STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :

of :

S&P GLOBAL, INC., f/k/a : DETERMINATION
THE McGRAW-HILL COMPANIES, INC. DTA NO. 825598
:

for Redetermination of a Deficiency or for Refund of
Corporation Franchise Tax under Article 9-A of the :
Tax Law for the Years 2002 through 2005.
:

Petitioner, S&P Global, Inc., f/k/a The McGraw-Hill Companies, Inc., filed a petition for redetermination of a deficiency or for refund of corporation franchise tax under article 9-A of the Tax Law for the years 2002 through 2005.[1]

A hearing was commenced before Dennis M. Galliher, Administrative Law Judge, in New York, New York, on June 16, 2015 at 10:30 A.M., and was continued to conclusion at the same location on April 11, 2016. All briefs were due by February 20, 2017, which date began the six-month period for the issuance of this determination. By a letter dated August 11, 2017, the six-month period was extended for an additional three months (Tax Law § 2010[3]). Petitioners appeared by McDermott Will & Emery LLP (Peter L. Faber, Esq., Mark W. Yopp, Esq., and Nicole R. Ford., Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Jennifer L. Baldwin, Esq., of counsel).

[1] Effective May 1, 2013, the name of The McGraw-Hill Companies, Inc., was changed to McGraw-Hill Financial, Inc. Effective April 27, 2016, the name of McGraw-Hill Financial, Inc., was changed to S&P Global, Inc.

ISSUE

Whether the amount of "[a]ny annual New York tax savings arising from" the terms of a certain agreement (Implementing Agreement), dated June 13, 1997, between petitioner and the Division of Taxation, is limited to only the amount of any annual Tax Law Article 9-A, section 209 corporation franchise tax savings arising from such agreement.[2]

FINDINGS OF FACT[3]

BACKGROUND

1. Petitioner, S&P Global, Inc., f/k/a The McGraw-Hill Companies, Inc., is a New York corporation that was organized on December 29, 1925. Its headquarters and principal executive offices, currently at 1221 Avenue of the Americas, New York, New York, have been located in New York City since 1925. In 1997, Standard & Poor's (S&P) was a large division of petitioner that was headquartered in New York City. S&P's primary business activity was, and is, to rate debt offerings. In 1997, S&P had approximately 3,000 employees, who primarily worked out of offices located on Water Street in lower Manhattan.

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[2] On August 19, 2014, petitioner filed a motion in limine, accompanied by an affirmation, memorandum of law and exhibits in support, seeking an order, pursuant to 20 NYCRR 3000.5, precluding the admission of certain evidence based upon application of the parol evidence rule. On October 6, 2014, the Division of Taxation submitted an affirmation in opposition to petitioner's motion. On October 14, 2014, petitioner filed a motion to strike the Division's affirmation in opposition. On November 14, 2014, the Division submitted a letter in opposition to petitioner's motion to strike. On February 12, 2015, the Administrative Law Judge issued an order: a) denying both motions; b) holding that the phrase "any annual New York tax savings" in paragraph II.(a) of the Implementing Agreement between the parties "could reasonably be read to include MTA Surcharge savings," such that the parol evidence rule did not bar introduction of evidence at hearing related to and occurring before the execution of the Implementing Agreement; and c) directing that the matter go forward to hearing. These proceedings ensued.

[3] On June 16, 2015, the parties, by their duly authorized representatives, executed a stipulation, setting forth agreed to "procedural facts" numbered "1" through "16," and "substantive facts," numbered "17 through "27." The parties' stipulation includes an agreed statement of the "issues in dispute," numbered "28," and an agreement as to the admissibility of some 42 exhibits, labeled "A" through "PP." The parties' stipulation is identified in the record as Joint Exhibit "A."

2. Certain leases that petitioner had entered into for office space in New York City were set to expire in 1997, or within the next few years thereafter. In conjunction with the impending expiration of its leases, petitioner was considering relocating the headquarters of its S&P division and its other facilities and operations, from New York City to New Jersey to reduce costs. At or about this same time period, petitioner had been offered a package of tax incentives from the State of New Jersey in exchange for relocating its S&P division there. Petitioner's corporate tax burden in New York was substantially higher than it would have been in New Jersey.[4] Petitioner began internal discussions regarding its continued cost of doing business in New York City, and decided that in order for it to remain headquartered there, its cost of doing business there would have to be decreased. Petitioner wanted to explore the feasibility of reducing its overall corporate tax liability, as well as the general costs of operating in New York City, with the goal of staying in the City.

3. In 1997, executives from petitioner, including Senior Vice-President of Taxes, Frank Kaufman, engaged representatives from Ernst & Young (E&Y), including Jeremiah Lynch, a State and Local Tax Partner at E&Y, and Dennis O'Toole, a Senior Manager at E&Y, to develop strategies that could be presented to the Division of Taxation (Division) in an effort to reduce petitioner's New York tax costs. Mr. Lynch, in turn, suggested that Louis "Jake" Jacobson, a former Division Deputy Commissioner who was a member of E&Y's "team" representing petitioner, make the initial contact with the Division. Mr. Jacobson did so, and a meeting was scheduled for April 7, 1997.

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[4] Petitioner's cost differential between maintaining headquarters in New York City versus New Jersey was estimated to be approximately $5.8 million (***see*** Finding of Fact 7-a).

Initial Contact Between Petitioner and the Division

4. In preparation for the meeting, Mr. Kaufman, Mr. O'Toole and petitioner's Director of State and Local Taxes, Janet Sacks, developed tax planning ideas by which petitioner's cost of doing business in New York could be reduced. Included among of the tax savings planning ideas that were formulated were:

> a) forming a trademark subsidiary entity in Delaware (Delaware trademark subsidiary), and seeking assurance from the Division that the subsidiary would not be combined with other of petitioner's taxable entities for Corporation Franchise Tax purposes; and
>
> b) requesting that the Division allow petitioner to source receipts from S&P's debt rating business for tax apportionment purposes based on the location of S&P's customers (i.e., "destination" sourcing as opposed to "place of performance" sourcing).[5]

Petitioner and the E&Y team understood that these planning ideas would allow petitioner to realize tax savings in New York similar to the savings that were being offered by New Jersey.

5. In conjunction with this effort, Mr. Kaufman developed mathematical computations (estimating models) by which calculations and analysis of the tax impact (New York tax savings) could be made and, in turn, compared to the savings that would result from petitioner moving to New Jersey. The estimating models allowed for a comparison of petitioner's tax liability, as computed under the Tax Law, without additional adjustments, to the tax computed thereunder but after a number of adjustments were made. The estimating models utilized a combined "NYC, NYS, and MTA rate" of 19.38%. In projecting the tax savings that would result on an annual basis, each estimating model assumed a growth rate of 5%, except in the scenario using debt rating destination sourcing only, which used an assumed growth rate of 7.5% because the debt rating business was growing at a faster pace than petitioner's other businesses.

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[5] "Destination sourcing" is also known as "market-based sourcing."

6. The estimating models were applied to calculate the annual tax savings that would result under the following scenarios:

a) moving the S&P division to New Jersey;

b) using a Delaware trademark subsidiary;

c) using destination sourcing for S&P's debt rating receipts;

d) using a Delaware trademark subsidiary plus destination sourcing for S&P's debt rating receipts.

7. The resulting range of tax savings under the estimating models were as follows:

a) an estimated $5,732,491.00 savings if petitioner moved the S&P division to New Jersey.

b) an estimated $5,483,428.00 savings if petitioner created and used a Delaware trademark subsidiary.

c) an estimated $2,093,870.00 savings if petitioner used destination sourcing for the S&P debt rating receipts.

d) an estimated $6,842,727.00 savings if petitioner created a trademark subsidiary and also used "destination sourcing" for its S&P debt-rating receipts.

8. The final $6.8 million amount became the "target" tax savings amount that was used by the parties in their negotiations, including the April 7, 1997 meeting. Mr. O'Toole explained in testimony that the MTA surcharge was taken into account in determining tax savings under all of the modeled scenarios, noting that the $6.8 million figure reflected "the reduction in New York State, City and MTA tax," and that petitioner would have saved the MTA tax upon a move to New Jersey. The calculations did not include the federal tax savings that would result from deducting the state and city taxes.

The April 7, 1997 Meeting and the Commissioner's Letter

9. The focus of the April 7, 1997 meeting was to discuss the possibility of petitioner's S&P division relocating to New Jersey, and what could be done to help S&P remain in New York City. At the meeting, representatives from E&Y provided a PowerPoint slide presentation to the Division in explanation of the cost differential between petitioner maintaining its S&P division in New York City versus moving to New Jersey. Based on the estimating models, petitioner projected that a move to New Jersey would result in approximately $5.8 million of annual savings and approximately $108 million in savings over a period of 20 years. Petitioner's presentation noted that New Jersey was offering "substantial incentives" to move there, and that approximately 3,400 jobs would be moved out of New York. E&Y's team provided proposed solutions to reduce the cost differential, based on the Division's exercise of discretion to allow certain filing positions, including the use of a non-combined Delaware trademark subsidiary company coupled with destination based receipts sourcing, as noted above (***see*** Finding of Fact 6-d). The presentation reflected that petitioner was seeking from New York State $6.8 million of annual tax savings, subject to a 5% growth factor to reflect the amount by which petitioner's business and income (and, in turn, its tax liability) was projected to increase in subsequent years. Mr. Lynch did not recall the MTA surcharge being an "isolated point of discussion" during the April 7, 1997 meeting, but stated that the $6.8 million savings target amount included savings of "New York City, New York State and MTA surcharge taxes."

10. No agreement was reached at the April 7, 1997 meeting. However, one day later, on April 8, 1997, then-Commissioner of Taxation and Finance, Michael H. Urbach, sent a letter (the Urbach letter) to Mr. Lynch, and included two additional attached letters. The additional letters, each also dated April 8, 1997, were from then-Deputy Commissioner and Counsel, Steven

U. Teitelbaum (the Teitelbaum letter), and from then-Director of the Corporation Tax Audit Bureau, Dominick Sciortino, written for then-Deputy Commissioner for Tax Operations, Arthur J. Roth (the Sciortino/Roth letter).

11. The Urbach letter stated that the proposed relief (tax savings) outlined in the attached two letters was presented as "an inducement for [petitioner] to remain in New York City" and that "our staff is working on further proposals which may be used in the alternative to achieve the at least $6.8 million per year tax cost savings that [petitioner] is seeking." The Sciortino/Roth letter stated that petitioner's reported business allocation percentage (BAP) did not appear to fairly reflect petitioner's business activity in New York, and proposed a discretionary adjustment to the receipts factor thereof (per Tax Law § 210.8 and 20 NYCRR 4-6.1) to more fairly reflect petitioner's business activity in New York. This letter noted that a representative from the Division would be available to meet and develop an "agreeable method" of determining the receipts factor to be used in computing petitioner's BAP. The Teitelbaum letter addressed petitioner's concerns as to whether the use of a Delaware trademark subsidiary would result in a requirement of combined filing under Tax Law Article 9-A, and outlined the specific criteria under which the Division would not seek such reporting. Neither of these letters specifically addressed either New York City tax savings or the MTA surcharge.

The Draft Implementing Agreement

12. From April through early June of 1997, the parties continued their discussions in their attempt to formulate a New York tax savings methodology that reached the $6.8 million target savings figure. Neither Mr. Lynch nor Mr. Kaufman could recall specifically discussing the MTA surcharge during the negotiations. On May 5, 1997, Mr. Lynch submitted to

Commissioner Urbach a memorandum from Mr. Kaufman, together with an initial draft of a document titled "Filings Methodologies & Implementing Agreement" (Draft Agreement).

13. The Draft Agreement proposed two alternative methodologies for arriving at the "savings number" (the $6.8 million target). Each of the alternative methodologies reflected adjustments to petitioner's BAP because, "[p]ursuant to Tax Law Section 210.8 (d) and Regulation 4-6.1, the Commissioner, in the exercise of his discretionary authority" had concluded that such adjustments were necessary to properly reflect petitioner's income in New York "for purposes of the tax on entire net income, the alternative minimum tax and the tax on capital." Each methodology also included destination sourcing for the S&P's debt rating receipts. The two alternative methodologies may be summarized as follows:

Alternative One

> The first alternative methodology produced slightly more than $6.8 million in tax savings by providing that: 1) S&P's debt rating sales would be sourced on a destination basis (rather than on a place of performance basis) in the same ratio as the non-debt rating destination sales of the S&P division; and 2) the numerators of each of the three statutory BAP factors (property, payroll and sales) of petitioner's combined reporting group would be reduced, such that 25% of the otherwise statutorily reportable property and payroll factor numerators would be reported, and that 50% of the otherwise statutorily reportable receipts factor numerator would be reported.[6]

Alternative Two

> The second alternative produced approximately $5.4 million in tax savings by providing that: 1) S&P's debt rating sales would be sourced on a destination basis (rather than on a place of performance basis) in the same ratio as the non-debt rating destination sales of the S&P division; 2) the taxable income of petitioner's combined group would be apportioned using a single sales factor in computing the BAP for petitioner and for certain of its affiliates; and 3) some investment tax credit would be allowed for certain equipment.

[6] The BAP apportionment factor fraction numerators represent the New York State portion of a taxpayer's total (everywhere) property, payroll and receipts (sales) amounts. During the years at issue, the receipts factor was counted twice, i.e., double weighted (***see*** Tax Law former § 210.3 [a][1-4]).

14. The Draft Agreement included both of the foregoing methodologies, as alternatives, and set forth a provision that limited the annual savings to be had from the methodologies, as follows:

> "Any annual New York tax savings arising from paragraph 1 above (when compared to tax calculated without the adjustments in paragraph 1 above) shall not exceed $6.8 million, provided that the foregoing amount shall be adjusted annually, starting in 1997, using the Applicable Annual Growth Factor as hereafter defined (such adjusted amount being hereafter referred to as the future value of $6.8 million or "FV $6.8 million"). The Applicable Annual Growth Factor shall be the lesser of 5% [as used in the calculation of the corporate income tax "gap" analysis presented by Ernst & Young'] or the actual growth rate of Operating Income (exclusive of unusual charges) reflected in the Annual Report of The McGraw-Hill companies, Inc., for the previous year."

The $6.8 million figure used in the limitation was based on Mr. Kaufman's original estimating model that used a Delaware trademark subsidiary and destination sourcing for S&P's debt rating receipts to achieve tax savings (***see*** Finding of Fact 6-d).

15. Two revised estimating models were provided with the Draft Agreement, each of which compared the statutory calculation of tax (NYS) to the calculation of tax after applying the proposed adjustments set forth in the foregoing methodologies (new NYS), with the resulting differences (under each of the methodologies) considered the tax savings. The first estimating model reflected the impact of Alternative Two, i.e., the use of a single sales factor together with destination sourcing for the S&P debt rating receipts, while the second estimating model reflected the impact of Alternative One, i.e., the reductions to the three numerators of petitioner's BAP factors together with destination sourcing for the S&P debt rating receipts.

16. In each instance, the revised estimating models utilized a "NYS [tax] Rate" of 9% and an "MTA [tax] Rate" of 17%. The first revised model estimated savings of "NYS Tax" and "MTA Tax" to be approximately $5.4 million in total, while the second revised model estimated

"NYS Tax" and "MTA Tax" to be approximately $6.5 million in total. Both revised estimating models included the combined savings effects on the corporation franchise tax under Tax Law § 209 and on the MTA surcharge under Tax Law § 209-B. Both models made the Draft Agreement provisions for destination sourcing of debt rating receipts, as well as the numerator percentage adjustments (decreases) that were specified as applicable to the apportionment factor fractions of the BAP, likewise applicable in calculating the numerators of the MCTD apportionment factor fractions used in computing the MTA surcharge allocation percentage. Thus, while the denominators of the BAP factor fractions (i.e., the "everywhere" property, payroll and receipts amounts) were not altered under the Draft Agreement, the BAP factor fraction numerators, as reduced under the Draft Agreement (i.e., the adjusted New York State portion of petitioner's property, payroll and receipts), did become the denominators of the MCTD apportionment factor fractions. Under the revised estimating models, the impact of the New York City General Corporation tax was no longer being considered.[7]

17. As noted, neither of the revised estimating models reached a total savings amount of $6.8 million. Both Mr. O'Toole and Mr. Lynch stated that the estimating models included savings of MTA surcharge. Ms. Sachs agreed but could not specify why that was the case. Mr. Lynch stated that he could not recall the MTA surcharge being "a significant discussion point at this point in time," while Mr. O'Toole stated that he could not recall it being specifically discussed with the Division.

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[7] The City of New York apparently did not choose (or was unwilling) to be involved in discussions based on tax adjustments similar to those described herein. There is evidence in the record indicating that the City afforded petitioner cost-saving relief measures in other (non-tax) areas.

The Final Implementing Agreement

18. By a letter dated June 10, 1997, Mr. Kaufman requested that the Commissioner exercise his discretion under Tax Law § 210.8 to equitably adjust petitioner's BAP apportionment factors. This letter was followed by an unsigned Implementing Agreement that included the first tax savings methodology (Alternative One) proposed in the previous draft and the same limitation provision on tax savings (***see*** Findings of Fact 13 and 14).

19. The Division accepted petitioner's request in a letter dated June 13, 1997, and signed by Deputy Commissioner Roth on behalf of Commissioner Urbach and the Division. The approved methodology, applicable to the taxable years spanning 1996 through 2018, is set forth in a final Implementing Agreement (Implementing Agreement), dated June 13, 1997, and provides, in relevant part, as follows:

> "1. Pursuant to Tax Law Section 210.8(d) and Regulation section 4-6.1, the Commissioner, in the exercise of his discretionary authority, has determined that the following adjustments to the business allocation percentage of The McGraw-Hill Companies, Inc. and of its affiliates named below are appropriate to fairly reflect their income in New York for purposes of the tax on entire net income, the alternative minimum tax and the tax on capital:
>
> > (a) Standard & Poor's Debt Rating Sales will be sourced on a destination basis (rather than based on place of performance) in the same ratio as the non-debt rating destination sales of the Standard & Poor's division of The McGraw-Hill Companies, Inc.
> >
> > (b) The following adjustments shall be made to the New York apportionment factors of The McGraw-Hill Companies, Inc., the J.J. Kenney combined group, and Standard & Poor's Comstock, Inc.
> >
> > > (1) The numerator of the regularly calculated property fraction shall be 25% of the amount thereof and the denominator shall not be altered.
> > >
> > > (2) The numerator of the regularly calculated payroll fraction shall be 25% of the amount thereof and the denominator shall not be altered.

(3) The numerator of the regularly calculated sales fraction (after application of paragraph I.(a) above) shall be 50% of the amount thereof and the denominator shall not be altered.

II. The annual savings from the methodologies described in paragraph 1 above shall be subject to the following terms and limitations:

(a) Any annual New York tax savings arising from paragraph 1 above (when compared to tax calculated without the adjustments in paragraph 1 above) shall not exceed $6.8 million, provided that the foregoing amount shall be adjusted annually, starting in 1997, using the Applicable Annual Growth factor as hereafter defined (such adjusted amount being hereafter referred to as the future value of $6.8 million or 'FV $6.8 million'). The Applicable Annual Growth factor shall be the lesser of 5% [as used in the calculation of the corporate income tax 'gap' analysis presented by Ernst & Young] or the actual growth rate of Operating Income (exclusive of unusual charges) reflected in the Annual Report of The McGraw-Hill companies, Inc. for the previous year.

(b) [i]f, . . . , the New York tax savings from paragraph I above are less than the [available Cap amount as adjusted], the shortfall can be carried forward for five years, without limitation in the carryforward year by paragraph II(a) above."

The 1996 Through 2003 Tax Years

20. The Implementing Agreement covers the tax years 1996 through 2018.[8] Ms. Sacks was the person in charge of preparing petitioner's returns in the years immediately after the Implementing Agreement was signed. Ms. Sacks had not been a part of the negotiations leading up to the signing of the Implementing Agreement, and she had not been specifically advised as to the tax return filing implications of the Implementing Agreement, including how to apply the FV

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[8] Paragraph IV of the Implementing Agreement states:

"To the extent that changes in existing law, a new alternative tax or a substitute tax structure is hereafter enacted and such change either reduces or eliminates the benefits to [petitioner] of this Document, or enhances such benefits beyond the contemplation of the parties, this Document shall be equitably reformed."

Notwithstanding that the Implementing Agreement was to apply, by its terms, through the year 2018, by a letter dated February 24, 2015, the Division advised petitioner that in light of: a) structural changes to the taxes imposed under article 9-A, and b) structural changes to petitioner's corporate organization, the terms of the Implementing Agreement would no longer be applicable or followed.

$6.8 million cap on annual tax savings contained in the Implementing Agreement. Ms. Sachs prepared, and after review by Mr. Kaufman and E&Y, filed petitioner's corporation franchise tax and MTA surcharge returns for the years 1996 through 2005.

21. During the years 1996 through 2003, Ms. Sacks applied the apportionment provisions in paragraph I of the Implementing Agreement to the computation of petitioner's corporation franchise tax liability under Tax Law § 209 (§ 209 tax liability) as follows:

> a) she computed petitioner's BAP using the statutory formula set forth in the Tax Law.
>
> b) pursuant to the Implementing Agreement, in making the foregoing computation, she sourced sales from S&P's debt rating services to the location of S&P's clients' headquarters for purposes of computing the numerator of petitioner's sales factor.
>
> c) pursuant to the Implementing Agreement, she multiplied the BAP apportionment fraction numerators of the property and payroll factors by 25%, and multiplied the numerator of the sales factor, as computed above, by 50%, in calculating petitioner's BAP per the terms of the Implementing Agreement. The denominators of petitioner's BAP apportionment fractions (property, payroll and receipts) were computed as called for under the statutory formula, without adjustment, since the Implementing Agreement did not impact these denominators.
>
> d) she applied petitioner's BAP, as calculated on the foregoing basis, to petitioner's business income so as to determine petitioner's allocated business income, its allocated ENI (ENI base), and ultimately, petitioner's § 209 tax liability.

22. To determine the amount of § 209 tax liability savings resulting from the application of the Implementing Agreement, Ms. Sacks computed petitioner's § 209 tax liability under the terms of the Implementing Agreement, as above (denominated the § 209 Settlement Method), and also as it would be under the Tax Law without the destination sourcing and BAP fraction numerator adjustments set forth in the Implementing Agreement (denominated the § 209

Statutory Method). She then compared the two resulting § 209 tax liability amounts to determine the amount of petitioner's § 209 tax liability savings under the Implementing Agreement.

23. Ms. Sacks computed petitioner's MTA surcharge liability for the years 1996 through 2003 as follows:

> a) she first computed petitioner's MTA surcharge liability using the statutory formula without any adjustments to reflect the BAP factor fraction changes under the Implementing Agreement, i.e., as set forth in the Tax Law (denominated the MTA Statutory Method).
>
> b) she next computed petitioner's MTA surcharge liability in light of her then-perceived impact of the Implementing Agreement thereon (denominated the MTA Settlement Method). In doing so, she computed the amount of the MTA surcharge base[9] that should be apportioned to the MCTD via the MCTD allocation percentage by:
>
> > 1) reducing the numerators of the MCTD apportionment factors (property, payroll and receipts) by the percentage amounts set forth in the Implementing Agreement (i.e., she multiplied the otherwise statutorily computed MCTD numerators of the property and payroll factors by 25%, and multiplied the numerator of the sales factor [computed using debt rating destination sourcing] by 50%, per the terms of the Implementing Agreement).
> >
> > 2) using the numerators as calculated under the § 209 tax liability computation, i.e., the New York State apportioned amount of petitioner's property, payroll and receipts, as above-reduced under the § 209 Settlement Method to reflect the terms of the Implementing Agreement (***see*** Finding of Fact 21-c), as the denominators for each of the factors of the MTA surcharge apportionment formula.
> >
> > 3) comparing the results of the foregoing two computations (MTA Statutory Method and MTA Settlement Method) in order to determine the amount of MTA surcharge savings.

24. Ms. Sacks understood that the total annual tax savings that could be realized under the Implementing Agreement was limited (capped) at FV $6.8 million. She also believed, until 2003, that this total cap on annual tax savings included both the § 209 tax liability savings and

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[9] The MTA surcharge base is the taxpayer's § 209 tax liability (***see*** Tax Law § 209-B [1], [2]).

the MTA surcharge savings. Consequently, if, during the years 1996 through 2003, the foregoing comparisons revealed that the total annual tax savings exceeded the savings cap, Ms. Sacks made an upward adjustment to petitioner's ENI, under the § 209 Settlement Method, so as to increase the same to the point that the resulting (decreased) total annual tax savings did not exceed the FV $6.8 million savings cap. Thus, for the years 2002 and 2003, Ms. Sachs increased petitioner's ENI in the amounts of $377,320,200.00 and $856,912,000.00, respectively, so that the total tax savings did not exceed the $8,860,968.00 and $9,304,016.00 FV $6.8 million limitation amounts available, respectively, for such years, as follows:

2002

	Tax Law[10]	Implementing Agreement[11]	Savings
Section 209 Tax	$10,681,408.00	$3,291,247.00	$7,390,161.00
MTA surcharge	$2,156,342.00	$685,535.00	$1,470,807.00
Total Tax	$12,837,750.00	$3,976,782.00	$8,860,968.00
Available Limitation			$8,860,016.00

2003

	Tax Law	Implementing Agreement	Savings
Section 209 Tax	$41,034,283.00	$33,417,922.00	$7,616,361.00
MTA surcharge	$8,111,028.00	$6,423,373.00	$1,687,655.00
Total Tax	$49,145,311.00	$39,841,295.00	$9,304,016.00
Available Limitation			$9,304,016.00

25. For the years 1996 through 2003, Ms. Sachs included both the § 209 tax liability savings and the MTA surcharge tax savings within the computation of the total annual New York

[10] "Tax Law" represents petitioner's liability as computed without the adjustments provided under the Implementing Agreement (i.e., the § 209 Statutory Method).

[11] "Implementing Agreement" represents petitioner's liability as computed in light of the adjustments provided under the Implementing Agreement (i.e., § 209 Settlement Method).

tax savings limitation per the Implementing Agreement, in accordance with her understanding of the Implementing Agreement at the time.

The 2004 and 2005 Tax Years

26. Petitioner's methodology for applying the limitation on annual tax savings changed for the years 2004 and 2005 (years at issue). In late 2005, Wayne Trumble, a senior manager at E&Y, performed a review of petitioner's 2004 tax returns before they were filed. In conjunction with this review, he was provided a copy of the Implementing Agreement, a necessary document for purposes of his review given that the terms of the Implementing Agreement impacted the manner in which petitioner's liability was calculated. Upon his review, Mr. Trumble concluded that since the paragraph in the Implementing Agreement that contained the savings limitation made no mention of its application to the MTA surcharge, the FV $6.8 million limitation on annual tax savings under the Implementing Agreement did not apply to the MTA surcharge. Thus, he believed "total annual savings" resulting from application of the Implementing Agreement meant only savings of § 209 tax liability, but not savings of MTA surcharge liability. When he raised this question, neither Ms. Sacks nor Mr. Kaufman could explain why petitioner had included the MTA surcharge savings that resulted from the manner in which petitioner's prior returns had been calculated, prepared, and filed, within the Implementing Agreement's limitation on annual tax savings.

27. Based upon conversations between Mr. Trumble, Mr. Kaufman and Ms. Sacks, petitioner decided to change its methodology of applying the savings limitation under the Implementing Agreement, beginning with the 2004 returns. Specifically, starting in 2004, petitioner applied the FV $6.8 million limitation on annual tax savings only to the savings of

§ 209 tax liability, and did not include the MTA surcharge savings therein. Petitioner also changed its manner of computing the MTA surcharge apportionment formula. Petitioner had previously taken the benefit of the reduced apportionment fractions under the Implementing Agreement (i.e., 25% property and payroll and 50% sales [after destination sourcing adjustment]) in computing its MCTD allocation percentage and its resulting MTA surcharge liability (***see*** Finding of Fact 23). Starting in 2004, petitioner computed its MCTD allocation percentage under the terms of the MTA surcharge statute (Tax Law § 209-B [2]), that is, without adjustment of the MCTD apportionment factor fractions to reflect the impact of the adjustments made to the numerators of the § 209 tax liability BAP apportionment fractions. Petitioner's prior calculation of its MCTD allocation percentage had reduced its MCTD apportionment numerators (property, payroll and receipts within the MCTD) in accord with the BAP fraction numerator percentage reductions afforded under the Implementing Agreement. Petitioner had also utilized, as its MCTD apportionment denominators (property, payroll and receipts within New York State), the (reduced) amounts of its BAP fraction numerators as computed under the terms of the Implementing Agreement. According to Ms. Sacks, the foregoing change to a non-discretionarily adjusted MCTD allocation percentage, as prescribed by statute, was made and applied to all returns filed from the year 2004 forward because the MTA surcharge was not specifically mentioned as included in the Implementing Agreement.

28. For the 2004 and 2005 tax returns, Ms. Sacks computed petitioner's § 209 tax liability as she had for all of the previous years, that is under both the § 209 Statutory Method and the § 209 Settlement Method (under the latter, applying the apportionment adjustments agreed to under the Implementing Agreement). She then compared the two resulting § 209 tax liability amounts, and if the difference exceeded the FV $6.8 million annual savings limitation, Ms. Sacks

increased (added) ENI under the § 209 Settlement Method so as to increase the resulting § 209 tax liability under that method to the point where the comparative difference between the two calculation methods resulted in savings that did not exceed the available annual limitation. Unlike the years 1996 through 2003, Ms. Sacks did not perform separate MTA Statutory Method and MTA Settlement Method computations, or include the results thereof as part of her calculation of the limitation on annual tax savings (***see*** Findings of Fact 23 and 27), but rather simply computed petitioner's MTA surcharge liability using unadjusted MCTD apportionment fraction factor amounts. Under this approach, any addback of ENI so as to increase petitioner's § 209 tax liability to an amount that, compared to such liability computed without the BAP adjustments of the Implementing Agreement, results in savings that do not exceed the FV $6.8 million cap, necessarily (mechanically) results in a correspondingly higher MTA surcharge base (i.e., a higher § 209 tax liability) and a greater amount of MTA surcharge tax liability.

29. For the years 2004 and 2005, the available FV $6.8 million annual savings limitation amounts were $9,769,217.00 and $10,257,678.00, respectively. For such years, the § 209 tax liability savings alone exceeded the available annual savings limitation amounts under the savings cap. Ms. Sachs increased petitioner's ENI under the § 209 Settlement Method, in the amounts of $649,990,900.00 (for 2004) and $1,479,364,500.00 (for 2005), respectively, so that the tax savings for those years resulting from comparing the two § 209 tax liability computational methods did not exceed the savings limitation amounts available for such years, as follows:

2004

	Tax Law	Implementing Agreement	Savings
Section 209 Tax	$15,868,852.00	$6,099,635.00	$9,769,217.00
Available Limitation			$9,769,217.00

MTA surcharge	$3,207,974.00	$1,268,777.00	$1,939,197.00
Total Tax	$19,076,826.00	$7,368,412.00	$11,708,414.00

2005

	Tax Law	Implementing Agreement	Savings
Section 209 Tax	$25,089,073.00	$14,831,395.00	$10,257,678.00
Available Limitation			$10,257,678.00
MTA surcharge	$4,895,703.00	$2,891,202.00	$2,004,501.00
Total Tax	$29,984,776.00	$17,722,597.00	$12,262,179.00

30. As set forth above, for each of the years 2004 and 2005, petitioner's § 209 tax liability was adjusted upward such that the liability difference resulting from the discretionary adjustments exactly equaled the available FV $6.8 million tax savings. In turn, petitioner's MTA surcharge liability, calculated as described above (***see*** Findings of Fact 27 and 28), and as set forth hereinafter (***see*** Findings of Fact 31 and 32), itself resulted in additional savings in the amounts of $1,939,197.00 and $2,004,501.00 for the years 2004 and 2005, respectively. These savings reflect the fact that petitioner's MTA surcharge base (its § 209 tax liability) for these years, although increased as the result of the described addbacks of ENI, was nonetheless still lower than it would have been if computed without the impact of the discretionary adjustments of the Implementing Agreement (***see*** Findings of Fact 28 and 29).

31. To compute petitioner's MTA surcharge for 2004 and 2005, Ms. Sacks began with petitioner's actual § 209 tax liability, as computed under the terms of the Implementing Agreement. She then computed the MCTD allocation percentage under the terms of the statute (Tax Law § 209-B [2]; i.e., without adjusting the MCTD apportionment factor fractions to reflect any changes thereto under the terms of the Implementing Agreement [***see*** Finding of Fact 27]). Thus, Ms. Sacks:

> a) did not apply the provisions of the Implementing Agreement pertaining to and reducing the BAP apportionment factor fraction numerators to establish the numerators of petitioner's MTA surcharge apportionment factor fractions.
>
> b) computed the denominators of the MTA surcharge apportionment fractions under the rules found in Tax Law § 209-B without regard to the Implementing Agreement (i.e., did not use the BAP apportionment factor numerators, as adjusted per the Implementing Agreement, as the denominators for the MCTD apportionment factor fractions).

32. The foregoing change in methodology was based upon a re-reading by petitioner of the Implementing Agreement. In 2004 and 2005, petitioner did not include any savings of MTA surcharge as part of the annual FV $6.8 million New York tax savings limitation under the Implementing Agreement. As a consequence, petitioner's total tax savings (Tax Law § 209 tax savings plus MTA surcharge tax savings) exceeded the available savings limitation by $1,939,197.00 in 2004 and $2,004,501.00 in 2005 (***see*** Finding of Fact 30). Petitioner did not file any amended returns based on the foregoing changed methodology for any prior years, notwithstanding that the statute of limitations remained (at the time) open for certain of such prior years.

The 1993 Through 1995 Refund Claims

33. The Draft Agreement included a provision that allowed petitioner to file refund claims employing the methodologies described therein, as follows:

> "The [petitioner] may file refund claims for the years 1993 - 1995 employing the methodologies described in paragraph I above, but such refund shall in no event exceed $7 million and shall be sourced to the latest years in such period."

34. Petitioner filed refund claims for the years 1993 through 1995, and the Division, in turn, conducted a limited scope field audit thereof. The auditor was provided with estimating models, dated May 12, 1997 or May 13, 1997, for the years 1993 through 1995. The models

employed the same methodology as did Mr. Kaufman's models for 1996, i.e., adjusting the three BAP apportionment factor numerators and applying destination sourcing to S&P's debt rating receipts. The models also employed the same adjustments to the MCTD allocation apportionment factors. The calculated savings ($2,693,372.00 for 1993, $912,327.00 for 1994 and $3,175,631.00 for 1995) were determined by comparing the statutory computation of petitioner's § 209 tax liability and MTA surcharge liability amounts (i.e., such § 209 tax and MTA surcharge liability amounts without adjustments) to the computation of such § 209 tax and MTA surcharge liability amounts after making the three apportionment factor numerator adjustments to arrive at petitioner's BAP and its MCTD allocation percentage. In sum, petitioner used the apportionment method (and the allocation percentages resulting therefrom) that was used for the years 1996 through 2003 (***see*** Findings of Fact 20 through 25).

35. After the parties made certain back-and-forth corrections to the foregoing calculations, and to the resulting refund amounts (including changes premised on the filing of an amended return for 1994), final schedules were created. For the § 209 tax liability, these final schedules reflect the noted reductions to the numerators of the apportionment factor fractions to arrive at the BAP, including destination sourcing for S&P's debt rating receipts. Likewise, for the MTA surcharge liability, the final schedules reflect the same sourcing and percentage reductions to the numerators of the MCTD apportionment factor fractions, as well as the use of the adjusted § 209 BAP apportionment factor fraction numerators as the MCTD apportionment factor fraction denominators, to arrive at petitioner's MCTD allocation percentage.[12]

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[12] More specifically, the numerators of the § 209 BAP factors, i.e., the New York State amounts of petitioner's property, payroll and receipts, become the denominators for the three MCTD apportionment factor fractions. The numerators of the three MCTD apportionment factor fractions represent the portion of a taxpayer's New York State apportionment factor amounts (property, payroll and receipts) that are sourced within the MCTD. Since the New York State BAP apportionment factor amounts (the denominators for MCTD apportionment

36. The total amount of refund due petitioner for the period 1993 through 1995 was $6,328,245.00, to which petitioner consented by documents executed on July 1, 1997 (a Consent to Field Audit Adjustment and a confirming Closing Agreement). There was no limitation on annual tax savings as part of the refund, and thus it was unnecessary for Ms. Sacks to perform comparative computations with respect to the same. In short, the savings cap was not an issue during the years 1993 through 1995.

Procedural History and the Current Audit

37. Petitioner timely filed its Forms CT-3 (General Business Corporation Franchise Tax Returns) for the years at issue, and paid the tax reflected thereon. On December 7, 2007, petitioner filed Forms 3360 (Federal Changes to Corporate Taxable Income) for the years at issue.

38. On January 7, 2009, the Division notified petitioner that it had been selected for an audit for the years 2002 through 2005. Petitioner responded to the audit notification on February 6, 2009. In turn, the Division conducted a general verification audit of petitioner's returns for the years 2002 through 2005, including a review of the support furnished for petitioner's computation of the adjustments provided for under the terms of the Implementing Agreement. Ms. Sacks provided workpapers for the years 2002 through 2005, and an explanation of how tax was computed by petitioner. Ms. Sacks explained that the computational methodology changed starting in 2004, as follows:

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purposes) had already been reduced, pursuant to the Implementing Agreement adjustments, it follows that, absent any similar adjustment to the MCTD allocation factor numerators, such numerators could exceed the (reduced) MCTD denominators, and result in an MCTD allocation percentage greater than 100% (thus, illogically, allocating based on fractional apportionment amounts of petitioner's property, payroll and receipts within the MCTD that exceeded the total New York State amounts of petitioner's property, payroll and receipts).

> "You may notice a slight change in the methodology beginning in 2004. This was due to a re-reading of the settlement which revealed that the settlement applied only to the regular income tax and not the MTA tax. Therefore, starting in 2004, the MTA apportionment used under the settlement and statutory method was the same and the 'cap' was applied to the regular income tax only."

39. The Division determined that there was no basis for the change in computational methodology from that previously employed by petitioner (i.e., from 1996 through 2003).

40. On January 26, 2012, the Division issued to petitioner a notice of deficiency, asserting additional tax due under Tax Law sections 209 and 209-B for the years 2002 through 2005 in the aggregate amount of $2,682,244.00, plus interest, less payments and credits in the aggregate amount of $16,358.00, as follows:

Tax Period Ended	§ 209 Liability	MTA Surcharge Liability	Payments/Credits
12/31/2002	$3,764.00	$600.00	$8,437.00
12/31/2003	$3,766.00	$599.00	$7,921.00
12/31/2004	$1,282,548.00	$224,312.00	$0.00
12/31/2005	$1,042,643.00	$124,212.00	$0.00

The payments and credits reflect petitioner's payment of the liabilities asserted as due for 2002 and 2003, and those years are not in dispute herein.

41. The parties have stipulated to the following:

> "a) If it should be determined that the phrase "any annual New York tax savings arising from paragraph I," as set forth in Paragraph II(a) of the Implementing Agreement, includes savings of only corporation franchise tax under Tax Law section 209, and the amount of corporation franchise tax determined under the Implementing Agreement is the base for the calculation of the MTA surcharge under Tax Law section 209-B, the Notice of Deficiency will be cancelled for 2004 and 2005.[13]

[13] This result requires the MCTD allocation percentage to be computed under the terms of the statute (Tax Law § 209-B), without adjustment of either the numerators or denominators of the apportionment factor fractions notwithstanding that the same are to be adjusted pursuant to the terms of the Implementing Agreement in arriving at petitioner's BAP.

> b) If it should be determined that the phrase "any annual New York tax savings arising from paragraph I," as set forth in Paragraph II(a) of the Implementing Agreement, includes savings of corporation franchise tax under Tax Law section 209 and MTA surcharge under Tax Law section 209-B, the amount of additional tax due will be the amounts set forth in the Notice of Deficiency, plus interest.
>
> c) If it should be determined that the Implementing Agreement has no application for any purpose in computing tax under Tax Law section 209-B, and the base for the computation of the MTA surcharge under Tax Law section 209-B is the corporation franchise tax as determined per Tax Law section 209 and not the Implementing Agreement, then the amount of additional MTA surcharge due will be $1,865,428.00 for 2004 and $1,861,498.00 for 2005, plus interest."

SUMMARY OF THE PARTIES' POSITIONS

42. There is no dispute that petitioner is subject to both the corporation franchise tax imposed under section 209 of Tax Law article 9-A, upon its entire net income base, and to the MTA surcharge imposed under section 209-B of Tax Law article 9-A, upon the basis of its MCTD allocated § 209 tax liability. Petitioner maintains that the savings arising from Paragraph I of the Implementing Agreement constitute savings only of New York State taxes imposed on allocated income, and that the savings to which the savings cap under Paragraph II applies can, therefore, only mean savings of petitioner's § 209 tax liability. Petitioner also posits that the § 209 tax liability savings gained from paragraph I of the Implementing Agreement result from the use of an adjusted BAP, a term defined in and applicable only to calculating § 209 tax liability. Petitioner asserts that the terms of the savings cap are clear, and that the phrase "any annual New York tax savings arising from [the application of the discretionary adjustments under] Paragraph I," is susceptible to only one reasonable interpretation, namely savings of tax imposed under Tax Law § 209, computed as and limited to the comparative difference between petitioner's § 209 tax liability, calculated on the basis of the portion of petitioner's entire net

income allocated to New York State via the BAP under Tax Law former § 210[1], versus such § 209 tax liability as calculated in the same manner but using the adjustments allowed under the Implementing Agreement. Petitioner notes in particular that the discretionary adjustments are specified as applicable only in calculating the apportionment factor fractions that result in petitioner's BAP, and are not specified as applicable in any manner in calculating the similarly computed apportionment factor fractions that result in petitioner's MCTD allocation percentage.

43. Petitioner also points out that there is no statutory or regulatory authority supporting the Division's position that the BAP factor fraction components, when and as changed by discretionary adjustments, in turn "flow through" and become the dollar amounts or values for purposes of the apportionment factor fractions upon which the MCTD allocation percentage is calculated. Petitioner notes that its manner of computation and application of the cap in the earlier audit years represents merely a mistaken interpretation that was corrected for later years, in order to reflect the proper calculation of its MCTD allocation percentage, and the proper interpretation and application of the limitation imposed by the cap.

44. Petitioner has also argued that the savings cap under paragraph II of the Implementing Agreement cannot apply as a limit with respect to tax imposed upon a taxpayer's business activity in a political subdivision, such as the MCTD. In this regard, petitioner distinguishes the MTA surcharge upon the basis that it is a separate tax imposed in addition to the § 209 tax. Petitioner notes that the Tribunal viewed the two as "separate and distinct taxes" in concluding that the statute of limitations on assessment of the MTA Surcharge did not begin to run with the filing of a taxpayer's corporation franchise tax return without, or until, the separately required filing of an MTA surcharge return (***see Matter of Kaiser Aerospace Electronics Corp.***, Tax Appeals Tribunal, January 16, 1997).

45. Petitioner acknowledges that not only § 209 tax savings, but also MTA surcharge tax savings, result from the impact of the discretionary adjustments. Petitioner maintains, however, that any such MTA surcharge savings are simply driven by the fact that applying the MCTD allocation percentage, properly computed, against the lower amount of actual § 209 tax liability resulting from the Implementing Agreement, necessarily, mechanically, and unavoidably results in a lower amount of MTA surcharge tax base against which the surcharge tax rate is applied, and thus results in a lower MTA surcharge tax liability, i.e. "savings." Petitioner points out that MTA surcharge savings are not explicitly mentioned in the Implementing Agreement, including specifically under the savings cap therein. Petitioner argues that the comparatively lower MTA surcharge tax liability that results from taxing a portion of its lowered § 209 tax liability, as described herein, though denominated as "savings," does not result from applying the methodologies of the Implementing Agreement in the calculation of petitioner's MTA surcharge tax liability, and thus such "savings" are therefore not subject to the cap under the Implementing Agreement.

46. The Division asserts that the discretionary adjustments in Paragraph I of the Implementing Agreement serve not only to reduce petitioner's § 209 tax liability, but further and unavoidably, also serve to reduce petitioner's MTA surcharge tax liability. The Division maintains that both the § 209 tax liability reduction, and the resulting MTA surcharge tax reduction, are New York State tax savings realized by petitioner, and that both arise directly (i.e., intentionally as to the first, and unavoidably as to the second) as a consequence of the adjustments under the Implementing Agreement. As such, the Division maintains that both are subject to the total savings limitation specified in Paragraph II(a) of the Implementing Agreement.

47. The Division counters petitioner's view that the Implementing Agreement can only be read to include § 209 tax savings resulting therefrom, in that the language of the Implementing Agreement includes no such limiting language. The Division argues that the Implementing Agreement speaks to "any New York tax savings," and that such language is broad enough to encompass the foregoing savings in both taxes resulting as a consequence of Paragraph I of the Implementing Agreement. The Division posits that the direct language of Paragraph II mandates this result, and is consistent with the parties' aim in negotiating the Implementing Agreement, to wit, to allow petitioner to achieve, but not exceed, the FV $6.8 million targeted total tax savings amount, so as to reduce its overall costs of doing business, and enable its continued presence in New York, while concomitantly allowing the State of New York to retain the significant number of jobs associated with petitioner's presence and operations in the State. The Division maintains this result is therefore beneficial to both parties, but does not result in a "windfall" of savings not anticipated under the terms of the Implementing Agreement, and in excess of the savings clause amount set forth at Paragraph II thereof. In sum, according to the Division, this result best fulfills the overall purpose to be reached by the discretionary adjustments afforded to petitioner under the terms of the Implementing Agreement.

CONCLUSIONS OF LAW

A. The first step in resolving this matter is to determine the proper method of calculating each of the two taxes in question. From that step, it then becomes possible to calculate any tax savings arising under the Implementing Agreement, and to determine whether, and to what extent, any such savings are properly subject to the FV $6.8 million savings limitation cap imposed thereunder.

Calculating Petitioner's Section 209 Tax Liability

B. Article 9-A of the Tax Law imposes a franchise tax on all domestic and foreign corporations doing business, employing capital, owning or leasing property, or maintaining an office in New York State (Tax Law former § 209 [1]). The § 209 tax is usually, and in this case was, imposed and calculated based upon the corporation's ENI.[14] ENI is, generally, the same as the taxpayer's federal taxable income with certain modifications, less income from investments in subsidiary corporations (Tax Law former §§ 210 [1] [a]; 208 [9]; 209 [1]). Once ENI is determined, it is separated into two components, to wit, "investment income" and "business income." (Tax Law §§ 208 [6]; 210 [3]). "Investment income" is defined as income from "investment capital" (Tax Law former § 208 [6]). "Business income," in turn, is comprised of ENI less investment income (Tax Law former § 208 [8]). For purposes of the § 209 tax, a corporation's ENI base, upon which the tax is computed, is comprised of its investment income and its business income, as allocated to New York pursuant to the corporation's investment allocation percentage (IAC) (Tax Law former § 210 [3] [b]), and its BAP (Tax Law former § 210 [3] [a]).

C. Tax Law former § 210 (3) (a) provided that the portion of the corporate taxpayer's business income to be allocated within New York State, and subjected to tax under Tax Law former § 209 (1), was to be determined based upon the taxpayer's BAP. The BAP, as set forth in the statute, is the arithmetic average of the ratios of the taxpayer's apportionment factors, i.e., its property, payroll and (double weighted) receipts values in New York State as compared to those

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[14] In addition to the entire net income base, the other bases upon which liability for the franchise taxes imposed under Tax Law former § 209 were calculated included the capital base, the minimum taxable income base, the fixed dollar minimum base and the subsidiary capital base (***see*** Tax Law former § 210 [1] [a]-[e]).

of the corporate taxpayer as a whole.[15] Computations using unadjusted apportionment factor fractions are described herein as the Statutory Method (***see*** Finding of Fact 22). Tax Law former § 210 (8) (d) and 20 NYCRR 4-6.1, however, allowed the Commissioner of Taxation the discretionary authority to make adjustments to the BAP, as calculated under Tax Law former § 210 (3), in order to more fairly or properly reflect the corporate taxpayer's income in New York.[16] In this case, the Implementing Agreement provided for an alternative apportionment via adjustments reducing the numerators of the three apportionment factor fractions by which petitioner's BAP was computed. Specifically the Implementing Agreement first allowed destination-based sourcing of petitioner's debt rating receipts, and thereafter also allowed percentage reductions to the dollar amounts or values of all three of the apportionment factor fraction numerators (***see*** Finding of Fact 19; Implementing Agreement at ¶ 1.[a], [b]). Computations using adjusted apportionment factor fractions, per the discretionary adjustments under the Implementing Agreement, are described herein as the Settlement Method (***see*** Finding of Fact 22). Thus, § 209 tax liability savings were achieved by discretionary adjustments that reduced the apportioned amounts of petitioner's New York State property, payroll and receipts for purposes of computing petitioner's BAP, and in turn, determining how much of petitioner's business income was allocable to and taxable by New York State.

D. In order to determine the annual New York § 209 tax savings that result from applying the discretionary adjustments set forth in paragraphs I(a) and I(b) of the Implementing

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[15] For tax years beginning on or before December 31, 2005, a corporation's BAP consisted of three apportionment factors, to wit, property, payroll and (double weighted) receipts (Tax Law former § 210 [3] [a] [1-4]). For tax years beginning on or after January 1, 2006, New York began a transition to a BAP consisting of a single weighted receipts factor, with the same becoming fully effective for tax years beginning on or after January 1, 2007 (Tax Law former § 210 [3] [a] [10] [A] [ii]).

[16] The relevant statutory language vests the discretionary adjustment authority in the Commissioner of Taxation. For purposes of simplicity herein, the term Commissioner is used interchangeably with the term Division.

Agreement, and, in turn, to determine the proper application of the FV $6.8 million savings limitation called for under the cap imposed by paragraph II(a) of such Agreement, it is necessary, as clearly indicated by the first sentence of paragraph II(a), to compute petitioner's § 209 tax liability due both:

a) without the discretionary sourcing and apportionment factor fraction adjustments set forth in the Implementing Agreement (the Statutory Method); and

b) with such discretionary adjustments set forth in the Implementing Agreement (the Settlement Method).

E. The method by which petitioner's § 209 tax liability is calculated is prescribed by statute. While the computations are herein denominated the "Statutory Method" and the "Settlement Method," there is no difference in the computational steps undertaken in either instance, and the discretionary adjustments, in and of themselves, do not alter the method by which tax is calculated, but rather only alter the resulting fractional apportionment percentages by which petitioner's BAP is determined. Thus, as specified in the Implementing Agreement, the discretionary adjustments themselves only directly impact petitioner's BAP, and hence the resulting amount of petitioner's actual § 209 tax liability. The impact of the discretionary adjustments upon petitioner's otherwise statutorily allocated New York business income, and the consequent tax liability difference between the two computations (Statutory and Settlement), determines the total resulting tax savings with respect to petitioner's Tax Law article 9-A, § 209 franchise tax liability. It is undisputed that any such annual resulting § 209 tax liability savings are subject in useable amount to the limitation set by the cap (as adjusted annually) per the terms of paragraph II(a), including any available prior years' unused § 209 tax liability savings (shortfall) as carried forward per paragraph II(b) (***see*** Finding of Fact 19; Implementing Agreement at ¶ II.[b]). For both years remaining at issue (2004 and 2005), the § 209 tax savings

alone exceeded the dollar amount of the FV $6.8 million savings available under the cap (***see*** Finding of Fact 29) .

Calculating Petitioner's MTA Surcharge Tax Liability

F. Under Tax Law article 9-A, and in addition to the foregoing tax imposed under Tax Law § 209 (1), New York State also imposes an MTA surcharge tax under Tax Law § 209-B. The tax is imposed on corporations that, like petitioner, are subject to tax under article 9-A and are exercising a corporate franchise, doing business, employing capital, owning or leasing property or maintaining an office in the state within the MCTD. The MCTD, established under Public Authorities Law § 1262, encompasses the territory covering the City of New York, plus Dutchess, Nassau, Orange, Putnam, Rockland, Suffolk and Westchester counties. Under Public Authorities Law §§ 1264 and 1265, the MCTD is managed by the MTA, and the revenues collected from the imposition of the MTA surcharge are (after the deduction of administrative costs incurred by the Division) deposited to the credit of the Metropolitan Mass Transportation Operating Assistance Account of the Mass Transportation Operating Assistance Fund, as an appropriation to the MTA via the Metropolitan Transportation Authority Dedicated Tax Fund (Tax Law § 171-a [2]; State Finance Law § 88-a; Public Authorities Law § 1270-c).

G. Petitioner seems to argue that the MTA surcharge is a separate, essentially non-New York State tax. However, the MTA surcharge tax is imposed, like the § 209 tax, under Tax Law article 9-A. It was, and is, enacted, administered, collected and disbursed by the State to the member jurisdictions within the specific targeted geographic area comprising the MCTD as outlined above (***see*** Conclusion of Law F). The individual MCTD member jurisdictions do not decide whether or not to impose the surcharge, and do not set the rate of the surcharge tax on a jurisdiction-by-jurisdiction basis. The Tribunal's decision in ***Kaiser*** stands for the proposition

that the § 209 tax and the MTA surcharge tax are separate and distinct taxes for purposes of the statute of limitations on assessment, such that the limitation period on assessment does not commence to run until the filing of the separately required MTA surcharge return. It does not, however, stand for the broader proposition that the MTA surcharge tax is not a state tax or, more importantly, is not a New York State franchise tax imposed upon the privilege of exercising one's corporate franchise (***see United Services Automobile Association v Curiale***, 88 NY2d 306 [1996]). The MTA Surcharge is, in fact, a New York State tax imposed in addition to the § 209 tax (***see id***).

H. The MTA surcharge tax is expressed as a percentage of a corporation's § 209 tax liability. It is calculated by applying the MTA surcharge tax rate, per Tax Law § 209-B (1), to the portion of the taxpayer's § 209 tax liability that has been attributed, by formula, to the taxpayer's business activities carried on within the MCTD. Such attribution to the MCTD, per Tax Law § 209-B (2), is premised upon an MCTD allocation percentage, the calculation of which essentially mirrors the three-factor (i.e., property, payroll and receipts) BAP calculation of Tax Law former § 210 (3). The MCTD allocation percentage thus consists of the arithmetic average of the ratios of the taxpayer's apportionment factors, i.e., a corporation's property, payroll and (single weighted) receipts values within the MCTD as compared to its property, payroll, and (single weighted) receipts values within New York State (Tax Law former § 209-B [2]).

I. Under the foregoing, the mechanics of the three-factor fractional apportionment method (or formula) are the same for both § 209 tax and MTA surcharge tax purposes. However, for § 209 tax purposes, the apportionment factor fractions are applied to determine the percentage and resulting portion of a taxpayer's business income that is allocable to and taxable by New York State. For MTA surcharge tax purposes, the apportionment factor fractions are applied to

determine the percentage and resulting portion of a taxpayer's § 209 tax liability that is allocable to the MCTD. The former thus speaks directly to and impacts the allocation of income, whereas the latter speaks to the allocation of the tax determined as a result of the former. Thus, while akin in methodology, the latter is a step removed in application and result, and as explained hereinafter, it does not follow that the discretionary adjustments in this case, specifically applicable as they are to the calculation of a taxpayer's BAP for purposes of allocating a portion of its business income to New York State, simply flow through or carry down to the calculation of petitioner's MCTD allocation percentage.

J. As reported by petitioner, and accepted by the Division, during the first eight years in which the Implementing Agreement was in effect, the New York State amounts (the BAP fraction numerators), as discretionarily adjusted per the Implementing Agreement, became the denominators for purposes of the MCTD apportionment fractions in computing petitioner's MCTD allocation percentage. Furthermore, the MCTD apportionment factor fraction numerators were computed based on applying the BAP numerator discretionary adjustment reductions specified in the Implementing Agreement (***see*** Finding of Fact 23). The Division continues to assert that this is the proper calculation method, and denominates the same simply as a "flow-through." Petitioner, however, has changed its MCTD apportionment method, and no longer uses the BAP adjustments in computing its MCTD allocation percentage. The Implementing Agreement specifically calls for applying the discretionary adjustments in computing petitioner's BAP. However, there is no language in the Implementing Agreement calling for such adjustments to be applied for purposes of computing petitioner's MCTD allocation percentage. Petitioner asserts there is no authority for applying such discretionary adjustments in calculating a taxpayer's MCTD allocation percentage, either directly under the relevant statutes, or via an

agreement between the parties, or via implicit "flow-through" as petitioner previously did and as the Division continues to do.

K. The Tax Law article 9-A expressly provides authority for the Division to adjust a corporation's BAP, on request of a taxpayer, or of its own volition, where it is found that the same, as otherwise computed per statute, fails to properly or fairly reflect the activity, business, income or capital of the taxpayer within the state (***see*** Tax Law § 210.8; 20 NYCRR 4-6.1 [c]; Conclusion of Law C). At the same time, and as petitioner points out, there is no similar explicit language under Tax Law § 209-B authorizing the Division to allow or impose discretionary adjustments to the apportionment fractions that result in a taxpayer's MCTD allocation percentage. The MCTD surcharge apportionment and allocation process under article 9-A is governed by Tax Law § 209-B (2) and (2-a), and not by the BAP apportionment rules of Tax Law former § 210.3 that are applicable for § 209 tax liability purposes. By contrast, in computing the MTA surcharge tax applicable to insurance corporations under Tax Law former article 33, the Division is vested with specific authority to make or allow discretionary adjustments to the MCTD apportionment fractions, independently, and without regard to whether any such discretionary adjustments were or were not made to the apportionment fraction factors in the first instance in computing a taxpayer's regular insurance tax liability under former Article 33 (***compare*** Tax Law §§ 1504, 1505-a [a] [1], [2] [specifically affording discretionary authority to alter the components of the statutory apportionment formula applicable to life and non-life insurance corporations operating within the MCTD for purposes of determining the Article 33 MTA surcharge, a tax similar to the article 9-A MTA surcharge tax]). Apparently, the Legislature did not see fit to allow such an independent discretionary adjustment authority for article 9-A MTA surcharge purposes, and the described MCTD discretionary authority of article

33 is simply a broader grant than that provided under article 9-A. The absence of specific discretionary adjustment authority under Tax Law article 9-A with respect to the MCTD apportionment fractions applicable in calculating the MTA surcharge supports the conclusion that no such changes may be made, either directly or, as here, via "flow-through" or "carry down." As a consequence, the ensuing logical conclusion is that under Tax Law article 9-A, the MCTD apportionment factor fractions must be based upon the unadjusted apportionment fraction components, i.e., the actual statutorily reportable dollar amounts or values, and not the amounts or values that reflect the destination sourcing and percentage adjustments that resulted from the discretionary adjustments under the Implementing Agreement. The fact that the calculation previously, and incorrectly, employed the adjusted factor fraction components does not support continuing this method, especially given the absence of legislative authority to do so.[17]

The Impact of the Savings Limitation (Cap)

L. Under the terms of the Implementing Agreement, the discretionary adjustments, also described as the "methodologies" (***see*** Finding of Fact 19; Implementing Agreement at ¶ II), specifically pertain to computing petitioner's BAP, so as to fairly reflect petitioner's income in New York for purposes of the "tax on entire net income, the alternative minimum tax and the tax on capital," i.e., the § 209 tax. The BAP apportionment fraction numerator adjustments are clearly described as percentage reductions to the "regularly calculated" property, payroll and

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[17] In light of the parties' Implementing Agreement, petitioner's actual (statutorily reportable) New York property, payroll and receipts amounts, *before* the adjustments afforded under the Implementing Agreement, are relevant for purposes of calculating petitioner's "would have been" § 209 tax liability under the Statutory Method, so as to calculate petitioner's § 209 tax liability savings (***see*** Finding of Fact 22; Conclusions of Law D and E). Such actual amounts are also relevant for purposes of determining the denominators of the MCTD apportionment factor fractions, so as to compute petitioner's MCTD allocation percentage to be applied against its actual § 209 tax liability to determine its MTA Surcharge tax base. Petitioner's BAP apportionment fraction amounts, as adjusted under the Implementing Agreement are, however, simply inapplicable for purposes of computing petitioner's MCTD allocation percentage.

receipts (sales) fractions, with the receipts percentage adjustment applicable to the already reduced dollar amount of receipts based on the discretionary adjustment allowing destination sourcing (***see*** Finding of Fact 19; Implementing Agreement at ¶ 1.[a], [b] [1-3]). The language used in paragraph I of the Implementing Agreement thus unequivocally applies only to, and results in a reduction only of, petitioner's BAP. In turn, it is by this specific BAP reduction that the amount of petitioner's ENI subject to the § 209 tax is reduced, and it is because of this reduction that petitioner pays less § 209 tax than would otherwise be due, and thus realizes § 209 tax savings.

M. The MTA surcharge tax base is the portion of a taxpayer's actual (i.e., reportable) § 209 tax liability that is allocated to the MCTD. In this case, since petitioner's actual § 209 tax liability has been reduced, it follows that petitioner's MTA surcharge tax base, and petitioner's resulting MTA surcharge tax liability, is likewise reduced. Such MTA surcharge reduction, broadly, constitutes New York tax savings (***see*** Finding of Fact 30). Critically, however, and as concluded above, the discretionary adjustments of the Implementing Agreement do not apply in the calculation of petitioner's MCTD allocation percentage or, as a consequence, in the calculation of petitioner's MTA surcharge tax liability. Instead, petitioner's MTA surcharge "savings" simply and mechanically result from calculating petitioner's MTA surcharge liability based on the portion of petitioner's actual § 209 tax liability that has been properly allocated, without the discretionary adjustments of the Implementing Agreement, to the MCTD (***see Matter of Infosys Technologies, Ltd.***, Tax Appeals Tribunal, February 21, 2008). Thus, the MTA surcharge savings are, at a minimum, a step removed from the savings gained from direct application of the discretionary adjustments of the Implementing Agreement. More to the point, while the total amount of § 209 tax liability available for allocation (or attribution) to the MCTD

is lower than it otherwise would have been, because of the BAP adjustments under the Implementing Agreement, the portion thereof that is actually allocated to the MCTD and subjected to the MTA surcharge tax is not in any way impacted by the discretionary adjustments of the Implementing Agreement. While petitioner's BAP is determined by the impact of the Implementing Agreement, its MCTD allocation percentage is not, and the adjustments under the Implementing Agreement are simply not a factor in calculating the allocation of petitioner's actual § 209 tax liability for purposes of the MTA surcharge tax that is based and imposed thereon.

N. Understanding the foregoing result requires recognition that the proper calculation of petitioner's MTA surcharge tax liability requires no reference to, and is in no way dependent upon, the terms of the Implementing Agreement. Rather, it is ultimately dependent only upon the actual amount of petitioner's § 209 tax liability, however calculated in its own right, as such is, in turn, allocable to the MCTD pursuant to the MCTD apportionment factor fractions as properly computed. The language of the savings limitation provision in the Implementing Agreement supports this result. Paragraph II(a) states, in relevant part, that "[a]ny annual New York tax savings arising from paragraph I above (when compared to tax calculated without the adjustments in paragraph I above), shall not exceed [FV $6.8 million]." As determined above, the calculation of petitioner's MTA surcharge liability must be performed without the adjustments of paragraph I, because those adjustments may not be applied by "flow through" or "carry down." It follows, therefore, that without the ability or authority to apply the adjustments (or "methodologies") of paragraph I in computing petitioner's MTA surcharge liability, then there is simply no calculation or comparison, as called for under paragraph II(a), that needs to be made for purposes of computing any MTA surcharge tax savings "arising from [the

methodologies described in] paragraph I". Petitioner's MTA surcharge tax liability is simply the amount due per statute, to wit, the portion of petitioner's actual § 209 tax liability that is statutorily allocable to the MCTD, without application of the discretionary adjustments, and subjected to the 17% MTA surcharge tax rate. This is fully consistent with the conclusion that the MTA surcharge tax is a New York State franchise tax that is separate from the franchise tax imposed under Tax Law former § 209 (***see*** Conclusion of Law G), and with the conclusion that while the discretionary adjustments of the Implementing Agreement apply in calculating petitioner's § 209 tax liability, they do not likewise apply in calculating its MTA surcharge tax liability (***see*** Conclusions of Law M).

O. It is also important to recognize that changes to the actual dollar values or the components of the three apportionment factors (property, payroll and receipts) by which allocation is determined, as reported on a return or as made and agreed to in the ordinary course of an audit (or as the result of litigation), differ from specific discretionary adjustments thereto, as allowed per Tax Law § 210 [8]. Changes to a taxpayer's reported dollar values or component parts of the apportionment factors (e.g., resulting from disputes as to the dollar value of a particular property, or whether a particular payroll item or amount is actually within or without the State [or MCTD], or whether receipts are properly calculated and reported in amount and/or location), as addressed and resolved in the normal course of audit activities (or as ultimately resolved by litigation), simply determine the actual dollar values of such items to be used in the statutory computations necessary for fractional apportionment, allocation, and, ultimately, tax liability. In contrast, discretionary adjustments under Tax Law § 210 [8] are specific deviations from these "actual" dollar values and must be applied only to the particular apportionment factor component items to which they specifically pertain. This distinction becomes evident in that it is

not possible to assess the need to allow or require discretionary adjustments that deviate from the actual, statutorily reportable, apportionment factor values, amounts, or components, in order to more fairly or properly reflect the same, without first establishing such actual statutory amounts.[18] In this case, the discretionary adjustments that were allowed were made applicable specifically and only to the computation of petitioner's BAP. With no directive in the Implementing Agreement, or more to the point, no apparent statutory authority to "flow through" or "carry down" such adjusted amounts to the calculation of petitioner's MCTD allocation percentage, the actual unadjusted amounts of petitioner's New York State and MCTD apportionment factor fraction components must be used for MCTD allocation computation purposes.

P. The testimony concerning the process that led to the discretionary adjustments, as well as the estimating models developed in connection therewith, reveal that the parties may have simply anticipated the discretionary adjustments would produce both § 209 tax savings and MTA surcharge tax savings, and accepted that such savings would be, as aggregated, subject to the limitation of the FV $6.8 million savings cap. This is borne out by the manner in which the Implementing Agreement was interpreted and carried out by petitioner for the years 1996 through 2003 (***see*** Findings of Fact 20 through 25), and by the Division for all of those years, as well as

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[18] It is of particular note that the discretionary adjustment by which destination sourcing of debt rating receipts was allowed in this case apparently represented a change to the composition of what was to be included in petitioner's actual New York State receipts under the Tax Law and regulations as then interpreted. That is, service receipts were, during the period here in question, generally sourced based on the "place of performance" of the "work" that generated such receipts (***see Matter of Siemens Corp. v Tax Appeals Tribunal*** (89 NY2d 1020 [1997]). In contrast, destination sourcing represented a specific departure, here via discretionary adjustment, from the Division's otherwise applicable sourcing rule (***compare*** Tax Law former § 210.3[a] [2] [B]; 20 NYCRR 4-4.3 [a], ***to*** Tax Law § 210-A; L 2014, ch 59 eff January 1, 2015 [New York Legislature recently amended the Tax Law to change the allocation of service receipts to a customer or market sourcing (i.e., destination) approach beginning with 2015]; ***see also*** 2014-2015 New York State Executive Budget, Revenue Article VII Legislation, Memorandum in Support, Part A).

for the years at issue here (2004 and 2005). However, as detailed above, this interpretation and application is not supported by the actual terms of the Implementing Agreement and, in fact, exceeds the reach of such terms, as well as the reach of the statutory provisions of Article 9-A under which the Division's authority to enter into discretionary adjustments is set forth. It is noteworthy that if the adjusted BAP factor numerators (the New York State amounts of petitioner's property, payroll and receipts) simply flow through, as advocated by the Division, they become the MCTD factor denominators. At the same time, however, the Implementing Agreement provides no adjustments relative to the MCTD fraction numerators (the MCTD amounts of petitioner's property, payroll and receipts) by which petitioner's MCTD allocation percentage is computed. Accepting a "flow-through" or "carry down" approach for purposes of establishing petitioner's MCTD factor fraction denominators also requires, as the Division recognizes, an accompanying "flow-through" or "carry down" and application of the BAP specific percentage and destination sourcing adjustments of the Implementing Agreement for purposes of calculating the MCTD factor fraction numerators. This is necessary in order to avoid a situation where the use of unadjusted (actual) numerator amounts (the "statutory" MCTD property, payroll and receipts amounts) in comparison to the discretionarily adjusted and carried down New York State denominator amounts, results in fractional apportionment in excess of 100 percent (***see*** Finding of Fact 35, n 12). Thus, adopting the Division's position requires more than simply carrying down or flowing through the dollar amounts as adjusted per the discretionary adjustments of the Implementing Agreement. It requires carrying down or flowing through the discretionary adjustments of the Implementing Agreement, and making those discretionary adjustments applicable to the calculation of both the numerators (a step that is particularly troubling), and the denominators of petitioner's MCTD apportionment factor fractions. The

parties' initial view as to the proper method of calculating petitioner's MTA surcharge liability, still utilized by the Division but now abandoned by petitioner, whereby the adjustments to the factor fractions from which the BAP was computed were simply carried down and used in computing the factor fractions from which the MCTD allocation percentage was computed is therefore rejected as incorrect.

Q. In sum, the discretionary adjustments of the Implementing Agreement do not apply in the calculation of petitioner's MTA surcharge tax liability. Therefore, since the MCTD apportionment factor fractions are not impacted by the discretionary adjustments, they are to be computed on the basis of petitioner's actual, unadjusted MCTD property, payroll and receipts amounts (the numerators), and its actual unadjusted New York State property, payroll and receipts amounts (the denominators). In turn, petitioner's resulting MCTD allocation percentage, to be applied to petitioner's actual (reportable) § 209 tax liability, so as to compute the amount of petitioner's MTA surcharge tax base that is subject to the MTA surcharge tax, is likewise not impacted by the discretionary adjustments. Any MTA surcharge tax "savings" in this case are realized simply as the mechanical result of applying the statutory MTA surcharge tax calculation rules of apportionment and allocation, without adjustments under the Implementing Agreement, to the actual (correctly computed) amount of petitioner's § 209 tax liability. Since the MTA surcharge tax savings in this case do not result from application of the discretionary adjustment "methodologies" of the Implementing Agreement in the computation of petitioner's MTA surcharge tax liability, the savings of MTA surcharge tax gained by petitioner do not fall within the language of the limitation imposed by the savings cap of Paragraph II of such Agreement.

R. The foregoing result is not only consistent with the requirements of the statutory rules for computing under fractional apportionment and allocation with respect to petitioner's § 209

tax liability, in light of the discretionary adjustment applicable thereto, but also as to computing its MTA surcharge tax liability with respect to which such discretionary adjustments do not apply. It is consistent with the specific terms of the Implementing Agreement, and requires no implicit action ("flow-through") in order to avoid the illogical potential result of taxation based on apportionment and allocation of fractional amounts that exceed the whole, i.e., factor dollar amounts (numerators) that are attributed to a geographic area that is within a portion of New York State (the MCTD), but that, illogically, exceed the total New York State dollar amounts that are available to be allocated. As such, the result herein best harmonizes the language and impact of the Implementing Agreement with the provisions of the Tax Law.

S. The petition of S&P Global, Inc., f/k/a The McGraw-Hill Companies, Inc., is hereby granted, and in accordance with the parties' stipulation set forth at Finding of Fact 41-a, the Notice of Deficiency dated January 26, 2012 is cancelled.

DATED: Albany, New York
November 16, 2017

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE