STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :

of :

THE McGRAW-HILL COMPANIES, INC : ORDER
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, 2003, 2004 and 2005. :

Petitioner, 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, 2003, 2004 and 2005.[1]

On August 19, 2014, petitioner, appearing by McDermott, Will & Emery, LLP (Peter L. Faber, Esq., and Maria P. Eberle, Esq., of counsel), filed a motion in limine seeking an order, pursuant to 20 NYCRR 3000.5, precluding the admission of certain evidence based upon application of the parol evidence rule. Accompanying the motion was a supporting affirmation made by Maria P. Eberle, Esq., a memorandum of law, and referenced exhibits. On October 6, 2014, the Division of Taxation (Division), appearing by Amanda Hiller, Esq. (Jennifer L. Baldwin, Esq., of counsel), submitted an affirmation in opposition to petitioner's motion.[2] 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.

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[1] Effective May 1, 2013, the name of The McGraw-Hill Companies, Inc., was changed to McGraw-Hill Financial, Inc.

[2] By a letter dated September 17, 2014, the date by which the Division was to respond to petitioner's motion in limine was extended, upon request, to October 6, 2014.

The 90-day period for issuance of this order commenced on November 19, 2012, the latest date by which a response to the motion to strike could be submitted.[3] After due consideration of the motion papers, annexed exhibits, affirmations in support and in opposition, and all pleadings and proceedings had herein, Dennis M. Galliher, Administrative Law Judge, renders the following order.

ISSUES

I. Whether the Division's affirmation in opposition to petitioner's motion in limine should be stricken because it quotes from or paraphrases evidence sought to be excluded from the record (per petitioner's motion in limine) as inadmissible pursuant to the parol evidence rule.

II. Whether petitioner has established that the terms of a certain agreement (Implementing Agreement) between it and the Division are clear and unambiguous such that any evidence of communications related to and before the execution of such agreement is barred by the parol evidence rule.

FINDINGS OF FACT

1. On June 13, 1997, petitioner and the Division entered into an "Implementing Agreement," consisting of four paragraphs. The introductory statement to the Implementing Agreement provides:

> "This Document implements the letter of [the then-Commissioner of Taxation to petitioner's then-representatives], dated April 8, 1997. Said letter was written to induce The McGraw-Hill Companies, Inc., to maintain its existing presence and headquarters, and the existing presence and headquarters of its Standard & Poor's division, in New York State [hereafter "New York"]."[4]

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[3] By a letter dated October 27, 2014, the date by which the Division was to respond to petitioner's motion to strike was set at November 19, 2014

[4] Included as part of the record on this motion is the April 8, 1997 letter from then-Commissioner Michael H. Urbach, as well as the two letters, also dated April 8, 1997, referenced therein (a letter from then-Deputy Commissioner and Counsel, Steven U. Teitelbaum, and a letter from then-Director of the Corporation Tax Audit

2. Paragraph I of the Implementing Agreement provides that:

> "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."

3. Paragraph I.(a) of the Implementing Agreement goes on to specify the sourcing basis (destination rather than place of performance) and ratio for certain sales of one of petitioner's divisions. Paragraph I.(b) specifies an adjustment to the regularly (i.e., statutorily) calculated numerator of each of the three business allocation percentage (BAP) ratio components (property, payroll and receipts) of petitioner and certain of its subsidiaries or affiliates by which petitioner's BAP is ultimately determined.[5]

4. Paragraph II of the Implementing Agreement provides that the "annual savings" from the adjustments (discretionary adjustments) described in paragraph I above shall be subject to the following terms and limitations (the Cap):

> "(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

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Bureau, Dominick Sciortino, written for the then-Deputy Commissioner for Tax Operations, Arthur J. Roth).

[5] During the subject years, the BAP represented the arithmetic average of the three separate percentages resulting from the ratios of a corporate taxpayer's property, receipts and payroll values within New York State to those of such corporate taxpayer as a whole. Tax Law former § 210(3)(a) provided for calculating the three component factors (property, payroll and receipts) comprising the BAP. The adjustments set forth in the Implementing Agreement served to reduce the numerator of two (property and payroll) of the three components (or factors) to 25% of the regularly (i.e., statutorily) calculated numerator of each of such components, and to reduce the third (receipts) component (after paragraph I.(a) adjustments) to 50% of the regularly calculated numerator of such component.

> 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.
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> (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." (Italics added.)

5. In order to determine the "annual New York tax savings" resulting from applying the discretionary adjustments set forth in paragraphs I.(a) and I.(b) above and, in turn, to determine the proper application of the limitation called for under the Cap imposed by paragraph II.(a) above, it is necessary, as clearly indicated by the first sentence of paragraph II.(a) above, to compute tax due both:

> a.) without the discretionary sourcing and BAP adjustments set forth in the Implementing Agreement (the Statutory Method), and
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> b) with such discretionary adjustments set forth in the Implementing Agreement (the Settlement Method).

6. At a minimum, it is undisputed that the impact of the discretionary adjustments to petitioner's otherwise (statutorily) New York allocated 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* (§ 209 tax liability). It would further appear to be undisputed that such resulting § 209 tax liability savings are, however, 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 4).

7. What is unclear and in dispute is whether, and to what extent (if at all), the Implementing Agreement and its Cap impacts the tax surcharge under Tax Law Article, 9-A, §

209-B (MTA Surcharge), imposed on corporations such as petitioner that are subject to tax under Tax Law Article 9-A and are doing business, employing capital, or owning or leasing property within the Metropolitan Commuter Transportation District (MCTD).[6] The Implementing Agreement makes no mention of the MTA Surcharge.

8. In October 2008, the Division commenced a general verification field audit of petitioner for the years 2002 through 2005. Among the issues presented during the audit was the computation of petitioner's franchise tax liability under the terms of the Implementing Agreement, and the impact of the Cap with respect to such liability.

9. On January 27, 2012, the Division issued to petitioner a Notice of Deficiency (L-037270930-7) asserting additional tax due under Tax Law §§ 209 and 209-B in the aggregate amount of $2,682,444.00 for the years 2002 through 2005, plus interest calculated to the date of the notice, less assessment payment/credits applied to the years 2002 and 2003, as follows:[7]

Tax Period Ended	T.L. §209 Tax Liability	T.L. § 209-B MTA Tax Surcharge	Payments/Credits
12/31/02	$3,764.00	$600.00	$8,437.00
12/31/03	$3,766.00	$599.00	$7,921.00
12/31/04	$1,282,548.00	$244,312.00	$0.00
12/31/05	$1,042,643.00	$124,212.00	$0.00

[6] The MTA Surcharge is imposed under Tax Law § 209-B(1) as a percentage (tax rate) applied to a portion of the tax due under Tax Law § 209. More specifically, the Surcharge is calculated by applying the MTA Surcharge tax rate to the portion of the tax due under Tax Law § 209 that has been, by formula, allocated to the MCTD. Such allocation of the § 209 tax to the MCTD is accomplished via an MCTD business allocation percentage (MCTDBAP) that essentially mirrors the three-factor (i.e., property, receipts and payroll) BAP of Article 9-A, former § 210(3). That is, the MCTDBAP represents the arithmetic average of the three separate percentages resulting from the ratios of the taxpayer's (1) property, (2) payroll and (3) receipts within the MCTD to the taxpayer's (1) property, (2) payroll and (3) receipts within New York State (Tax Law § 209-B[2]).

[7] The tax amounts shown are exclusive of interest thereon. The payments/credits amounts include payments of both the amounts of tax and the amounts of interest calculated as due thereon.

Total	$2,332,721.00	$349,723.00	$16,358.00

Petitioner challenged the foregoing notice by filing a petition with the Division of Tax Appeals.

10. During the initial years after execution of the Implementing Agreement, and as specifically pertaining to the years 2002 and 2003, petitioner computed its § 209 tax liability and its MTA Surcharge tax liability under both the Statutory Method and the Settlement Method. The aggregate difference (tax savings) between the total amounts of tax due under each such computation for each such tax equaled the Cap amount (as annually adjusted). Rather than reducing its § 209 tax liability by the amount of the difference (tax savings) applicable thereto and, in turn, carrying any unused § 209 tax liability savings forward (per paragraph II.[b]), petitioner apparently utilized a portion of the available Cap amount of tax savings against its § 209 tax liability, and the remaining unused amount of such available Cap savings against its MTA Surcharge liability.

11. Petitioner continued to compute its § 209 tax liability and MTA Surcharge liability under both the Statutory Method and the Settlement Method. In contrast to the earlier years, however, starting in 2004 and continuing thereafter in 2005, the difference (tax savings) between petitioner's § 209 tax liability, per the Statutory Method, versus its § 209 tax liability, per the Settlement Method, alone equaled the available Cap amount (as annually adjusted). Rather than utilizing the Cap amount as before, by splitting the same between its § 209 tax liability and its MTA Surcharge liability, petitioner instead utilized the full available Cap amount in reduction of its § 209 tax liability, and thereafter also reduced its MTA Surcharge liability by the difference (tax savings) resulting from calculating such liability under the Statutory Method versus the

Settlement Method. Under this interpretation of the Implementing Agreement, where the Cap limitation is applied only to petitioner's § 209 tax liability, the dollar amount of total tax savings realized (and utilized) exceeds the available Cap dollar amount as calculated per Paragraph II of the Implementing Agreement.

12. In sum, per Paragraph II of the Implementing Agreement the tax difference between the Statutory Method and the Settlement Method (tax savings from the discretionary adjustments) cannot exceed the dollar limit imposed by the Cap. In the years 2002 and 2003, the § 209 tax savings were less than the available Cap amount, leaving "unused" Cap room. This unused Cap room was available to "absorb" the MTA Surcharge savings, and apparently was so used by petitioner. However, in 2004 and 2005, the § 209 tax savings from the discretionary adjustments equaled the available Cap amount, leaving no unused Cap room available against which any MTA savings could, as in earlier years, be applied or absorbed.[8]

13. Petitioner has brought a motion in limine seeking an advance ruling that any evidence related to and before the June 13, 1997 execution date of the Implementing Agreement is not admissible and should be excluded from the record (either at hearing or upon submission without a hearing). Petitioner maintains that the Implementing Agreement is clear and unambiguous on its face, and that the parol evidence rule bars introduction of extrinsic evidence for purposes of interpreting the Agreement or creating ambiguity therein. Petitioner refers, in its brief in support of the motion, to anticipating the Division's possible introduction and reference

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[8] The record does not disclose whether the adjusted Cap amount for 2004 and 2005 simply equaled the difference (tax savings) between petitioner's § 209 tax liability per the Statutory versus Settlement methods for such years, or rather if such difference exceeded the available Cap amount so as to require an adjustment to reduce such difference downward to the Cap amount for such years (i.e., bring the excess § 209 savings amount back down to the Cap amount as adjusted via the process described in Paragraph 6 of the Division's Affirmation in Opposition, [where under "[a]dditional income is added as an adjustment to petitioner's entire net income so as to limit tax savings to the annually adjusted cap (the "settlement adjustment")]).

to certain communications between it and the Division that occurred before the execution of the Implementing Agreement, including prior draft versions of the Implementing Agreement and a PowerPoint presentation given by petitioner's tax accountants to encourage the Division to entertain the request for alternative apportionment.

14. The Division has opposed such motion, arguing that the phrase "[a]ny annual New York tax savings arising from paragraph 1" of the Implementing Agreement is ambiguous. Most specifically, the Division's argues that the words "any" and "arising from" in such phrase can be interpreted to mean something other than, or in addition to, only § 209 tax liability savings including, specifically, "any" MTA Surcharge savings derived from or arising as the result of applying the discretionary adjustments.

15. Petitioner has also brought a motion seeking an order striking the Division's affirmation in opposition, upon the basis that the affirmation quotes extensively from the evidence petitioner seeks to have excluded from the record pursuant to the foregoing motion in limine.

16. The Division responded to the motion to strike, arguing that its affirmation in opposition does not refer to, paraphrase or quote from any preexecution materials, including any draft versions of the Implementing Agreement or the noted PowerPoint presentation, but rather only quotes from or paraphrases certain documents provided by petitioner to the Division during the audit of the petitioner, all of which were generated subsequent to the execution of the Implementing Agreement.

SUMMARY OF THE PARTIES' POSITIONS

17. The Implementing Agreement appears to be the culminating product resulting from a period of ongoing discussions between the parties that occurred prior to June 13, 1997 (the

execution date of the Implementing Agreement). Petitioner argues that the Implementing Agreement sets forth the entire agreement reached between the parties as the result of these discussions, and that resort to any evidence, oral or written, of communications between the parties related to and before the execution of the Implementing Agreement is barred by operation of the parol evidence rule. Petitioner maintains that the Implementing Agreement is clear and unambiguous on its face, and that extrinsic evidence cannot be used to vary, contradict or supplement the terms of the Agreement or to create an ambiguity therein. Petitioner asserts that there is no evidence of fraud, accident or (mutual) mistake regarding the execution of the Implementing Agreement, and that therefore such exceptions to the application of the parol evidence rule do not apply.

18. Petitioner asserts, in particular, that the terms of the Paragraph II 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. Specifically, petitioner argues that the phrase "any annual New York tax savings" is limited to savings arising from the use of an adjusted BAP, and that such language can only be held to mean New York State tax savings respecting the tax imposed under Tax Law § 209 (i.e., the § 2009 franchise tax as calculated here 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]). Petitioner maintains that the § 209 franchise tax, and any such savings thereunder, are distinct from the MTA Surcharge tax, and that the Cap under the Implementing Agreement does not apply or serve as a limit to any MTA Surcharge tax savings that might result from computing the MTA Surcharge tax under the Settlement Method versus the Statutory Method. Finally, petitioner notes that its manner of computation and application of the Cap in the earlier audit years (***see*** Findings of Fact

10, 11 and 12), represents merely a mistaken interpretation corrected, however, for later years in order to reflect the proper interpretation and application of the limitation imposed by the Cap.

19. The Division argues, in opposition, that the word "any" and its appearance in the phrase "any annual New York tax savings arising from paragraph I," is ambiguous and is subject to more than one interpretation. Specifically, the Division maintains that such phrase can reasonably be interpreted to mean not only § 209 tax liability savings, as petitioner argues, but in view of the manner in which the MTA Surcharge is calculated, can also reasonably be interpreted to mean (and include) MTA Surcharge tax savings. The Division thus maintains that the parol evidence rule is not applicable as a bar to the introduction of evidence concerning the parties intent prior to the execution of the Implementing Agreement. The Division further asserts that petitioner's motion to strike should be denied, in that the materials referenced in the Division's affirmation in opposition do not predate the execution of the Implementing Agreement.

CONCLUSIONS OF LAW

A. The heart of the substantive dispute in this case concerns the extent of the limitation imposed by the Cap (as adjusted annually). Petitioner argues that the Cap serves as a limit only with respect to petitioner's § 209 tax liability, but imposes no limit on any other (i.e., non-§ 209 tax liability) savings including, specifically, MTA Surcharge savings. The Division argues that the Cap imposes a dollar amount limit on "any annual New York tax savings" (i.e., § 209 tax liability savings and MTA Surcharge tax savings) arising as a result of applying the discretionary adjustments. As explained hereafter, the Division's position is that since the discretionary adjustments impact both petitioner's § 209 tax liability and, as a consequence thereof, its MTA Surcharge liability (computed, as it is, based on an allocated portion of petitioner's § 209 tax liability), then the Cap applies to any resulting tax savings in both of such taxes. The Division does not appear to dispute petitioner's entitlement to the benefit of such resulting reductions in both taxes, so long as the aggregate benefit does not exceed the total available annual dollar amount of the Cap. The foregoing substantive dispute gives rise to the motions herein concerning the admissibility of preexecution evidence that might shed light on the parties' intent concerning the scope and application of the phrase "any annual New York tax savings arising from paragraph I" of the Implementing Agreement.[9]

B. It is undisputed that during the years in issue, petitioner was subject to the tax imposed per Tax Law § 209(1), and also did business within the MCTD so as to be subject to the surcharge imposed under Tax Law § 209-B. In order to address the question presented concerning the applicability of the parol evidence rule, it will be helpful to set forth the manner in which the foregoing two taxes are imposed and calculated.

C. Under Tax Law Article 9-A, New York State imposes an annual franchise tax on corporations for the privilege of exercising a corporate franchise, doing business, employing capital, owning or leasing property or maintaining an office in the state (Tax Law § 209[1]). The tax is usually, and in this case was, imposed and calculated based upon the taxpayer's "entire net income" (ENI).[10] ENI is, generally, the same as the taxpayer's federal taxable income with certain modifications, less income from investments in subsidiary corporations (Tax Law §§ 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"

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[9] The Order issued here will only address whether the parol evidence rule bars admission of preexecution evidence. It will not address the *impact* of any such evidence that might be determined admissible if, or when, offered at hearing, or limit any arguments concerning the proper weight to be accorded any such evidence deemed admissible.

[10] In addition to the entire net income base, the other bases upon which liability for the franchises taxes imposed under Tax Law § 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]).

is defined as income from "investment capital" (Tax Law § 208[6]). "Business income," in turn, is comprised of ENI less investment income (Tax Law § 208[8]).

D. To compute the tax imposed under Tax Law § 209(1), 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 was to be determined based upon the taxpayer's BAP. The BAP, as set forth in the statute (described herein as the Statutory Method), is the arithmetic average of the ratios of the taxpayers property, payroll and receipts values in New York State to those of the corporate taxpayer as a whole (***see*** Finding of Fact 3). 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 reflect the corporate taxpayer's *income* in New York. The Implementing Agreement provided for such discretionary adjustments, as set forth in Paragraph I thereof (described herein as the Settlement Method).

E. Under Tax Law Article 9-A, and in addition to the tax imposed under Tax Law § 209(1), New York State also imposes an additional tax (MTA Surcharge) under Tax Law § 209-B on corporations that, like petitioner, are subject to tax under Tax Law 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 (***see*** Finding of Fact 7). 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 Metropolitan Transportation Authority (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).

F. The MTA Surcharge is expressed as a percentage of the 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 § 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 business allocation percentage (MCTDBAP) that essentially mirrors the three-factor (i.e., property, payroll and receipts) BAP of Tax Law former § 210(3) (***see*** Finding of Fact 7). That is, the MCTDBAP represents the arithmetic average of the ratios of the taxpayers receipts, payroll and property values within the MCTD to those of the corporate taxpayer within New York State (described herein as the Statutory Method). Tax Law § 209-B does not expressly specify any discretionary authority by which the Commissioner of Taxation may adjust the three ratio factors utilized in computing the MCTDBAP. However, to the extent the § 209 BAP computed using the discretionary adjustments under the Settlement Method impacts (reduces) the amount of the § 209 tax liability, it likewise would necessarily impact (reduce) the amount of the MTA Surcharge liability.[11]

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[11] The record at this point does not disclose whether petitioner's MTA Surcharge liability under the Settlement Method is lower than such liability under the Statutory Method simply because petitioner's § 209 tax liability is lower under the Settlement Method, or rather if a separate (and more involved) calculation of MTA Surcharge liability was utilized involving MCTDBAP factor calculations reflecting the adjusted BAP factor calculation under the Implementing Agreement (i.e., if the reduced New York State values resulting from the lowered property, payroll and receipts numerators of the BAP under the Implementing Agreement became or were used as the fraction denominators in calculating the MCTDBAP).

G. In its motion papers, petitioner argues that the savings arising from Paragraph I of the Implementing Agreement constitute savings of New York State taxes only. Petitioner thus maintains the Cap under paragraph II of the Implementing Agreement cannot apply as a limit on any tax imposed upon a taxpayer's business activity in a political subdivision (i.e., the MCTD). Petitioner also posits that the § 209 tax liability savings under paragraph I of the Agreement result from the use of an adjusted BAP, a term defined in and applicable only to calculating the § 209 tax liability. Petitioner would further distinguish the MTA Surcharge upon the basis that it is a separate tax imposed in addition to the § 209 tax. In this regard, 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 the (separately required) MTA Surcharge return (***Matter of Kaiser Aerospace Electronics Corp.***, Tax Appeals Tribunal, January 16, 1997). Petitioner thus argues that the phrase "any annual New York tax savings," in the context of the Implementing Agreement, is clear and unambiguous and can *only* mean any annual New York *§ 209* tax savings.

H. Notwithstanding the foregoing distinctions, the MTA Surcharge is imposed, like the § 209 tax, under Tax Law Article 9-A. It is collected by the state and, in turn, is allocated and disbursed to the member jurisdictions comprising the MCTD as outlined above (***see*** Conclusion of Law E). 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 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 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]).

I. The discretionary adjustments under the Implementing Agreement were specifically allowed "to fairly reflect [petitioner's] *income* in New York for purposes of the [Article 9-A franchise] taxes [as imposed] on [either the] entire net income [base], the alternative minimum [taxable income] tax [bases] or the tax on capital [base] (***see*** Finding of Fact 2; Conclusions of Law C and D; Tax Law former § 210[1]; Implementing Agreement at paragraph I). It is obvious (and undisputed) that reducing the amount of petitioner's business income allocated to New York State, by application of the discretionary adjustments, results in a consequent reduction in the amount of petitioner's New York State franchise tax liability otherwise due under Tax Law § 209 (computed in this case on the basis of petitioner's ENI). It is further undisputed that such § 209 tax liability savings, resulting from the discretionary adjustments, constitute "annual New York tax savings" under the terms of the Implementing Agreement. Finally, it is clear that the foregoing result under the Implementing Agreement, in turn, serves to reduce the amount of petitioner's MTA Surcharge liability that would otherwise be due (***see*** Conclusion of Law F). What remains in dispute is whether any such reduction to petitioner's MTA Surcharge liability (MTA Surcharge savings) falls within the phrase "any additional New York tax savings arising from Paragraph I" so as to subject the dollar amount of such impact to the dollar amount limit set by the Cap.

The Motion to Strike

J. Petitioner's motion to strike is premised on the allegation that the Division's affirmation in opposition quotes extensively from the very evidence sought to be precluded as inadmissible under the parol evidence rule. Specifically, petitioner complains that the affirmation quotes from communications between the parties that are extrinsic to the Implementing Agreement. Petitioner argues that allowing (and not striking from the record) the Division's affirmation will place the disputed evidence allegedly representing the "intent" of the parties prior to the execution of the Implementing Agreement into the record before a ruling is made on its admissibility, and allegedly will serve no purpose other than to prejudice the trier of fact.

K. In contrast, the Division correctly points out that petitioner's motion in limine seeks specifically to preclude the admission of any evidence (oral and written) between the parties "related to or before the execution of," "leading up to the execution of," "related to and before the execution of," 'that took place prior to the execution of," or "that occurred before the execution of," the Implementing Agreement. The Division states that its affirmation quotes from or paraphrases the Implementing Agreement itself, from a letter dated many years after the execution of the Implementing Agreement, and from work papers relating to the audit of petitioner for the years 2002 through 2005, all of which documents post-date the June 13, 1997 execution of the Implementing Agreement. The Division thus maintains that such materials are not preexecution materials sought to be barred under the motion in limine.

L. Petitioner's motion to strike the Division's affirmation in opposition is denied. While there is no specific list of evidentiary materials sought to be barred under the motion in limine (the materials are described, generally, as oral and written communications [including prior draft versions of the Implementing Agreement, a power point presentation and, perhaps, related work papers]) (***see*** Finding of Fact 13), the common thread is that such materials pertain to the time period prior to the June 13, 1997 execution date of the Implementing Agreement. As detailed above, the Division's affirmation does not present material allegedly representing the intent of the parties prior to the execution of the Implementing Agreement. Rather, the affirmation appears to set forth the manner in which the terms of the Implementing Agreement were applied, in fact, by petitioner during the audit years (2002 through 2005), so as to arrive at its reported § 209 tax liability and its reported MTA Surcharge liability. Clearly, the described manner of applying the Agreement is not necessarily what *both* parties understood, intended or agreed should or would happen under the terms of the Implementing Agreement. In addition, it is undisputed that petitioner changed its manner of applying the Cap during the latter two years of the audit period (***see*** Finding of Fact 12). The initial manner of computation, denominated an "incorrect" or "mistaken" application of the Cap by petitioner during the earlier two audit years, and its subsequent "correction" for the latter two audit years, is certainly not dispositive as to what is (substantively) the proper calculation and application of the Cap. Again, and more to the point concerning the motion to strike, the Division's recitation of the facts of such computations merely appears to set forth the process and result upon which petitioner reported its tax liability under its interpretation of the Implementing Agreement during the audit years. As such, the material set forth in the Division's affirmation does not necessarily represent the "intent" of the parties prior to the execution of the Implementing Agreement. Finally, any possibility of prejudice as to the trier of fact, so as to negatively impact the ultimate outcome on the substantive issue presented in this case, is both highly unlikely and clearly less critical than that which might occur in a trial before a jury. Accordingly, the Division's affirmation in opposition will not be stricken from the record.

The Motion in Limine

M. A motion in limine is a pre-trial motion brought generally in an effort to exclude, limit the introduction of, or reference to, evidence that is alleged to be immaterial, unduly prejudicial to the trier of fact or, as here, claimed to be inadmissible (***see State v. Metz***, 241 AD2d 192 [1998]). In administrative adjudication, there is broad latitude concerning the admissibility of evidence, leaving the relevance and weight to be accorded to such evidence within the province of the trier of fact. In this respect, State Administrative Procedure Act § 306(2) provides:

> "All evidence, including records and documents in the possession of the agency of which it desires to avail itself, shall be offered and made a part of the record, and all such documentary evidence may be received in the form of copies or excerpts, or by incorporation by reference. In the case of incorporation by reference, the materials so incorporated shall be available for examination by the parties before being received in evidence."

N. Petitioner's motion in limine seeks an order, in advance of a hearing in this case, barring the introduction of any oral or written evidence extrinsic to the Implementing Agreement. Petitioner argues that such Agreement is complete and unambiguous on its face, and that the parol evidence rule bars the introduction of extrinsic evidence for purposes of interpreting or varying the terms of such an Agreement (contract). Notwithstanding the broad latitude afforded in admitting evidence in administrative adjudicatory proceedings, and the absence of a jury thereby minimizing, if not eliminating, the issue of undue prejudice, it remains that the Tribunal has consistently applied the parol evidence rule as a bar, where appropriate, to allowing the admission or consideration of extrinsic evidence for purposes of modifying or varying the meaning or terms of an otherwise unambiguous contract. Given the somewhat unique facts of this case, and the potential impact of the ruling sought herein on the scope of a future hearing on the substantive issue presented, it is appropriate to consider the motion in limine brought by petitioner.

O. As a starting point, the parties agree that "[i]n the absence of fraud, accident or mistake, the parol evidence rule prohibits resort to extrinsic evidence to vary the meaning of a contract when the language of the contract is unambiguous" (***Matter of Emery Air Freight Corp.***, Tax Appeals Tribunal, October 17, 1991, ***confirmed*** 188 AD2d 772 [1992]). The Tribunal has consistently applied this standard and rule so as to bar oral testimony as a basis for varying or modifying the unambiguous language of a contract (***Id.*** [oral testimony to construe a written lease term barred as irrelevant in determining the intent of the parties]; ***see Matter of Landmark Dining Systems, Inc.***, Tax Appeals Tribunal, September 8, 1994, ***confirmed*** 224 AD2d 785 [1996][evidence of a contemporaneous oral agreement barred for purposes of modifying the terms of an unambiguous integrated written contract]; ***Matter of Schechter***, Tax Appeals Tribunal, October 13, 1994 [barring oral testimony regarding the existence of a contractual contingency]). At the same time, where the language of a contract is ambiguous, the rule will not serve as a bar to the admissibility of extrinsic evidence to explain that which is unclear (***Matter of Howard Enterprises***, Tax Appeals Tribunal, August 4, 1994 [oral testimony not used to contradict written terms, but allowed to clarify vague terms ("all liability" for third party debts)]; ***see also Matter of Officemax North America v. Tax Appeals Tribunal***, 33 AD2d 1161 [2006], ***lv denied*** 8 NY3d 804 [2007]). In short, the parol evidence rule does not present a bar to considering extrinsic evidence if an agreement is reasonably susceptible to more than one meaning within the context of the entire integrated agreement.

P. The question presented by the motion in limine turns on whether there is ambiguity in the terms of the Implementing Agreement itself, since under the parol evidence rule any "[a]mbiguity is determined within the four corners of the document; it cannot be created by extrinsic evidence that the parties intended a meaning different than that expressed in the agreement and, therefore, extrinsic evidence may be considered only if the agreement is ambiguous" (***Brad H. v. City of New York***, 17 NY2d 180, 186 [2011]). An agreement is ambiguous if the language was "written so imperfectly that it is susceptible to more than one reasonable interpretation." (***Id.***) In this case, the language of the Implementing Agreement speaking of "*the annual savings from* [the discretionary adjustments under Paragraph I]," and of "*any annual New York tax savings arising from* [the discretionary adjustments under Paragraph I]," is, in light of the manner in which the franchise taxes under Tax Law Article 9-A are imposed and computed, susceptible to more than one reasonable interpretation. Therefore, petitioner's motion for an advance ruling barring certain extrinsic evidence concerning the Agreement, on the basis of the parol evidence rule, must be denied.

Q. Petitioner posits that the language of the Cap imposes no limit on the amount of "any" tax savings *other than* those savings to its § 209 tax liability resulting from the impact of the discretionary adjustments (***see*** Conclusion of Law G). Under petitioner's view, "any annual New York tax savings" subject to the Cap requires reading the disputed phrase as including the term "§ 209 tax" therein (i.e., "any annual New York § 209 tax savings") resulting from the discretionary adjustments. Petitioner argues that this reading follows implicitly from the context of the rest of the Implementing Agreement, noting that the Agreement speaks of the bases (ENI base, Capital base, Alternative Minimum Income base) upon which the § 209 tax liability is calculated, but is silent as to the MTA Surcharge. The Division, in contrast, believes that the

Cap more broadly applies to limit the dollar amount of "any" (i.e., all) tax savings arising from applying the discretionary adjustments, and thus applies to limit *both* § 209 tax liability savings and MTA Surcharge savings, in the aggregate up to the annual available amount of the Cap. The Division maintains that the language "any annual New York tax savings" is broad enough to include any such savings derived or resulting from the Implementing Agreement and its discretionary adjustments, specifically including MTA Surcharge savings, and is not limited only to § 209 tax liability regardless of the base (ENI, Capital or Minimum Taxable Income) upon which such latter tax liability is calculated.

R. If the Statutory Method only was applied for purposes of calculating petitioner's MTA Surcharge liability (i.e., if the amount of petitioner's § 209 tax liability being allocated to the MCTD and subjected to the MTA Surcharge was the amount of such § 209 tax liability statutorily determined *without* regard to the discretionary adjustments), then it is obvious there would be no "savings." However, it appears there were "savings," and thus it follows that petitioner apparently calculated its MTA Surcharge liability based, at least in part, on the result flowing from applying the discretionary adjustments in calculating its § 209 tax liability (***see*** Finding of Fact 12). As noted, the application of the MTA Surcharge tax rate against a lower amount of § 209 tax liability (however calculated) necessarily results in a lower amount of MTA Surcharge liability (i.e., tax savings)(***see*** Conclusion of Law I). The ambiguity in the Implementing Agreement thus presents itself due to the fact that the MTA Surcharge is imposed and calculated as a percentage of the § 209 tax liability. That is, if the § 209 tax liability is reduced due to the discretionary adjustments, then it follows that the MTA Surcharge liability will in turn be reduced, such that the phrase "*any annual New York tax savings arising from* [the discretionary adjustments]" could reasonably be read to include such MTA Surcharge savings, and not only § 209 tax liability savings as asserted by petitioner.

S. The Implementing Agreement's silence on the MTA Surcharge in the context of applying the Cap may, among other possibilities, indicate that reference to the MTA Surcharge:

> a) was implicitly included within the phrase "any annual New York tax savings," since the MTA Surcharge is a franchise tax to which petitioner is subject under Tax Law Article 9-A, such that any savings resulting from the application of the discretionary adjustments in calculating the § 209 tax liability (upon a portion of which the MTA Surcharge liability is based) clearly impacts (reduces) petitioner's MTA Surcharge liability and is subject to the Cap, or
>
> b) was specifically omitted from such phrase because it was not intended that the limit of the Cap on § 209 tax liability savings would further serve to cap any resulting MTA Surcharge savings, or
>
> c) was omitted as the result of oversight.

T. In view of all of the foregoing, the phrase "any annual New York tax savings arising from paragraph I" in the Implementing Agreement, and the impact of that phrase on the scope of the limitation imposed under the terms of the Cap, is ambiguous. Accordingly, the parol evidence rule does not serve as a bar to the introduction of evidence concerning the same.[12]

U. The motions of The McGraw-Hill Companies, Inc., seeking orders striking the Division's affirmation in opposition to the motion in limine and an advance ruling precluding the introduction at hearing of any evidence (testimonial or documentary) related to and before

[12] Indeed, evidence of the parties' intent and understanding may shed light on the question of whether the absence of any mention of the MTA Surcharge in the Implementing Agreement reflects implicit inclusion, intentional omission, or simple oversight in drafting.

execution of the Implementing Agreement are hereby denied, and this matter shall proceed to hearing in due course.

DATED: Albany, New York
February 12, 2015

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE