continue binding arbitration for disagreements. These provisions currently are scheduled to expire on June 30, 2019.

Section 9 would amend PML § 238(1)(a) to continue the current distribution of revenue from on-track wagering on NYRA races, which currently is scheduled to expire on December 31, 2019.

Extending these provisions would maintain the pari-mutuel betting and simulcasting structure that is currently in place in New York State. The provisions extended by sections one through six of this bill were first enacted in 1994 and section seven was enacted in 1990. These provisions were extended numerous times since their original enactment, most recently in FY 2019.

Budget Implications:

Enactment of this bill is necessary to implement the FY 2020 Executive Budget because it maintains the current pari-mutuel betting structure in New York State.

Effective Date:

This bill would take effect immediately.

Part II – Mid-Atlantic Drug Compact

Purpose:

This bill would authorize entry into the Mid-Atlantic Drug Compact, to enhance and standardize equine drug testing, and maintain the integrity of the racing industry.

Summary of Provisions and Statement in Support:

A new Article XI-a is added to the Racing, Pari-Mutuel Wagering and Breeding Law authorizing the Gaming Commission to participate in the compact.

The Compact:

- Enables member states to act jointly to create more uniform, effective, and efficient rules relating to drugs and medications for racehorses;
- Becomes effective as soon as any two states enact substantially similar compact language. It would allow for one delegate for each member state;
- Provides that rules shall take effect by super majority vote (80% of delegates);
- Would require the adoption, amendment, and rescission of by-laws to govern its conduct;
- Would allow the delegates to establish breed specific equine drug and medication rules;
- Directs the publication in each member state of each equine drug rule proposed, conducts a review of public comments received in response to such proposed rule, consults with national industry stakeholders, and votes on the adoption of the proposed compact rule;
- Dissolves when the withdrawal of a member state reduces compact membership to one state.

Budget Implications:

Enactment of this bill is necessary to implement the FY 2020 Executive Budget because it provides standardization of equine drug testing rules across all member states.

Effective Date:

This bill would take effect immediately

Part JJ – Extend Advisory Committee on Equine Drug Testing and Remove the Morrisville Equine Drug Lab Restriction

Purpose:

This bill would extend the equine drug testing advisory committee for an additional year, and allow the Gaming Commission to procure a qualified equine testing lab through a competitive process.

Summary of Provisions and Statement in Support:

The current language establishes an advisory committee only through 2018. The current law also requires the Gaming Commission to use a "state college within the state with an approved equine science program"; currently, Morrisville College is the only qualified capable provider. Removing the restrictive language will ensure that equine testing in New York is conducted at the highest level of quality at the most competitive rates.

Section 1 would amend section 2 of Part EE of Chapter 59 of the Laws of 2018 to provide a one-year extension for the advisory committee on equine drug testing to review the current state of equine drug testing in New York State, and make recommendations going forward.

Section 2 would broaden the potential number of equine drug testing laboratories that the Gaming Commission could use in support of equine drug testing programs.

Budget Implications:

Enactment of this bill is necessary to implement the FY 2020 Executive Budget because it will ensure continuity of equine testing at the most competitive rates.

Effective Date:

This bill would take effect immediately.

Part KK – Streamline Occupational Licensing for Casino Employees

Purpose:

This bill would make amendments to the Racing, Pari-Mutuel Wagering and Breeding Law to allow for the distinguishing of non-key and key casino employees, and the requirements of each for occupational licensing for employment of gaming activities.

This bill would grant the Gaming Commission with authority to provide and investigate sub-registrations and sub-licenses for applicants with a criminal history, with clearly defined restrictions.

Summary of Provisions and Statement in Support:

This bill would add a new section 104-a to the Racing, Pari-Mutuel Wagering and Breeding Law to establish the validation, and purpose of sub-registrations and sub-licenses to any persons engaging in gaming activity regulated and administered by the Gaming Commission.

This bill would also amend the Racing, Pari-Mutuel Wagering and Breeding Law for the following purposes:

- Establish the classification and definition of non-gaming employees;
- Modify the language regarding the disqualification of applicants, specifically related to applicants convicted of felony crimes;
- Allow for an occupational license to be suspended, in addition to being denied or revoked;
- Disallow the denial or revocation of a license to key employees and employees of vendors, based on conviction of certain crimes if sufficient rehabilitation has been demonstrated;
- Provide only disqualified applicants with a copy of their criminal history information;
- Subject non-gaming employees to registration requirements and modify language to give the Gaming Commission authority to deny a registration;
- Allow the applicant for registration to provide the Gaming Commission with evidence of good character, honesty, and integrity as it pertains to their criminal history and prior gaming operation association;
- Extend allowance of further investigation conducted by the Gaming Commission to licenses or registrations, and for non-gaming employees;
- Extend the necessity of an “ancillary casino vendor enterprise” license for certain casino vendors;
- Distinguish which persons associated with a casino vendor enterprise, and an ancillary casino vendor enterprise, is a key gaming employee and which is a non-key gaming employee;
- Provide specific classifications for all other key and non-key gaming employees of vendors not specified in previous subdivisions; and
- Grant the executive director rights to wave requirements of this section if the gaming license applicant proves association with a vendor is limited in scope and

addresses specific responsibilities said licensee applicant has in providing proof of such relations. The waiver may also be revoked at the discretion of the executive director.

Budget Implications:

Enactment of this bill is necessary to implement the FY 2020 Executive Budget.

Effective Date:

This bill would take effect immediately.

Part LL – Cap annual growth in STAR exemption benefits

Purpose:

This bill would impose a zero percent cap upon the growth in Basic and Enhanced STAR benefits for purposes of the STAR exemption, beginning with the 2019-20 school year. For purposes of the STAR credit, the existing 2% cap would remain intact.

Summary of Provisions and Statement in Support:

STAR was enacted in 1997 to offset rising property taxes for homeowners and to provide additional targeted property tax relief to senior citizens. Since then, five enhancements have been made that have contributed to increases in the current and projected cost of the STAR program. The costs of the STAR program increased approximately 33 percent between FY 2002 and FY 2017. The direct costs of the STAR program in FY 2017 were over $3.3 billion.

Existing law allows all STAR savings to grow at a rate not to exceed 2 percent annually, as implemented with the FY 2012 Enacted Budget. This bill would amend Real Property Tax Law §1306-a to lower the cap on the growth of tax savings under the exemption component of STAR Program, beginning with the 2019-20 school year. As a result, Basic and Enhanced STAR savings would be capped at the 2018-19 savings amounts for these exemption programs. For purposes of the STAR credit program, the existing 2% cap would remain intact.

Capping growth of the exemption program at current levels is critical for a balanced State budget. Notably, school tax levy growth has averaged below 2 percent since the enactment of the Governor's property tax cap; reducing STAR benefit growth reinforces the incentive for school districts to continue to control their costs and minimize the growth in their tax levies.

Budget Implications:

Enactment of this bill is necessary to implement the FY 2020 Executive Budget. Capping the exemption benefits would reduce General Fund spending by an estimated $106 million in FY 2020.

Effective Date:

This bill would take effect immediately.

Part MM – Allow Disclosure of Certain Information on Cooperative Housing Corporation Information Returns

Purpose:

This bill would allow the Department to share certain information reported by cooperative housing corporations with local assessors for real property tax administration purposes.

Summary of Provisions and Statement in Support:

One of the major challenges DTF has encountered in administering the STAR Credit program is that assessment records do not typically contain the names and addresses of co-op 'owners' (who technically are not property owners, but rather are shareholders with proprietary leases). This lack of information causes delays in the issuance of STAR checks to such individuals.

Under existing law, a real property transfer report (RP-5217) must be filed whenever a deed is recorded. The real property transfer report is a public record that contains basic information about sales of real property, most notably, the names of the buyers. Because cooperative housing apartment units are transferred by the sale of a share or shares in a cooperative housing corporation, those transactions do not require the filing of a deed and, therefore, do not require the filing of an RP-5217.

Most of the information reported on the RP-5217 is also reported on the TP-588 information returns that cooperative housing corporations must file annually. However, unlike RP-5217, TP-588 is not a public record. This bill would allow the disclosure of certain information reported on the TP-588 to local assessors, which would help both local assessors and DTF value co-op units for real property tax purposes. Sensitive information, such as Social security numbers and employer identification numbers, would continue to be covered by the secrecy requirements of the Tax Law and would not be shared with assessors.

Budget Implications:

Enactment of this bill is necessary to implement the FY 2020 Executive Budget.

Effective Date:

This bill would take effect on January 1, 2020.

Part NN – Clarify Calculation of New York City Enhanced Real Property Tax Circuit Breaker Credit

Purpose:

This bill would make a technical amendment to the Tax Law to clarify the calculation of the Enhanced Real Property Tax Circuit Breaker Credit applicable to New York City.

Summary of Provisions and Statement in Support:

Under existing law, the Enhanced Real Property Tax Circuit Breaker Credit specifies the amount of the credit allowable for taxable years after 2013 and prior to 2016, but does not say how the credit should be calculated now that it has been extended through 2020.

This proposal would simply clarify that the credit continues to be calculated the way it has previously been calculated until the credit expires.

Budget Implications:

Enactment of this bill is necessary to implement the FY 2020 Executive Budget.

Effective Date:

This bill would take effect immediately and would apply to taxable years beginning on and after January 1, 2016, and would expire and be deemed repealed on the date that the Enhanced Real Property Tax Circuit Breaker Credit is deemed repealed.

Part OO – Require Mobile Home Park Reporting to Tax Department

Purpose:

This bill would improve the administration of the STAR Credit program by requiring information about manufactured home parks to be reported to the Department of Taxation and Finance ("DTF").

Summary of Provisions and Statement in Support:

One of the major challenges DTF has encountered in administering the STAR Credit program is that assessment records do not typically contain the names and addresses of tenants of manufactured home parks. The lack of such information causes delays in the issuance of STAR checks to such individuals, which all parties concerned would greatly prefer to avoid.

Under existing law, owners and operators of mobile home parks must file annual reports with the Department of Housing and Community Renewal ("DHCR") that disclose: (1) the names of all park owners; (2) the names of all park tenants (3) all services provided by the park owners to the tenants; and (4) all current park rules and regulations. Reporting occurs by the submission of paper forms via mail.

This bill would amend the law so that, as of 2020, those annual reports would become quarterly statements that would go to DTF rather than DHCR, and would include information regarding whether tenants own or lease their mobile homes and such other information as DTF may deem necessary. Such information would be filed through an internet-based online system, thereby making reporting easier and less time consuming. Until DTF establishes a system for electronic filing, reports would continue to be filed with DHCR. DTF would be required to provide DHCR with a copy of the information contained in each quarterly statement within 30 days of receipt. These reports would help DTF, as well as local assessors, administer the STAR credit and STAR exemption programs.

Budget Implications:

Enactment of this bill is necessary to implement the FY 2020 Executive Budget.

Effective Date:

This bill would take effect immediately.

Part PP – Prevent STAR fraud and abuse

Purpose:

This bill would build upon the State's efforts to keep the STAR program free from fraud and abuse.

Summary of Provisions and Statement in Support:

Bill section one would expand the STAR Income Verification Program by providing that, effective with 2020 assessment rolls, the Commissioner of the Department of Taxation and Finance (DTF) would be required to annually verify that Enhanced STAR exemption recipients meet the residency and age requirements, thus requiring the same eligibility verification for the Enhanced STAR exemption that it has done for the basic STAR exemption.

Bill sections two and three would incorporate a STAR exemption anti-fraud provision into the STAR credit. In particular, the STAR exemption law provides that someone who is found to have put materially false information on a STAR exemption application is precluded from receiving the STAR exemption for six years. This bill would provide that such a person is also precluded from switching to the STAR credit during that six-year period. It would also add a similar six-year ban to the STAR credit, so that a person who provides materially false information when registering for the STAR credit would be precluded from receiving that credit for six years.

Bill section four would clarify that where a STAR check is inadvertently sent to someone whose primary residence was receiving a STAR exemption for the same year, the Commissioner may seek repayment of the check amount upon notice and demand. A notice of deficiency would not be required, since there are no questions of law or fact to be resolved in such cases. This would facilitate the recovery of the amounts due without compromising the rights of these check recipients.

<u>Budget Implications</u>:

Enactment of this bill is necessary to implement the FY 2020 Executive Budget.

<u>Effective Date:</u>

This bill would take effect immediately.

Part QQ – Disclosure of STAR-related information to assessors

<u>Purpose</u>:

This bill would authorize the Commissioner of Taxation and Finance to disclose certain STAR-related information to assessors, in order to facilitate the administration of STAR and other property tax exemptions.

<u>Summary of Provisions and Statement in Support:</u>

Bill sections one and two would allow the Commissioner to disclose certain STAR eligibility information to assessors. Namely:

1. The Commissioner is authorized to disclose the names of property owners who he or she has found are <u>not</u> eligible for a STAR exemption or credit. A limited explanation would be provided as well (e.g., that the owner's income exceeds the STAR limit *[the amount of his or her income would not be disclosed]*, or that the owner's primary residence is elsewhere, or in the case of Enhanced STAR, that the owners do not meet the age requirement or haven't submitted the income worksheet if required). This information would help assessors ensure that these property owners don't improperly receive

other exemptions that also have an income, residency and/or age requirement, such as the senior citizens and veterans exemptions.

2. The Commissioner is also authorized to disclose the names of property owners who are eligible for either the Enhanced STAR exemption or Enhanced STAR credit and whose federal adjusted gross income is below the maximum allowable amount set by Real Property Tax Law (RPTL) § 467(1)(b)(3) for the senior citizens exemption (currently $37,400, but $58,400 in New York City). With this data, assessors would be able to reach out to those individuals, inform them about the senior citizens exemption, and encourage them to apply. This bill would enable assessors to help ensure that lower-income senior citizens receive the full amount of property tax relief that they are entitled to receive.

Bill sections three and four would provide that when an income tax return is filed on behalf of a decedent, the Commissioner may disclose to the Director of Real Property Tax Services of the county in which the decedent resided the following information: the decedent's name, address, and date of death. The County Director would share the information with the assessor and tax collector, and if delinquent taxes are due, with the County Treasurer. Current law does not provide a mechanism to ensure ensure that assessors or other local officials are informed of a property owner's death in a timely manner. As a result, tax bills may be misdirected, causing interest and penalties to accrue, and certain exemptions – particularly, STAR and the senior citizens and veterans exemptions – may remain in place too long. This bill would close this gap in the law.

All information disclosed to local officials under this bill would only be used only for purposes of real property tax administration, and such information would be otherwise be deemed confidential, and not subject to FOIL provisions.

Budget Implications:

Enactment of this bill is necessary to implement the FY 2020 Executive Budget.

Effective Date:

This bill would take effect immediately.

Part RR – Lower Basic STAR income limit to $250,000 – Exemption Program only

Purpose:

This bill would lower the income limit for the Basic STAR exemption to $250,000, beginning with the 2019-20 school year. For purposes of the STAR credit, the existing $500,000 income limit would remain intact.

Summary of Provisions and Statement in Support:

STAR was enacted in 1997 to offset rising property taxes for homeowners and to provide additional targeted property tax relief to senior citizens. Since then, five enhancements have been made that have contributed to increases in the current and projected cost of the STAR program. The costs of the STAR program increased approximately 33 percent between FY 2002 and FY 2017. The direct costs of the STAR program in FY 2017 were over $3.3 billion.

This bill would lower the income limit for the Basic STAR exemption to $250,000, beginning with the 2019-20 school year. Higher-income homeowners with Basic STAR exemptions would be able to avoid adverse impacts by switching to the STAR credit program, where the $500,000 income limit would remain intact. Homeowners who switch from the exemption would see a difference in the amount of the benefit, rather the only difference they would see is that the STAR benefit would be delivered to them in the form of a check rather than a reduced school tax bill.

The bill would also correct a drafting oversight by making clear that the verification of income-eligibility for exemption purposes will be based primarily upon data obtained by the Tax Commissioner through the STAR registration program. The law currently only makes reference to the verification process authorized by Tax Law §171-u, which became of secondary importance once the registration program was enacted.

Budget Implications:

Enactment of this bill is necessary to implement the FY 2020 Executive Budget. Lowering the Basic STAR income limit would reduce General Fund spending by $125 million in FY 2020.

Effective Date:

This bill would take effect immediately.

Part SS – Clarify STAR check tax bill notices

Purpose:

This bill would clarify the notice that appears on the school tax bills of recipients of STAR credit checks.

Summary of Provisions and Statement in Support:

Under the 2016-2017 Enacted State Budget, the STAR exemption program was closed to new homeowners and the STAR credit program was enacted to take its place. To help promote public awareness of the program, the law requires that a notice be placed on the school tax bills of credit recipients stating that that a STAR check "will be mailed" to them. This wording is potentially confusing for some taxpayers who receive their checks before their school tax bills, leading such taxpayers to erroneously conclude that that they will receive a second check.

This proposal clarifies the tax bill notice by rewording it to say that a "STAR check has been or will be mailed" to them.

Budget Implications:

Enactment of this bill is necessary to implement the FY 2020 Executive Budget.

Effective Date:

This bill would take effect immediately.

Part TT – Improve the STAR administrative process to be more responsive to taxpayer needs

Purpose:

This bill would improve the STAR administrative provisions to be more responsive to taxpayer needs, as to (1) dispensations for "good cause" and (2) the "renunciation" process".

Summary of Provisions and Statement in Support:

Dispensations for "good cause" (bill § 1): As part of the 2016-2017 Enacted Budget, the STAR exemption statute was amended to provide relief to taxpayers with Enhanced STAR exemptions who fail to timely file their renewal applications. Those taxpayers may file extension requests with the Commissioner of Taxation and Finance up to the last day for paying school taxes without incurring interest or penalty, and may have their Enhanced exemptions restored if the Commissioner finds they had "good cause" for missing the filing deadline.

By its terms, this relief is available to renewal applicants, not first-time applicants. As a result, homeowners with Basic STAR exemptions who reach age 65 cannot seek similar relief if they fail to apply for Enhanced STAR by the deadline, even if they have "good cause" for the oversight. This is an unduly harsh outcome, which this bill would rectify. The bill would also expedite the process for implementing the Commissioner's determination by empowering the school district to adjust the tax bill if the tax has not yet been paid or issue a refund if it has. While there is a process to correct a host of errors, aptly named the "Correction of Errors", (Real Property Tax Law §§ 550-559), this process is cumbersome and time-consuming and serves no purpose where there is no question of fact to be resolved.

“Renunciation” reforms (bill §§ 2-4): Section two of the bill would waive the $500 processing fee for taxpayers who renounce their STAR exemptions before their tax bills are issued. The renunciation statute was enacted to accommodate taxpayers who want to give up a STAR (or other) exemption they’ve been receiving and repay the benefits they’ve received, going back up to 10 years. Since this may require local officials to retrieve and recalculate tax records for several prior years, the taxpayer is required to pay a $500 processing fee in addition to the taxes due. However, in some cases, taxpayers have sought to renounce their STAR exemptions prospectively, before the current year’s school tax bills have been prepared. Because they acted promptly, there is no processing to be done in these cases, so there is no reason for them to be subjected to a processing fee. This bill would waive the $500 processing fee for taxpayers who renounce their STAR exemptions before their tax bills are issued.

Section three of the bill would also clarify that when a STAR exemption is renounced, the amount to be repaid is the “tax savings” shown on the taxpayer’s school tax bill(s), which may not always equal the property’s taxable assessed value times the school tax rate because the law has provided for the past several years that the STAR tax savings in any school district may not grow by more than two percent from one year to the next. Lastly, section four of the bill would make it easier for a taxpayer to renounce a STAR exemption in order to switch to the STAR credit by allowing the switch to occur even when the payment is made after the end of the taxable year in certain cases. This provision is warranted because there have been instances where a taxpayer has submitted a renunciation application during the desired taxable year, but due to processing delays, the taxpayer did not receive a final determination until the next taxable year. As long as the taxpayer pays the amount due within the time prescribed by law, their attempt to switch to the credit would be honored.

Budget Implications:

Enactment of this bill is necessary to implement the FY 2020 Executive Budget.

Effective Date:

This bill would take effect immediately.

Part UU – Enacts a comprehensive tobacco policy

Purpose:

This bill would implement various new regulations, restrictions and protections with regard to the use of tobacco and electronic cigarettes (e-cigarettes) and vapor products, as well as imposes a 20 percent tax on vapor products, for the benefit of the health and wellbeing of New Yorkers.

Summary of Provisions and Statement in Support:

To protect the health of New Yorkers from a multibillion dollar industry that produces a product that when used as directed, kills up to half its users by (1) raising the minimum sales age for tobacco products from 18 to 21; (2) prohibiting sales of tobacco products in all pharmacies; (3) prohibiting the acceptance of price reduction instruments for both tobacco products and e-cigarettes; (4) prohibiting the display of tobacco products or e-cigarettes in stores; (5) clarifying that the Department has the authority to promulgate regulations that prohibit or restrict the sale or distribution of electronic cigarettes (e-cigarettes) or electronic liquids (e-liquids) that have a characterizing flavor, or the use of names for characterizing flavors intended to appeal to minors; (6) prohibiting smoking inside and on the grounds of all hospitals licensed or operated by the Office of Mental Health (OMH); (7) impose a 20 percent excise tax on vapor products; and (8) requiring that electronic cigarettes be sold only through licensed tobacco retailers.

Comprehensive tobacco control policy action would prevent death and disease associated with tobacco use, as well as save the State money due to the high cost of health care expenses for tobacco-related illnesses, estimated at $10.4 billion annually, including $3.3 billion in Medicaid costs. Smoking prematurely kills over 28,000 New Yorkers each year - more people than alcohol, AIDS, car crashes, illegal drugs, murders, and suicides combined. In a 2012 report on youth tobacco use, the US Surgeon General characterized tobacco use as a pediatric epidemic.

New York has a comprehensive Clean Indoor Air law, the highest state cigarette tax in the nation ($4.35 per pack) and a comprehensive tobacco control program. New York is one of the leading innovators addressing tobacco control in the US, however tobacco use continues to be the #1 cause of preventable death in our state due to its insidious addictive nature and industry marketing tactics.

The tobacco industry continues to invest over $9 billion annually marketing cigarettes and scientific evidence establishes that tobacco industry marketing causes youth tobacco use. The industry devotes countless resources to keep existing customers and recruit new customers, most of whom are youth, while undermining the proven effective public health measures already put in place.

In addition to combustible tobacco products, e-cigarettes (including vapor products) and similar devices are emerging as the latest public health threat to youth and young adults. Uptake of vapor products by youth is dramatically increasing and more high school age youth are now using vapor products than smoking combustible cigarettes. Dual use by youth and adults is common, showing that they are not substituting vapor products for cigarettes but using both to maintain and strengthen addiction.

Budget Implications:

Enactment of this bill is necessary to implement the FY 2020 Executive Budget because it would increase All Funds revenue by $2 million in FY 2020 and $19 million thereafter.

Tobacco Minimum Sales Age: Retailers may incur costs for signage updates in accordance with the Adolescent Tobacco Use Prevention Act however the department has provided signage in the past; and as the prevalence of tobacco initiation is reduced in youth and young adults, over time, tobacco sales and tax revenue collected will decline.

There will likely be costs to DTF to register e-cigarette retailers and any cost associated with additional enforcement inspections, but it is difficult to assess the dollar amount given no reliable information on the number of e- cigarette retailers. These costs will also likely be offset by the additional tax revenue generated by taxing electronic cigarettes.

Effective Date: This bill would be effective 180 days after it becomes law except that section 16 shall become law on the first day of a sales tax quarterly period next commencing 180 days after this act shall have become law.

Part VV – Enact the Cannabis Regulation and Taxation Act.

Purpose:

This bill would create and amend existing laws to legalize adult-use cannabis, consolidate governance of all forms of cannabis and create a regulatory structure to oversee the licensure, cultivation, production, distribution, sale and taxation of cannabis within New York State.

Summary of Provisions and Statement in Support:

This bill would create the cannabis control law, which would create a new section for adult-use and hemp cannabis while merging existing law for medical cannabis. Regulation of cannabis benefits public health by enabling government oversight of the production, testing, labeling, distribution, and sale of marijuana. The creation of a regulated cannabis program would enable New York State to control licensure, ensure quality control and consumer protection, set age and quantity restrictions and do so through a comprehensive regulatory framework.

This bill would establish the Office of Cannabis Management (OCM) within the Division of Alcohol Beverage Control, and consolidate governance of adult-use, medical and hemp cannabis. The powers of this new office include but are not limited to: the establishment of cultivation and processing standards; the licensure of all business entities in the production and distribution chain; the inspection and enforcement of program standards and the development and issuance of program regulations.

Article 3 governs New York State's Medical Cannabis Program, designed to comprehensively regulate the manufacture, sale and use of medical cannabis while striking a balance between potentially relieving the pain and suffering of those in desperate need of treatment and protecting the public against risks to health and safety. The Office of Cannabis Management will supervise the continued expansion of the medical cannabis program and promote reforms that expand patient access and product affordability while encouraging research opportunities.

Article 4 of the bill would regulate and control the cultivation, processing, manufacturing, distribution and sale of cannabis products for adults over 21 years of age. This bill would utilize a three-tier market structure (similar to the alcohol model) for the adult-use cannabis industry. In general, the model prohibits vertical integration and would be coupled with licensing limits and supply management to control market concentration and encourage social equity applicant participation.

This bill would establish a robust social equity program to actively encourage members of communities who have been disproportionally impacted by the policies of prohibition to participate in the new industry through the implementation of a social equity licensing and incubator program – providing technical assistance, training, loans and mentoring to social equity applicants. Additionally, this bill would create a program to review and seal prior cannabis convictions and eliminate the collateral consequences of conviction while also ensuring the enforcement framework of legalization does not replicate the arrest disparities and criminalization of prohibition.

Article 5 of the bill would provide a regulatory framework to comprehensively regulate hemp cannabis including the licensing, cultivation, processing, extracting and distribution. Hemp grown and used for industrial or food purposes (such as fiber or seed) will continue to be regulated by the Department of Agriculture and Markets. The bill would also regulate the packaging and labeling and laboratory testing requirements of hemp cannabis products and their distribution.

This bill would amend Tax Law to add a new Article 20-C, Tax on Adult-Use Cannabis Products, to impose three taxes. The first tax is imposed on the cultivation of cannabis at the rate of $1 per dry weight gram of cannabis flower and $0.25 per dry weight gram of cannabis trim. The second tax is imposed on the sale by a wholesaler to a retail dispensary at the rate of 20 percent of the invoice price. The third tax is imposed on the same sale by a wholesaler to a retail dispensary at the rate of 2 percent of the invoice price but collected in trust for and on account of the county in which the retail dispensary is located. All wholesalers would be required to apply to the Commissioner of Taxation and Finance for a Certificate of Registration prior to commencing business and renew such registration every two years. The initial application and renewal would be subject to a fee of $600.

Revenues from the State cannabis taxes shall be deposited in the New York State Cannabis Revenue Fund and expended for the following purposes: administration of the regulated cannabis program, data gathering, monitoring and reporting, the governor's traffic safety committee, small business development and loans, substance abuse, harm reduction and mental health treatment and prevention, public health education and intervention, research on cannabis uses and applications, program evaluation and improvements, and any other identified purpose recommended by the director of the Office of Cannabis Management and approved by the Director of the Budget.

County governments would have the opportunity to opt-out of the provisions of Article 4 of the bill with the passage of a local law, ordinance or resolution by a majority vote of their governing body. If a county does not opt out, a city with a population over 100,000 in that county could elect to opt out.

The bill also would create conforming changes to a number of different laws including amending the public health law, in relation to the description of cannabis; the vehicle and traffic law, in relation to making technical changes regarding the definition of cannabis; the penal law, in relation to the qualification of certain offenses involving cannabis and to exempt certain persons from prosecution for the use, consumption, display, production or distribution of cannabis; the tax law, in relation to providing for the levying of taxes on cannabis; the criminal procedure law, the civil practice law and rules, the general business law, and the state finance law.

Budget Implications:

Enactment of this bill is necessary to implement the FY 2020 Executive Budget because it would increase All Funds revenue by $83 million in FY 2021, $85 million in FY 2022, $141 million in FY 2023 and $184 million in FY 2024.

Effective Date:

This bill would take effect immediately; provided, however, that the amendments to article of the penal law made by section fifty-five of this act shall not affect the repeal of such article and shall be deemed to be repealed therewith; provided further that the amendments to section 89-h of the state finance law made by section fifty-eight of this act shall not affect the repeal of such section and shall be deemed repealed therewith; provided further, that the amendments to section 221.00 of the penal law made by section fifteen of this act shall be subject to the expiration of such section when upon such date the provisions of section fifteen-a of this act shall take effect; provided, however, that the amendments to subdivision 2 of section 3371 of the public health law made by section sixty-one of this act shall not affect the expiration of such subdivision and shall be deemed to expire therewith; provided further, that the amendments to subdivision 3 of section 853 of the general business law made by section sixty-two of this act shall not affect the repeal of such subdivision and shall be deemed to be repealed therewith; and provided further, that the amendments to subdivision 5 of section 410.91 of the penal law made by section sixty-three of this act shall be subject to the expiration and reversion of such subdivision when upon such date the provisions of section sixty-three-a of this act shall take effect; provided however that sections 37-38 of this Act shall take effect on April 1, 2020 and shall apply on and after such date: (1) to the cultivation of cannabis flower and cannabis trim transferred by a cultivator who is not a wholesaler; (2) to the cultivation of cannabis flower and cannabis trim sold or transferred to a retail dispensary by a cultivator who is a wholesaler; and (3) to the sale or transfer of adult use cannabis products to a retail dispensary.

Part WW – Expand Supplemental Auto Rental Surcharge to Fund Upstate Public Transportation Systems

Purpose:

This bill would expand the special supplemental auto rental surcharge from the Metropolitan Commuter Transportation District (MCTD) to the remainder of the State. The additional funds would be directed to Upstate public transportation systems.

Summary of Provisions and Statement in Support:

Current law imposes a 6% auto rental tax, statewide, which is directed to the State's highway and bridge program. An additional, supplemental surcharge of 5% is imposed in the MCTD only, and is directed to Downstate public transportation systems including the Metropolitan Transportation Authority.

This bill would provide necessary assistance to Upstate transit systems by imposing the same 5% supplemental surcharge in areas of the State north of Dutchess and Orange counties and directing those funds to Upstate public transportation systems. These systems serve a population that is often skewed toward the economically disadvantaged, and are therefore heavily reliant on revenues from sources other than fares.

Budget Implications:

Enactment of this bill is necessary to implement the FY 2020 Executive Budget because it funds State appropriations for Upstate transit systems.

Effective Date:

This bill would take effect on September 1, 2019.

The provisions of this act shall take effect immediately, provided, however, that the applicable effective date of each part of this act shall be as specifically set forth in the last section of such part.

NEW YORK STATE 2018

Department of Taxation and Finance

Instructions for Form CT-3

General Business Corporation Franchise Tax Return

CT-3-I

Table of contents

Form CT-1, *Supplement to Corporation Tax Instructions*

See Form CT-1 for the following topics:

- Changes for the current tax year (general and by Tax Law Article)
- Business information (how to enter and update)
- Entry formats
  - Dates
  - Negative amounts
  - Percentages
  - Whole dollar amounts
- Are you claiming an overpayment?
- NAICS business code number and NYS principal business activity
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- Is your return in processible form?
- Use of reproduced and computerized forms
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- Form CT-200-V
- Collection of debts from your refund or overpayment
- Fee for payments returned by banks
- Reporting requirements for tax shelters
- Tax shelter penalties
- Voluntary Disclosure and Compliance Program
- Your rights under the Tax Law
- Need help?
- Privacy notification

All citations are to New York State Tax Law sections unless specifically noted otherwise.

Corporate tax filing requirements

All New York C corporations subject to tax under Tax Law Article 9-A must file using the following returns, as applicable:

- Form CT-3, *General Business Corporation Franchise Tax Return*
- Form CT-3-A, *General Business Corporation Combined Franchise Tax Return*
- Form CT-3-M, *General Business Corporation MTA Surcharge Return*

Any return filed on an incorrect form, or on a form for the wrong year, except as described below, will not be processed and will not be considered timely filed. As a result, penalties and interest may be incurred.

See Form CT-3-A-I, *Instructions for Form CT-3-A*, for information as to when a combined return is permitted or required.

Use this tax return for calendar year 2018, fiscal years that begin in 2018 and end in 2019, and tax years of less than 12 months that begin on or after January 1, 2018, but before January 1, 2019.

You can also use the 2018 return if:

- you have a tax year of less than 12 months that begins and ends in 2019, and
- the 2019 return is not yet available at the time you are required to file the return.

In this case you must show your 2019 tax year on the 2018 return and take into account any tax law changes that are effective for tax years beginning **after** December 31, 2018.

For information on voluntary dissolution and surrender of authority, see *Instructions for voluntary dissolution of a New York corporation* (TR-125), and *Instructions for surrender of authority by foreign business corporation* (TR-199), on our website.

Taxpayers using a 52-53 week year – A taxpayer who reports on the basis of a 52-53 week accounting period for federal income tax purposes may report on the same basis for Article 9-A purposes. If a 52-53 week accounting period begins within seven days from the first day of any calendar month, the tax year is deemed to begin on the first day of that calendar month. If a 52-53 week accounting period ends within seven days from the last day of any calendar month, the tax period will be deemed to end on the last day of the calendar month.

Corporations subject to tax under Article 9-A

The definition of a corporation, as used in Article 9-A and in these instructions, includes associations, limited liability companies (LLCs), limited liability partnerships (LLPs), and publicly traded partnerships that are taxed as corporations under the Internal Revenue Code (IRC). For more information, see §208.1.

A business corporation subject to tax under Article 9-A includes all corporations **except:**

- insurance corporations (including for-profit HMOs required to obtain a certificate of authority under Public Health Law Article 44) (Tax Law Article 33);
- transportation and transmission corporations (other than aviation corporations, corporations principally engaged in transportation, transmission, or distribution of gas, electricity, or steam (TTD corporations), and nonelecting railroad and trucking corporations) (Tax Law Article 9);
- farmers, fruit growers, and similar agricultural cooperatives with, or without, capital stock (§209.12);
- nonstock, not-for-profit corporations, no part of the net earnings of which inures to the benefit of any officer, director, or member;
- continuing §186 taxpayers (Article 9).

Domestic corporations – A domestic corporation (incorporated in New York State) subject to tax under Article 9-A is generally liable for franchise taxes for each fiscal or calendar year, or part thereof, during which it is incorporated until it is formally dissolved with the Department of State. However, a domestic corporation that is no longer doing business, employing capital, owning or leasing property, or deriving receipts from activity, in New York State is exempt from the fixed dollar minimum tax for years following its final tax year and is not required to file a franchise tax return provided it meets the requirements listed in §209.8.

Foreign corporations – A foreign corporation (incorporated outside of New York State) is liable for franchise taxes under Article 9-A during the period in which it is doing business, employing capital, owning or leasing property, maintaining an office, or deriving receipts from activity, in New York State.

A corporation is considered to be deriving receipts in this state if it has receipts within New York of $1 million or more in a tax year (§209.1). *Receipts* means the receipts that are subject to the apportionment rules in §210-A, and the term *receipts within* *this state* means the receipts included in the numerator of the apportionment factor determined under §210-A. Also, receipts from processing credit card transactions for merchants include merchant discount fees received by the corporation (§209.1(b)).

A corporation is doing business in this state if (§209.1(c)):

- it has issued credit cards (including bank, credit, travel, and entertainment cards) to 1,000 or more customers who have a mailing address in this state as of the last day of its tax year;
- it has merchant customer contracts with merchants and the total number of locations covered by those contracts equals 1,000 or more locations in this state to whom the corporation remitted payments for credit card transactions during the tax year; **or**
- the sum of the number of customers and the number of locations equals 1,000 or more.

A foreign corporation that is a partner in a partnership should see *Corporate partners*.

A foreign corporation shall **not** be deemed to be doing business, employing capital, owning or leasing property, maintaining an office, or deriving receipts from activity, in this state by reason of (§209.2):

- the maintenance of cash balances with banks or trust companies in this state;
- the ownership of shares of stock or securities kept in this state if kept in a safe deposit box, safe, vault, or other receptacle rented for the purpose, or if pledged as collateral security, or if deposited with one or more banks or trust companies, or with brokers who are members of a recognized security exchange, in safekeeping or custody accounts;
- the taking of any action by any such bank or trust company or broker, which is incidental to the rendering of safekeeping or custodian service to the corporation;
- the maintenance of an office in this state by one or more officers or directors of the corporation who are not employees of the corporation if the corporation otherwise is not doing business in this state, and does not employ capital or own or lease property in this state;
- the keeping of books or records of a corporation in this state if such books and records are not kept by employees of the corporation and the corporation does not otherwise do business, employ capital, own or lease property, or maintain an office in this state; **or**
- any combination of the activities listed above.

All business corporations subject to tax under Article 9-A, other than New York S corporations, must file franchise tax returns using Form CT-3, unless such corporations are required or permitted to file as members of a combined group (see Form CT-3-A). A business corporation that has elected to be treated as a New York S corporation by filing Form CT-6, *Election by a Federal S Corporation to be Treated as a New York S Corporation*, must file Form CT-3-S, *New York S Corporation Franchise Tax Return*, instead of Form CT-3.

Qualified subchapter S subsidiary (QSSS) – The filing requirements for a QSSS that is owned by a federal S corporation that is a New York C corporation or a nontaxpayer corporation are outlined below.

In those instances where New York State follows federal QSSS treatment:

- the QSSS is not considered a subsidiary of the parent corporation;
- the QSSS is ignored as a separate taxable entity, and the assets, liabilities, income, and deductions of the QSSS are included with the assets, liabilities, income, and deductions of the parent for franchise tax purposes; and
- for other taxes, such as sales and excise taxes, the QSSS continues to be recognized as a separate corporation.

In the situations outlined below where the federal QSSS treatment is followed for NYS, the combined reporting rules are applied to determine if the parent (with its QSSS's activity included) files a Form CT-3, or files as a member of a combined group on a Form CT-3-A. In the situations outlined below where the federal QSSS treatment is **not** followed, the combined reporting rules must still be applied to determine if either the parent, the QSSS, or both should file as distinct members of a combined group on a Form CT-3-A.

- **Parent is a New York C corporation –** New York State follows the federal QSSS treatment if: 1) the QSSS is a New York State taxpayer; or 2) the QSSS is not a New York State taxpayer but the parent makes a QSSS inclusion election. In both cases, the parent (**with** its QSSS's activity included) files as a New York C corporation on a Form CT-3 or, if the combined filing requirements are met with one or more entities (other than the QSSS), on a Form CT-3-A. If the parent does **not** make a QSSS inclusion election when the QSSS is not a New York State taxpayer, the parent (**without** its QSSS's activity included) files as a New York C corporation on a Form CT-3 or, if the combined filing requirements are met with one or more other entities (one of which could be the QSSS), on a Form CT-3-A. In this case, both the parent and the QSSS, as separate entities, are subject to the combined reporting rules, and if the parent and QSSS are unitary they both file as distinct members of a combined group on the same Form CT-3-A.
- **Nontaxpayer parent –** New York State follows the federal QSSS treatment where the QSSS is a New York State taxpayer but the parent is not, if the parent elects to be taxed as a New York S corporation by filing Form CT-6. The parent and QSSS are taxed as a single New York S corporation, and file Form CT-3-S. If the parent does **not** elect to be a New York S corporation, the QSSS (**without** its parent's activity included) must file as a New York C corporation on a Form CT-3 or, if the combined filing requirements are met with one or more other entities (one of which could be the parent), on a Form CT-3-A.

  In this case, both the parent and the QSSS, as separate entities, are subject to the combined reporting rules, and if the parent and QSSS are unitary they both file as distinct members of a combined group on the same Form CT-3-A.
- **Exception: excluded corporation –** Notwithstanding the above rules, QSSS treatment is not allowed when the parent and QSSS file under different Articles of the Tax Law (or would file under different Articles if both were subject to New York State franchise tax); in this case, each corporation must file as a distinct entity under its applicable Article, subject to the Article 9-A or Article 33 combined reporting rules, as applicable.

Mandated New York S corporations – Shareholders of an eligible federal S corporation that have not made the election to be treated as a New York S corporation for the current tax year will be deemed to have made that election and must file Form CT-3-S if the corporation's investment income is more than 50% of its federal gross income for that year. For purposes of the mandated New York State S election, *investment income* means the sum of an eligible S corporation's gross income from interest, dividends, royalties, annuities, rents and gains derived from dealings in property, including the corporation's share of such items from a partnership, estate, or trust, to the extent such items would be includable in the corporation's federal gross income for the tax year. In determining whether an eligible S corporation is deemed to have made this election, the income of a QSSS owned, directly or indirectly, by the eligible S corporation shall be included with the income of the eligible S corporation.

Corporate partners

- If a partnership is doing business, employing capital, owning or leasing property, maintaining an office, or deriving receipts from activity, in New York State, then a corporation that is a **general** partner in that partnership is subject to tax under Article 9-A (§209.1(f)).
- If a partnership is doing business, employing capital, owning or leasing property, maintaining an office, or deriving receipts from activity, in New York State, then a corporation that is a **limited** partner of that partnership (other than a portfolio investment partnership) is subject to tax under Article 9-A if it is engaged, directly or indirectly, in the participation or in the domination or control of all or any portion of the business activities or affairs of the partnership.

An LLC or LLP that is treated as a partnership for federal income tax purposes will be treated as a partnership for New York State tax purposes.

For purposes of determining nexus, the $1 million threshold for deriving receipts is determined by combining the **general** partner's receipts in New York with the partnership's receipts in New York. Also, when a **limited** partner is engaged, directly or indirectly, in the participation or in the domination or control of all or any portion of the business activities or affairs of the partnership, other than a portfolio investment partnership, for purposes of determining nexus, the $1 million threshold for deriving receipts is determined by combining the limited partner's receipts in New York with the partnership's receipts in New York.

In instances where an LLC is treated as a partnership, other than a portfolio investment partnership, when a corporate member is **not** limited in the participation in the management of the LLC by the LLC's operating agreement, such member's receipts in New York are combined with the receipts in New York of the LLC. Where the LLC operating agreement limits a corporate member's participation in the management of the LLC but such member is engaged, directly or indirectly, in the participation in or domination or control of all or any portion of the business activities or affairs of the LLC such member's receipts in New York are combined with the receipts in New York of the LLC.

Example: *Partnership A has two general partners: Partner B who owns 60% of the partnership and Partner C who owns 40%. Partnership A has $600,000 of receipts in New York. Separately, Partner B has $700,000 of receipts in New York and Partner C has $450,000 of receipts in New York. For purposes of determining nexus only, both partners B and C would be treated as having $600,000 from the partnership. Combined with their own receipts, both general partners exceed $1 million in receipts in New York ($1.3 million for Partner B and $1.05 million for Partner C). Therefore, both general partners are subject to tax.*

Alien corporations – An alien corporation (a corporation organized under the laws of a country, or any political subdivision thereof, other than the United States, or organized under the laws of a possession, territory or commonwealth of the United States) is **not** deemed to be doing business, employing capital, owning or leasing property, maintaining an office, or deriving receipts from activity, in this state if its activities in this state are limited solely to:

- investing or trading in stocks and securities for its own account per IRC section 864(b)(2)(A)(ii);
- investing or trading in commodities for its own account per IRC section 864(b)(2)(B)(ii); **or**
- any combination of the above two activities.

An alien corporation that under any provision of the IRC is not treated as a domestic corporation as defined under IRC section 7701 and has no effectively connected income, gain, or loss, for the tax year will not be subject to tax under Article 9-A for that tax year (§209.2-a).

Other forms you may need to file

Form CT-3.1, *Investment and Other Exempt Income and Investment Capital,* must be filed by a corporation that has investment capital (§208.5), investment income (§208.6), other exempt income (§208.6-a), stock that generates (or could generate) other exempt income, or is required to make the addback for prior years' presumed investment capital items that failed to meet the holding period presumption.

Form CT-3.2, *Subtraction Modification for Qualified Banks,* must be filed to utilize the subtraction modification for qualified residential loan portfolios (§208.9(r)), the subtraction modification for community banks and small thrifts (§208.9(s)), or the subtraction modification for community banks and small thrifts with a captive real estate investment trust (REIT) (§208.9(t)).

Form CT-3.3, *Prior Net Operating Loss Conversion (PNOLC) Subtraction,* must be filed to calculate and utilize the PNOLC subtraction and carryforward (§210.1(a)(viii)). This form must be filed for **every** tax year for which you carry a balance of a PNOLC subtraction, even if you are unable to utilize the subtraction in a given year.

Form CT-3.4, *Net Operating Loss Deduction (NOLD),* must be filed to calculate and utilize the NOLD and carryforward (§210.1(a)(ix)). This form must also be filed with the amended return when the carryback of a net operating loss (NOL) for a tax year beginning on or after January 1, 2015, is claimed. This form is also used to elect to waive the carryback of a loss in the year a loss is incurred.

Form CT-3-M, *General Business Corporation MTA Surcharge Return,* must be filed by any corporation taxable under Article 9-A that does business, employs capital, owns or leases property, maintains an office, or derives receipts from activity, in the Metropolitan Commuter Transportation District (MCTD). The MCTD includes the counties of New York, Bronx, Kings, Queens, Richmond, Dutchess, Nassau, Orange, Putnam, Rockland, Suffolk, and Westchester. An exception applies to a qualified entity of a New York State innovation hot spot when the qualified entity is located solely within a hot spot.

Form CT-33-D, *Tax on Premiums Paid or Payable to an Unauthorized Insurer,* must be filed if you purchase or renew a taxable insurance contract directly from an insurer not authorized to transact business in New York State under a *Certificate of Authority* from the Superintendent of Financial Services; you may be liable for a tax of 3.6% (.036) of the premium. For more information, see Form CT-33-D.

Form CT-60, *Affiliated Entity Information Schedule,* must be filed if you are an Article 9-A taxpayer and you have included the activities of any of the following on your return:

- a QSSS;
- a single member LLC; **or**
- a tax-exempt domestic international sales corporation (DISC).

You must also file Form CT-60 if:

- you are a federal S corporation but are filing as a New York C corporation,
- you are a partner in a partnership,

- you are a federal QSSS where New York State does **not** follow federal QSSS treatment; **or**
- you have affiliated entities.

Tax-exempt DISCs – A corporation that qualifies as a DISC under IRC section 992(a) is exempt from tax under Article 9-A if during the year it received more than 5% of its:

- gross sales from the sale of inventory or other property purchased from its stockholders;
- gross rentals from the rental of property purchased or leased from its stockholders; or
- total receipts, other than sales or rentals, from its stockholders.

All corporate stockholders in tax-exempt DISCS must adjust each item of its receipts, expenses, assets, and liabilities, as otherwise computed under Article 9-A, by adding thereto its attributable share of each such DISC's receipts, expenses, assets, and liabilities as reportable by each such DISC to the United States Treasury for its annual reporting period ending during the current tax year of such taxpayer. The tax-exempt DISC itself has no franchise tax filing requirement.

Taxable DISCs are DISCs that do not meet the 5% test under *Tax-exempt DISCs*. Taxable DISCs must file Form CT-3 on or before the 15th day of the ninth month after the end of the tax year. Such a DISC is subject to the tax on apportioned capital or the fixed dollar minimum, whichever is larger. Write ***DISC*** after the legal name of the corporation in the address section of the return.

Form CT-186-E, *Telecommunications Tax Return and Utility Services Tax Return,* must be filed by a corporation that provides telecommunication services. The corporation must pay an excise tax on its gross receipts from the sale of telecommunication services under Article 9 section 186-e.

Form CT-222, *Underpayment of Estimated Tax by a Corporation,* must be filed to inform the Tax Department that your corporation meets one of the exceptions to reduce or eliminate the underpayment of estimated tax penalty pursuant to Tax Law, Article 27, section 1085(d).

Form CT-223, *Innovation Hot Spot Deduction,* must be filed if you are a corporation that is a qualified entity located both inside and outside a hot spot, or you are a corporate partner of a qualified entity, or both.

Form CT-224, *Public Utility, Power Producer, and Pipeline Adjustments,* must be filed to make adjustments to federal taxable income (FTI) pursuant to §208.9(c-2) and §208.9(c-3).

Form CT-225, *New York State Modifications,* must be filed if you are entering an amount on Form CT-3, Part 3, lines 2 and/or 4.

Form CT-300, Mandatory First Installment (MFI) of Estimated Tax for Corporations, must be filed to pay the MFI for tax years beginning on or after January 1, 2017, if your second preceding year's franchise tax after credits exceeds $1,000.

Form CT-399, *Depreciation Adjustment Schedule,* must be filed to compute the allowable New York State depreciation deduction if you claim: 1) the federal accelerated cost recovery system (ACRS) depreciation or modified accelerated cost recovery system (MACRS) deduction for certain property placed in service after December 31, 1980; or 2) a federal special depreciation deduction for certain qualified property described in IRC section 168(k)(2) placed in service on or after June 1, 2003, in tax years beginning after December 31, 2002.

This form also contains schedules for determining a New York State gain or loss on the disposition of ACRS/MACRS property and property for which you claimed such federal special depreciation deduction.

Form CT-400, *Estimated Tax for Corporations,* must be filed if your New York State franchise tax liability can reasonably be expected to exceed $1,000.

Most corporations are required to electronically file this form either using tax software or online, after setting up an online services account, through the department's website.

Form DTF-664, *Tax Shelter Disclosure for Material Advisors,* must be filed to assist material advisors in complying with New York State's disclosure requirements.

Form DTF-686, *Tax Shelter Reportable Transactions Attachment to New York State Return,* must be filed to assist taxpayers and persons in complying with New York State's disclosure requirements.

For more information about other taxes that may apply to you, see **Publication 20, *Tax Guide for New Businesses***.

When to file

File your return within 3½ months after the end of your reporting period. If you are reporting for the calendar year, your return is due on or before April 15. If your filing date falls on a Saturday, Sunday, or legal holiday, then you must file your return on or before the next business day.

Extensions if you cannot meet the filing deadline

If you cannot meet the filing deadline, you may request a six-month extension of time by filing Form CT-5, *Request for Six-Month Extension to File (for franchise/business taxes, MTA surcharge, or both),* and paying your properly estimated franchise tax and metropolitan transportation business tax (MTA surcharge) on or before the original due date of the return.

Most corporations are required to electronically file their extension request either using tax software or online, after setting up an online services account, through the department's website.

You may request up to two additional extensions by filing Form CT-5.1, *Request for Additional Extension of Time to File (for franchise/business taxes, MTA surcharge, or both)*. File it on or before the expiration date of the original extension or previously filed additional extension.

Where to file

NYS CORPORATION TAX
PO BOX 15181
ALBANY NY 12212-5181

Private delivery services – See Publication 55, *Designated Private Delivery Services.*

Penalties and interest

If you pay after the due date

If you do not pay the tax due on or before the original due date, you must pay interest on the amount of the underpayment from the original due date of the return (**without** regard to any extension of time for filing) to the date the tax is paid. Interest is always due, without any exceptions, on any underpayment of tax. An extension of time for filing **does not** extend the due date for payment of tax.

If you file and pay after the due date

Compute additional charges for late filing and late payment on the amount of tax minus any payment made on or before the due date (**with** regard to any extension of time for filing).

A. If you do not file a return when due, or if the request for extension is invalid, add to the tax 5% per month up to 25% (§1085(a)(1)(A)).

B. If you do not file a return within 60 days of the due date, the additional charge in item A above cannot be less than the smaller of $100 or 100% of the amount required to be shown as tax (§1085(a)(1)(B)).

C. If you do not pay the tax shown on a return when due, add to the tax ½% per month up to a total of 25% (§1085(a)(2)).

D. The total of the additional charges in items A and C may not exceed 5% for any one month, except as provided for in item B above (§1085(a)).

If you think you are not liable for these additional charges, attach a statement to your return explaining the delay in filing, payment, or both (§1085).

Note: You may compute your penalty and interest by accessing our website, or you may call and we will compute the penalty and interest for you (see *Need help?*).

If you understate your tax

If the tax you report is understated by 10% or $5,000, whichever is greater, you must pay a penalty of 10% of the amount of understated tax. You can reduce the amount on which you pay penalty by subtracting any item for which: 1) there is or was substantial authority for the way you treated it; or 2) there is adequate disclosure on the return or in an attached statement (§1085(k)).

If you underpay your estimated tax

If you can reasonably expect your New York State franchise tax liability to exceed $1,000, you must make payments of estimated tax. A penalty will be imposed if you fail to file a declaration of estimated tax or fail to timely pay the entire installment payment of estimated tax due. For complete details, see Form CT-222.

Other penalties

Strong civil and criminal penalties may be imposed for negligence or fraud.

Voluntary Disclosure and Compliance Program

Have you underreported your tax due on past returns?

Tax Law, Article 36, section 1700 authorizes the Tax Department to waive civil and criminal penalties for taxpayers who disclose and pay overdue taxes. Under the Tax Department's Voluntary Disclosure and Compliance Program, eligible taxpayers who owe back taxes can avoid monetary penalties and possible criminal charges by:

- telling the Tax Department what taxes they owe;
- paying those taxes; and
- entering an agreement to pay all future taxes.

It is easy to apply. Visit our website (see *Need help?*). Follow the prompts, answer a few questions, and submit your application electronically.

Is this an amended return?

If you are filing an amended return for any purpose, mark an ***X*** in the *Amended return* box on page 1 of the return.

If you file an amended federal return, you must file an amended New York State return within 90 days thereafter.

You **must** file using the correct year's return for the tax year being amended. Do **not** use the most current year's return if the current year is not the year being amended. If you file on the wrong year's return, it may cause the amended return to be rejected, or may cause a delay in receiving any tax benefits being claimed.

For amended returns based on changes to federal taxable income (FTI) – If your FTI has been changed or corrected by a final determination of the Commissioner of Internal Revenue, or by a renegotiation of a contract or subcontract with the United States, you must file an amended return reflecting the change to FTI within 90 days of the final federal determination (as final determination is described under the regulations of the Commissioner of Taxation and Finance).

You must attach a copy of federal Form 4549, *Income Tax Examination Changes,* to your amended return.

If you filed as part of a consolidated group for federal tax purposes but on a separate basis for New York State tax purposes, you must submit a statement indicating the changes that would have been made if you had filed on a separate basis for federal tax purposes.

For credits or refunds based upon carryback of a net operating loss (NOL) – To claim a credit or refund resulting from the carryback of an NOL to a prior year, file an amended return for the year to which the carryback is being applied within three years of the date the original return was filed or within two years of the date the tax was paid, whichever is later.

You must attach the following to your amended return:

- a copy of the New York State return previously filed with New York State for the loss year; and
- Form CT-3.4 when carrying back loss incurred in a tax year that began on or after January 1, 2015, to a tax year that began on or after January 1, 2015.

NOLs from tax years that begin on or after January 1, 2015, cannot be carried back to tax years that began before January 1, 2015.

For credits or refunds of corporation tax paid – To claim any refund type that requires an amended return, other than an NOL carryback (see *For credits or refunds based upon carryback of a net operating loss (NOL)*), file an amended New York State return for the year being amended and, if applicable, attach a copy of the claim form filed with the IRS (usually Form 1120X) and proof of federal refund approval, *Statement of Adjustment to Your Account*. You must use the tax return for the year being amended.

If you are a federal S corporation, file an amended New York State return for the year being amended. If applicable, attach a copy of the amended federal Form 1120S.

The amended return must be filed within three years of the date the original return was filed or within two years of the date the tax was paid, whichever is later. If you did not file an original return, you must make the request within two years of the date the tax was paid. However, a claim for credit or refund based on a federal change must be filed within two years from the time the amended return reporting the change or correction was required to be filed (see *For amended returns based on changes to federal taxable income (FTI)).* For additional limitations on credits or refunds, see §1087.

Filing your final return

Mark an ***X*** in the *Final return* box on page 1 of the return if the corporation is a:

- domestic corporation that ceased doing business, employing capital, owning or leasing property, or deriving receipts from activity, in New York State during the tax year and wishes to dissolve; or
- foreign corporation that is no longer subject to the franchise tax in New York State.

Do not mark an ***X*** in the *Final return* box if you are only changing the type of return that you file (for example, from Form CT-3 to CT-3-S).

Do not mark an ***X*** in the *Final return* box in the case of a merger or consolidation.

Include the full profit from any installment sale made in your final tax year on your final return. Also include on your final return any remaining profit not yet received from a prior years' installment sale. Include such amounts in your FTI before NOL and special deductions on Part 3, line 1.

For information on voluntary dissolution and surrender of authority, see *Instructions for voluntary dissolution of a New York business corporation* (TR-125), and *Instructions for surrender of authority by foreign business corporation* (TR-199), on our website (see *Need help?)*.

New York S corporation termination year

When a New York S corporation terminates its federal or New York S election on a day other than the first day of a tax year, the tax year is divided into two tax periods (an S short year and a C short year). The corporation must file Form CT-3-S for the New York S short year and Form CT-3 for the New York C short year.

When an IRC section 338(h)(10) election is made for a target corporation that is a New York S corporation, the target corporation must file two short-period (less than 12 months) returns. When filing the second short-period return, the FTI of the new target is the starting point for computing entire net income (ENI).

The total tax for the S short year and the C short year may not be less than the fixed dollar minimum tax determined as if the corporation were a C corporation for the entire tax year. For more information, see Form CT-3-S-I, *Instructions for Form CT-3-S*.

The due date of the New York S corporation short year return (Form CT-3-S) is the same as the New York C corporation short year, even though they are treated as separate short tax years.

Overview of corporation franchise tax

Tax bases

Corporations subject to tax under Tax Law Article 9-A generally must compute three distinct taxes and pay the tax that results in the largest amount owed. The three taxes include a tax on business income, a tax on capital, and a fixed dollar minimum tax.

New York State innovation hot spot program

A qualified entity of a New York State innovation hot spot that is located solely within a hot spot is subject only to the fixed dollar minimum tax for five tax years beginning with the first tax year the qualified entity becomes a tenant in, or part of, an innovation hot spot. A qualified entity must be certified by a New York State innovation hot spot. A taxpayer who claims this benefit or who enters an amount on Form CT-3, Part 3, line 4, as a subtraction from FTI for the income or gain attributable to the operations at, or as part of, the hot spot is no longer eligible for any other New York State exemption, deduction, credit, or refund under the Tax Law to the extent that such exemption, deduction, credit, or refund is attributable to the business operations of a tenant in, or as part of, the New York State innovation hot spot. Claiming these benefits represents an irrevocable election.

Tax on business income

The tax on the business income base is computed in Part 3. The business income base is determined using a single receipts factor. The factor is computed in Part 6.

Tax on business capital

The tax on the business capital base is computed in Part 4. The business capital base is determined using a single receipts factor. The factor is computed in Part 6.

Fixed dollar minimum tax

The fixed dollar minimum tax is determined by a corporation's New York receipts.

A domestic corporation that is no longer doing business, employing capital, owning or leasing property, or deriving receipts from activity, in New York State is exempt from the fixed dollar minimum tax for years following its final tax year and is no longer required to file a franchise tax return, provided it meets the requirements listed in §209.8.

Computation of tax for corporate partners

A taxpayer that is a partner in a partnership (a corporate partner) computes its tax for its interest in the partnership using either the aggregate method or entity method, whichever applies. For an exception to these methods, see *Election by a foreign corporate limited partner*.

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

Entity method – Under the entity method, a partnership is treated as a separate entity and a corporate partner is treated as owning an interest in the partnership entity. The partner's interest is an intangible asset that is classified as business capital. To the extent a corporate partner's ENI includes its distributive share of partnership items of income, gain, loss, or deduction, those items are treated as business income.

Corporate partners required to file under the aggregate method

A corporate partner receiving a complete Form IT-204-CP, *New York Corporate Partner's Schedule K-1,* must file using the aggregate method. In addition, a corporate partner must file using the aggregate method if the corporate partner has access to the information necessary to compute its tax using the aggregate method. A corporate partner is presumed to have access to the information and therefore is required to file using the aggregate method if it meets **one or more** of the following conditions:

- it is conducting a unitary business with the partnership;
- it is a general partner of the partnership or is a managing member of an LLC that is treated as a partnership for federal income tax purposes;
- it has a 5% or more interest in the partnership;

- it has reported information from the partnership for a prior tax year using the aggregate method;
- its partnership interest constitutes more than 50% of its total assets;
- its basis in its interest in the partnership determined under IRC section 705 on the last day of the partnership year that ends within or with the taxpayer's tax year is more than $5 million; or
- any member of its affiliated group has the information necessary to perform such computation.

A corporate partner that does not receive a complete Form IT-204-CP may file using the entity method **only** if it does **not** meet any of the conditions listed above **and** does not have access (and will not have access within the time period allowed for filing a return with regard to all extensions of time to file) to the information necessary to compute its tax using the aggregate method and certifies these facts to the Commissioner of Taxation and Finance.

Computation of tax under the aggregate method – The taxpayer's **distributive share** (IRC section 704) of each partnership item of receipts, income, gain, loss, and deduction, and the taxpayer's **proportionate part** of each partnership asset, liability, and partnership activity are included in the computation of the taxpayer's business income base, capital base, and the fixed dollar minimum. These items have the same source and character in the hands of the partner for Article 9-A purposes that the items have for the partner for federal income tax purposes.

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

Election by a foreign corporate limited partner – A foreign corporation that is a limited partner in, and that is engaged, directly or indirectly, in the participation or in the domination or control of all or any portion of the business activities of, one or more limited partnerships, where such partnership(s) are doing business, employing capital, owning or leasing property, maintaining an office, or deriving receipts from activity, in New York State is subject to tax under Article 9-A. When this is the **sole** reason such foreign corporation is taxable under Article 9-A, and the corporation does not file on a combined basis for Article 9-A purposes, the corporation may elect to compute its tax by taking into account **only** its distributive share of each partnership item of receipts, income, gain, loss, and deduction (including any addition or subtraction modifications to FTI) and its proportionate part of each asset, liability, and partnership activity of the limited partnership (the separate accounting election).

If a partnership is required to file a NYS partnership return, but is **not** doing business, employing capital, owning or leasing property, maintaining an office, or deriving receipts from activity, in NYS (when, for example, the partnership has a NYS partnership return filing requirement only because it has a NYS resident partner that is an individual, estate, or trust), then having an interest in that partnership would not subject a foreign corporate limited partner to tax under Article 9-A, and the separate accounting election would **not** be applicable with respect to that partnership.

This election may not be made if the limited partnership and corporate group are engaged in a unitary business, wherever conducted.

Corporate group means the corporate limited partner itself or, if it is a member of an affiliated group, the corporate limited partner and all other members of such affiliated group.

Affiliated group has the same meaning as such term is defined in IRC section 1504 without regard to the exclusions provided for in section 1504(b). However, the term *common parent corporation* means any person as defined in IRC section 7701(a)(1).

How to make the separate accounting election – The separate accounting election is made by the foreign corporate limited partner at the time of filing Form CT-3, is not revocable, and is binding with respect to that partnership interest for all future tax years. **For its tax years beginning on or after January 1, 2017,** a foreign corporation makes the separate accounting election, with respect to a limited partnership, on Form CT-60, *Affiliated Entity Information Schedule*, in Schedule B, Part 3. Form CT-60 must be signed and filed with Form CT-3.

How to complete Form CT-3 when the separate accounting election is made – If you file Form CT-3, and you have made the separate accounting election for a limited partnership, when computing your tax bases report **only** your **distributive share** or **proportionate part** of receipts, income, gain, loss, deduction, assets, liabilities, and activities of such limited partnership. Thus, when computing the tax on the business income base, your starting point would be federal taxable income as if your **only** activity was your interest in the partnership. The same is true for your starting point in computing the tax on the capital base.

In computing the business income and capital bases, any required modifications and/or adjustments required to be made to the starting points will, again, be made as if your **only** activity was your interest in the partnership. Business income and business capital amounts so computed are then apportioned to New York State using a business apportionment factor that is computed by completing Form CT-3, Part 6, using **only** your **distributive share** of such limited partnership's receipts, net income, net gains, and other items, that must be included in the numerator and denominator of the business apportionment fraction in accordance with Tax Law §210-A and the applicable regulations.

Note: Receipts, net income, net gains, and other items must be **sourced**, and the amounts allowed in the business apportionment factor must be determined, in accordance with **Article 9-A** sourcing rules set forth in Tax Law §210-A. Include in the numerator and denominator of the business apportionment fraction **only** your share of the receipts, net income, net gains (not less than zero), and other applicable items described in Tax Law §210-A that are earned by the partnership in the regular course of business and included in your business income, determined without regard to the amount subtracted on Form CT-3, Part 3, line 6, (subtraction modification for qualified banks), and without regard to any amount from investment capital that is determined to exceed the 8% of ENI limitation on gross investment income (see Form CT-3.1).

For the fixed dollar minimum tax, the amount computed for the numerator of the business apportionment factor, as described above, is the amount of New York receipts used to compute the fixed dollar minimum tax.

When the separate accounting election is in effect, do not take into account any gain or loss that is recognized from the sale of the interest in the limited partnership for which the election was made.

When the separate accounting election is in effect and you do not have access to all of the necessary information to properly complete Form CT-3 – If you have made the separate accounting election with respect to a limited partnership, and

Tax rates schedule

Tax base	Tax rates
Table 1 – Business income base for general business taxpayers	.065
Table 2 – Business income base for qualified small business taxpayers	.065
Table 3 – Business income base for qualified New York manufacturers	.00
Table 4 – Business income base for qualified emerging technology companies (QETCs)	.04875
Table 5 – Capital base	.00075
Table 6 – Capital base for qualified New York manufacturers and QETCs	.00056
Table 7 – Capital base for qualified cooperative housing corporations	.0004
Table 8 – Fixed dollar minimum tax	
For a corporation with New York receipts of:	
Not more than $100,000:	$ 25
More than $100,000 but not over $250,000:	$ 75
More than $250,000 but not over $500,000:	$ 175
More than $500,000 but not over $1,000,000:	$ 500
More than $1,000,000 but not over $5,000,000:	$ 1,500
More than $5,000,000 but not over $25,000,000:	$ 3,500
More than $25,000,000 but not over $50,000,000:	$ 5,000
More than $50,000,000 but not over $100,000,000:	$ 10,000
More than $100,000,000 but not over $250,000,000:	$ 20,000
More than $250,000,000 but not over $500,000,000:	$ 50,000
More than $500,000,000 but not over $1,000,000,000:	$ 100,000
Over $1,000,000,000:	$ 200,000
Table 9 – Fixed dollar minimum tax for qualified New York manufacturers and QETCs	
For a corporation with New York receipts of:	
Not more than $100,000:	$ 19
More than $100,000 but not over $250,000:	$ 56
More than $250,000 but not over $500,000:	$ 131
More than $500,000 but not over $1,000,000:	$ 375
More than $1,000,000 but not over $5,000,000:	$ 1,125
More than $5,000,000 but not over $25,000,000:	$ 2,625
Over $25,000,000:	$ 3,750
Table 10 – Fixed dollar minimum tax for non-captive REITs and non-captive RICs	
For a corporation with New York receipts of:	
Not more than $100,000:	$ 25
More than $100,000 but not over $250,000:	$ 75
More than $250,000 but not over $500,000:	$ 175
Over $500,000:	$ 500

you do not have the information necessary to compute your tax bases and business apportionment factor as discussed above, you must treat your distributive share of such partnership's items of income, gain, loss, and deduction as business income. In this case, you would show the starting point for the computation of the business income base as described above, but would make **no** modifications and/or adjustments to such amounts. The starting point for the computation of business capital would be the partnership interest, with no adjustments being made thereto. These business income and business capital amounts would be apportioned 100% to NYS. Report a business apportionment factor of 100% by reporting, on Form CT-3, Part 6, line 54, a New York State receipts amount (column A) **equal to** your distributive share of such limited partnership's Everywhere receipts (column B).

When the separate accounting election is in effect for multiple limited partnership interests AND you have NO limited partnership interests for which the election has NOT been made – Complete the front page of Form CT-3. Then complete Part 1, making sure to mark an ***X*** in the box for Section C, line 7. Then you must compute the business income base (Part 3) and capital base (Part 4) per the following instructions.

An **individual** pro forma Form CT-3, Part 3, lines 1 through 13, and an **individual** pro forma Form CT-3, Part 4, lines 1 through 11, must be completed for **each** limited partnership for which the election was made. These lines must be completed as if your **only** activity was your interest in each such partnership; this includes any modifications and/or adjustments required in such computations.

Apportion each such pro forma business income base and pro forma capital base to New York State using a business apportionment factor that is computed by using **only** your **distributive share** of the limited partnership's receipts, net income, net gains, and other items, that must be included in the numerator and denominator of the business apportionment fraction in accordance with Tax Law §210-A and the applicable regulations, **for which** you are apportioning the pro forma business income base and pro forma capital base. To do so, complete an individual pro forma Form CT-3, Part 6 for **each** limited partnership for which the election was made.

For **each** limited partnership for which the election was made, multiply that partnership's pro forma business income base, and pro forma capital base, by the pro forma business apportionment factor computed for **that** limited partnership. Each result is the amount to enter on the associated pro forma Form CT-3, Part 3, line 15 (for the business income base), and on the associated pro forma Form CT-3, Part 4, line 13 (for the capital base).

For **each** pro forma business income base, complete the pro forma Form CT-3, Part 3, lines 16 through 19. **Sum all** pro forma Forms CT-3, Part 3, line 19, counting negative amounts as zeros. Enter the result on Part 3, line 19 of the Form CT-3 **that will be filed with New York State**.

Complete Part 3, line 20 of the Form CT-3 that will be filed with New York State, and also enter the line 20 amount on Part 2, line 1a of the Form CT-3 that will be filed with New York State.

For the capital base, on Part 4, line 13, of the Form CT-3 that will be filed with New York State, enter the **sum** of **all** pro forma Forms CT-3, Part 4, line 13. When summing the pro forma line 13s, count any negative amounts as zeros. Then, complete Part 4, line 15 of the Form CT-3 that will be filed with New York State, and also enter the line 15 amount on Part 2, line 1b of the Form CT-3 that will be filed with New York State.

On Part 2, line 1c of the Form CT-3 that will be filed with New York State, enter the **sum** of **all** pro forma Forms CT-3, Part 6, line 54, column A. Then complete the remaining lines of Part 2 of the Form CT-3 that will be filed with New York State.

Make no entries on Part 6 of the Form CT-3 that will be filed with New York State.

Foreign airlines

Foreign airlines that have a foreign air carrier permit pursuant to section 402 of the Federal Aviation Act of 1958 may exclude from ENI all income from international operations effectively connected to the United States, foreign passive income, and income earned from overseas operations, provided the foreign country in which the airline is based has a similar exemption from tax with respect to United States airlines (§208.9(c-1)).

When computing the tax on capital, foreign airlines may also exclude from business capital those assets used to generate the income that was excluded based on the previous paragraph (to the extent the assets were employed in generating that income) (§208.7(b)).

However, if the country in which the foreign airline is based does not provide a similar exemption from tax with respect to United States airlines, the foreign airline is not entitled to the exclusions from income and capital described above.

How to fill out your tax return

Important identifying information

When preparing your corporation tax return, be sure to accurately complete the corporation's identifying information (employer identification number (EIN) and file number) including your current address. Keep a record of your identifying information for future use.

If you use a paid preparer or accounting firm, make sure they use your complete and accurate information when completing all your forms.

All filers must complete the beginning and ending tax year boxes in the upper right corner on page 1 of the form.

Signature

The return must be certified by the president, vice president, treasurer, assistant treasurer, chief accounting officer, or other officer authorized by the taxpayer corporation.

The return of an association, publicly traded partnership, or business conducted by a trustee or trustees must be signed by a person authorized to act for the association, publicly traded partnership, or business.

If an outside individual or firm prepared the return, all applicable entries in the paid preparer section must be completed, including identification numbers (see *Paid preparer identification numbers* in Form CT-1).

Failure to sign the return will delay the processing of any refunds and may result in penalties.

Line instructions

Line A – Make your check or money order payable in United States funds. We will accept a foreign check or foreign money order only if payable through a United States bank or if marked ***Payable in U.S. funds.***

Line B – If during the tax year you do business, employ capital, own or lease property, maintain an office, or derive receipts from activity, in the MCTD, you are subject to the MTA surcharge.

A corporation is deriving receipts from activity in the MCTD if it has receipts within the MCTD of $1 million or more in a tax year. For more information, see Form CT-3-M-I.

The MCTD includes the counties of New York, Bronx, Kings, Queens, Richmond, Dutchess, Nassau, Orange, Putnam, Rockland, Suffolk, and Westchester.

Mark an ***X*** in the appropriate box. If *Yes*, you must file Form CT-3-M.

Line C – Pursuant to Public Law 86-272, a foreign corporation is not subject to the tax imposed by Article 9-A if its activities are limited to those described in that law. If you are disclaiming tax liability in New York State based on Public Law 86-272, but still want to file a New York State franchise tax return, mark an ***X*** in the box. You must also complete Form CT-3 in its entirety **and** enter ***0*** on Part 2, line 4.

Part 1 – General corporate information

Section A – Qualification for preferential tax rates

Failure to mark a box that pertains to you may result in a delay in processing your return or the loss of a claimed tax benefit.

Generally, you will have only one box marked in Section A indicating the preferential tax status you are actually utilizing to realize the tax benefits of that status. However, a qualified New York manufacturer can have the boxes on both lines 2 and 3 marked if it meets the principally engaged test for line 2 and the different principally engaged test for line 3.

Also, a small business taxpayer utilizing the small business tax benefits would mark the box on line 6 as well as the box on line 6b if it was also a QETC, or the box on line 6c if it was also a qualified New York manufacturer.

Line 1 – If you are claiming QETC status for purposes of the lower business income base tax rate, the lower capital base tax rate and cap, and the reduced fixed dollar minimum tax amounts, you must mark an ***X*** in the box. For qualifying criteria, see New York State Public Authorities Law section 3102-e(1)(c), without regard to the $10 million limitation. For more information, see TSB-M-12(9)C, *Clarification of Qualifications for Qualified Emerging Technology Company (QETC) Tax Credits*.

Line 2 – If you are claiming qualified New York manufacturer status based on the principally engaged test (see below) for purposes of the lower business income base tax rate and the reduced fixed dollar minimum tax amounts, you must mark an ***X*** in the box.

A q*ualified New York manufacturer* is a manufacturer (as described below) that has property in New York State that is principally used by the manufacturer in the production of goods by manufacturing, processing, assembling, refining, mining, extracting, farming, agriculture, horticulture, floriculture, viticulture, or commercial fishing, and either:

- the adjusted basis of the property for federal income tax purposes is at least $1 million at the close of the tax year; or
- all of its real and personal property is located in New York State.

A corporation qualifies as a manufacturer if during the tax year the taxpayer is **principally engaged** in the production of goods by manufacturing, processing, assembling, refining, mining, extracting, farming, agriculture, horticulture, floriculture, viticulture, or commercial fishing. A taxpayer is *principally engaged* in the foregoing activities if during the tax year more than 50% of its gross receipts are derived from receipts for the sale of goods produced by these activities.

For purposes of the 0% business income base tax rate and the reduced fixed dollar minimum tax amounts, the generation and distribution of electricity, the distribution of natural gas, and the production of steam associated with the generation of electricity are **not** considered qualifying activities for purposes of the principally engaged test.

For more information, see TSB-M-15(3)C, *Real Property Tax Credit and Reduction of Tax Rates for Qualified New York Manufacturers*, and TSB-M-15(3.1)C, *Revised Information on the Real Property Tax Credit and Reduction of the Capital Base Tax Rate for Qualified New York Manufacturers*.

Line 3 – If you are claiming qualified New York manufacturer status based on the principally engaged test for purposes of the lower capital base tax rate and capital base tax cap, you must mark an ***X*** in the box. The definition of *qualified New York manufacturer* and the principally engaged test, as described in line 2 instructions, apply. For purposes of the lower capital base tax rate and capital base tax cap, the generation and distribution of electricity, the distribution of natural gas, and the production of steam associated with the generation of electricity are **not** considered qualifying activities for purposes of the principally engaged test. For more information, see TSB-M-15(3)C and TSB-M-15(3.1)C.

Line 4 – If you are claiming qualified New York manufacturer status based on the significant employment and property test (see below) for purposes of the lower business income base tax rate, the lower capital base tax rate and cap, and the reduced fixed dollar minimum tax amounts, you must mark an ***X*** in the box.

A taxpayer that does not satisfy the principally engaged test may be a qualified New York manufacturer if the taxpayer employs during the tax year at least 2,500 employees in manufacturing in New York and the taxpayer has property in the state used in manufacturing, the adjusted basis of which for federal income tax purposes at the close of the tax year is at least $100 million.

For purposes of the 0% business income base tax rate, the reduced fixed dollar minimum tax amounts, and the lower capital base tax rate and capital base tax cap, the generation and distribution of electricity, the distribution of natural gas, and the production of steam associated with the generation of electricity are **not** considered qualifying activities for purposes of determining if employees are employed in manufacturing, or if property is used in manufacturing. For more information, see TSB-M-15(3)C and TSB-M-15(3.1)C.

Line 5 – A qualified cooperative housing corporation is entitled to use a reduced tax rate of .0004 when computing its tax using the capital base. To claim this reduced rate, you must mark an ***X*** in the box.

A corporation that has only one class of stock that entitles the shareholder to live in a house or an apartment in a building owned or leased by the corporation may be a cooperative housing corporation. For a complete definition, see IRC section 216(b).

Note: All cooperative housing corporations must file Form TP-588, *Cooperative Housing Corporation Information Return,* twice a year. For more information, see the instructions on Form TP-588.

Line 6 – If you are claiming small business taxpayer status for purposes of the exemption from the capital base tax when you are reporting for either of your first two tax years, you must mark an ***X*** in the box.

A corporation qualifies as a small business taxpayer if:

1) its ENI is not more than **$390,000**;
2) the total amount of money and other property it received for stock, as a contribution to capital and as paid-in surplus, is not more than $1 million as of the last day of its tax year;

3) the average number of individuals (excluding general executive officers) employed full time in New York State during the tax year is 100 or fewer; **and**
4) the corporation is not part of an affiliated group, as defined in IRC section 1504, unless the group itself would have met the above criteria if it had filed a combined return.

For purposes of item 3 above, determine the average number of individuals employed full time in the state by averaging the sum of such individuals employed on March 31, June 30, September 30, and December 31 of the tax year.

An individual *employed full time* means an employee in a job consisting of at least 35 hours per week, or two or more employees who are in jobs that together constitute the equivalent of a job of at least 35 hours per week (full-time equivalent). A full-time equivalent employee in New York State includes any employee regularly connected with or working out of an office or place of business of the taxpayer in New York State.

General executive officers include the chairman, president, vice president, secretary, assistant secretary, treasurer, assistant treasurer, comptroller, and any other officer charged with the general executive affairs of the corporation. An executive officer whose duties are restricted to territory either in or outside New York State is not a general executive officer.

Short periods: A corporation that files Form CT-3 for a tax year of less than 12 months must annualize ENI from Form CT-3, Part 3, line 7, to determine if it qualifies as a small business taxpayer. For a period of less than 12 months, annualize the ENI by multiplying the ENI by 12 and dividing the result by the number of months in the short period.

Line 6a – If you are claiming the small business taxpayer exception to the capital base tax (see line 6 instructions), you must provide the information requested on this line. The amount taken into account with respect to any property other than money is the amount equal to the adjusted basis to the taxpayer of such property for determining gain, reduced by any liability to which the property was subject or was assumed by the taxpayer. Use the worksheet below to determine the total capital contributions to enter on this line.

	No. of shares	Amount
Par value stock......................		
No-par value stock		
Contributions to capital and paid-in surplus		
Total capital contributions; enter on line 6a		

Line 7 – For information as to how to qualify as an entity of a New York State innovation hot spot, see TSB-M-14(1)C, *New York State Business Incubator and Innovation Hot Spot Support Act*.

Part 1 Section B – New York State information

Line 1 – Enter the number of full-time employees at the end of the tax year. For more information, see Section A, line 6 instructions.

Line 2 – Enter the total amount of all wages and compensation of employees (except general executive officers) that work out of an office or location in New York State.

Line 3 – A *business establishment* is a single physical location where business is conducted, or where services or industrial operations are performed.

Line 5 – A taxpayer that is not included in a combined return with a related member must add back royalty payments directly or indirectly paid, accrued, or incurred in connection with one or more direct or indirect transactions with one or more related members during the tax year. These royalty payments must be added back to the extent deductible in calculating FTI. This addback applies unless the taxpayer meets one of the following four exceptions:

1. The addback will not apply to the portion of the royalty payment for which the taxpayer establishes by clear and convincing evidence of the form and type specified by the Commissioner of Taxation and Finance that:
   - the related member was subject to tax in New York or another state or possession of the United States, a foreign nation, or a combination of these on a tax base that included the royalty payment paid, accrued, or incurred by the taxpayer;
   - the related member during the same tax year directly or indirectly paid, accrued, or incurred the portion of the royalty payment to a person that is not a related member; and
   - the transaction giving rise to the royalty payment between the taxpayer and the related member was undertaken for a valid business purpose.
2. The addback will not apply if the taxpayer establishes by clear and convincing evidence of the form and type specified by the commissioner that:
   - the related member was subject to tax on, or measured by, its net income in New York, another state or possession of the United States, or a combination of these;
   - the tax base for the tax included the royalty payment paid, accrued, or incurred by the taxpayer; and
   - the aggregate effective rate of tax applied to the related member in those jurisdictions is not less than 80% of the statutory rate of tax that applied to the taxpayer under §210 for the tax year.
3. The addback will not apply if the taxpayer establishes by clear and convincing evidence of the form and type specified by the commissioner that:
   - the royalty payment was paid, accrued, or incurred to a related member organized under the laws of a country other than the United States;
   - the related member's income from the transaction was subject to a comprehensive income tax treaty between that country and the United States;
   - the related member was subject to tax in a foreign nation on a tax base that included the royalty payment paid, accrued, or incurred by the taxpayer;
   - the related member's income from the transaction was taxed in that country at an effective rate of tax at least equal to that imposed by New York; and
   - the royalty payment was paid, accrued, or incurred pursuant to a transaction that was undertaken for a valid business purpose and using terms that reflect an arm's-length relationship.
4. The addback will not apply if the taxpayer and the commissioner agree in writing to the application or use of alternative adjustments or computations. The commissioner may, in his or her discretion, agree to the application or use of alternative adjustments or computations if he or she concludes that the income of the taxpayer would not be properly reflected in the absence of such an agreement.

If you are claiming one of these exceptions, mark an ***X*** in the box and see the instructions for line 5a.

Line 5a – Enter the number of the applicable exception (see above) and the amount of royalty payments excluded from ENI. Attach a statement to your return explaining how you meet each requirement for the exception.

Line 6 – A corporation is deriving receipts from activity in this state if it has receipts within this state of $1 million or more in the tax year. If you are not protected by Public Law 86-272 and are subject to tax **solely** as a result of deriving receipts in New York, mark an ***X*** in the box (§209.1).

Part 1 Section C – Filing information

To avoid an erroneous assessment or delayed refund, all filers **must** complete the applicable lines in this section.

Line 6 – Federal Public Law (P.L. 110-343) added section 457A to the Internal Revenue Code (IRC) to address the taxation of certain nonqualified deferred compensation.

If you were required to report any nonqualified deferred compensation on your 2018 federal tax return, as required under IRC section 457A, or if any such amounts flowed-through to you from a pass-through entity, mark an ***X*** in the *Yes* box; otherwise mark an ***X*** in the *No* box.

Part 2 – Computation of balance due or overpayment

Line 1b – The tax on the capital base does not apply to certain filers. If you are a:

- REIT as defined in IRC section 856 that is subject to tax under IRC section 857, or
- RIC as defined in IRC section 851 that is subject to tax under IRC section 852,

enter ***0*** here and on Part 4, line 15.

A REIT or RIC filing federal Form 1120-REIT or 1120-RIC **must** mark an ***X*** in the applicable box on Part 1, Section C, line 1, to avoid an erroneous assessment or delayed refund.

A **small business taxpayer** may claim an exemption from the tax on capital base for its first two tax years if it meets certain requirements. However, it must mark the correct box on Part 4, line 14 for the return to process properly, and must complete lines 6 through 6c in Part 1, Section A, as applicable.

Line 1c – The fixed dollar minimum tax is determined by the corporation's New York receipts. Enter your New York receipts in the first box. If you do not have New York receipts, enter ***0***. **To avoid an erroneous assessment or a delay in your refund,** you **must** enter an amount on this line.

New York receipts are the receipts included in the numerator of the apportionment factor as determined in Part 6, *Computation of business apportionment factor*.

For a short period, compute New York receipts by dividing the amount of New York receipts for the tax year by the number of months in the tax year and multiplying the result by 12.

See Table 8, 9, or 10 of the *Tax rates schedule* to determine the applicable fixed dollar minimum tax to enter on line 1c. The fixed dollar minimum tax may be reduced for short periods.

Period	Reduction
Not more than six months	50%
More than six months but not more than nine months	25%
More than nine months	None

A homeowners association, as such term is defined in IRC section 528(c), without regard to section 528(c)(1)(E), with no FTI, as the term is defined in section 528(d), is not subject to the fixed dollar minimum tax and must enter ***0*** on line 1c. A homeowners association filing federal Form 1120-H must mark an ***X*** in the applicable box on Part 1, Section C, line 1, to avoid an erroneous assessment or delayed refund.

Qualified New York manufacturers and QETCs must mark an ***X*** in the applicable box on Part 1, Section A, line 1, 2, or 4, and non-captive REITs, and non-captive RICs must mark the 1120-REIT or 1120-RIC box on Part 1, section C, line 1, to avoid an erroneous assessment or delayed refund.

Line 2 – Tax due

Small business taxpayer exception: If you qualify as **both** a small business taxpayer **and** either a qualified New York manufacturer or a QETC, you must use the small business taxpayer rate for purposes of the business income base in order to be exempt from the tax on capital base. You **cannot** claim qualified New York manufacturer or QETC status for those lower business income base tax rates, **and** also claim small business taxpayer status for the exemption from the capital base tax.

To indicate that you are claiming small business taxpayer status, mark an ***X*** in the box on Part 1, Section A, line 6, but do **not** mark an ***X*** in any of the boxes on Part 1, Section A, line 1, 2, 3, or 4.

Qualified entity of a New York State innovation hot spot exception: If located **solely** within a hot spot and electing to be subject only to the fixed dollar minimum tax, enter only the amount from line 1c. To indicate that you are making this election, mark an ***X*** in the box on Part 1, Section A, line 7.

Taxable DISC exception: Enter the larger of line 1b or 1c.

Line 3 – Complete Part 7, and enter the total amount of the tax credits that you are claiming to reduce your tax due. If you are claiming more than one tax credit, see Form CT-600-I, *Instructions for Form CT-600*, for the order of application under Article 9-A. **Attach** copies of all forms and schedules used. If you claim a tax credit without filing the appropriate tax credit claim form, the tax credit will be disallowed.

There are limited instances in which the use of a tax credit can reduce your tax below the fixed dollar minimum tax shown on line 1c. The manufacturer's real property tax credit may reduce your tax to $25. The QEZE tax reduction credit (if you have a 100% zone allocation), the tax-free New York area excise tax on telecommunications credit (if you have a 100% area allocation), and the tax-free New York area tax elimination credit (if you have a 100% area allocation) may reduce your tax to $0.

Line 8 – Form CT-222 is filed by a corporation to inform the Tax Department that the corporation meets one of the exceptions to reduce or eliminate the underpayment of estimated tax penalty pursuant to §1085(d).

Lines 9 and 10 – If you are not filing this return on time, you must pay interest and additional charges. See *Penalties and interest*.

Lines 12a through 12k

If you want to make a contribution to *Return a Gift to Wildlife*, *Breast Cancer Research and Education Fund*, *Prostate and Testicular Cancer Research and Education Fund*, *National September 11 Memorial & Museum at the World Trade Center*, *Volunteer Firefighting and Volunteer Emergency Services Recruitment and Retention Fund*, *Veterans Remembrance and Cemetery Maintenance and Operations Fund*, *Women's Cancers Education and Prevention Fund*, *Veterans' Home Assistance Fund*, *Love Your Library Fund*, *Lupus Education and Prevention Fund*, *Military Family Relief Fund*, or all eleven, enter the whole dollar amount(s) on the appropriate line(s). Your gift will increase your payment due or reduce your overpayment. You cannot change the amount of your gift after you file your return.

Line 12a – Return a Gift to Wildlife – Your contribution will benefit New York's fish, wildlife, and marine resources, and you can receive a free issue of *Conservationist* magazine. Call

1 800 678-6399 for your free sample issue. For more information about New York State's environmental conservation programs, go to *www.dec.ny.gov*. For information about *Conservationist*, go to *www.TheConservationist.org*.

Line 12b – Breast Cancer Research and Education Fund – Your contribution will support ground-breaking research and education in New York State to prevent, treat, and cure breast cancer. Help make breast cancer a disease of the past. For more information, go to *www.wadsworth.org/extramural/breastcancer*. New York State will match your contribution to the Breast Cancer Research and Education Fund, dollar for dollar.

Line 12c – Prostate and Testicular Cancer Research and Education Fund – Your contribution will advance prostate and testicular cancer research, support programs and education projects in New York State. New York State will match contributions to the Prostate and Testicular Cancer Research and Education Fund, dollar for dollar.

Line 12d – National September 11 Memorial & Museum at the World Trade Center *(9/11 Memorial)* – Your contribution will help create and sustain the National September 11 Memorial & Museum which will commemorate and honor the thousands of people who died in the attacks of September 11, 2001, and February 26, 1993. The Memorial and Museum will recognize the endurance of those who survived, the courage of those who risked their lives to save others, and the compassion of all who supported us in our darkest hours. Help New York State, the nation, and the world remember by making a contribution. For more information, go to *www.911memorial.org*.

Line 12e – Volunteer Firefighting and Volunteer Emergency Services Recruitment and Retention Fund – Contributions to this fund will help recruit and retain the men and women who make up our volunteer fire and volunteer emergency medical services units. Volunteer firefighters and volunteer emergency services personnel are crucial to the effective operation of a municipality and for the safety and well-being of the citizens of this state. Volunteer firefighters and volunteer emergency medical services personnel provide invaluable benefits to their local communities. Despite their importance, the number of volunteer firefighters and volunteer emergency services personnel has declined significantly over the past few years. For more information, go to *www.dhses.ny.gov/ofpc* or contact the State Office of Fire Prevention and Control at (518) 474-6746.

Line 12f – Veterans Remembrance and Cemetery Maintenance and Operation Fund *(Veterans Remembrance)* Your contribution will help provide for the perpetual care of state veterans cemeteries. Contributions will be used for the purchase, leasing, and improvement of land for veterans cemeteries, the purchase and leasing of equipment and other materials needed for the maintenance of cemeteries, and other associated costs.

Line 12g – Women's Cancers Education and Prevention Fund – Contributions to this fund will be used for grants for women's cancers education and prevention programs that have been approved by the New York State Department of Health. High risk women's cancers include cervical, endometrial, gestational trophoblastic tumors, ovarian, uterine sarcoma, vaginal, and vulvar cancers. Increased education and early detection can help women become more aware of symptoms and seek timely medical attention. For more information, go to *www.health.ny.gov/diseases/cancer/*.

Line 12h – Veterans' Home Assistance Fund *(Veterans' Homes)* – Contributions to this fund will be used for the care and maintenance of certain veterans' homes in New York. Monies on deposit in the fund will be disbursed equally each fiscal year to the following facilities: The State Home for Veterans and Their Dependents at Oxford; The State Home for Veterans in the City of New York *(St. Albans)*; The State Home for Veterans at Batavia; the State Home for Veterans at Montrose; and The Long Island State Veterans Home at Stony Brook University. Either the Commissioner of Health or the Commissioner of Education shall approve and certify expenditures from the fund.

Line 12i – Love Your Library Fund – Contributions to this fund will be used for the purposes of providing funding for the statewide summer reading program established under the New York State Education Law. The New York State Department of Education will oversee the collection and distribution of amounts in the fund.

Line 12j – Lupus Education and Prevention Fund *(Lupus Fund)* – Contributions to this fund will be used to assist in supporting Lupus education and prevention programs, including grants, which are approved by the Department of Health. Monies on deposit in the fund will be disbursed each fiscal year for programs that support lupus education, prevention, and awareness. The Commissioner of Health will approve and certify expenditures from the fund.

Line 12k – Military Family Relief Fund *(Military Family Fund)* – Contributions to this fund will be used to provide assistance to military families for housing, clothing, food, medical services, utilities, or any other related necessity of daily living. The New York State Director of Veterans' Affairs will establish criteria for determining who is eligible to receive assistance from this fund.

Line 15 – Determine the amount to enter by completing the *Worksheet for Part 2, line 15* below.

Worksheet for Part 2, line 15

From the Form CT-300 used to report the MFI for the tax period for which **this** return is being filed (**Note:** For calendar-year 2018 filers, such Form CT-300 was due March 15, **2018**):

1	Enter the portion of line A *(Payment enclosed)* that represents **New York State** MFI paid: generally, the amount on line 6, column A of such Form CT-300.	1	
2	Enter the portion of line 5, column A **actually** applied toward satisfying the amount on line 2, column A: generally, the lesser of the amount on line 5, column A or the amount on line 2, column A of such Form CT-300. This is your *2017 anticipated overpayment applied*.	2	
3	**Add the amounts on lines 1 and 2, and enter the total here and on Form CT-3, Part 2, line 15.**	3	

Line 20 – Enter the sum of the amounts reported on lines 25 and 30 of the Form CT-3 that you filed for the tax period **immediately prior** to the tax period for which this return is being filed.

Composition of prepayments on Part 2, line 22 – If you need more space, write ***see attached*** in this section, and attach a separate sheet showing all relevant prepayment information. Transfer the total shown on the attached sheet to line 22.

Payment due or overpayment to be credited/refunded

If line 14 is **less than** line 22, skip lines 23a through 23c and proceed to line 24a.

If line 14 is **greater than or equal to** line 22, proceed to line 23a.

Line 23a – Subtract line 22 from line 14 and enter the result here.

Line 23b – If on line 5, column A of the Form CT-300 used to report the MFI for the tax period immediately **following** the tax period for which this return is being filed (the **next** franchise tax period) you did **not** apply an anticipated overpayment amount of New York State **franchise** tax from the tax period for which this return is being filed to your MFI for the **next** franchise tax period, enter ***0*** and proceed to line 23c. **Note:** For calendar-year 2019 filers, such Form CT-300 was due March 15, **2019**.

If on line 5, column A of such Form CT-300 you **did** apply an anticipated overpayment amount of New York State **franchise** tax from the tax period for which this return is being filed to your MFI for the **next** franchise tax period, enter the amount from line 5, column A of such Form CT-300 that you **actually** applied toward satisfying the amount on line 2, column A of such Form CT-300: generally, the lesser of the amount on line 5, column A or the amount on line 2, column A.

Line 23c – Add lines 23a and 23b. Enter the result here, and enter the **payment amount** on page 1, line A. Skip lines 24a through 24c.

Line 24a – Subtract line 14 from line 22 and enter the result here.

Line 24b – If on line 5, column A of the Form CT-300 used to report the MFI for the tax period immediately **following** the tax period for which this return is being filed (the **next** franchise tax period) you did **not** apply an anticipated overpayment amount of New York State **franchise** tax from the tax period for which this return is being filed to your MFI for the **next** franchise tax period, enter ***0*** and proceed to line 24c. **Note:** For calendar-year 2019 filers, such Form CT-300 was due March 15, **2019**.

If on line 5, column A of such Form CT-300 you **did** apply an anticipated overpayment amount of New York State **franchise** tax from the tax period for which this return is being filed to your MFI for the **next** franchise tax period, enter the amount from line 5, column A of such Form CT-300 that you **actually** applied toward satisfying the amount on line 2, column A of such Form CT-300: generally, the lesser of the amount on line 5, column A or the amount on line 2, column A. If line 24b is **less than** or **equal to** line 24a, proceed to line 24c. If line 24b is **greater than** line 24a, subtract line 24a from line 24b and enter the result on line **23c**. This is the amount due. Enter the **payment** amount on Form CT-3, page 1, line A. Skip line 24c.

Line 24c – Subtract line 24b from line 24a. This is your overpayment amount. Proceed to line 25.

Unrequested refunds to be credited forward – If the corporation overpays its tax, it will not automatically receive a refund. Instead, we will credit your overpayment to the following tax year unless you request a refund on line 28. We will notify you that the overpayment has been credited and explain how to request a refund of the credited amount. If you choose to request a refund of such credited amount, you must claim a refund of such overpayment prior to the original due date of the following year's return.

Lines 25 through 28 – You may apply an overpayment to your next state franchise tax period, or to your MTA surcharge for this period, or you may have it refunded. Indicate on these lines the amount of overpayment you want credited or refunded.

Lines 29 and 30 – If you request a refund of unused tax credits, enter the total amount on line 29. If you request tax credits to be credited as an overpayment to next year's return, enter the total amount on line 30. **Do not include** these amounts in the total credits claimed on Part 2, line 3; or Part 7, line 2 or 3. Attach the appropriate tax credit forms.

Part 3 – Computation of tax on business income base

Note: All amounts entered on lines 2, 4, 6, 8, 10, 12, 16, and 18 must be entered as a positive number.

Business income is ENI minus investment income and other exempt income.

ENI is:

- FTI for non-alien corporations; **or**
- income, gain, or loss, effectively connected with the conduct of a trade or business within the United States, as determined under IRC section 882, for an alien corporation that under any provision of the IRC is not treated as a *domestic corporation* as defined in IRC section 7701; **or**
- FTI that would have been reported to the IRS in the case of a corporation which is exempt from federal income tax (other than tax on unrelated business income imposed under IRC section 511), but is taxable under Article 9-A;

plus or minus certain New York State modifications.

The **sum** of investment income and other exempt income must **not** exceed ENI.

Line 1 – Generally, the amount to enter is your FTI, before NOL and special deductions, as required to be reported to the U.S. Treasury Department. However, see below, for instructions specific to different federal Forms 1120.

- If you file federal Form 1120, use the amount from line 28.

  Note: If you were required to include in your calculation of FTI an IRC section 965(a) inclusion amount, the inclusion is already reflected in such line 28 amount. Tax Law §208.9(b)(23) requires that any IRC section 965(c) amount deducted when computing FTI must be added back to FTI. However, as the amount reported on line 1 is **before** the special deductions amount reported on federal Form 1120, no addition modification to FTI for any IRC section 965(c) deduction is required. Also, Tax Law §208.9(b)(24) requires that any IRC section 250(a)(1)(A) amount deducted (as reduced by IRC section 250(a)(2)) when computing FTI must be added back to FTI. However, as the amount reported on line 1 is **before** the special deductions amount reported on federal Form 1120, no addition modification to FTI for any IRC section 250(a)(1)(A) deduction is required. You are allowed the IRC section 250 deduction for the portion of the deduction computed under IRC section 250(a)(1)(B)(i), as reduced by IRC section 250(a)(2). This is done using a subtraction modification on Form CT-225.
- If you file Form 1120-REIT, use REIT taxable income (as defined in IRC section 857(b)(2), but **before** the NOL deduction, total deduction for dividends paid, and the IRC section 857(b)(2)(E) deduction), as modified by IRC section 858.

  Note: If you were required to include in your calculation of REIT taxable income an IRC section 965(a) inclusion amount, such inclusion, as well as the corresponding

IRC section 965(c) amount, is already reflected in the REIT taxable income amount. Tax Law §208.9(b)(23) requires that any IRC section 965(c) amount deducted when computing REIT taxable income must be added back to REIT taxable income. The add back of the IRC section 965(c) deduction amount is reported on Form CT-225. A federal election can be made under IRC section 965(m)(1)(B). When such election is made, New York State conforms to this election.

- If you file Form 1120-RIC, use the sum of:
  - investment company taxable income (as defined in IRC section 852(b)(2), modified for IRC section 855, but **before** the deduction for dividends paid and the deductions for tax imposed under IRC sections 851(d)(2) and 851(i)) **plus**
  - the amount taxable under IRC section 852(b)(3).

  Note: Your FTI reported on line 1 must include the amount of the IRC section 965(a) inclusion regardless of how, or on what lines, on your federal return you reported such amount. Tax Law §208.9(b)(23) requires that any IRC section 965(c) amount deducted when computing FTI must be added back to such FTI. Therefore, if the FTI you report on line 1 includes the deduction under IRC section 965(c), you must add back such deduction when computing ENI. The add back is reported on Form CT-225. No add back is required if the IRC section 965(c) deduction is not reflected in the FTI amount you report on line 1.
- If you file federal Form 1120-H, use the amount from line 19.
- If you file federal Form 1120-POL, use the amount from line 19.

  Note: If you were required to include in your calculation of FTI an IRC section 965(a) inclusion amount, such inclusion, as well as the corresponding IRC section 965(c) amount, is already reflected in the line 1 amount. Tax Law §208.9(b)(23) requires that any IRC section 965(c) amount deducted when computing FTI must be added back to FTI. The add back of the IRC section 965(c) deduction amount is reported on Form CT-225.
- If you file federal Form 1120-C, use the amount from line 25c. **Note:** If you were required to include in your calculation of FTI an IRC section 965(a) inclusion amount, the inclusion is already reflected in such line 25c amount. Tax Law §208.9(b)(23) requires that any IRC section 965(c) amount deducted when computing FTI must be added back to FTI. However, as the amount reported on line 1 is **before** the special deductions amount reported on federal Form 1120-C, no addition modification to FTI for any IRC section 965(c) deduction is required. Also, Tax Law §208.9(b)(24) requires that any IRC section 250(a)(1)(A) amount deducted (as reduced by IRC section 250(a)(2)) when computing FTI must be added back to FTI. However, as the amount reported on line 1 is **before** the special deductions amount reported on federal Form 1120-C, no addition modification to FTI for any IRC section 250(a)(1)(A) deduction is required. You are allowed the IRC section 250 deduction for the portion of the deduction computed under IRC section 250(a)(1)(B)(i), as reduced by IRC section 250(a)(2). This is done using a subtraction modification on Form CT-225.
- If you are a member of a federal affiliated group that files a consolidated return, complete a pro forma 1120 reporting the FTI you would have been required to report on a separate federal tax return, and attach a copy of the federal consolidating workpaper indicating your separate taxable income before any elimination of intercorporate transactions included in the federal consolidated return.
- If you are a federal S corporation filing federal Form 1120S but you have **not** made an election to be treated as a New York S corporation, you must determine the amount you would have had to report as FTI, before NOL and special deductions, were you not a federal S corporation. Attach a separate sheet showing how you determined this amount. In general, the items on Form 1120 affected are:
  - dividends
  - interest
  - gross rents
  - gross royalties
  - capital gain net income
  - charitable contributions
  - IRC section 199 deduction
- If you file Form 1120-F, use the amount from Section II, line 29. Mark an ***X*** in the box on Part 1, Section C, line 5.
- If you are exempt from federal income tax but subject to New York State franchise tax, you must determine the amount you would have had to report as FTI, before NOL and special deductions, were you not exempt. Attach a separate sheet showing how you determined the amount.
- If you have an amount of excess inclusion as a result of having a residual interest in a real estate mortgage investment conduit (REMIC), you must properly reflect this income in FTI.
- If you are a corporate stockholder in a tax-exempt DISC, all transactions between you and each such DISC must be eliminated from your receipts, expenses, assets, and liabilities. Your ENI must not include the amount of the deemed distribution of current income, if any, that was included in your FTI. The tax-exempt DISC itself has no franchise tax filing requirement.

Line 6 – Certain thrifts and community banks are eligible to make **one** of the following modifications to ENI:

- Subtraction modification for qualified residential loan portfolios (§208.9(r))
- Subtraction modification for community banks and small thrifts (§208.9(s))

Enter the amount of subtraction modification (r) or (s) from Form CT-3.2, Schedule A, line 1.

Note: The subtraction modification under §208.9(t) will only be claimed by a thrift or community bank that is filing as part of a combined group on Form CT-3-A.

Line 8 – The amount entered on this line must **not** exceed your ENI (line 7).

Line 12 – An addback to business income is required when the presumptive holding period for qualification as investment capital is not met. See Form CT-3.1.

Line 19 – When this line is reporting a loss, Form CT-3.4 must be filed to report such loss, and to make the irrevocable election to waive the carryback of such loss, if applicable.

Line 20 – If you do not qualify as a QETC (see Part 1, Section A, line 1 instructions), or a qualified New York manufacturer (see Part 1, Section A, lines 2 and 4 instructions), multiply line 19 by 6.5% (.065). Enter the result on this line and on Part 2, line 1a.

QETCs: Multiply line 19 by 4.875% (.04875). Enter the result on this line and on Part 2, line 1a.

Qualified New York manufacturers: Enter ***0*** on this line and on Part 2, line 1a.

Mark an ***X*** in the applicable box in Part 1, Section A, to avoid an erroneous assessment or delayed refund.

Part 4 – Computation of tax on capital base

The tax on the capital base is computed on that portion of the total business capital apportioned to New York State. Total business capital includes the addback of capital previously reported as investment capital that subsequently does not meet the holding period requirement. §208.7(a) defines business capital as all assets, other than investment capital and stock issued by the taxpayer, less liabilities not deducted from investment capital. Business capital includes only those assets the income, loss, or expense of which are properly reflected (or would have been properly reflected if not fully depreciated or expensed, or depreciated or expensed to a nominal amount) in the computation of ENI for the tax year. Business capital includes stock that generates, or could generate, other exempt income. When filing using the aggregate method, corporate partners must include their proportionate part of the partnership's assets and liabilities in their computation.

Lines 1 through 15

To determine the value of your assets for the capital base computations, you must include real property and marketable securities at fair market value (FMV). You must include all other property at the value shown on your books in accordance with generally accepted accounting principles (GAAP). Use lines 2 through 5 to adjust the value of the real property and marketable securities you reported on your federal return. If you are not required to complete the balance sheet on your federal tax return, use the amount that would have been reported on the federal return. If you are an alien corporation, only report the amounts that are effectively connected with your United States trade or business.

On lines 1 through 6, enter the values at the beginning of the year in column A and at the end of the year in column B. Enter the average value in column C. Average value is generally computed **quarterly** if your usual accounting practice permits it. However, you may use a more frequent basis such as monthly, weekly, or daily. If your usual accounting practice does not permit a quarterly or more frequent computation of the average value of assets, you may use a semiannual or annual computation if no distortion of average value results.

Short periods – If a tax return is for a period of less than 12 months, determine the amount of business capital by multiplying the average value by the number of months covered by the return and dividing by 12 (§210.2).

Line 4 – Enter the FMV of real property and marketable securities included on line 2. The *fair market value* of an asset is the price (without deduction of an encumbrance whether or not the taxpayer is personally liable) at which a willing seller will sell and a willing purchaser will buy. You can generally find the FMV of marketable securities from price quotes in financial newspapers. For determination of FMV of real property, see TSB-M-85(18.1)C, *Valuation of Real Property*.

Line 6 – Enter the amount of all liabilities attributable to assets entered on line 1, both long and short term. Use the same method of averaging used to determine average value of assets.

Line 10 – An addback to business capital is required when the presumptive holding period for qualifications of investment capital is not met (§208.5(d)). See Form CT-3.1.

Line 14 – Small business taxpayers (see Part 1, Section A, line 6 instructions)**:** You may claim an exemption from the tax on the capital base for your first two tax years. If you are claiming this exemption, enter ***0*** on line 15 and mark the box indicating the year for which the exemption is taken. You will continue to be liable for the tax computed on Part 2, line 2.

Line 15 – Capital base tax computation – If you do **not** qualify as a cooperative housing corporation, QETC, or qualified New York manufacturer, multiply line 13 by the tax rate of .00075. Do **not** enter more than $5 million.

Cooperative housing corporations: Multiply line 13 by the tax rate of .0004 (see Part 1, Section A, line 5 instructions). Do **not** enter more than $5 million.

Qualified New York manufacturers (see Part 1, Section A, lines 2, 3, and 4 instructions) **and QETCs** (see Part 1, Section A, line 1 instructions)**:** Multiply line 13 by the tax rate of .00056. Do **not** enter more than $350,000.

Part 5 – Computation of investment capital for the current tax year

This part computes the amount of investment capital that is excluded from the tax on the capital base and is reported on Part 4, line 8.

For more information on investment capital, see Form CT-3.1.

Note: You **must** file Form CT-3.1 and identify investment capital items or the subtraction will be disallowed.

Part 6 – Computation of business apportionment factor

Receipts, net income, net gains, and other items are sourced, and the amounts allowed in the apportionment factor are determined, per §210-A. Include only the receipts, net income, net gains, and other items described in §210-A that are earned in the regular course of business and included in your business income, determined without regard to the amount subtracted on Part 3, line 6 *(Subtraction modification for qualified banks)*, and without regard to any amount from investment capital that is determined to exceed the 8% of ENI limitation on gross investment income.

Note: Generally, receipts from services are reported on line 52 *(Receipts from other services/activities not specified)*.

Columns A and B – *New York State* (NYS) (column A) amounts are determined per the specific line instructions. *Everywhere* (EW) (column B) amounts should be 100% of the amount of the item being reported on a line unless otherwise specified. If only one line of Part 6 applies to your business, you must still complete both columns for that line. Skip a line only if **both** the numerator (column A) and the denominator (column B) are zero.

Taxpayers that have no receipts required to be included in the denominator of the apportionment factor must mark the box at the beginning of Form CT-3, Part 6, *Computation of business apportionment factor*. Examples include taxpayers that own property in New York State but have no FTI, ECI, or receipts from the rental, sale or lease of such property amounts, or taxpayers whose only income is dividends and net gains from the sales of stock or sales of partnership interests when the fixed percentage election is **not** made. If you have any other everywhere receipts, this box does not apply. If you mark the box, you must attach a statement explaining why you have no receipts required to be included in the business apportionment factor. Failure to properly complete Part 6 may result in the imposition of a 100% business apportionment factor.

Section 210-A.2 – Sales of tangible personal property, electricity and net gains from real property

Line 1 – Receipts from the sale of tangible personal property are included in the New York State column when shipments are made to points in the state, or the destination of the property is a point in the state. Receipts from sales of tangible personal property and electricity that are traded as commodities, as defined in IRC section 475, are included on line 27, in accordance with §210-A.5(a)(2)(I).

Line 2 – Receipts from the sale of electricity are included in the New York State column when delivered to points in the state. Receipts from sales of tangible personal property and electricity that are traded as commodities, as defined in IRC section 475, are included on line 27, in accordance with §210-A.5(a)(2)(I).

Line 3 – For the New York State column, net the gains from the sales of real property located within the state against the losses from the sales of real property located within the state and enter the result (but not less than zero). For the Everywhere column, net the gains from the sales of real property located everywhere against the losses from the sales of real property located everywhere and enter the result (but not less than zero).

Section 210-A.3 – Rentals of real and tangible personal property, royalties, and rights for certain closed-circuit and cable TV transmissions

Line 4 – Receipts from rentals of real and tangible personal property located within the state are included in the New York State column.

Line 5 – Receipts of royalties from the use of patents, copyrights, trademarks, and similar intangible personal property within the state are included in the New York State column.

Line 6 – Receipts from the sales of rights for closed-circuit and cable television transmissions of an event (other than events occurring on a regularly scheduled basis) taking place within the state as a result of the rendition of services by employees of the corporation, as athletes, entertainers, or performing artists, are entered in the New York column to the extent that those receipts are attributable to such transmissions received or exhibited within the state.

Section 210-A.4 – Receipts from sale of, license to use, or granting of remote access to digital products

Line 7 – For Article 9-A apportionment purposes, the term *digital product* means any property or service, or combination thereof, of whatever nature delivered to the purchaser through the use of wire, cable, fiber-optic, laser, microwave, radio wave, satellite or similar successor media, or any combination of these. Digital product includes, but is not limited to, an audio work, audiovisual work, visual work, book or literary work, graphic work, game, information or entertainment service, and storage of digital products. In addition, it includes computer software by whatever means delivered. The term *delivered* to includes furnished or provided to or accessed by. A digital product does **not** include legal, medical, accounting, architectural, research, analytical, engineering or consulting services.

If the receipt for a digital product is comprised of a combination of digital property and services, it cannot be divided into separate components and is considered to be one receipt, regardless of whether it is separately stated for billing purposes. The entire receipt must be allocated according to a hierarchy (see below).

Receipts from the sale of, license to use, or granting of remote access to digital products within the state, are sourced according to the following hierarchy:

1) The customer's primary use location of the digital product.
2) The location where the digital product is received by the customer or is received by a person designated for receipt by the customer.
3) The apportionment fraction for the preceding tax year for such digital product.
4) The apportionment fraction in the current tax year for those digital products that can be sourced using the methods in items 1 and 2.

Note: Item 3 does not apply to your first tax period that begins on or after January 1, 2015, for which you are subject to Article 9-A.

The taxpayer must exercise due diligence under each method before rejecting it and proceeding to the next method in the hierarchy, and must base its determination on information known to the taxpayer or information that would be known to the taxpayer upon reasonable inquiry.

Section 210-A.5(a)1 – Qualified financial instruments (QFIs), the 8% fixed percentage method

Line 8 – A *qualified financial instrument (QFI)* means a financial instrument of these types that is marked to market in the tax year by the taxpayer under IRC section 475 or 1256: Type A (reported on lines 11 and 12); Type B (reported on lines 13 – 18); Type C (reported on lines 19 – 21): Type D (reported on lines 22 – 24); Type I (reported on line 27); Type(s) H (reported on lines 29 and 30); and Type(s) G (also reported on line 30).

If the taxpayer has in the tax year marked to market a financial instrument within types A, B, C, D, and I, then **any** financial instrument **within that same type** that has **not** been marked to market by the taxpayer under IRC section 475 or 1256 **is also** a QFI in the tax year. When a financial instrument within either types H or G is marked to market, **not** all financial instruments within type H or G, respectively, are QFIs, as explained further below.

When reporting interest from "other" financial instruments on line 29, and net gains and other income from "other" financial instruments on line 30, marking to market one "other" financial instrument does **not** necessarily cause all "other" financial instruments to be QFIs. It is an instrument by instrument determination as to when "other" financial instruments are of the same type. Thus, you may have more than one **type** of "other" financial instruments reported on either of lines 29 and 30, and some types may be QFI while other types may not be QFI.

Line 30 can be used to report financial instruments under clause **G** (dividends and net gains from sales of stock or partnership interests) **or** clause **H** ("other" financial instruments) of §210-A.5(a)(2), or both. Line 30 will be used to report financial instruments under clause (G) **only** when the financial instrument is a QFI **and** the 8% fixed percentage method has been elected. When **any** stock that is business capital has been marked to market, **all** stock that is business capital is a QFI (for exception, see next paragraph immediately following). When **any** partnership interest in a widely held or publicly traded partnership has been marked to market, **all** partnership interests in a widely held or publicly traded partnership are QFIs. However, marking to market stock that is business capital does **not** cause partnership interests in a widely held or publicly traded partnership that are **not** marked to market to be QFIs. The same is true in regard to the marking to market of partnership interests in a widely held or publicly traded partnership in respect to stock that is business capital. When a financial instrument falling under clause (H) has been marked to market, it does **not** necessarily cause all financial instruments under clause (H) to be QFIs. It is an instrument by instrument determination as to when instruments under clause (H) are of the same **type**. Thus, you may have more than one type of "other" financial instruments under clause (H) to report on line 30. Marking to market a financial instrument of the type under clause (G) does **not** cause financial instruments of the type under clause (H) to be QFIs. The same is true in regard to clause (H) in respect to clause (G).

If the **only** loans that are marked to market under IRC section 475 or 1256 are loans secured by real property, then **no** loans are QFIs. Stock that is investment capital shall **not** be a QFI. A stock that generates other exempt income as defined in §208.6-a, and that is not, **itself**, marked to market under IRC section 475 or 1256, is **not** a QFI with respect to such other exempt income only, even if other stocks are marked to market in the tax year.

Taxpayers may elect to use the 8% *fixed percentage method* to apportion business receipts from QFIs. This election is irrevocable, applies to **all** QFIs, and must be made on an annual basis on the original timely filed return (determined with regard to valid extensions of time for filing) by marking an ***X*** in the box on line 8. If you do not mark the box but still apportion QFI receipts by 8%, you will be considered to have made the election and to have marked the box.

Non-captive REITs and non-captive RICs may also elect to use the 8% fixed percentage method to apportion business receipts from QFIs even though they do not mark to market assets under IRC section 475 or 1256.

Regardless of whether or not the 8% fixed percentage method is elected, when **any** financial instrument has been marked to market that is described on:

a) **either** line 11 or 12, then the boxes on **both** lines 11 and 12 must be marked, and all financial instruments reported on such lines are QFIs (Type A financial instruments);
b) **any** of lines 13 through 18, then the box above line 13 must be marked, and all financial instruments reported on such lines are QFIs (Type B financial instruments);
c) **any** of lines 19 through 21, then the box above line 19 must be marked, and all financial instruments reported on such lines are QFIs (Type C financial instruments);
d) **any** of lines 22 through 24, then the box above line 22 must be marked, and all financial instruments reported on such lines are QFIs (Type D financial instruments);
e) line 27, then the box above line 27 must be marked, and all financial instruments reported on line 27 are QFIs (Type I financial instruments);
f) line 28, then the box above line 28 must be marked;
g) line 29, then the box above line 29 must be marked;
h) line 30, due to clause (H), then the section 210-A.5(a)(2)(H) box above line 30 must be marked; and
i) line 30, due to clause (G), then the section 210-A.5(a)(2)(G) box above line 30 must be marked

A marked QFI box does **not** indicate which method of sourcing (8% fixed percentage method or customer-based sourcing rule) is being used to apportion such instruments. Also, because lines 28, 29, and 30 may report more than one **type** of financial instrument, when the QFI box above line 28 is marked, or one of the boxes above lines 29 and 30 is marked: a) in the case of line 28, it does **not** indicate that all financial instruments being reported on line 28 are QFIs, and b) in the case of lines 29 and 30 it does **not** indicate that all financial instruments being reported on lines 29 and 30 are QFIs.

General lines 9 through 52 instructions

For all financial instruments that do **not** meet the definition of a QFI, or for instruments that meet the definition of a QFI but the 8% fixed percentage method election is **not** in effect, use the customer-based sourcing rules as detailed in the specific line instructions for lines 9 through 27, 29, and 30.

Regardless of whether or not the 8% fixed percentage method election is in effect, Worksheets A, B, and C of these instructions compute certain amounts for lines 10, 12, 21, 24, 28, and 30 of Part 6.

For purposes of these apportionment instructions, an individual is deemed to be located in New York State if his or her billing address is in the state. A business entity is deemed to be located in New York State if its commercial domicile is located in the state.

Use the following hierarchy to determine the *commercial domicile* of a business entity, based on known information, or information that would be known upon reasonable inquiry:

1) The seat of management and control of the business entity.
2) The billing address of the business entity in the taxpayer's records.

You must exercise due diligence before rejecting the first method and proceeding to the next method in this hierarchy.

For purposes of these apportionment instructions, *registered securities broker or dealer* means a broker or dealer registered as such by the Securities and Exchange Commission (SEC) or a broker or dealer registered as such by the commodities futures trading commission, and shall include an over-the-counter (OTC) derivatives dealer as defined under regulations of the SEC (17 CFR 240.3b-12).

Section 210-A.5(a)(2)(A) – Loans

A loan is secured by real property if 50% or more of the value of the collateral used to secure the loan (when valued at FMV as of the time the loan was originated) consists of real property.

Line 9 – Include in the New York column, interest from loans secured by real property located within the state.

Include in the Everywhere column interest from loans secured by real property located anywhere.

Line 10 – For the New York column, multiply the amount of **net** gains (not less than zero) from sales of loans secured by real property by a fraction, the numerator of which is the amount of gross proceeds from sales of loans secured by real property located within the state, and the denominator of which is the amount of gross proceeds from sales of such loans everywhere.

In the Everywhere column, include the amount of net gains (not less than zero) from sales of loans secured by real property both within and outside New York State.

Use Worksheet A at the end of these instructions.

Line 11 – When the 8% fixed percentage method **is** elected (the box on Part 6, line 8, is marked), **and** the QFI box on line 11 **is** marked, use such method for **all** financial instruments to be reported on this line.

When the 8% fixed percentage method **is not** elected (the box on Part 6, line 8, is **not** marked), **and** the QFI box on line 11 **is** marked, use the customer-based sourcing rule below for **all** financial instruments to be reported on this line.

When the QFI box on line 11 is **not** marked, use the customer-based sourcing rule below for **all** financial instruments to be reported on this line.

In the New York column, include interest from loans **not** secured by real property if the borrower is located in New York State.

In the Everywhere column, include interest from all loans **not** secured by real property.

Line 12 – For the New York column, multiply net gains (not less than zero) from sales of loans **not** secured by real property by a fraction, the numerator of which is the amount of gross proceeds from sales of loans not secured by real property to purchasers located within the state, and the denominator of which is the amount of gross proceeds from sales of such loans to purchasers located within and outside the state.

In the Everywhere column, include the amount of net gains (not less than zero) from sales of loans **not** secured by real property within and outside the state.

Use Worksheet A at the end of these instructions.

Section 210-A.5(a)(2)(B) – Federal, state, and municipal debt

Lines 13 through 18 – Receipts are **not** included in column A (NYS) **unless** you have made the election to apportion QFI receipts using the 8% fixed percentage method. For lines 13, 15, and 16, in the Everywhere column, enter 100% of the applicable receipts regardless of if the 8% fixed percentage method election was made. For lines 17 and 18, if the 8% fixed percentage method election was made, and the QFI box above line 13 is marked, enter 100% of the receipts constituting interest and net gains from sales of debt instruments issued by other states or their political subdivisions in the Everywhere column. Otherwise, enter 50% for lines 17 and 18 in the Everywhere column.

Line 16 – When netting gains against losses, only net the gains from federal, NYS, and NYS political subdivisions debt against the losses from federal, NYS, and NYS political subdivisions debt. Do not enter less than zero.

Line 18 – When netting gains against losses, only net the gains from other states and their political subdivisions debt against the losses from other states and their political subdivisions debt. Do not enter less than zero.

Section 210-A.5(a)(2)(C) – Asset-backed securities and other government agency debt

Line 19 – In the Everywhere column, enter 100% of the interest income from **all**:

1) Asset-backed securities issued by government agencies;
2) Other securities issued by government agencies, including but not limited to securities issued by the Government National Mortgage Association (GNMA), the Federal National Mortgage Association (FNMA), the Federal Home Loan Mortgage Corporation (FHLMC), or the Small Business Administration (SBA); and
3) Asset-backed securities issued by other entities.

In the New York column, enter 8% of the amount in the Everywhere column.

Line 20 – In the Everywhere column enter the result (but not less than zero) of netting the gains and losses from all:

1) Sales of asset-backed securities or other securities issued by government agencies, including but not limited to securities issued by GNMA, FNMA, FHLMC, or the SBA; and
2) Sales of other asset-backed securities that are sold through a registered securities broker or dealer, or through a licensed exchange.

In the New York column, enter 8% of the amount in the Everywhere column.

Line 21 – For the New York column, multiply net gains (not less than zero) from sales of other asset-backed securities **not** reported on line 20 by a fraction, the numerator of which is the amount of gross proceeds from such sales to purchasers located in the state, and the denominator of which is the amount of gross proceeds from such sales to purchasers located within and outside the state.

In the Everywhere column, enter 100% of the amount of net gains (not less than zero) from sales of other asset-backed securities not reported on line 20.

Use Worksheet A at the end of these instructions.

Section 210-A.5(a)(2)(D) – Corporate bonds

Line 22 – In the New York column, enter interest from corporate bonds when the commercial domicile of the issuing corporation is in the state.

If the 8% fixed percentage method election has been made (the box on line 8 is marked), **and** the QFI box above line 22 is marked, enter 8% of the applicable receipts in the New York column.

Line 23 – In the Everywhere column, enter the result (but not less than zero) of netting the gains and losses from the sales of all corporate bonds sold through a registered securities broker or dealer, or through a licensed exchange.

In the New York column, enter 8% of the amount in the Everywhere column.

Line 24 – For the New York column, multiply net gains (not less than zero) from those sales of corporate bonds **not** reported on line 23 by a fraction, the numerator of which is the amount of gross proceeds from such sales to purchasers located within the state, and the denominator of which is the amount of gross proceeds from such sales to purchasers located within and outside the state.

In the Everywhere column, enter the amount of net gains (not less than zero) from sales of corporate bonds to purchasers within and outside the state.

Use Worksheet A at the end of these instructions.

Section 210-A.5(a)(2)(E) – Interest income from reverse repurchase and securities borrowing agreements

Line 25 – In the New York column, enter 8% of net interest income (not less than zero) from reverse repurchase agreements and securities borrowing agreements. For this calculation, net interest income is determined after the deduction of the amount of interest expense from the taxpayer's repurchase agreements and securities lending transactions, but cannot be less than zero. The amount of such interest expense is the interest expense associated with the sum of the value of the taxpayer's repurchase agreements where the taxpayer is the seller or borrower, **plus** the value of the taxpayer's securities lending agreements where the taxpayer is the securities lender (provided such sum is limited to the sum of the value of the taxpayer's reverse repurchase agreements where the taxpayer is the purchaser or lender, **plus** the value of the taxpayer's securities lending agreements where the taxpayer is the securities borrower).

Section 210-A.5(a)(2)(F) – Interest income from federal funds

Line 26 – In the Everywhere column, enter 100% of the net interest from federal funds. In determining net interest from federal funds, deduct interest expense that is from federal funds. The resulting net interest cannot be less than zero.

In the New York column, enter 8% of the amount in the Everywhere column.

Section 210-A.5(a)(2)(I) – Net income from sales of physical commodities

Line 27 – For the New York column, multiply the net income from sales of physical commodities by a fraction, the numerator of which is the amount of receipts from sales of physical commodities actually delivered to points within the state or, if there is no actual delivery of the physical commodity, the amount sold to purchasers located in the state, and the denominator of which is the amount of receipts from all sales of physical commodities actually delivered to points within and outside the state or, if there is no actual delivery of the physical commodity, the amount sold to purchasers located both within and outside the state.

Net income (not less than zero) from sales of physical commodities is determined after the deduction of the cost to acquire or produce the physical commodities.

In the Everywhere column, enter 100% of the net income (not less than zero) from sales of physical commodities.

Section 210-A.5(a)(2)(J) – Marked to market net gains

Line 28 – All marked to market net gains are reported on this line for **all** financial instruments.

For the purposes of computing marked to market net gains for this line, *marked to market* means that a financial instrument is **treated** by the taxpayer as sold for its FMV on the last business day of the taxpayer's tax year, despite no actual sale having taken place, under IRC section 475 or 1256. The term *marked to market gain or loss* means the gain or loss recognized by the taxpayer under IRC section 475 or 1256 because the financial instrument is **treated** as sold for its FMV on the last business day of the tax year.

All marked to market net gains are reported on this line. When the 8% fixed percentage method **is** elected, use such method to source marked to market net gains for all financial instruments **that are QFIs**.

When the 8% fixed percentage method **is** elected, use the customer-based sourcing rule below to source the marked to market net gains for those financial instruments that are **not** QFIs. Also, use the customer-based sourcing rule below to source **all** marked to market net gains for **all** financial instruments when the 8% fixed percentage method **is not** elected.

The amount of marked to market net gains to be included in the **New York** column of line 28 for financial instruments **described** on any certain line of Form CT-3, Part 6, is determined by multiplying such marked to market net gains by a fraction, the **numerator** of which is the amount included in the numerator of the apportionment fraction for the net gains from **actual** sales of financial instruments reported on that **same** certain line of Form CT-3, Part 6, and the **denominator** of which is the amount included in the denominator of the apportionment fraction for the net gains from **actual** sales of the financial instruments reported on that **same** certain line of Form CT-3, Part 6.

In the **Everywhere** column, enter 100% of the marked to market net gains from financial instruments for which the amount to be included in the New York column is determined under the immediately preceding paragraph.

If financial instruments that are **described** on any certain line of Form CT-3, Part 6, have marked to market net gains, but there are **no actual** sales of financial instruments reported on that **same** certain line of Form CT-3, Part 6, **or** if there **are actual** sales of financial instruments reported on that **same** certain line of Form CT-3, Part 6, but those **actual** sales resulted in a net **loss**, the amount of the marked to market net gains to include in the **New York** column of line 28 for those same financial instruments is determined by multiplying such marked to market net gains by a fraction, the **numerator** of which is the **sum** of the amounts entered in the New York column for Part 6, lines 9 through 30, and the **denominator** of which is the **sum** of the amounts entered in the Everywhere column of Part 6, lines 9 through 30.

In the **Everywhere** column, enter 100% of the marked to market net gains from financial instruments for which the amount to be included in the New York column is determined under the immediately preceding paragraph.

Use Worksheet C at the end of these instructions.

However, when sourcing the marked to market net gain from loans secured by real property, always use customer-based sourcing (even when the 8% fixed percentage method election was made). If using customer-based sourcing to source such marked to market net gains, when 210-A.5(a)(2)(j)(iii) applies, never include any amounts sourced under the 8% fixed percentage method election in computing the NYS aggregate marked to market factor in Part 2 of Worksheet C.

Section 210-A.5(a)(2)(H) – Income from other financial instruments

Line 29 – When the 8% fixed percentage method **is** elected, use such method for all financial instruments to be reported on this line **that are QFIs**. When the 8% fixed percentage method **is** elected, use the customer-based sourcing rule below for those financial instruments to be reported on this line that are **not** QFIs. Also, use the customer-based sourcing rule below for **all** financial instruments to be reported on this line when the 8% fixed percentage method **is not** elected.

Interest income from other financial instruments includes, but is not limited to, interest income on: deposit accounts; money market mutual funds; and debt issued by a country, or political subdivision thereof, other than the United States.

In the New York column, enter interest from other financial instruments when the payor is located in New York State.

Line 30 – More than one type of financial instrument may be reported on this line. Report financial instruments under clause (G) or clause (H) of §210-A.5(a)(2).

Include clause (G) financial instruments **only** when the 8% fixed percentage method **is** elected. The following constitute clause (G) instruments to be included:

- dividends and net gains from stock that is business capital if you have, in the tax year, marked to market any stock under IRC section 475 or 1256; provided that dividends that qualify as other exempt income should **not** be included; and
- net gains from the sale of partnership interests in widely held or publicly traded partnerships if you have, in the tax year, marked to market any partnership interest in a widely held or publicly traded partnership under IRC section 475 or 1256.

Customer-based sourcing rules for clause (H) instruments included on line 30:

- for gains from "other" financial instruments, for the Everywhere column, net the gains from all sales of a type of "other" financial instrument against the losses from all sales of the **same** type of "other" financial instrument. For the New York column, for the **same** type of "other" financial instrument being reported in the Everywhere column, net the gains from all sales of such **same** type of "other" financial instrument, where the purchaser or payor is located in New York State, against the losses from all sales of such **same** type of "other" financial instrument, where the purchaser or payor is located in New

York State. **However**, if the purchaser or payor is a registered securities broker or dealer, or the transaction is made through a licensed exchange, then include 8% of the Everywhere amount in the New York column.

- for "other" income from "other" financial instruments, for the Everywhere column, compute the "other" income (but not less than zero) from a type of "other" financial instrument. For the New York column, for the **same** type of "other" financial instrument being reported in the Everywhere column, compute the "other" income (but not less than zero) from such **same** type of "other" financial instrument, where the purchaser or payor is located in New York State. **However**, if the purchaser or payor is a registered securities broker or dealer, or the transaction is made through a licensed exchange, then include 8% of the Everywhere amount in the New York column.

Use Worksheet B at the end of these instructions.

Section 210-A.5(b) – Other receipts from broker or dealer activities

For the purposes of lines 31 through 37, *securities* has the same meaning as in IRC section 475(c)(2), and *commodities* has the same meaning as in IRC section 475(e)(2). If the taxpayer receives any of the receipts reported on lines 31 through 35 as a result of a securities correspondent relationship that the taxpayer has with another broker or dealer (with the taxpayer acting in this relationship as the clearing firm), those receipts are deemed generated within the state to the extent set forth in §210-A.5(b)(1) through §210-A.5(b)(4). The amount of those receipts excludes the amount the taxpayer is required to pay to the correspondent firm for the correspondent relationship. If the taxpayer receives any of the receipts reported on lines 31 through 35 as a result of a securities correspondent relationship that the taxpayer has with another broker or dealer (with the taxpayer acting in this relationship as the introducing firm), these receipts are deemed generated within the state to the extent set forth in §210-A.5(b)(1) through §210-A.5(b)(4). If the taxpayer is unable to determine the mailing address of the customer from its records, include 8% of the receipts in the numerator of the apportionment fraction.

Line 31 – In the New York column, enter brokerage commissions derived from the execution of securities or commodities purchase or sales orders for the accounts of customers if in the records of the taxpayer, the mailing address of the customer responsible for paying the commissions is in the state.

Line 32 – In the New York column, enter margin interest earned on behalf of brokerage accounts if in the records of the taxpayer, the mailing address of the customer responsible for paying such margin interest is in the state.

Line 33 – In the New York column, enter the amount of fees for advisory services to a customer in connection with the underwriting of securities for the entity that is contemplating issuing or is issuing securities, or fees for managing an underwriting, if in the records of the taxpayer, the mailing address of the customer responsible for paying such fees is in the state.

Line 34 – In the New York column, enter the receipts constituting the primary spread of selling concession from underwritten securities if the customer is located in the state. The term *primary spread* means the difference between the price paid by the taxpayer to the issuer of the securities being marketed and the price received from the subsequent sale of the underwritten securities at the initial public offering price, less any selling concession and any fees paid to the taxpayer for advisory services or any manager's fees, if those fees are not paid by the customer to the taxpayer separately. The term *public offering price* means the price agreed upon by the taxpayer and the issuer at which the securities are to be offered to the public. The term *selling concession* means the amount paid to the taxpayer for participating in the underwriting of a security where the taxpayer is not the lead underwriter.

Line 35 – In the New York column, enter account maintenance fees if in the records of the taxpayer, the mailing address of the customer responsible for paying such account maintenance fees is in the state.

Line 36 – In the New York column, enter fees for management or advisory services, including fees for advisory services in relation to merger or acquisition activities, if in the records of the taxpayer, the mailing address of the customer responsible for paying such fees is in the state. Exclude fees paid for services reported on line 43.

Line 37 – Interest earned on loans and advances made by the taxpayer to a corporation affiliated with the taxpayer, but with which the taxpayer is not included in a combined return under Article 9-A is deemed to arise from services performed at the principal place of business of the affiliated corporation. If such principal place of business is in New York State, include the interest in the New York column.

Section 210-A.5(c) – Receipts from credit card and similar activities

Lines 38 through 42 – These lines are used by corporations that **issue or process** credit cards and **not** by businesses that accept credit cards as payment for goods or services.

Line 38 – In the New York column, enter interest, fees, and penalties in the nature of interest from bank, credit, travel, and entertainment card receivables if in the records of the taxpayer, the mailing address of the card holder is in the state.

Line 39 – In the New York column, enter service charges and fees from such cards, if in the records of the taxpayer, the mailing address of the card holder is in the state.

Line 40 – In the New York column, enter receipts from merchant discounts when the merchant is located within the state. If the merchant has locations both within and outside of New York State, **only** receipts from merchant discounts attributable to sales made from locations within New York State are entered in the New York column. The location of the merchant is presumed to be the address of the merchant shown on the invoice submitted to the taxpayer by the merchant.

Line 41 – In the New York column, enter receipts from credit card authorization processing, and clearing and settlement processing, received by credit card processors if the location where the customer of the credit card processor accesses the credit card processor's network is located within the state.

Line 42 – For the New York column, multiply the total amount of all other receipts received by credit card processors not reported on lines 1 through 41, lines 43 through 51, or line 53 by the average of 8% and the percent of its New York access points. The *percent of New York access points* is the number of locations within the state from which the credit card processor's customers access the credit card processor's network, divided by the total number of locations in the United States where the credit card processor's customers access the credit card processor's network.

Section 210-A.5(d) – Receipts from certain services to investment companies

Line 43 – For the New York column, multiply the receipts received from an investment company arising from the sale of management, administration, or distribution services to such investment company by a fraction, the numerator of which is the sum of the monthly percentages determined for each month of the investment company's federal tax year that ends within the tax year of the taxpayer (but excluding any month during which the investment company had no outstanding shares), and the denominator of which is the number of those monthly percentages.

To determine the monthly percentage for each month, divide the number of shares in the investment company that are owned on the last day of the month by shareholders that are located in New York State by the total number of shares in the investment company outstanding on that date.

In the Everywhere column, enter 100% of the receipts received from an investment company arising from the sale of management, administration, or distribution services to the investment company.

For purposes of these receipts, the following apply:

- An individual, estate or trust is deemed located in the state if his, her, or its mailing address in the records of the investment company is in the state. A business entity is deemed located in the state if its commercial domicile is located in the state.
- *Investment company* means a regulated investment company, as defined in IRC section 851, and a partnership to which IRC section 7704(a) applies (by virtue of section 7704(c)(3)) and that meets the requirements of IRC section 851(b). This is applied to the tax year, for federal income tax purposes, of the business entity that is asserted to constitute an investment company that ends within the tax year of the taxpayer.
- *Receipts from an investment company* includes amounts received directly from an investment company as well as amounts received from the shareholders in the investment company, in their capacity as such.
- *Management services* means the rendering of investment advice to an investment company, making determinations as to when sales and purchases of securities are to be made on behalf of an investment company, or the selling or purchasing of securities constituting assets of an investment company, and related activities, but only where such activity or activities are performed pursuant to a contract with the investment company entered into according to the federal Investment Company Act of 1940, section 15(a), as amended.
- *Distribution services* means the services of advertising, servicing investor accounts (including redemptions), marketing shares or selling shares of an investment company; but in the case of advertising, servicing investor accounts (including redemptions) or marketing shares, **only** where such service is performed by a person who is (or was, in the case of a closed end company) also engaged in the service of selling such shares. In the case of an open-end company, the service of selling shares must be performed pursuant to a contract entered into pursuant to the federal Investment Company Act of 1940, section 15(b), as amended.
- *Administration services* includes clerical, accounting, bookkeeping, data processing, internal auditing, legal, and tax services performed for an investment company, but only if the provider of such service or services during the tax year in which such service or services are sold also sells management or distribution services (as defined above), to such investment company.

Section 210-A.6 – Receipts from railroad and trucking businesses

Line 44 – For the New York column, multiply receipts from the conduct of a railroad business or a trucking business (including surface railroad, whether or not operated by steam, subway railroad, elevated railroad, palace car or sleeping car business) by a fraction, the numerator of which is the revenue miles in such business within the state during the period covered by this return, and the denominator of which is the revenue miles in such business both within and outside the state during such period.

Section 210-A.6-a – Receipts from operation of vessels

Line 45 – For the New York column, multiply receipts from the operation of vessels by a fraction, the numerator of which is the aggregate number of working days of the vessels owned or leased by the taxpayer in territorial waters of the state during the period covered by this return, and the denominator of which is the aggregate number of working days of all vessels owned or leased by the taxpayer during such period.

Section 210-A.7 – Receipts from aviation services

Line 46 Air freight forwarding – In the New York column, enter the receipts from the activity of air freight forwarding acting as principal and like indirect air carrier receipts arising from that activity as follows:

- 100% of such receipts if both the pickup and delivery associated with those receipts are made in the state; and
- 50% of such receipts if either the pickup or delivery associated with those receipts is made in this state.

In the Everywhere column, enter the amount of receipts from all such activity.

Line 47 Other aviation services – For the New York and Everywhere columns, determine the portion of receipts from aviation services, other than services described in line 46 (but including the receipts of a qualified air freight forwarder, as described below) to enter by completing *Worksheet for Part 6, line 47*.

Aircraft arrivals and departures means the number of landings and takeoffs in the tax year, **plus** the number of air pickups and deliveries by such aircraft. Do **not** include arrivals and departures solely for maintenance, repair, or refueling (where no debarkation or embarkation of traffic occurs). Arrivals and departures of ferry and personnel training flights, or in the event of emergency situations, are also not included. Arrivals and departures of flights transporting officers and employees receiving air transportation are included (but see *Note:* below for exceptions) without regard to remuneration.

Note: The Commissioner of Taxation and Finance may exempt from the calculation arrivals and departures of all non-revenue flights including flights involving the transportation of officers and employees receiving air transportation to perform maintenance or repair services, or where such officers or employees are transported in conjunction with an emergency situation or the investigation of an air disaster (other than on a scheduled flight).

Revenue tons handled by the taxpayer at airports means the weight, in tons, of revenue passengers (at 200 pounds per passenger) and revenue cargo first received, either as originating or connecting traffic or finally discharged at an airport.

Originating revenue means revenue to the taxpayer from the transportation of revenue passengers and revenue property first received by the taxpayer as originating or connecting traffic at airports.

A corporation is a *qualified air freight forwarder* with respect to another corporation if:

- it owns or controls, either directly or indirectly, all of the capital stock of such other corporation; or if all of its capital stock is owned or controlled, either directly or indirectly, by such other corporation; or if all of the capital stock of both corporations is owned or controlled, either directly or indirectly, by the same interests;

- it is principally engaged in the business of air freight forwarding; and
- its air freight forwarding business is carried on principally with the airline or airlines operated by such other corporation.

Section 210-A.8 – Advertising: newspapers/periodicals, TV/radio, and other means

Line 48 – For the New York column, multiply receipts from sales of advertising in newspapers or periodicals by a fraction, the numerator of which is the number of newspapers and periodicals delivered to points within the state, and the denominator of which is the number of newspapers and periodicals delivered to points both within and outside the state.

Line 49 – For the New York column, multiply receipts from sales of advertising on television or radio by a fraction, the numerator of which is the number of viewers or listeners within the state, and the denominator of which is the number of viewers or listeners both within and outside the state.

Line 50 – For the New York column, multiply receipts from sales of advertising **not** reported on either line 48 or 49 that is furnished, provided, or delivered to or accessed by the viewer or listener through the use of wire, cable, fiber-optic, laser, microwave, radio wave, satellite or similar successor media, or any combination of these by a fraction, the numerator of which is the number of viewers or listeners within the state, and the denominator of which is the number of viewers or listeners both within and outside the state.

Section 210-A.9 – Receipts from the transportation or transmission of gas through pipes

Line 51 – For the New York column, multiply receipts from the transportation or transmission of gas through pipes by a fraction, the numerator of which is the taxpayer's transportation units within the state, and the denominator of which is the taxpayer's transportation units both within and outside the state. A *transportation unit* is the transportation of one cubic foot of gas over a distance of one mile.

Section 210-A.10 – Receipts from other services/activities not specified

Line 52 – In the New York column, enter receipts from services and other business receipts not reported on lines 1 through 51 or line 53, if the location of the customer is within the state. The determination of the amount of receipts included in the New York column is made according to the *Hierarchy of methods* below. The taxpayer must exercise due diligence under each method described before rejecting it and proceeding to the next method in the hierarchy, and must base its determination on information known to the taxpayer, or information that would be known to the taxpayer upon reasonable inquiry.

Hierarchy of methods

1) The benefit is received in this state.
2) Delivery destination.
3) The apportionment fraction for such receipts within the state determined according to §210-A.10 for the preceding tax year.
4) The apportionment fraction for the current tax year determined according to §210-A.10 for those receipts that can be sourced using the hierarchy of sourcing method in item 1 or 2.

Note: Item 3 does not apply to your first tax period that begins on or after January 1, 2015, for which you are subject to Article 9-A.

Line 53 – Section 210-A.11 – Discretionary adjustments

GILTI – Global intangible low-taxed income (GILTI) under IRC section 951A must be included on line 53; include 100% of such income, less the IRC section 250(a)(1)(B)(i) amount (if applicable), on line 53 in the *Everywhere* column. Such income is **not** included in the *New York* column. You must attach to your return a statement that indicates the amount of GILTI included in the *Everywhere* column.

Discretionary adjustments – If it appears that the apportionment fraction determined according to §210-A does not result in a proper reflection of the taxpayer's business income or capital within the state, the Commissioner of Taxation and Finance is authorized in his or her discretion to adjust it, or the taxpayer may request that the commissioner adjust it. This is done by:

- excluding one or more items in such determination,

Worksheet for Part 6, line 47

			A Within NYS	B Column A X 60% (.60)	C Everywhere	D NYS percentage *(round to three decimal places)*
1	**Aircraft arrivals and departures** during the period of this return	1				
2	Divide line 1, column B, by line 1, column C	2				
3	**Revenue tons handled at airports** during the period of this return	3				
4	Divide line 3, column B, by line 3, column C	4				
5	**Originating revenue** during the period of this return	5				
6	Divide line 5, column B, by line 5, column C				6	
7	Add all percentage amounts in column D, lines 2, 4, and 6; then divide by 3				7	
8	Enter 100% of receipts from other aviation services; also enter on line 47, in column B				8	
9	Multiply line 7 by line 8; also enter on line 47, in column A				9	

- including one or more other items in such determination, or
- any other similar or different method calculated to effect a fair and proper apportionment of the business income and capital reasonably attributed to the state.

The party seeking the adjustment bears the burden of proof to demonstrate that the apportionment fraction determined according to §210-A does not result in a proper reflection of the taxpayer's business income or capital within the state and that the proposed adjustment is appropriate.

Where you have received approval from the commissioner to make such adjustment, use line 53 to report it. Do **not** use line 53 to report an adjustment **unless** you have received the approval of the commissioner. If you have received the approval of the commissioner, you must attach a copy of such approval to your return. If you have not received the approval of the commissioner before filing this return, you must file using the statutory rules for apportionment. You may file an amended return after you have received approval.

Calculation of business apportionment factor

Line 55 – The business apportionment factor (BAF) should be shown as a decimal, not a percent. When computing the BAF, round to 6 decimal places. For example, 5,000/7,500 = 0.6666666 = 0.666667. **Note:** If all your receipts are New York State receipts, enter decimal as 1.000000.

Worksheet A – Gross proceeds factors and net gains for lines 10, 12, 21, and 24

Line 10	§210-A.5(a)(2)(A)(iii) – **Gross proceeds** from sales of loans secured by real property *(see instructions)*			
	10a	NYS		
	10b	EW		
	10c	NYS gross proceeds factor		
	§210-A.5(a)(2)(A)(iii) – **Net gains** from sales of loans secured by real property *(see instructions)*			
	10d	EW		
	10e	NYS		
Line 12	§210-A.5(a)(2)(A)(iv) – **Gross proceeds** from sales of loans not secured by real property *(see instructions)*			
	12a	NYS		
	12b	EW		
	12c	NYS gross proceeds factor		
	§210-A.5(a)(2)(A)(iv) – **Net gains** from sales of loans not secured by real property *(see instructions)*			
	12d	EW		
	12e	NYS		
Line 21	§210-A.5(a)(2)(C) – **Gross proceeds** from all other asset backed securities not reported on line 20 *(see instructions)*			
	21a	NYS		
	21b	EW		
	21c	NYS gross proceeds factor		
	§210-A.5(a)(2)(C) – **Net gains** from all other asset backed securities not reported on line 20 *(see instructions)*			
	21d	EW		
	21e	NYS		
Line 24	§210-A.5(a)(2)(D) – **Gross proceeds** from other sales of corporate bonds not reported on line 23 *(see instructions)*			
	24a	NYS		
	24b	EW		
	24c	NYS gross proceeds factor		
	§210-A.5(a)(2)(D) – **Net gains** from other sales of corporate bonds not reported on line 23 *(see instructions)*			
	24d	EW		
	24e	NYS		

Worksheet A – Gross proceeds factors and net gains – Form CT-3, Part 6, lines 10, 12, 21, and 24.

General information

This worksheet computes the amounts for Form CT-3, Part 6, lines 10, 12, 21, and 24. See the corresponding Form CT-3-I, Part 6 line instructions and also the specific instructions below. In the instructions below, ***all lines*** refers to lines 10, 12, 21, and 24, and specific rows (a, b, c, d, or e) are indicated to clarify which rows of these lines the specific instruction applies to.

Line instructions for Worksheet A

Use the instructions for Condition 1 or Condition 2 below, whichever applies; however:

- for **line 10**, use the specific instructions under Condition 1 below and skip Condition 2.
- for **lines 12, 21, and 24,** when the receipts for a certain line are **not** from QFIs (the QFI box pertaining to that specific line is **not** marked), use the specific instructions under Condition 1 below.

Condition 1 – If the fixed percentage method for QFIs is **not** in effect (use when Form CT-3, Part 6, line 8 box is **not** marked)

1.1. For all lines, rows a and b respectively, enter the total NYS and EW gross proceeds amount for that line's category of receipts; do not enter an amount less than zero. In determining such total gross amounts for each line, deduct any cost incurred to acquire the securities. When this results in a negative proceed amount for an individual security reported on a line, such negative amount is not limited to zero, and is netted against any positive proceed amounts for securities also reported on the **same** line.

1.2. For all lines, row c, divide the amount in row a by the amount in row b, and enter the result rounded to four decimal places; however, if either the amount in row a or the amount in row b is equal to zero, enter ***0***. This is the NYS gross proceeds factor for each respective line. It is used to compute the row e *(NYS)* amount for all lines.

1.3. For all lines, row d, enter the *EW* receipts for that line's category of receipts, but if the result is less than zero, enter ***0***.

1.4. For all lines, row e, multiply the factor in that line's row c (the NYS gross proceeds factor) by the amount in that line's row d, and enter the result. If the result is zero, enter ***0***.

Condition 2 – If the fixed percentage method for QFIs **is** in effect (use for a specific line when Form CT-3, Part 6, line 8 box is marked **and** the QFI box pertaining to **that** specific line is also marked)

2.1. Leave rows a through c blank, for such specific line(s).

2.2. For such specific lines, row d, enter the *EW* receipts for that line's category of receipts, but if the result is less than zero, enter ***0***.

2.3. In **row e**, for such specific line(s), multiply row d by 8% (.08) and enter the result; however, if the result is an amount equal to zero, enter ***0*** in row e.

Where are the amounts calculated on Worksheet A entered?

The amounts entered or calculated in rows a, b, and c, for all lines, are only used for Worksheet A calculations and do not get transferred to any other form or worksheet. The amounts entered or calculated in rows d and e need to be entered on Form CT-3, as follows:

Amount from Worksheet A	Amount is entered on
Line 10d (EW)	CT-3, Part 6, line 10 EW (column B)
Line 10e (NYS)	CT-3, Part 6, line 10 NYS (column A)
Line 12d (EW)	CT-3, Part 6, line 12 EW (column B)
Line 12e (NYS)	CT-3, Part 6, line 12 NYS (column A)
Line 21d (EW)	CT-3, Part 6, line 21 EW (column B)
Line 21e (NYS)	CT-3, Part 6, line 21 NYS (column A)
Line 24d (EW)	CT-3, Part 6, line 24 EW (column B)
Line 24e (NYS)	CT-3, Part 6, line 24 NYS (column A)

Worksheet B – Net gains and “other” income for line 30			
Part 1			
§210-A.5(a)(2)(H) – **Net gains** from all “other” financial instruments of one type *(see instructions)*			
30.1a	EW		
30.1b	NYS		
§210-A.5(a)(2)(H) – **Net gains** from all “other” financial instruments of a second type *(see instructions)*			
30.1a	EW		
30.1b	NYS		
§210-A.5(a)(2)(H) – **Net gains** from all “other” financial instruments of a third type *(see instructions)*			
30.1a	EW		
30.1b	NYS		
§210-A.5(a)(2)(H) – **Other income** from all “other” financial instruments of one type *(see instructions)*			
30.2a	EW		
30.2b	NYS		
§210-A.5(a)(2)(H) – **Other income** from all “other” financial instruments of a second type *(see instructions)*			
30.2a	EW		
30.2b	NYS		
§210-A.5(a)(2)(H) – **Other income** from all “other” financial instruments of a third type *(see instructions)*			
30.2a	EW		
30.2b	NYS		
Part 2 *(see instructions)*			
§210-A.5(a)(2)(G) – **Dividends** from stock that is business capital *(see instructions)*			
30.3a	EW		
30.3b	NYS		
§210-A.5(a)(2)(G) – **Net gains** from sales of stock that is business capital *(see instructions)*			
30.4a	EW		
30.4b	NYS		
§210-A.5(a)(2)(G) – **Net gains** from sales of partnership interests *(see instructions)*			
30.5a	EW		
30.5b	NYS		
Totals of Parts 1 and 2			
§210-A.5(a)(2)(H) and (G) – Net gains and “other” income from “other” financial instruments *(see instructions)*			
30a	Total EW		
30b	Total NYS		

Worksheet B – Net gains and “other” income – Form CT-3, Part 6, line 30

General information

This worksheet computes certain amounts for Form CT-3, Part 6, line 30. See the line 30 instructions in Form CT-3-I, Part 6 and also the specific instructions below. In the instructions below, ***all lines*** refers to all lines 30.1 and 30.2, and lines 30.3, 30.4, 30.5, and 30, and specific rows (a or b) are indicated to clarify which rows of these lines the specific instruction applies to. **Note:** Lines 30.1 through 30.5 are specific to this worksheet only. Since Form CT-3, Part 6, line 30 is comprised of different types of receipts that have to be netted separately, these receipts amounts are shown separately on lines 30.1 through 30.5.

Line instructions for Worksheet B

Part 1

Only clause (H) receipts are reported in Part 1.

Step 1 – Lines 30.1 and 30.2, row a – Regardless of whether or not the fixed percentage method is in effect for **lines 30.1 and 30.2,** for **row a** (EW), follow the applicable Form CT-3-I, Part 6, line 30 instructions to determine the amount of everywhere receipts, except that if the amount is less than zero, enter ***0***. When you have **net gains** from sales of more than one type of “other” financial instruments, use separate lines 30.1 to report sales of all “other” financial instruments of each such type. The same is true for lines 30.2 when reporting **other income** from “other” financial instruments.

If you have receipts reportable on lines 30.1 or 30.2 from **more** than three separate types of “other” financial instruments, use an additional line 30.1 or line 30.2 for **each** additional separate type of “other” financial instrument for which you have net gains (line 30.1) or other income (line 30.2); include the amounts from these additional lines in the same manner as you would for the three lines 30.1 and 30.2 provided on the worksheet, as you complete the steps below, as applicable.

Step 2 – Complete **lines 30.1 and 30.2, row b** (NYS)**,** using the instructions for Condition 1 or Condition 2, or both, as applicable.

Condition 1 – If the fixed percentage method for QFIs is **not** in effect (Form CT-3, Part 6, line 8 box is **not** marked); **or** if the receipts from line 30.1 or 30.2 do **not** represent receipts from QFIs (see instructions for Form CT-3, Part 6, line 8):

1.1. For such **lines 30.1 and 30.2, row b,** follow the applicable line 30 instructions to determine the amount of NYS receipts, except that if the amount is less than zero, enter ***0***. Use a separate line 30.1 for **net gains** from sales of all “other” financial instruments of each certain type, and use a separate line 30.2 for **other income** from all “other” financial instruments of each certain type.

Condition 2 – If the fixed percentage method for QFIs **is** in effect (Form CT-3, Part 6, line 8 box is marked) **and**:

2.1. the clause (H) QFI box is **not** marked on Form CT-3, Part 6, above line 29, then lines 30.1 and 30.2, row **b**, are completed in the same manner as if the fixed percentage method is **not** in effect (see above instructions).

2.2. the clause (H) QFI box **is** marked on Form CT-3, Part 6, above line 29, **and** the receipts to be reported on a line 30.1 or 30.2 represent receipts from QFIs (see instructions for CT-3, Part 6, line 8), then for such lines 30.1 or 30.2, **row b,** multiply row **a**, for each respective line, by 8% (.08) and enter the result; however, if the result is an amount equal to zero, enter ***0*** in row **b**. Use a separate line 30.1 for **net gains** from sales of all “other” financial instruments of **each** certain type, and use a separate line 30.2 for **other income** from all “other” financial instruments of **each** certain type.

Part 2

Only clause (G) receipts are reported in Part 2.

Part 2 of Worksheet B must **only** be completed **if** the fixed percentage method for QFIs **is** in effect. If Form CT-3, Part 6, line 8 box is **not** marked, leave lines 30.3, 30.4, and 30.5 blank and continue with *Totals of Parts 1 and 2* instructions below; otherwise continue with Step 1 below.

Step 1 – Lines 30.3 and 30.4, rows a (EW) and b (NYS) – If the fixed percentage method for QFIs **is** in effect and you have marked to market **any** stock that is business capital under

IRC section 475 or 1256 in the tax year, complete substep 1.1 below; otherwise leave lines 30.3 and 30.4 blank and continue with Step 2 below.

1.1. Enter on **line 30.3**, **row a,** 100% of dividends from stock that is business capital, provided that dividends that qualify as other exempt income should **not** be included. Enter on **line 30.4**, **row a**, 100% of net gains from sales of stock that is business capital; if the amount is less than zero, enter ***0***.

1.1.1. For **lines 30.3 and 30.4**, **row b**, multiply row **a**, for each respective line, by 8% (.08) and enter the result; however, if the result is an amount equal to zero, enter ***0*** in row b.

Step 2 – Line 30.5, rows a (EW) and b (NYS) – If the fixed percentage method for QFIs **is** in effect, and you have marked to market **any** partnership interest in a widely held or publicly traded partnership under IRC section 475 or 1256 in the tax year, complete substep 2.1, below; otherwise leave line 30.5 blank and continue with *Totals of Parts 1 and 2* below.

2.1. Enter on **line 30.5**, **row a**, 100% of net gains from sales of partnership interests in widely held or publicly traded partnerships; if the amount is less than zero, enter ***0***.

2.1.1. In **line 30.5**, **row b**, multiply row **a**, for each respective line, by 8% (.08) and enter the result; however, if the result is an amount equal to zero, enter ***0*** in row b.

Totals of Parts 1 and 2

Step 1 – Line 30, rows a and b

2.1. For line 30, row **a**, enter the sum of the amounts in row a, lines 30.1 through 30.5.

2.2. For line 30, row **b**, enter the sum of the amounts in row b, lines 30.1 through 30.5.

Where are the amounts calculated on Worksheet B entered?

The amounts entered or calculated on lines 30.1 through 30.5 are used to compute the line 30 totals and do not get transferred to any other form or worksheet; the line 30 totals need to be entered on Form CT-3 as follows:

Amount from Worksheet B	Amount is entered on
Line 30b (Total NYS)	Form CT-3, Part 6, line 30 NYS (column A)
Line 30a (Total EW)	Form CT-3, Part 6, line 30 EW (column B)

Worksheet C – Marked to market (MTM) net gains for line 28

Part 1 – MTM net gains under §§210-A.5(a)(1) and 210-A.5(a)(2)(J) *(see instructions)*

Line 10	MTM net gains from loans secured by real property				
	10a	EW			
	10b	NYS		J(ii)	J(iii)
Line 12	MTM net gains from loans **not** secured by real property				
	12a	EW			
	12b	NYS	8%	J(ii)	J(iii)
Line 14					
Line 16	MTM net gains from federal, NYS, and NYS political subdivisions debt				
	16a	EW			
	16b	NYS	8%	J(ii)	J(iii)
Line 18	MTM net gains from other states and their political subdivisions debt				
	18a	EW			
	18b	NYS	8%	J(ii)	J(iii)
Line 20	MTM net gains from government agency debt or asset-backed securities sold through an exchange				
	20a	EW			
	20b	NYS	8%	J(ii)	J(iii)
Line 21	MTM net gains from all other asset-backed securities				
	21a	EW			
	21b	NYS	8%	J(ii)	J(iii)
Line 23	MTM net gains from corporate bonds sold through broker/dealer or licensed exchange				
	23a	EW			
	23b	NYS	8%	J(ii)	J(iii)
Line 24	MTM net gains from other corporate bonds				
	24a	EW			
	24b	NYS	8%	J(ii)	J(iii)
Line 27	MTM net gains from physical commodities				
	27a	EW			
	27b	NYS	8%	J(ii)	J(iii)
Line 30	MTM net gains from all "other" financial instruments of one type				
	30a	EW			
	30b	NYS	8%	J(ii)	J(iii)
Line 30	MTM net gains from all "other" financial instruments of a second type				
	30a	EW			
	30b	NYS	8%	J(ii)	J(iii)
Line 30	MTM net gains from all "other" financial instruments of a third type				
	30a	EW			
	30b	NYS	8%	J(ii)	J(iii)
Line 30-Stk	MTM net gains from stock that is business capital				
	30a Stk	EW			
	30b Stk	NYS	8%		
Line 30-Pship	MTM net gains from partnership interests				
	30a Pship	EW			
	30b Pship	NYS	8%		

Worksheet C continued on next page

Worksheet C *(continued)*			
J(ii) Totals *(see instructions)*			
J(ii) Total EW			
J(ii) Total NYS			
Line 28	Total MTM net gains under §210-A.5(a)(2)(J)		
	28a	EW	
	28b	NYS	
Part 2 – NYS aggregate MTM factor, based on net gains from actual sales, plus J(ii) MTM net gains *(see instr.)*			
A	NYS		
B	EW		
C	NYS aggregate MTM factor		

Worksheet C – Marked to market (MTM) net gains – Form CT-3, Part 6, line 28

General information

Note: You must first complete Worksheets A and B, and lines 9 through 27, 29, and 30 of Form CT-3, Part 6; then, follow the steps below, in order, to complete Worksheet C.

This worksheet computes the amounts for Form CT-3, Part 6, line 28. See the Form CT-3, Part 6, line 28 instructions and also the specific instructions below. For purposes of Worksheet C, §210-A.5(a)(2)(J)(ii) is referred to as J(ii), and §210-A.5(a)(2)(J)(iii) as J(iii). J(ii) sources MTM net gains based on the sourcing of net gains from **actual** sales of financial instruments of the **same** type. J(iii) is used when there are **no** actual sales of a type, or the actual sales of a type resulted in a net **loss** for that type.

Part 1 of the worksheet computes MTM net gains for those financial instruments that are **described on** Form CT-3, Part 6, lines 10, 12, 16, 18, 20, 21, 23, 24, 27, and 30, **and that have been MTM**. Row b is broken out into subcolumns for lines 10, 12, 16, 18, 20, 21, 23, 24, 27, and all lines 30. For each such line, only **one** of the subcolumns will apply for that line, depending on the sourcing rule that applies for that line; the subcolumns that do **not** apply should be left **blank**.

Part 2 of the worksheet is generally only applicable if the 8% fixed percentage method for QFIs is **not** in effect. Provided however, that if the fixed percentage method for QFIs **is** in effect, and you have MTM net gains reportable on line 10 of the worksheet, you **may** have to complete Part 2 of the worksheet, as instructed further below. Part 2 computes the NYS aggregate MTM factor. This factor is used to determine NYS MTM net gains under J(iii) in Part 1, as per the specific line instructions under *Customer-based sourcing* below.

Line instructions for Worksheet C

If the fixed percentage method for QFIs **is** in effect (Form CT-3, Part 6, line 8 box **is** marked), you **must** complete the steps under the *8% fixed percentage method elected* instructions below to complete Worksheet C. Do **not** complete the steps under the *Customer-based sourcing* instructions, **unless** specifically instructed to do so for a certain line.

If the fixed percentage method for QFIs is **not** in effect (Form CT-3, Part 6, line 8 box is **not** marked), you **must** complete the steps under the *Customer-based sourcing* instructions below to complete Worksheet C. Do **not** complete the steps under the *8% fixed percentage method elected* instructions.

Regardless of whether or not the fixed percentage method for QFIs is in effect, use a **separate** line 30 for MTM net gains from all "other" financial instruments of one **same** certain type. If you need more than three lines 30, use an additional line 30 for each separate type of "other" financial instrument for which you have MTM net gains; include the amounts from these additional lines in the same manner as you would for the three lines 30 provided on the worksheet, as you complete the steps below, as applicable.

8% fixed percentage method elected

When the 8% fixed percentage method for QFIs **is** in effect, follow the instructions for Condition 1 or Condition 2 below, whichever applies. When Condition 1 applies, only Part 1 of Worksheet C needs to be completed, and the **Part 1, J(ii) Totals** section should be left blank. When Condition 2 applies, you may need to complete Part 2 of the worksheet and the **Part 1, J(ii) Totals** section.

Condition 1 – If you do **not** have MTM net gains reportable on line 10 of this worksheet, complete **steps 1** and **2** below (under these *8% fixed percentage method elected* instructions) and do **not** complete any of the steps under the *Customer-based sourcing* instructions.

Condition 2 – If you have MTM net gains reportable on line 10 of this worksheet, you must determine the amounts to enter on line 10 by completing the applicable steps under *Customer-based sourcing* **for line 10 only**. When Condition 2 applies:

- First, **for line 10 only**, complete **steps 1.1** through **4.1.2** under *Customer-based sourcing*, (do **not** complete step 5).
- Next, complete **all of steps 1 and 2 below** (under these *8% fixed percentage method elected* instructions) for all remaining lines (including lines 30-STK and 30-Pship, if applicable).

Step 1 – Part 1, rows a and b

1.1. In **row a** (EW), lines 12, 16, 18, 20, 21, 23, 24, 27, all lines 30, 30-Stk, and 30-Pship, enter **100%** of your MTM net gains for those financial instruments **described** on each such line (and described further in the lines corresponding line instructions in Form CT-3, Part 6), except that if the net amount is less than or equal to zero, enter ***0***.

Note: Use **line 30** for MTM net gains from "other" financial instruments (§210-A.5(a)(2)(H)). If in the tax year you have MTM **any** stock under IRC section 475 or 1256, use **line 30-Stk** for MTM net gains from sales of stock that is business capital (§210-A.5(a)(2)(G)); otherwise leave line 30-Stk blank. If in the tax year you have MTM **any** partnership interest in a widely held or publicly traded partnership under IRC section 475 or 1256, use **line 30-Pship** for MTM net gains from sales of partnership interests in widely held or publicly traded partnerships (§210-A.5(a)(2)(G)); otherwise, leave line 30-Pship blank.

1.2. In **row b** (NYS), **subcolumn 8%**, lines 12, 16, 18, 20, 21, 23, 24, 27, all lines 30, 30-Stk, and 30-Pship, multiply row **a**, for each respective line, by 8% (.08) and enter the result; if the result is equal to zero, enter ***0***. You must leave **row b**, **subcolumn J(ii)** and **row b**, **subcolumn J(iii)** blank for all such lines as they are **not** applicable when the 8% fixed percentage method sourcing **is** in effect for QFIs.

Step 2 – Part 1, line 28, rows a and b

2.1. For worksheet line 28, **row a**, enter the **sum** of the amounts from row a for lines 10, 12, 16, 18, 20, 21, 23, 24, 27, all lines 30, 30-Stk, and 30-Pship.

2.2. For worksheet line 28, **row b**, enter the **sum** of all amounts from all applicable subcolumns in row b for lines 10, 12, 16, 18, 20, 21, 23, 24, 27, all lines 30, 30-Stk, and 30-Pship.

Customer-based sourcing

Parts 1 and 2 of Worksheet C need to be completed when the 8% fixed percentage method for QFIs is **not** in effect. To complete Worksheet C in this instance, follow Steps 1 through 5 below, in that order.

Note: Lines 30-Stk and 30-Pship should **not** be completed as these lines are not applicable when customer-based sourcing is used (§210-A.5(a)(2)(G)).

If the fixed percentage method for QFIs **is** in effect **and** you have MTM net gains reportable on worksheet line 10, then you must use customer-based sourcing for the MTM net gains **for line 10 only**. In this instance follow the instructions for **Condition 2** under the *8% fixed percentage method elected* instructions, above.

Step 1 – Part 1, row a, and row b, subcolumn J(ii)

1.1. In **row a**, lines 10, 12, 16, 18, 20, 21, 23, 24, 27, and all lines 30, enter **100%** of your **MTM** net gains for those financial instruments **described** on each such line (and described further in the corresponding line instructions in Form CT-3, Part 6), except that if the net amount is less than or equal to zero, enter ***0***.

1.2. **Row b, subcolumn J(ii)** - Subcolumn J(ii), lines 10, 12, 16, 18, 20, 21, 23, 24, 27, and all lines 30, is used to compute **NYS MTM** net gains, for those financial instruments **described** on each such line, under the sourcing rules of J(ii). Follow the steps below to compute the subcolumn J(ii) amounts. Complete substeps 1.2.1 through 1.2.4 for each line (10, 12, 16, 18, 20, 21, 23, 24, 27, and all lines 30):

1.2.1. If the step 1.1 amount is equal to zero, for any line, enter ***0*** in row b, subcolumns J(ii) and J(iii), for **that** line.

1.2.2. For **each** line for which row **a** is **not** equal to zero, determine if you have **actual** everywhere sales that generated a **net gain** during the tax year, for **that** type of financial instrument. You had **actual** everywhere sales that generated a **net gain** during the tax year for a specific type of financial instrument if there is an amount greater than zero reported on **that** type of financial instrument's corresponding line of Form CT-3, Part 6, column **B** (EW). However, for line 30, you had **actual** everywhere sales that generated a **net gain** during the tax year for a type of financial instrument described in §210-A.5(a)(2)(H) if there is an amount greater than zero reported on Worksheet **B**, on line 30.1 (used to report the **same** specific type of financial instruments), row **a**.

1.2.3. For **each** line for which Worksheet C, row **a**, is **not** equal to zero, if you **did** have **actual** everywhere sales that generated a **net gain** for the **same** specific type of financial instrument described on such line (as determined in substep 1.2.2 above), enter in row b, subcolumn J(ii), for such line, the **product** of: the amount in row **a** for such line, and a fraction, the numerator and the denominator of which are determined as follows:

- For all such lines (except line 30): the **numerator** of the fraction for such line (except line 30) is the amount from Form CT-3, Part 6, column A (NYS) of the corresponding line; and the **denominator** of the fraction for such line (except line 30) is the amount from Form CT-3, Part 6, column B (EW) of the corresponding line. However, if the numerator so determined is equal to zero, enter ***0***. For line 30, see the specific line 30 instruction below.
- **Line 30 –** The **numerator** of the fraction for any **specific** line 30 is the amount from Worksheet B, line 30.1 (used to report the **same** specific type of financial instrument), row b (NYS). The **denominator** of the fraction for any **specific** line 30 is the amount from Worksheet B, line 30.1 (used to report the **same** specific type of financial instrument), row a (EW). However, if the numerator so determined is zero, enter ***0***.

1.2.4. For **each** line for which row **a** is **not** equal to zero, if you did **not** have **actual** everywhere sales that generated a **net gain** for the **same** specific type of financial instrument described in **that** line (as determined in substep 1.2.2 above), leave row b, subcolumn J(ii) **blank** for **that** line.

Step 2 – Part 1, J(ii) Total EW, and J(ii) Total NYS

When you have completed Part 1, row a, and row b subcolumn J(ii), for lines 10, 12, 16, 18, 20, 21, 23, 24, 27, and all lines 30, you must next complete the **J(ii) Total** lines for EW and NYS, which are below line 30-Pship. The J(ii) totals are needed to calculate the NYS aggregate MTM factor in Part 2 of this worksheet, when applicable.

2.1. Enter in the **J(ii) Total EW** line, the **sum** of the row **a** amounts for all lines that have an amount entered in row **b**, subcolumn J(ii) even if the amount entered is zero.

2.2. Enter in the **J(ii) Total NYS** line, the **sum** of the row b, subcolumn J(ii) amounts for all lines that have an amount entered in row b, subcolumn J(ii).

Step 3 – Part 2

Part 2 of the worksheet computes your NYS aggregate MTM factor which you will need in order to complete Part 1, row b, subcolumn J(iii), when applicable.

Never include any amounts sourced under the 8% fixed percentage method election when determining the amounts to include in the sums described in these step 3 instructions.

3.1. **Line A** – Enter the **sum** of: the **J(ii) Total NYS** amount from Part 1 of this worksheet plus the amounts from Form CT-3, Part 6, column A (NYS), lines 9 through 27, 29, and 30.

3.2. **Line B** – Enter the **sum** of: the **J(ii) Total EW** amount from Part 1 of this worksheet plus the amounts from Form CT-3, Part 6, column B (EW), lines 9 through 27, 29, and 30.

3.3. **Line C** – Divide the line A amount by the line B amount and enter the result, rounded to four decimal places.

Step 4 – Part 1, row b, subcolumn J(iii)

4.1. **Row b, subcolumn J(iii)** - Subcolumn J(iii), lines 10, 12, 16, 18, 20, 21, 23, 24, 27, and all lines 30, is used to compute **NYS MTM** net gains, for those financial instruments **described** on each such line, under the sourcing rules of J(iii). Follow the steps below to compute the subcolumn J(iii) amounts. Complete substeps 4.1.1 and 4.1.2 for each line (10, 12, 16, 18, 20, 21, 23, 24, 27, and all lines 30):

4.1.1. For **each** line, if there is an amount greater than or equal to zero entered in row b, subcolumn J(ii), then leave row b, subcolumn J(iii) **blank** for **that** line. **Note**: When you had **actual** everywhere sales that generated a **net gain** for **that type** of financial instrument during the tax year, subcolumn J(ii) should have an amount entered, and subcolumn J(iii) should be left **blank**.

4.1.2. For **each** line, if you did **not** have **actual** everywhere sales that generated a **net gain** for **the specific type** of financial instrument **described** on **that** line (**row b, subcolumn J(ii)** was left blank per substep 1.2.4), enter in row b, subcolumn J(iii), for **that** line, the **product** of: the amount in row a (EW) for **that** line, and the factor in Part 2, line C.

Step 5 – Part 1, line 28, rows a and b

5.1. For line 28, **row a** (EW), enter the **sum** of the amounts from row **a** (EW) for lines 10, 12, 16, 18, 20, 21, 23, 24, 27, and all lines 30.

5.2. For line 28, **row b** (NYS), enter the **sum** of all amounts from row **b** (NYS), subcolumns J(ii) **and** J(iii) for lines 10, 12, 16, 18, 20, 21, 23, 24, 27, and all lines 30.

Where are the amounts calculated on Worksheet C entered?

The amounts entered or calculated on Part 1, lines 10, 12, 16, 18, 20, 21, 23, 24, 27, 30, 30-Stk, and 30-Pship and Part 2, lines A, B, and C are only used to compute the **line 28** MTM totals in Part 1 and do not get transferred to any other form or worksheet; the **line 28 totals** from Part 1 need to be entered on Form CT-3 as follows:

Amount from Worksheet C	Amount is entered on
Line 28b (NYS)	Form CT-3, Part 6, line 28 NYS (column A)
Line 28a (EW)	Form CT-3, Part 6, line 28 EW (column B)

Part 7 – Summary of tax credits claimed

Enter in the appropriate box the amount of each tax credit that is being used to reduce the Part 2, line 2 tax due amount. Attach the corresponding properly completed credit form to the return.

Line 2 – Enter the total amount of any tax credits that you are claiming against your current year's franchise tax here and on Part 2, line 3. For other credits not specified, enter the amount of credits being claimed in the *Other credits* box and include this amount in the total. Generally, the *Other credits* box will be used only when a credit claim form for a newly-enacted tax credit was not developed in time to appear on Form CT-3. Do not include any amount of tax credit requested as a refund on Part 2, line 29, or requested as a tax credit to be credited as an overpayment to next year's return on Part 2, line 30. If you are required to recapture a tax credit that was allowed in a previous reporting period and the result is a negative credit amount on your credit claim form, enter this negative amount using a minus sign (-) in the applicable box.

Line 3 – Enter the amount of those tax credits being claimed on Part 2, line 3, against your current year's franchise tax that are refund **eligible**. Do **not** include any amount of credits actually requested as a refund on Part 2, line 29, or requested as an overpayment credited to next year's tax on Part 2, line 30. Refer to the individual credit forms and Form CT-600-I for refund eligibility.

STATE OF CONNECTICUT
DEPARTMENT OF REVENUE SERVICES
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SPECIAL NOTICE

Treatment of Global Intangible Low-Taxed Income for Connecticut Corporation Business Tax Purposes

Effective Dates: This guidance applies to income years commencing on or after January 1, 2018.

Purpose: As a result of changes made by the federal Tax Cuts and Jobs Act, certain US taxpayers are subject to tax on their global intangible low-taxed income (GILTI) for income years beginning on or after January 1, 2018. This publication explains how GILTI will be treated for Connecticut Corporation Business Tax purposes.

Federal Treatment: For federal purposes, GILTI is included in a corporation's gross income and is generally treated in a manner similar to Subpart F income. I.R.C. §§ 951A(a) and 951A(f).[1] A corporation with GILTI is allowed to claim a deduction against a portion of such income on its federal return. I.R.C. § 250. The amount of a corporation's GILTI and corresponding deduction are determined under federal law. In addition, a corporation may exclude from its federal gross income any income that has previously been taxed as GILTI. I.R.C. § 959.

Connecticut Treatment

Dividends Received Deduction for GILTI. Connecticut treats Subpart F income as a dividend. Because GILTI is treated in a manner similar to Subpart F income for federal tax purposes, Connecticut will treat such income as dividend income.

Connecticut provides a dividend received deduction (DRD) that fully offsets the dividend income that a corporation receives from foreign corporations to the extent such income is not otherwise deducted. Accordingly, even though a corporation must include its GILTI on its Connecticut return, it is then entitled to claim a deduction to fully offset such income.

After a corporation claims the DRD, a corporation must add back its expenses that relate to its dividend income on its Connecticut return. Pursuant to Conn. Gen. Stat. § 12-217(a)(2), which was recently amended by 2018 Conn. Pub. Acts 49, § 13, this addback is equal to 5% of the dividend income. The addback should equal 5% of the gross amount of GILTI prior to any corresponding federal deduction.

The combined effect of the 100% DRD and the 5% addback is a net 95% DRD for GILTI.

Previously Taxed GILTI Excluded. Connecticut conforms to the federal definition of "gross income" unless there is a modification specifically provided by Connecticut law. No Connecticut modification exists with respect to the previously taxed GILTI exclusion. Therefore, because income previously taxed as GILTI is excluded from gross income for federal purposes, it is similarly excluded for Connecticut Corporation Business Tax purposes.

GILTI Excluded from Apportionment Factor Calculation. For Corporation Business Tax purposes, Connecticut does not include dividend income in the apportionment factor calculation. Accordingly, GILTI must be excluded from the apportionment factor calculation.

How to Report GILTI on a Connecticut Corporation Business Tax Return. As of the date of this publication, the Internal Revenue Service has not issued forms that show how GILTI, the corresponding deduction, and the previously taxed income exclusion will be reported for federal tax purposes. After the Internal Revenue Service issues such forms, the Department of Revenue Services (DRS) will issue specific guidance on how such

[1] All references to the Internal Revenue Code are to the Internal Revenue Code as amended by the Tax Cuts and Jobs Act.

items will need to be reported on a Connecticut Corporation Business Tax return.

Effect on Other Documents: None.

Effect of This Document: A Special Notice announces a new policy or practice in response to changes in state or federal laws or regulations or to judicial decisions. A Special Notice indicates an informal interpretation of Connecticut tax law by DRS.

For Further Information: Call DRS during business hours, Monday through Friday:

- **1-800-382-9463** (Connecticut calls outside the Greater Hartford calling area only); **or**
- **860-297-5962** (from anywhere).

TTY, TDD, and Text Telephone users only may transmit inquiries anytime by calling 860-297-4911.

Forms and Publications: Visit the DRS website at **www.ct.gov/DRS** to download and print Connecticut tax forms and publications.

Paperless Filing/Payment Methods (fast, easy, free, and confidential): Business and individual taxpayers can use the **Taxpayer Service Center *(TSC)*** at **www.ct.gov/TSC** to file a variety of tax returns, update account information, and make payments online.

File Electronically: You can choose first-time filer information and filing assistance or log directly into the ***TSC*** to file returns and pay taxes.

Pay Electronically: You can pay taxes for tax returns that cannot be filed through the ***TSC***. Log in and select the *Make Payment Only* option. Choose a payment date up to the due date of the tax and mail a paper return to complete the filing process.

DRS E-alerts Email Service: Get connected to the latest DRS news including new legislation, policies, press releases, and more. Visit the DRS website at **www.ct.gov/DRS** and select *Sign up for e-alerts* under *How Do I?* on the gold navigation bar.

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FLORIDA DEPARTMENT OF REVENUE

STATUS REPORT

Examination of the Impact of the Tax Cuts and Jobs Act of 2017

August 3, 2018

Status Report on the
Examination of the Impact of the Tax Cuts and Jobs Act of 2017
August 3, 2018

I. Overview

During the 2018 legislative session, the Florida Legislature recognized that federal tax law changes made by the Tax Cuts and Jobs Act of 2017 (Public Law 115-97) would have significant effects on Florida corporate income tax and taxpayers when it is fully implemented. To better understand these effects, the Department of Revenue was directed to examine how the Tax Cuts and Jobs Act of 2017 will affect the state corporate income tax as a result of the state's adoption of the 2018 Internal Revenue Code. Chapter 2018-119, Laws of Florida, provides guidance on how the examination is to be conducted and requires a final report to be submitted to the Governor, President of the Senate, Speaker of the House of Representatives, and the chairs of the appropriate legislative committees by February 1, 2019. The chapter law also requires the Department to provide status reports on August 3, 2018, and November 16, 2018, to the chairs of the appropriate legislative committees. The status reports are to include a brief description of the Department's activities as well as any relevant guidance issued by the Internal Revenue Service (IRS). The information provided below details the Department's activities thus far in examining the Tax Cuts and Jobs Act of 2017 and describes the processes that the Department has established to solicit and receive public input.

II. Process for Receiving Public Input

In accordance with the law, the Department has established a process to receive input from the public about the Tax Cuts and Jobs Act of 2017. The Department created a dedicated webpage that went live in April, floridarevenue.com/citreview. The webpage provides the public with multiple methods by which to provide comments, including a dedicated email address. The webpage also provides links to the law requiring the examination, Chapter 2018-119, Laws of Florida; the Tax Cuts and Jobs Act of 2017, Public Law No. 115-97; Florida's corporate income tax code, Chapter 220, Florida Statutes; and information from the IRS. The Department sent notices seeking public comment to the Florida Institute of Certified Public Accountants, the Tax Section of the Florida Bar, as well as through the Department's general tax information electronic notification lists. A notice was also published in the Florida Administrative Register on May 2, 2018. Various postings on the Department's website alert taxpayers to the project. The Department posts all public comments received on the webpage weekly. As of July 31, 2018, the Department has received five public comments.

III. Process for Developing the Final Report

The Department has established a 14-member team, from various sections within the agency, to work on this project. The team includes attorneys from the General Counsel's Office, staff and managers from the General Tax Administration Program, Office of Technical Assistance and Dispute Resolution, Office of Tax Research, Office of Legislative and Cabinet Services, and the Executive Office. Currently, the Department has identified 13 topics that have the potential to have significant impacts on Florida. The topics were identified based on information that was obtained during and after the legislative session. The Department's Office of Tax Research used the federal Joint Committee on Taxation's spreadsheet, which identified the estimated budget effects of the Tax Cuts and Jobs Act of 2017, as a starting point. The Department also reviewed a report published by the Council on State Taxation and the final House of Representatives legislative bill analysis on House Bill 7093 to determine possible topics with substantial impact to Florida. One topic was also included after an inquiry from a member of the public. The Department is also monitoring and reviewing IRS guidance and other information as it is released. As IRS guidance is issued and additional information is received about potential impacts from the public or other sources, the list of topics may change.

IV. Topics Under Review and Relevant IRS Guidance

Listed below are the 13 topics that the Department has identified as having the potential to have significant impacts on Florida. For each topic, relevant IRS guidance that has been issued as of July 31, 2018, has been identified. The Department is currently analyzing these topics and guidance to determine the potential effects of the Tax Cuts and Jobs Act of 2017 on the state corporate income tax structure and state revenues. The Department is also reviewing options for changes the Legislature could make to state tax law, which may be needed to integrate state law with federal law.

A. Treatment of Deferred Foreign Income Upon Transition to a Participation Exemption System of Taxation

The Tax Cuts and Jobs Act of 2017 amends Internal Revenue Code (IRC) section 965 to impose a one-time corporate income tax transition tax on deferred (untaxed) foreign income as if such income had been repatriated to the United States in the business's last tax year beginning before January 1, 2018.

Public Law 115-97 References: Section 14103

Internal Revenue Code References: Section 965

IRS Guidance:

- Publication 5292, How to Calculate Section 965 Amounts and Elections Available to Taxpayers, https://www.irs.gov/pub/irs-pdf/p5292.pdf
- Questions and Answers about Reporting Related to Section 965 on 2017 Tax Returns, https://www.irs.gov/newsroom/questions-and-answers-about-reporting-related-to-section-965-on-2017-tax-returns
- Notice 2018-07, Guidance under Section 965, https://www.irs.gov/pub/irs-drop/n-18-07.pdf
- Notice 2018-13, Additional Guidance Under Section 965 and Guidance Under Sections 863 and 6038 in Connection with the Repeal of Section 958(b)(4), https://www.irs.gov/pub/irs-drop/n-18-13.pdf
- Notice 2018-26, Additional Guidance Under Section 965, Guidance Under Sections 62, 962, and 6081 in Connection with Section 965; and Penalty Relief Under Section 6654 and 6655 in Connection with Section 965 and Repeal of Section 958(b)(4), https://www.irs.gov/pub/irs-drop/n-18-26.pdf
- Revenue Procedure 2018-17, https://www.irs.gov/pub/irs-drop/rp-18-17.pdf

Florida Tax Information Publication: 18C01-01

B. Repeal of Alternative Minimum Tax

The Tax Cuts and Jobs Act of 2017 repeals the federal corporate alternative minimum tax (AMT) for taxable years beginning after December 31, 2017. The Act also accelerates the use of previously earned federal AMT credits by not only allowing those credits to offset the regular federal corporate income tax liability, but also by allowing the credit to be refunded.

Public Law 115-97 References: Sections 12001, 12002

Internal Revenue Code References: Sections 53, 55, 56

IRS Guidance:

- Effect of Sequestration on the Alternative Minimum Tax Credit for Corporations, March 28, 2018, https://www.irs.gov/businesses/effect-of-sequestration-on-the-alternative-minimum-tax-credit-for-corporations

C. Increases in the Section 179 Expense Amount

Taxpayers may elect to immediately expense certain business assets rather than depreciating them over time. The Tax Cuts and Jobs Act of 2017 amends IRC section 179, to increase the deduction from $500,000 to $1 million and the deduction phase-out from $2 million to $2.5 million.

Public Law 115-97 References: Sections 11002, 13101

Internal Revenue Code References: Section 179

IRS Guidance:

- Fact Sheet FS-2018-9, April 2018, https://www.irs.gov/newsroom/new-rules-and-limitations-for-depreciation-and-expensing-under-the-tax-cuts-and-jobs-act

- IRS Tax Reform Tax Tip 2018-68, May 3, 2018, https://www.irs.gov/newsroom/tax-reform-changes-to-depreciation-affect-businesses-now

D. Changes to the Net Operating Loss Deduction

The Tax Cuts and Jobs Act of 2017 amends IRC section 172 to eliminate the two-year net operating loss carryback for most taxpayers, extend the carryforward period indefinitely, and limit the amount of net operating loss deduction that may be claimed in each year to 80% of income.

Public Law 115-97 References: Section 13302

Internal Revenue Code References: Section 172

IRS Guidance: None available as of July 31, 2018

E. Bonus Depreciation

The Tax Cuts and Jobs Act of 2017 extends and modifies the additional first-year bonus depreciation deduction through 2026 for most property acquired and placed in service after September 27, 2017. The 50% allowance is increased to 100% for property placed in service before January 1, 2023. After December 31, 2022, the 100% allowance is reduced by 20% per calendar year and eliminated in 2027.

Public Law 115-97 References: Section 13201

Internal Revenue Code References: Section 168(k)

IRS Guidance:

- Fact Sheet FS-2018-9, April 2018, https://www.irs.gov/newsroom/new-rules-and-limitations-for-depreciation-and-expensing-under-the-tax-cuts-and-jobs-act
- IRS Tax Reform Tax Tip 2018-68, May 3, 2018, https://www.irs.gov/newsroom/tax-reform-changes-to-depreciation-affect-businesses-now
- Publication 946 (*How To Depreciate Property*), February 28, 2018, https://www.irs.gov/pub/irs-pdf/p946.pdf

F. Repeal of the Deduction for Domestic Production Activities

Internal Revenue Code section 199 provided a reduced tax rate for income from certain domestic production activities. The Tax Cuts and Jobs Act of 2017 repeals the domestic production activities deduction for taxable years beginning after December 31, 2017.

Public Law 115-97 References: Section 13305

Internal Revenue Code References: Section 199

IRS Guidance: None available as of July 31, 2018

G. BEAT – Base Erosion Anti-Abuse Tax

The Tax Cuts and Jobs Act of 2017 creates a new base erosion and anti-abuse tax (BEAT) in IRC section 59A, which is a new minimum tax on large corporations with significant base erosion payments to related foreign parties. The BEAT tax is in addition to the regular federal income tax and is calculated on payments made to related entities.

Public Law 115-97 References: Section 14401

Internal Revenue Code References: Section 59A

IRS Guidance: None available as of July 31, 2018

H. Amortization of Research and Experimental Expenditures

The Tax Cuts and Jobs Act of 2017 eliminates the current deduction for IRC section 174 expenditures, and requires all domestic research expenditures to be amortized over a minimum of five years and for all foreign research expenditures to be amortized over a minimum of fifteen years. The Research and Development Credit is not affected by the Act.

Public Law 115-97 References: Section 13206

Internal Revenue Code References: Section 174

IRS Guidance: None available as of July 31, 2018

I. Deduction for Dividends Received from Foreign Corporations

The Tax Cuts and Jobs Act of 2017 provides in IRC section 245A that a U.S. corporation that is a 10% or more owner of certain foreign corporations may claim a 100% dividends-received deduction for the foreign source portion of dividends received from that foreign corporation. The foreign dividends-received deduction is limited to domestic corporations (not REITs or RICs) and may not be included in the computation of the foreign tax credit.

Public Law 115-97 References: Section 14101

Internal Revenue Code References: Section 245A

IRS Guidance: None available as of July 31, 2018

J. Global Intangible Low-Taxed Income

The Tax Cuts and Jobs Act of 2017 creates IRC section 951A, which imposes a tax on the global intangible low-taxed income (GILTI) of certain U.S. taxpayers and their affiliates for tax years beginning on or after January 1, 2018. GILTI is included in a company's gross income and generally treated in a manner similar to Subpart F income, with certain deductions and exemptions.

Public Law 115-97 References: Section 14201

Internal Revenue Code References: Section 951A

IRS Guidance: None available as of July 31, 2018

K. Deduction for Foreign Derived Intangible Income

The Tax Cuts and Jobs Act of 2017 creates a new provision in IRC section 250 that gives domestic corporations reduced rates of U.S. tax on their foreign-derived intangible income. It provides a lower effective tax rate on high-returns related to foreign sales. The calculation is similar to GILTI in that returns in excess of 10% of fixed assets form the basis of the calculation.

This is achieved by providing domestic corporations a deduction against foreign-derived intangible income (subject to certain limitations) of 37.5% initially, reduced to 21.875% for tax years beginning after 2025. At a 21% corporate tax rate, the deduction results in effective rates of 13.125% and 16.40625% respectively. IRC section 250 also provides a subtraction for 50% of GILTI and for 50% of IRC section 78 dividends.

Public Law 115-97 References: Section 14202

Internal Revenue Code References: Section 250

IRS Guidance: None available as of July 31, 2018

L. Net Interest Deduction

The deduction for interest expenses is limited to 30% of "adjusted taxable income" (ATI) plus business interest income, with special elections available for real property trades and businesses. For the first four years after the enactment of the Tax Cuts and Jobs Act of 2017, ATI is computed without subtracting depreciation, amortization, or depletion in addition to interest and taxes. Beginning in 2022, ATI would be decreased by depreciation, amortization, or depletion, thus making the computation 30% of net interest expense exceeding earnings before interest and taxes.

Public Law 115-97 References: Section 13301

Internal Revenue Code References: Section 163(j)

IRS Guidance:

- Notice 2018-28, Initial Guidance Under Section 163(j) as Applicable to Taxable Years Beginning After December 31, 2017, April 2, 2018, https://www.irs.gov/pub/irs-drop/n-18-28.pdf

M. Changes to the Treatment of Capital Contributions

The Tax Cuts and Jobs Act of 2017 amends IRC section 118 to provide that certain federal, state, and local incentives used to attract companies are treated as current taxable income to those businesses rather than deferred capital contributions.

Public Law 115-97 References: Section 13312

Internal Revenue Code References: Section 118

IRS Guidance: None available as of July 31, 2018

V. Consultation with the Revenue Estimating Conference

On July 13, 2018, the Department had an initial consultation with members of the Revenue Estimating Conference to discuss the development of the required reports.

VI. Public Workshops

In accordance with the law, the Department will be holding at least two public workshops to gather input and comments from the public. The first public workshop will be held in Tallahassee at 9:00 a.m. on August 22, 2018. A webinar also will be provided so those unable to attend in person will be able to participate from remote locations. The Department will encourage the public to bring to our attention information and topics related to the law changes that they believe are relevant and possible options to be considered. A second workshop is tentatively scheduled for October 24, 2018**.**

Maryland Income Tax

Tax Alert

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04-19

Maryland Guidance on the Reporting and Taxation of IRC § 951A Global Intangible Low Taxed Income

Questions have arisen as to how Maryland treats Global Intangible Low Taxed Income (GILTI), the new category of income created by the Tax Cuts and Jobs Act (TCJA). GILTI is included in federal adjusted gross income. GILTI is not a dividend or deemed dividend, so it is not eligible for Maryland's dividend subtraction; therefore, GILTI is taxed as income in Maryland. GILTI's corresponding federal § 250 deduction for corporations is also captured on the Maryland return.

TCJA broadened the scope of foreign earnings subject to tax when it created GILTI. The new federal provisions impose a tax on shareholders of controlled foreign corporations (CFCs) when the return on specific tangible assets of the CFC exceeds 10%. These specific assets are referred to as qualified business asset investment (QBAI). Taxation of GILTI is based on the assumption that if a company invests in tangible assets, it can reasonably expect a return of 10% on those assets. Any profit in excess of 10% of QBAI is supernormal, and it is inferred that supernormal profits are attributable to intangible assets that have been parked in foreign, low tax rate jurisdictions to avoid tax. GILTI rules presume that some of this income is more appropriately sourced to the United States, and is subject to tax, though at a lower rate. Because of how GILTI is calculated, the tax on GILTI will affect any business whose income is high relative to the fixed asset base. The GILTI rules apply to US persons that own, directly or indirectly, 10% or more of the value or vote of the CFC.

The lower tax rate (the "LT" in GILTI) is achieved, at the federal level, through a deduction, as well as a credit. IRC § 250 entitles C corporations to a 50% deduction on GILTI. This deduction is only available to C corporations, not to partnerships or S corporations, who ultimately pass the income to their respective partners and shareholders. Individual partners and shareholders must include their pro-rata share of GILTI on their individual returns. C corporations reporting GILTI are also entitled to a federal tax credit up to 80% of foreign taxes paid, or an amount equal to its US tax liability times the ratio of foreign profits to worldwide profits, whichever is lower.

This Tax Alert will address how, mechanically, GILTI income is captured by Maryland on the income tax returns for corporations, pass-through entities, and individuals.

GILTI on Maryland Forms for Corporations, Pass-Through Entities, and Individuals

Form 500, Corporations

GILTI and the corresponding § 250 deduction are included in Maryland taxable income for corporations. There is no mechanism under Maryland law that provides a foreign tax credit for this income.

GILTI amounts are included in federal adjusted gross income. Federal adjusted gross income at line 28 of federal Form 1120, or line 25a of federal Form 1120-C, is the starting point for Maryland Form 500. The § 250 deduction is a special deduction, reported on line 29b of federal Form 1120 and line 26b of 1120-C. Special deductions are subtracted from federal taxable income on line 1c of Maryland Form 500.

To compute the Maryland apportionment factor, the total amount of GILTI is included in the denominator. Because GILTI is income attributable to intangibles, it is included in the numerator based on the average of the property and payroll factors. If the resulting apportionment formula does not fairly represent the extent of a corporation's activity in this State, the Comptroller may alter the formula or its components. Manufacturing corporations using the single sales factor do not include GILTI in the apportionment formula.

Form 510, S-Corporations, Partnerships, Limited Liability Companies, Business Trusts

The entire amount of GILTI is included in Maryland taxable income for pass-through entities. Pass-through entities are not eligible for the § 250 deduction, and no foreign tax credit is available. GILTI is passed to the individual shareholders, partners, or members through the income reported on the K-1.

The Maryland pass-through entity return begins with the total distributive or pro rata share of income on federal form 1065, 1065-B or 1120S. Since GILTI is included in income at the federal level, it flows through to the Maryland return.

Whether the pass-through entity uses the apportionment formula or separate accounting to determine its allocation of income, GILTI must be included in Maryland income. Pass-through entities using the apportionment formula must include GILTI in the denominator. GILTI is included in the numerator based upon the average of the property and payroll factors. If the resulting apportionment formula does not fairly represent the extent of a corporation's activity in this State, the Comptroller may alter the formula or its components. For entities eligible to apportion income using a separate accounting, the Comptroller may accept a reasonable method of allocating a portion of GILTI to Maryland.

Form 502, Individual Shareholders; Form 504, Fiduciaries

The entire amount of GILTI is included in individuals' and fiduciaries' Maryland taxable income. GILTI is included federal adjusted gross income, which is the starting point for Maryland Forms 502 and 504. No deductions or credits apply, and the entire GILTI amount is subject to Maryland tax.

Nonresident beneficiaries of resident fiduciaries are not taxed on income derived from intangible personal property. To the extent GILTI is held in trust for the benefit of a nonresident beneficiary, it is eligible for the nonresident beneficiary subtraction.

Form 505, Nonresident Individuals

The entire amount of GILTI is included in federal adjusted gross income as other income. However, nonresidents are not subject to Maryland tax on income attributable to intangibles; therefore, GILTI may be excluded from Maryland income on Maryland Form 505.

Note on Apportionment

If the taxpayer asserts the apportionment formula does not fairly reflect the income attributable to Maryland, it may request an alternative apportionment method. Requests for alternative apportionment must be in writing, propose the alternative apportionment calculation, and must include a copy of the Maryland income tax return. The request for alternative apportionment should be submitted at the time the return is filed. If the return has already been filed, taxpayers may still submit the request for alternative apportionment for review. Requests for alternative apportionment should be mailed to: Comptroller of Maryland, Attn: Legal Section, PO Box 1829, Annapolis, MD 21404-1829.

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The lower tax rate is achieved, at the federal level, through a deduction, as well as a credit. IRC § 250 entitles C corporations to a 50% deduction on GILTI. This deduction is only available to C corporations, not to partnerships or S corporations, who ultimately pass the income to their respective partners and shareholders. Individual partners and shareholders must include their pro-rata share of GILTI on their individual returns. C corporations reporting GILTI are also entitled to a federal tax credit up to 80% of foreign taxes paid, or an amount equal to its US tax liability times the ratio of foreign profits to worldwide profits, whichever is lower.

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Nonresident beneficiaries of resident fiduciaries are not taxed on income derived from intangible personal property. To the extent GILTI is held in trust for the benefit of a nonresident beneficiary, it is eligible for the nonresident beneficiary subtraction.

Form 505, Nonresident Individuals

The entire amount of GILTI is included in federal adjusted gross income as other income. However, nonresidents are not subject to Maryland tax on income attributable to intangibles; therefore, GILTI may be excluded from Maryland income on Maryland Form 505.

Note on Apportionment

If the taxpayer asserts the apportionment formula does not fairly reflect the income attributable to Maryland, it may request an alternative apportionment method. Requests for alternative apportionment must be in writing, propose the alternative apportionment calculation, and must include a copy of the Maryland income tax return. The request for alternative apportionment should be submitted at the time the return is filed. If the return has already been filed, taxpayers may still submit the request for alternative apportionment for review. Requests for alternative apportionment should be mailed to: Comptroller of Maryland, Attn: Legal Section, PO Box 1829, Annapolis, MD 21404-1829.

Waiver of Interest and Penalty on Underpayment of Estimated Tax

Due to the timing of the publication of this Tax Alert, taxpayers affected by IRC § 951A may have underestimated their 2018 final or extension tax payment or 2019 quarterly estimated income tax payments for Maryland purposes. The Comptroller has the authority to waive interest and penalty for reasonable cause. If a taxpayer owes interest or penalty for underpayment of estimated taxes due to underreporting GILTI, and the return has already been filed, they may submit a request for abatement in writing, along with adjusted payment, to Taxpayer Accounting at the following address:

Comptroller of Maryland
110 Carroll Street
Attn: Taxpayer Accounting
Annapolis, Maryland 21401

If the original 2018 return is being filed, the request should be a statement included with the return. The written request must also include support demonstrating that the underpayment was due to the tax on GILTI. The return should be sent to the address in the instructions.

State Tax Matters

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Income/Franchise:
New Jersey DOR Provides Combined Reporting-Related Guidance on Exclusion of Double Inclusion of GILTI and Treatment of Intercompany Expense Addbacks

TB-88 Combined Groups: Exclusion of Double Inclusion of GILTI and Treatment of Related Party Addbacks, N.J. Div. of Tax. (4/23/19). The New Jersey Division of Taxation (Division) recently issued administrative guidance addressing New Jersey's related party expense "addback" provisions and global intangible low taxed income (GILTI) in light of the federal Tax Cut and Jobs Act's (*i.e.*, P.L. 115-97) provisions related to Internal Revenue Code (IRC) Secs. 951A and 250, and within the context of New Jersey tax reforms enacted in 2018 [A.4202 2018); see previously issued Multistate Tax Alert for more details on these 2018 law changes; A.4495 (2018); see previously issued Multistate Tax Alert for more details on these 2018 law changes] that collectively mandate combined reporting for New Jersey corporation business tax (CBT) purposes and allow for a worldwide election for tax years ending on and after July 31, 2019 (or, beginning on and after August 1, 2018, if the defined "managerial member" has a twelve-month tax year that ends July 31, 2019) – specifically, how members of a combined group included on the same New Jersey combined return should comply with various relevant state statutory provisions.

The Division states that although there are certain income exclusions for New Jersey CBT purposes, there is not a provision under CBT law that specifically excludes the "non-effectively connected income of a member of a combined group that is a corporation incorporated under the laws of a foreign nation." Under state law, the income of a controlled foreign corporation is included in the combined group income if the controlled foreign corporation is a member included on the same New Jersey combined return. Therefore, the Division explains, the inclusion of GILTI generated by the controlled foreign corporation in the entire net income of other members of a combined group "would improperly result in a double inclusion (and double taxation) of the same income." The Division states that it has determined that such double inclusion of the same income is improper and that a schedule is being created for taxpayers to use, "which will eliminate the double taxation of GILTI." The guidance clarifies that only GILTI amounts that are directly attributable to the controlled foreign corporation combined group members that are included in the same New Jersey combined return may be excluded – "GILTI that is not attributable to any of the members of the same New Jersey combined return cannot be excluded." The guidance also notes that the deduction available under N.J.S.A. 54:10A-4.15 (relating to IRC Sec. 250) remains available to

In this issue

the extent it was taken for federal income tax purposes if the GILTI is excluded by the Division to prevent double taxation.

Regarding New Jersey's intercompany expense "addback" provisions, the guidance explains that such addbacks generally do not apply to members of the combined group included on the same New Jersey combined return. However, if there are related parties not included on the same New Jersey combined return, "the related party deduction/expense addbacks will apply unless some other exception applies." With respect to GILTI, the Division states that it will allow the members of a New Jersey combined group to claim New Jersey's "unreasonable exception" to its related party addback provisions for expenses attributable to the related party controlled foreign corporation if:

1. There is a related party not included in the same New Jersey combined return;
2. The members of the combined group have GILTI from the related party; and
3. The members of the combined group can demonstrate that the related party was the entity that generated the GILTI included in the member's entire net income.

The guidance also explains that New Jersey CBT taxpayers filing on a separate return basis that have GILTI from a related party included in their entire net income may also be able to claim an unreasonable exception to the related party addback provisions of N.J.S.A. 54:10A-4(k)(2)(I) and N.J.S.A. 54:10A-4.4. The guidance additionally notes that the amounts deducted pursuant to N.J.S.A. 54:10A-4.15 (relating to IRC Sec. 250) are *not* subject to the related party addback provisions of N.J.S.A. 54:10A-4(k)(2)(I) or N.J.S.A. 54:10A-4.4.

Lastly, the Division announces that it is in the process of drafting regulations addressing the topics covered in this guidance. Please contact us with any questions.

— Norm Lobins (Parsippany)
Managing Director
Deloitte Tax LLP

Mike Bryan (Philadelphia)
Managing Director
Deloitte Tax LLP

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Combined Groups: Exclusion of Double Inclusion of GILTI and Treatment of Related Party Addbacks

TB-88 - Issued April 23, 2019

Tax: Corporation Business Tax

P.L. 2018, c. 48 and P.L. 2018, c. 131 collectively mandate combined reporting for tax years ending on and after July 31, 2019 (beginning on and after August 1, 2018, if a full 12-month tax year of the managerial member begins August 1, 2018, and ends July 31, 2019). The chapter laws also provided several other amendments. This Technical Bulletin addresses I.R.C. § 951A, I.R.C. § 250, N.J.S.A. 54:10A-4(k)(2)(I), and N.J.S.A. 54:10A-4.4 (in the context of New Jersey combined returns only), and the relevant portions of N.J.S.A. 54:10A-4.6.

Both N.J.S.A. 54:10A-4(k)(2)(I) and N.J.S.A. 54:10A-4.4.e contain an exception to the related party addbacks for transactions between members of a combined group reported on a New Jersey combined return.

The relevant portions of N.J.S.A. 54:10A-4.6 state that:

> A taxable member of a combined group shall determine its entire net income from the unitary business as its share of the entire net income of the combined group in accordance with a combined unitary tax return made pursuant to this section and sections 19, 20, and 23 of P.L.2018, c.48 (C.54:18A-4.7, C.54:18A-4.8, and C.54:10A-4.11). The entire net income from the unitary business of a combined group is the sum of the entire net incomes of each taxable member and each nontaxable member of the combined group derived from the unitary business, which shall be determined as follows:
>
> a. For a member incorporated in the United States, the income included in income of the combined group shall be the member's entire net income otherwise determined pursuant to the Corporation Business Tax Act (1945), P.L.1945, c.162 (C.54:10A-1 et seq.).
>
> b. For a member not incorporated in the United States, the income to be included in the entire net income of the combined group shall be determined from a profit and loss statement that shall be prepared for each foreign branch or corporation in the currency in which the books of account of the branch or corporation are regularly maintained, adjusted to conform it to the accounting principles generally accepted in the United States for the presentation of those statements and further adjusted to take into account any book-tax differences required by federal or State law. The profit and loss statement of each foreign member of the combined group and the allocation factors related thereto, whether United States or foreign, shall be translated into or from the currency in which the parent company maintains its books and records on any reasonable basis consistently applied on a year-to-year or entity-by-entity basis. Income shall be expressed in United States dollars. In lieu of these procedures and subject to the determination of the director that the income to be reported reasonably approximates income as determined under the Corporation Business Tax Act (1945), P.L.1945, c.162 (C.54:10A-1 et seq.), income may be determined on any reasonable basis consistently applied on a year-to-year or entity-by-entity basis.

N.J.S.A. 54:10A-4.11 also mandates a water's-edge default filing method with an option of the managerial member to choose either a world-wide election or affiliated group election.

This publication provides information on how members of a combined group included on the same New Jersey combined return will comply with various statutory provisions.

GILTI and the I.R.C. § 250(a) Deduction

For New Jersey Corporation Business Tax purposes, a combined group can include the controlled foreign corporations that generate Global Intangible Low Tax Income (GILTI) included in other members' entire net income. Members of a combined group that are incorporated under the laws of a foreign nation must include all world-wide income regardless of whether it is included as income for federal purposes.

Although there are certain income exclusions for New Jersey Corporation Business Tax (CBT) purposes, there is not a provision in the CBT that specifically excludes the non-effectively connected income of a member of a combined group that is a corporation incorporated under the laws of a foreign nation. The income of a controlled foreign corporation is included in the combined group income if the controlled foreign corporation is a member included on the same New Jersey combined return. Therefore, the inclusion of GILTI generated by the controlled foreign corporation in the entire net income of other members of a combined group would improperly result in a double inclusion (and double taxation) of the same income. The Division of Taxation has determined that such double inclusion of the same income is improper. A schedule is being created for taxpayer's to use, which will eliminate the double taxation of GILTI. The schedule will require the following information:

1. The amount of GILTI (in part or in whole) reported for federal tax purposes by the members of the combined group that are included in the New Jersey combined return;
2. The identity of other members of the combined group that are included in the same New Jersey combined return, which are the controlled foreign corporations that generated GILTI;
3. The amount of the controlled foreign corporation members' income that generated GILTI, which is already included in the combined group's entire net income; and
4. The identity of any other controlled foreign corporations that were not included in the same New Jersey combined return but that also generated GILTI.

Note: Only GILTI amounts that are directly attributable to the controlled foreign corporation combined group members that are included in the same New Jersey combined return can be excluded. GILTI that is not attributable to any of the members of the same New Jersey combined return cannot be excluded.

The deduction available in N.J.S.A. 54:10A-4.15 (relating to IRC § 250) remains available to the extent it was taken for federal purposes if the GILTI is excluded by the Director to prevent double taxation.

Related Parties NOT Included on the Same New Jersey Combined Return and the Related Party Addbacks

The related party expense addbacks do not apply to members of the combined group included on the same New Jersey combined return. If there are related parties not included on the same New Jersey combined return, the related party deduction/expense addbacks will apply unless some other exception applies.

> **The Unreasonable Exception.** Generally, the Director will allow the members of the combined group to claim an unreasonable exception for the expenses attributable to the related party for purposes of the addback required under N.J.S.A. 54:10A-4(k)(2)(I) and N.J.S.A. 54:10A-4.4, consistent with the circumstances outlined in [TAM-2011-13R].
>
> **GILTI and the Unreasonable Exception**. There are circumstances where the GILTI inclusion in entire net income of a member of the combined group is generated by a related party controlled foreign corporation that is not included as a member of the same New Jersey combined group. The expenses represented by the payments made by combined group members to the related party controlled foreign corporation are generally required to be added back pursuant to N.J.S.A. 54:10A-4(k)(2)(I) and N.J.S.A. 54:10A-4.4. If no exception applies, it could lead to double taxation.

Therefore, the Director will allow the members of the combined group to claim an unreasonable exception for the expenses attributable to the related party controlled foreign corporation if:

1. There is a related party not included in the same New Jersey combined return; and
2. The members of the combined group have GILTI from the related party; and
3. The members of the combined group can demonstrate that the related party was the entity that generated the GILTI included in the member's entire net income.

Note: Taxpayers filing on a separate return basis that have GILTI from a related party included in their entire net income may also be able to claim an unreasonable exception to the related party addback provisions of N.J.S.A. 54:10A-4(k)(2)(I) and N.J.S.A. 54:10A-4.4.

The amounts deducted pursuant to N.J.S.A. 54:10A-4.15 (relating to IRC § 250) are not subject to the related party addback provisions of N.J.S.A. 54:10A-4(k)(2)(I) or N.J.S.A. 54:10A-4.4.

The Division of Taxation is in the process of drafting regulations addressing the topics covered by this Technical Bulletin.

Note: A Technical Bulletin is an informational document that provides guidance on a topic of interest to taxpayers and may describe recent changes to the relevant laws, regulations, and/or Division policies. It is accurate as of the date issued. However, taxpayers should be aware that subsequent changes to the applicable laws, regulations, and/or the Division's interpretation thereof may affect the accuracy of a Technical Bulletin. The information provided in this document does not cover every situation and is not intended to replace the law or change its meaning.

Technical Memorandum
TSB-M-19(1)C
Corporation Tax
February 8, 2019

New York State Tax Treatment of Repatriation, Foreign-Derived Intangible Income Deduction, and Global Intangible Low-Taxed Income for Businesses

The federal Tax Cuts and Jobs Act[1] (the TCJA) created new provisions in the Internal Revenue Code (IRC) addressing income earned from overseas operations, including mandatory deemed repatriation income, foreign-derived intangible income (FDII), and global intangible low-taxed income (GILTI).

This memorandum generally explains the impact of these federal changes, as well as related changes enacted in the 2018-19 New York State budget,[2] on businesses.

Mandatory deemed repatriation income

The TCJA required taxpayers to recognize mandatory deemed repatriation income as Subpart F income. This is generally accomplished for U.S. shareholders by recognizing post-1986 accumulated earnings and profits and deficits of certain specified foreign corporations under IRC § 965(a) and (b) (together referred to as the *IRC § 965(a) inclusion amount*). These taxpayers are then allowed to deduct a portion of the inclusion amount under IRC § 965(c), resulting in a net IRC § 965 amount. The amounts recognized under IRC § 965 include amounts earned directly by the U.S. shareholders, as well as distributive shares of IRC § 965 amounts from flow-through entities. New York's tax treatment of these amounts varies by type of entity as explained below.

Unlike federal law, which allows certain taxpayers to elect to defer payment of a portion of their federal tax liability related to their mandatory deemed repatriation income, New York taxpayers, including combined groups, cannot defer payment of any portion of their New York State tax associated with mandatory deemed repatriation income.

Exempt organizations

Any net IRC § 965 amount required to be included in federal unrelated business taxable income is included in New York unrelated business taxable income under Article 13. There is no New York exemption or deduction for this income for exempt organizations and no related income modifications.

Insurance corporations[3]

For tax years beginning on or after January 1, 2017, the IRC § 965(a) inclusion amount received from foreign corporations that are not included in a combined report with the taxpayer must be subtracted when computing entire net income (ENI) under Article 33. Taxpayers must deduct this amount from ENI and add back to federal taxable income (FTI) interest and

[1] See Public Law 115-97.
[2] See Part KK of Chapter 59 of the Laws of 2018.
[3] This information does not apply to captive insurers and insurance companies filing a CT-33-NL.

noninterest deductions directly or indirectly attributable to the IRC § 965(a) inclusion amount. Since the IRC § 965(a) inclusion amount is not included in entire net income, the federal deduction under IRC § 965(c) is not allowed.

Insurance corporations that have an underpayment of estimated tax penalty related to the addback of interest deductions directly and indirectly attributable to their IRC § 965(a) inclusion amount on their New York 2017 tax year return may request a penalty waiver if they receive a bill for that penalty. There is no penalty relief for tax years after 2017.

New York C corporations

For tax years beginning on or after January 1, 2017, the IRC § 965(a) inclusion amount received from both unitary and non-unitary corporations not included in a combined return with the taxpayer is considered gross exempt controlled foreign corporation (CFC) income under Article 9-A. It is never considered gross investment income.

The IRC § 965(a) inclusion amount, less any interest deductions directly or indirectly attributable to the income (or less 40% of the IRC § 965(a) inclusion amount if the safe harbor election is made), is considered exempt CFC income and deducted from entire net income (ENI) when computing business income. Since the IRC § 965(a) inclusion amount is considered gross exempt CFC income, the federal deduction under IRC § 965(c) is not allowed.

The IRC § 965(a) inclusion amount is not included in the numerator or denominator of the business apportionment factor (BAF).

The IRC § 965(a) inclusion amount is disregarded for purposes of the "principally engaged" test used to determine a taxpayer's, or combined group's, eligibility for preferential rates and amounts available to manufacturers.

New York C corporations that have an underpayment of estimated tax penalty related to the direct and indirect attribution of interest deductions to their IRC § 965(a) inclusion amount (or the 40% safe harbor election attributable to their IRC § 965(a) inclusion amount) on their New York 2017 tax year return may request a penalty waiver if they receive a bill for that penalty. There is no penalty relief for tax years after 2017.

New York S corporations

For purposes of the business apportionment factor (BAF), the net IRC § 965 amount is treated as dividends from stock. When the 8% fixed percentage method election is in effect and the stock that generated the net IRC § 965 amount is a qualified financial instrument, the net IRC § 965 amount is included in the denominator of the BAF and 8% of such amount is included in the numerator of the BAF. In all other instances, the net IRC § 965 amount is **not** included in the numerator or denominator of the New York S corporation's BAF.

[IRC § 965; Tax Law §§ 208(6-a)(b), 208(9)(b)(23), 1085(c)(1), 1503(b)(1)(A), 1503(b)(1)(B), 1503(b)(1)(S), 1503(b)(2)(B), 1503(b)(2)(H), 1503(b)(2)(W)]

Foreign-derived intangible income (FDII) deduction

For federal tax purposes, a U.S. domestic corporation taxed as a C corporation[4] can deduct a portion of its income derived from serving foreign markets. For purposes of Article 9-A and Article 33, the federal FDII deduction is not allowed for tax years beginning on or after January 1, 2017.

[IRC § 250(a)(1)(A); Tax Law §§ 208(9)(b)(24), 1503(b)(2)(X)]

Global intangible low-taxed income (GILTI)

For federal tax purposes, a U.S. shareholder of any CFC is required to include in gross income its GILTI, which is the excess of a U.S. shareholder's net CFC tested income for the tax year over the U.S. shareholder's net deemed tangible income return for the tax year.[5] A U.S. domestic corporation taxed as a C corporation[6] is allowed a deduction for a portion of its GILTI.[7] GILTI includes amounts earned directly by the U.S. shareholder, as well as distributive shares of GILTI from flow-through entities.

Exempt organizations

Any GILTI amount required to be included in federal unrelated business taxable income is included in New York unrelated business taxable income under Article 13. There is no New York exemption or deduction for this income for exempt organizations and no related income modifications.

Insurance corporations

If the stock of a foreign corporation that generates GILTI is subsidiary capital, the GILTI under IRC § 951A and any GILTI-related IRC § 78 dividends are considered income from subsidiary capital and are exempt from tax. The corresponding deductions allowed under IRC § 250 for GILTI and IRC § 78 dividends attributable to GILTI are disallowed.

In all other instances, the GILTI under IRC § 951A, as well as any GILTI related IRC § 78 dividends, remain in entire net income and are subject to tax. The corresponding deductions allowed under IRC § 250 for GILTI and IRC § 78 dividends attributable to GILTI are allowed in computing ENI.

New York C corporations[8]

Net GILTI income, which is the GILTI recognized under IRC § 951A less the allowable IRC § 250(a)(1)(B)(i) deduction, is included in ENI under Article 9-A. IRC § 78 dividends attributable to GILTI are not included in ENI.

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[4] Real estate investment trusts (REITs) and regulated investment companies (RICs) are not eligible for the deduction allowed under IRC § 250 related to FDII.
[5] See IRC § 951A.
[6] REITs and RICs are not eligible for the deduction allowed under IRC § 250 related to GILTI.
[7] See IRC § 250(a)(1)(B).
[8] As REITs and RICs are not allowed the IRC § 250 deduction related to GILTI, these entities must use GILTI, as opposed to the net GILTI income, when following the instructions in this section.

If the stock of a foreign corporation that generates GILTI is business capital, net GILTI income needs factor representation in the BAF in order to properly reflect the taxpayer's business income and capital in the State. The Commissioner has determined that such net GILTI income must be included in the denominator but not the numerator of the BAF. Taxpayers must report this amount in the *Everywhere* column of the discretionary adjustment line of Part 6 of Form CT-3 or Form CT-3-A and attach a statement to the return indicating the GILTI amounts included on this line.

If the stock of a foreign corporation that generates GILTI is investment capital, only the net GILTI income may be deducted as investment income in the computation of business income. Such net GILTI amount, like all other income from investment capital, is not included in the numerator or denominator of the BAF.

The net GILTI amount is disregarded for purposes of the "principally engaged" test used to determine a taxpayer's, or combined group's, eligibility for preferential rates and amounts available to manufacturers.

New York S corporations

GILTI income reported on the federal return and, consequently, the New York return, needs factor representation in the BAF in order to properly reflect the S corporation's business income and capital in the State. Therefore, the Commissioner has determined that such GILTI income must be included in the denominator but not the numerator of the New York S corporation's BAF. Taxpayers must report this amount in the *Everywhere* column of the discretionary adjustment line of Part 3 of the Form CT-3-S and attach a statement to the return indicating the GILTI amounts included on this line.

[IRC §§ 250(a)(1)(B) and 951A; Tax Law §§ 208(9)(b)(2), 208(9)(a)(6), 1503(b)(1)(A)]

Note: A TSB-M is an informational statement of existing department policies or of changes to the law, regulations, or department policies. It is accurate on the date issued. Subsequent changes in the law or regulations, judicial decisions, Tax Appeals Tribunal decisions, or changes in department policies could affect the validity of the information presented in a TSB-M.