• *Credit for historic property rehabilitation*

A credit is available for 100% of the federal credit for the rehabilitation of historic properties (Sec. 210(40), Tax Law). (¶948)

• *Historic barn renovation credit*

A 25% credit is allowed for qualified rehabilitation expenditures to renovate or rehabilitate qualified historic barns in New York. (Sec. 210(12(I)), Tax Law) (¶933)

• *Agricultural property tax credit*

Taxpayers whose federal gross income from farming is at least 2/3 of their total federal gross income in excess of $30,000 may take a credit for school district property taxes paid on qualified agricultural property. (Sec. 210(22), Tax Law) (¶934)

• *Credits for employing qualified disabled persons*

Employers that hire qualified disabled persons for at least 180 days or 400 hours a year may take a credit for 35% of the qualified employee's first $6,000 in wages. (Sec. 210(23), Tax Law; TSB-M-98(2)C, TSB-M-98(3)C, and TSB-M-98(1)I) From 2015 through 2019, an additional credit may be claimed for hiring workers with developmental disabilities (Sec. 210-B(48), Tax Law).(¶928)

• *Credit for disabled-accessible taxis*

Until December 31, 2016, a company providing taxicab or livery service may claim a credit for the incremental cost, up to $10,000, of upgrading a vehicle so that it is "accessible by individuals with disabilities," as defined in federal law (Sec. 210[40], Tax Law). (¶947)

• *Emerging technology credits*

A taxpayer may take a 10% or 20% capital credit for qualified investments in a qualified emerging technology company (QETC), up to $150,000 or $300,000, and a QETC may take an employment credit equal to $1,000 per employee in excess of its base year employment. (Sec. 210(12-E), (12-F), Tax Law) (¶936)

• *Automated external defibrillator credit*

A credit is available for the purchase of automated external defibrillators. The credit is equal to the cost of each defibrillator or $500, whichever is less. (Sec. 210(25), Tax Law) (¶937)

• *Green building*

A credit is allowed for a portion of the costs incurred in performing qualified construction or rehabilitation to enhance the supply of environmentally sound buildings in New York. (Sec. 210(31), Tax Law) (¶942)

• *Low-income housing*

A credit is provided for the construction or rehabilitation of rent-restricted housing that, with some differences, qualifies for the federal low-income housing credit. (Sec. 210(30), Tax Law) (¶941)

• *Long-term care insurance*

A credit is allowed for 20% of the premium paid during the taxable year for long-term care insurance premiums. (Sec. 210(25-a), Tax Law) (¶939)

• *Brownfield remediation*

Three refundable brownfield credits are available to taxpayers that own or develop a qualified site for which a certificate of completion has been issued to the taxpayer by the Commissioner of Environmental Conservation. (Secs. 21-23, 210(33-35), Tax Law) These credits are designated the brownfield redevelopment tax credit, credit for remediated brownfields, and environmental remediation insurance credit (¶943).

• *Real property tax credit for qualified manufacturers*

Effective for tax years beginning on or after January 1, 2014, a credit is available for property taxes paid by qualified New York manufacturers. (Sec. 210(48), Tax Law) (¶958)

• *Film production credit*

A credit is available through 2019 to qualified film production companies, or sole proprietors of qualified film production companies. The amount of the credit is generally 30% of the qualified production costs of a qualified film and may be increased for post-production costs (Secs. 24, 210(36), Tax Law). In addition, New York City has adopted a 5% film production credit against general corporation and unincorporated business taxes. (¶944, ¶2806)

• *Commercial production credit*

A credit is available to qualified commercial production companies, or sole proprietors of qualified film production companies for a percentage of its qualified production costs, applicable to tax years beginning after 2006, and before 2015 (Sec. 28, Tax Law). (¶949)

• *Musical and theatrical production credit*

For tax years 2015 through 2019, a credit is available 25% of the qualified production expenditures and transportation costs incurred by eligible production companies to produce a live, dramatic stage presentation in a qualified production facility on a tour that consists of eight or more shows in three or more localities (Sec. 24-a(B), Tax Law). (¶959)

• *Credit for security training*

Qualified building owners may claim a refundable credit for a portion of the cost of training security officers. (Sec. 210(37), Tax Law) (¶946)

• *Biofuel production credit*

A biofuel production credit is available for taxable years beginning after 2005 and before 2020. The credit equals 15¢ for each gallon of biofuel produced at a biofuel plant, after the production of the first 40,000 gallons per year presented to market. (Sec. 28, Tax Law) (¶952)

• *Credit for conservation easement property taxes*

A credit is available in the amount of 25% of the school district, county, and city real property taxes paid on land that is under a conservation easement. The credit amount claimed by a taxpayer may not exceed $5,000 in any given year. (Sec. 210(38), Tax Law) (¶951)

• *Youth Works credit*

The New York Youth Works Tax Credit Program provides tax credits of up to $1,000 for a six-month period to qualified businesses employing at-risk youths in full-time and part-time positions in 2012 through 2018. The program is administered by the Department of Labor. (Sec. 210[44], Tax Law) (¶953)

• *Empire State Jobs Retention Program*

The Empire State Jobs Retention Program creates tax credits equal to 6.85% of the gross wages paid for impacted jobs in order to retain strategic businesses and jobs that are at risk of leaving the state due to the impact on business operations of an event (such as a natural disaster) leading to an emergency declaration by the governor. (Sec. 36, Tax Law; Sec. 210[44], Tax Law) (¶954)

An LLIC or LLTC that is treated as a partnership for federal tax purposes will be treated as a partnership for New York State income tax purposes. Accordingly, members of LLICs or LLTCs that are classified as partnerships for federal purposes will be taxed as partners in a partnership, and will be liable for personal income tax in their separate or individual capacities.

LLICs or LLTCs that are treated as partnerships for federal tax purposes are subject to the same annual filing fees that apply to limited liability companies (see discussion above).

¶114 Credits Against Tax and Other Tax Incentives—In General

Law: Sec. 38, 208(9)(a)(18), 209(11), 210(49), 606, 612(c)(39), Tax Law (CCH NEW YORK TAX REPORTS, ¶16-805).

The New York personal income tax law provides numerous credits against the tax, as discussed in the following paragraphs.

• *Carryovers; recapture*

Most credits may not reduce a taxpayer's tax liability below zero, although some "refundable" credits may generate a refund to the taxpayer even if there is no tax liability. With some exceptions, credits not used in one year may be carried forward indefinitely. Recapture of credits may be required if property does not remain in qualified use.

• *Effect of certain criminal convictions on credits*

If a taxpayer stands convicted (or is a shareholder of an S corporation or a partner in a partnership that is convicted) of certain penal law offenses concerning corruption, bribery, and misconduct, then the taxpayer will not be eligible for any tax credit allowed under the corporate franchise tax or any business tax credit allowed under the personal income tax. The provision applies to acts committed on or after April 30, 2014. (Sec. 41, Tax Law)

• *Order of credits*

Credits that cannot be carried forward and that are not refundable must be deducted first. Credits that can be carried over to subsequent years, and carryovers of such credits, must be deducted next; among such credits, those whose carryover is of limited duration must be deducted before those whose carryover is of unlimited duration. Credits that are refundable must be deducted last.

• *Business tax credits deferred*

For tax years 2010, 2011, and 2012, taxpayers with more than $2 million in aggregated business tax credits were required to defer the amounts above $2 million until 2013. The total amount of credits deferred will be paid back to taxpayers over tax years 2013, 2014, and 2015. (Secs. 33, 34, Tax Law; TSB-M-10(11)I, New York Department of Taxation and Finance, September 13, 2010, CCH NEW YORK TAX REPORTS, ¶406-976)

Beginning with tax year 2010, Form IT-500, *Income Tax Deferral Credit*, provides taxpayers with detailed instructions and schedules regarding the temporary deferral of tax credits.

• *Obsolete credits*

The following credits are no longer available, but unused credits may be carried forward until exhausted:

Special additional mortgage recording taxes: For taxable years beginning before 1988, a credit against personal income tax was allowed for special additional mortgage recording taxes paid on mortgages recorded on or after January 1, 1979. (Sec. 606(f), Tax Law) The credit was revived for taxable years beginning after 2003 (see ¶145).

Alternative fuel vehicle property: Applicable to property placed in service after 1997 (after 1999 for qualified hybrid vehicles) and before 2005, a credit was available for a percentage of expenditures on electric vehicles, clean-fuel vehicles, and qualified hybrid vehicles (Sec. 606(p), Tax Law). A credit for alternative fuel vehicle refueling property and electric vehicle recharging property is in effect for tax years beginning on or after January 1, 2013, but before January 1, 2018 (see ¶148).

• *Business Incubator and Innovation Hot Spot incentives*

The New York State Business Incubator and Innovation Hot Spot Support Act (Part C, Ch. 59, Laws 2013) was enacted to support the growth of companies in the early stages of development. The Act authorizes the Empire State Development Corporation (ESDC) to designate five "New York State innovation hot spots" in SFY 2013-14 and an additional five in SFY 2014-15.

ESD is authorized to issue an annual request for proposals for grants and assistance based on available appropriations and to designate qualified applicants as New York State incubators. In addition, in each of state fiscal years 2013 and 2014, ESD is authorized to designate five qualified New York State incubators as New York State Innovation Hot Spots. These New York State Innovation Hot Spots can certify certain clients as a qualified entities eligible for tax benefits under Sec. 38, Tax Law.

Entities designated as innovation hot spots must demonstrate an affiliation with and the support of at least one college, university, or independent research institution, and offer programs consistent with regional economic development strategies. Qualified entities in innovation hot spots are eligible for the tax benefits listed below for five taxable years, beginning with the year the entity becomes a tenant in or part of an innovation hot spot:

— A qualified entity that is located within an Innovation Hot Spot is subject only to the fixed dollar minimum tax under Article 9-A (¶905).

— Qualified entities located within and without the Hot Spot and corporate partners of qualified entities are allowed a deduction for the amount of income or gain attributable to operations in the Hot Spot (¶1003).

— Individuals who are sole proprietors of a qualified entity, or are partners/members/shareholders of a partnership, limited liability company, or New York S corporation, respectively, that is a qualified entity are allowed a deduction for the amount of income or gain attributable to operations at the Hot Spot. This benefit is also available under the New York City personal income tax on residents. (¶303; ¶3010)

— Qualified entities are also eligible for a credit or refund of sales and use tax imposed on the retail sale of tangible personal property or services (¶2109).

Taxpayers claiming the above tax benefits are not eligible for any other New York State exemptions, deductions, credits, or refunds to the extent the exemption, deduction, credit, or refund is attributable to the business operations in the Innovation Hot Spot.

(Secs. 38, 208.9(a)(18), 209(11), 612(c)(39), and 1119(d)(1); Sec. 1(16-v), Urban Development Corporation Act; Sec. 11-1712(c)(35); NYC Admin. Code; *TSB-M-14(1)C, (1)I, (2)S*, March 7, 2014, CCH NEW YORK TAX REPORTS, ¶408-039)

• *START-UP NY Program*

The SUNY Tax-Free Areas to Revitalize and Transform Upstate (START-UP) New York program (Ch. 68 (A.B. 8113), Laws 2013; Sec. 39, Tax Law, Sec. 40, Tax Law, Sec. 606(ww), Tax Law) provides several personal and corporate income tax, sales and use

Husband and wife: In the case of a husband and wife who file a joint federal return but are required to determine their New York taxes separately, the EIC may be applied against the tax of either spouse or divided between them as they may elect.

Noncustodial parents: For taxable years beginning after 2005 and before 2017, an enhanced EIC is available to any resident taxpayer, 18 or older, who meets all of the following requirements (Sec. 606(d-1), Tax Law):

— the taxpayer is the parent of a minor child or children with whom the taxpayer does not reside;

— the taxpayer has an order that has been in effect for at least one-half of the taxable year requiring him or her to make child support payments that are payable through a support collection unit; and

— the taxpayer has paid an amount in child support in the taxable year at least equal to the amount of current child support due during the taxable year for every order requiring him or her to make child support payments.

The credit is equal to the greater of the following: (1) 20% of the amount of the earned income tax credit that would have been allowed to the taxpayer under IRC Sec. 32 (absent the application of IRC Sec. 32(b)(2)(B)) if the child or children satisfied the requirements for a qualifying child under IRC Sec. 32(c)(3), provided that the credit must be calculated as if the taxpayer had only one child; or (2) the product of 2.5 multiplied by the amount of the earned income tax credit that would have been allowed to the taxpayer under IRC Sec. 32 if the taxpayer satisfied the eligibility requirements under IRC Sec. 32(c)(1)(A)(ii).

CCH Caution: Recordkeeping

The Division of Taxation properly disallowed a New York taxpayer's earned income credit after he failed to sustain his burden of proof in establishing receipt of earned income on his personal income tax return. The taxpayer, a self-employed, licensed taxi driver, kept no records or receipts of his income for the year at issue. He admitted to estimating his income. A failure to accurately prove earned income justified the denial of his claim for the earned income credit (*Sanchez*, New York Division of Tax Appeals, Small Claims, DTA No. 820220, September 15, 2005, CCH NEW YORK TAX REPORTS, ¶405-201).

¶127 Credits Against Tax—Film Production Credit

Law: Secs. 24, 31, 606(gg), Tax Law (CCH NEW YORK TAX REPORTS, ¶16-891).

For tax years beginning before 2020, a credit is available to qualified film production companies, or sole proprietors of qualified film production companies, for a portion of the qualified production costs of a qualified film. (Sec. 24, Tax Law; Sec. 606(gg), Tax Law) The credit is allowed for the taxable year in which the production of the qualified film is completed.

• *Definitions*

"Qualified production costs" means production costs only to the extent such costs are attributable to the use of tangible property or the performance of services within New York directly and predominately in the production (including pre-production and post-production) of a qualified film. (Sec. 24(b)(1), Tax Law)

"Production costs" means costs for tangible property used and services performed directly and predominately in the production (including pre-production and post-production) of a qualified film. Production costs generally include technical and crew production costs, such as expenditures for film production facilities, props, makeup, wardrobe, film processing, camera, sound recording, set construction, lighting, shooting, editing, and meals. (Sec. 24(b)(2), Tax Law)

Production costs do not include:

— costs for a story, script, or scenario to be used for a qualified film; and

— wages or salaries or other compensation for writers, directors, including music directors, producers, and performers (other than background actors with no scripted lines).

A "qualified film" is a feature-length film, television film, relocated television production, television pilot and/or each episode of a television series, regardless of the medium (Sec. 24(b)(3), Tax Law). A qualified film must have a minimum budget of $500,000 (Sec. 31(a)(5), Tax Law).

A qualified film does not include:

— a documentary film, news or current affairs program, interview or talk program, "how-to" (*i.e.*, instructional) film or program, film or program consisting primarily of stock footage, sporting event or sporting program, game show, award ceremony, film or program intended primarily for industrial, corporate or institutional end-users, fundraising film or program, daytime drama (*i.e.*, daytime soap opera), commercials, music videos or "reality programs"; or

— a production for which records are required to be maintained with respect to any performer in such production (reporting of books, films, etc. with respect to sexually explicit conduct).

A "qualified film production facility" is a film production facility in New York that contains at least one sound stage having a minimum of 7,000 square feet of contiguous production space. (Sec. 24(b)(5), Tax Law)

A "qualified film production company" is a corporation, partnership, limited partnership, or other entity or individual principally engaged in the production of a qualified film and in control of the qualified film during production. (Sec. 24(b)(6), Tax Law) Members of a partnership that is a qualified film production company may claim the credit.

• *Credit amount*

The amount of the credit is the product (or, in the case of a partnership, the partner's pro rata share of the product) of 30% (10%, for taxable years before 2008), and the qualified production costs paid or incurred in the production of a qualified film; provided that the qualified production costs (excluding post production costs) attributable to the use of tangible property or the performance of services at a qualified film production facility in the production of the qualified film equal or exceed 75% of the production costs (excluding post production costs) paid or incurred that are attributable to the use of tangible property or the performance of services at any film production facility within and without New York in the production of the qualified film. (Sec. 24(a)(2), Tax Law)

If the qualified production costs (excluding post production costs) attributable to the use of tangible property or the performance of services at a qualified film production facility in the production of the qualified film is less than $3 million, then the portion of the qualified productions costs attributable to the use of tangible property or the performance of services in the production of the qualified film outside of a qualified film production facility is allowed only if the shooting days spent in New York outside of a film production facility in the production of the qualified film equal or exceed 75% of the total shooting days spent within and without New York outside of a film production facility in the production of the qualified film. (Sec. 24(a)(2), Tax Law)

If the amount of the credit is between $1 million and $5 million, the credit is paid out in two equal installments over a two year period beginning in the taxable year in which the production of the qualified film is completed. If the credit is greater than $5 million, it is paid out in three equal installments in consecutive years beginning with the taxable year in which the production of the qualified film is completed.

ume of business transacted), includes that portion of the total compensation for services which the total number of working days employed within New York bears to the total number of working days everywhere. (Rule Sec. 132.18) Nonworking days, such as Saturdays, Sundays, holidays, days of absence because of illness or personal injury, vacations, or leave with or without pay, are excluded. The items of gain, loss, and deduction of the employee attributable to that individual's employment, derived from or connected with New York sources, are similarly determined.

Practitioner Comment: Necessity or Convenience?

A major area of contention during audits is New York's rule that any allowance claimed for days worked outside New York must be based on performance of services that, of necessity, as distinguished from convenience, obligates the employee to out-of-state duties in the service of the employer. This rule has been applied to employees who were specifically requested by their employer to work at home (*Phillips*, NYS TAT (4/15/99), *aff'd*, 700 NYS2d 566 (3rd Dept. 1999), CCH NEW YORK TAX REPORTS, ¶403-546). It was also applied to a taxpayer who lived in Tennessee (*Huckaby*, NY Court of Appeals, No. 8, March 29, 2005; CCH NEW YORK TAX REPORTS, ¶405-078). However, wages will not be allocated to New York under the convenience test if the taxpayer performs *no* services in New York (*Friedman*, NYS ALJ (6/27/02)).

In 2006, New York's tax department slightly revised its position concerning the application of the convenience rule and provided a variety of tests that can be used to determine if a taxpayer's home office is a bona fide office of the employer. (TSB-M-06(5)I, CCH NEW YORK TAX REPORTS, ¶300-512)

Note: As a result of New York's initiative, federal legislation was introduced to prohibit one state's taxation of a telecommuter from another state. See H.R. 5616, The Telecommuter Tax Fairness Act of 2012.

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• *Pensions and other retirement benefits*

Federal legislation enacted in 1996 (P.L. 104-95, 104th Cong, 1st Sess.; 4 USC 114(a)) sharply curtails the rights of states to reach across their borders to subject retirement income of former residents to state income taxation. The legislation prohibits source taxation of pension income or other retirement distributions received from IRC Sec. 401(a) trusts exempt from taxation under IRC Sec. 501(a), simplified IRC Sec. 408(k) employee pension plans, IRC Sec. 403(a) annuity plans, IRC Sec. 403(b) annuity contracts, IRC Sec. 7701(a)(37) individual retirement plans, eligible IRC Sec. 457 deferred compensation plans, eligible IRC Sec. 457 deferred compensation plans, IRC Sec. 414(d) government plans, and IRC Sec. 501(c)(18) employee pension trusts created before June 25, 1959. In addition, the legislation prohibits source taxation of distributions from IRC Sec. 3121(v)(2)(C) nonqualified deferred compensation plans if payments are made at least annually and spread over the actuarial life expectancy of the beneficiaries or spread over at least a 10-year period. If the plan is a trust under IRC Sec. 401(a) but exceeds the limits of IRC Sec. 401(a)(17) or IRC Sec. 415, the payouts cannot be subject to out-of-state tax. All of these provisions apply to amounts received after 1995.

In addition, federal P.L. 109-264 (H.R. 4019) (2006), provides that the prohibition applies to the retirement income of a nonresident retired partner, as well as a nonresident retired employee, and that the application of a predetermined formula cap or a cost-of-living adjustment in a nonqualified deferred compensation plan does not make the retirement income of such nonresidents subject to state taxation. These changes apply to amounts received after December 31, 1995. See TSB-M-07(2)I, January 24, 2007, CCH NEW YORK TAX REPORTS, ¶405-601.

• *Specific wages and professions*

Members of professional athletic teams: Nonresident members of professional athletic teams must allocate their wages to New York based on the number of games played within and outside the state. Income is apportioned on the basis of the number of duty days spent in one state compared to duty days spent in all states. (Rule Sec. 132.22) "Duty days" include (1) all days during the taxable year from the beginning of the team's official preseason training through the last game in which the team competes or is scheduled to compete, (2) days that do not fall within the designated period on which a member of a professional team renders a service for a team (*e.g.*, participation in instructional leagues, the "Pro Bowl," or promotional caravans), and (3) days during the off-season when a team member undertakes training and rehabilitative activities, but only if conducted at the team's facilities.

A "member of a professional athletic team" includes active players, players on the team's disabled list, and any other player who is required to travel, travels with and performs services on behalf of the team on a regular basis (*e.g.*, coaches, managers, trainers, etc.).

Salespersons: In the case of a salesperson whose compensation depends directly on the volume of business, New York income is the proportion of the compensation received which the volume of business transacted by that individual in New York bears to the total volume of business transacted everywhere. (Rule Sec. 132.17)

Ships' crews: All compensation received by a nonresident employee for services on a vessel operating exclusively in New York is New York source income. In addition, all items of income, gain, loss, and deduction attributable to such employment are New York source income. However, income items attributable to employment on a vessel operating between New York and foreign ports, or ports of other states, are not New York source income. (Rule Sec. 132.19)

Practitioner Comment: Nonresidents Who Perform Duties on Vessels

As a result of federal legislation (Section 11108 of Title 46 of the United States Code), New York cannot tax any compensation paid to nonresidents who are (1) engaged on a vessel to perform assigned duties in more than one state as a licensed pilot, or (2) engaged to perform regularly assigned duties as a master, officer, or crewman on a vessel operating on the navigable waters of more than one state. (TSB-M-02(4)I)

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Interstate rail and motor carriers: Compensation paid by a motor private carrier or a rail or motor carrier providing transportation subject to the jurisdiction of the Surface Transportation Board (formerly the Interstate Commerce Commission) pursuant to Subchapter I or II, Chapter 105, Title 49, U.S.C., to an employee who performs regularly assigned duties in two or more states is regarded as income derived from the individual's state of residence. Accordingly, when a nonresident receives compensation as an employee of an interstate rail carrier, an interstate motor carrier or an interstate motor private carrier for performing regularly assigned duties in two or more states, the compensation does not constitute income derived from New York sources, even though the services may have been performed in New York. (Rule Sec. 132.11(b))

Military pay: Compensation paid by the United States for active service in the United States Armed Forces performed by an individual not domiciled in New York does not constitute income derived from New York sources. Accordingly, where a nondomiciliary is paid compensation by the United States for active service in the armed forces, the compensation received by the individual does not constitute income derived from New York sources, even though the service is performed in whole or in part within New York. However, any other income that a nonresident

Thus, a foreign eligible entity will be classified as a corporate entity if all of the members have limited liability. A foreign eligible entity will be classified as a partnership if it has two or more members and at least one member does not have limited liability. The entity will be disregarded as an entity separate from its owner if it has a single owner and that owner does not have limited liability (Treas. Reg. Sec. 301.7701-3(b)(2)(i)). For both domestic and foreign entities, the default classification for an entity in existence prior to 1997 is the classification that the entity claimed immediately prior to that date, unless the entity elects otherwise. However, if an eligible entity with a single owner claimed to be a partnership, the entity is now disregarded as an entity separate from its owner (Treas. Reg. Sec. 301.7701-3(b)(3)).

Making a classification election: If the default rules do not provide the desired tax classification, then an eligible entity may elect to be classified differently. The election is as simple as checking a box on Form 8832, Entity Classification Election.

Although the election is generally effective on the date filed, a taxpayer can specify another date, provided that date is not more than 75 days prior to the date on which the election is filed and not more than 12 months after the date on which the election is filed (Treas. Reg. Sec. 301.7701-3(c)(1)(iii)).

A copy of Form 8832 must also be attached to the entity's federal tax or information return for the year in which the election is to be effective. If the entity is not required to file a return for that year, then a copy of Form 8832 must be attached to any direct or indirect owner's federal income tax return or information return for the owner's tax year in which the election is effective. Although the failure of the entity or an owner to attach a copy of Form 8832 to the applicable return will not void an otherwise valid election, such a failure may give rise to penalties against the non-filing party. Other applicable penalties may also apply to parties that file federal tax or information returns inconsistent with their entity's election.

To ensure that the taxpayers who recognize the tax consequences of a conversion election approve of that election, the election must be signed by every owner on the date of the deemed conversion transaction (Treas. Reg. Sec. 301.7701-3(c)(2)(iii)).

The ability of an entity to make multiple classification elections is limited by prohibiting an eligible entity from changing its classification more than once during any 60-month period. However, the IRS may waive this 60-month limitation when there has been a more than 50% change in the ownership of the entity (Treas. Reg. Sec. 301.7701-3(c)(1)(iv)).

Reclassification due to numerical membership changes: An entity's default classification may change as a result of a change in the number of its members. Specifically, an eligible entity classified as a partnership will become a disregarded entity when the entity's membership is reduced to one member, and a disregarded entity will be classified as a partnership when the entity has more than one member (Treas. Reg. Sec. 301.7701-3(f)(2)).

¶852 Partnerships

Law: Secs. 208, 601(f), Tax Law (CCH NEW YORK TAX REPORTS, ¶10-220—10-235, 15-185).

Comparable Federal: Secs. 701-761, 7704 (U.S. MASTER TAX GUIDE ¶401-481).

New York generally follows IRC Sec. 701—IRC Sec. 761, the federal income tax provisions addressing partners and their partnerships, because the starting point for New York entire net income is federal taxable income before the net operating loss and special deductions (see ¶202). (Sec. 208(1), Tax Law) Since New York follows the federal income tax treatment of a partnership and its partners, income and losses, including net operating losses (NOLs) of the partnership flow to its partners (Sec. 601(f), Tax Law).

Aside from limited liability partnerships (LLPs) classified as associations for federal income tax purposes, partnerships are not subject to the general corporate franchise (income) tax under Article 9-A. However, a corporate partner of a partnership is subject to the Article 9-A corporate franchise (income) tax.

Electing large partnerships.—New York has no provisions comparable to IRC Sec. 771—IRC Sec. 777, the federal income tax provisions that authorize the election of electing large partnership (ELP) status.

Practitioner Comment: No Special Forms for Electing Large Partnerships

An electing large partnership under federal law must still file a "regular" partnership return using the IT-204. According to the Tax Department, "New York does not conform to the electing large partnership provisions". (See Instructions to IT-204, Page 2)

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Publicly traded partnerships.—New York follows IRC Sec. 7704, under which a publicly traded partnership (PTP) is taxed as a corporation unless at least 90% of its gross income consists of qualifying passive income, without significant modification. After analyzing the applicable New York provisions relative to the PTP, an overview of the relevant federal income tax provisions is provided.

- ***Interaction of federal and state provisions***

The term "partnership" has the same meaning as set forth in IRC Sec. 761(a) whether or not the election provided in that IRC section has been made (Reg. Sec. 1-2.5). In addition, the term "partnership" does not include a corporation as defined in Reg. Sec. 1-2.5(b).

A partnership may be either a general partnership or a limited partnership. In a general partnership, all partners share in the partnership's income and liabilities and all partners have, as a matter of law, a right to participate in the partnership management. However, the general partners can agree to turn management of the partnership over to one or more managing partners.

- ***Federal income tax provisions***

For federal income tax purposes, a "partnership" is defined as "a syndicate, group, pool, joint venture, or other unincorporated organization through or by means of which any business, financial operation, or venture is carried on and which is not a corporation, trust, or estate." (IRC Sec. 761(a)) Under the "check-the-box" regulations discussed at ¶851, the determination of whether an entity is taxable as a partnership or as an association taxable as a corporation is simplified. Understandably, for federal tax purposes, a "partner" is simply a member of the partnership (IRC Sec. 761(b)).

A general partnership is not a separate taxable entity. Although the general partnership must file Form 1065, a federal information tax return, it does not pay any federal income tax. Rather, the general partnership serves as a conduit to the underlying partners. Any income, loss, deduction, or credit attributable to the general partnership's business activities is first computed at the entity level and is then passed through to the partners according to their "distributive share." A partner's distributive share is generally determined by the partnership agreement, which defines the partners' business relationship to one another and to the general partnership. (See IRC Sec. 761(c)). These pass-through shares must then be included and reported on the partners' own federal income tax returns.

Since the general partnership format directly passes the relevant tax items through to the partners without an entity-level tax, the double taxation of income that burdens the C corporation is avoided. Additionally, any tax loss attributable to the general partnership's business that is passed through to the partners may be used, subject to the IRC Sec. 465 at-risk rules and the IRC Sec. 469 passive activity limitation

Application for credit: A claim for investment tax credit is made on Form CT-46, Claim for Investment Tax Credit.

CCH Advisory: ITC Carryover After IRC Sec. 338(h)(10) Transaction

The New York Department of Taxation and Finance issued a corporate franchise tax advisory opinion examining whether a parent corporation succeeds to an investment tax credit (ITC) carryover of its wholly-owned subsidiary if the parent sells the subsidiary's stock to a third-party purchaser and makes a joint election with the purchaser under IRC Sec. 338(h)(10) to treat the stock sale as a deemed asset sale. The opinion concludes that the parent corporation may succeed to the ITC carryover of the subsidiary, provided that the parent meets its burden of proof to substantiate the amount of the credit. (*TSB-A-11(3)C*, New York Commissioner of Taxation and Finance, February 18, 2011, CCH NEW YORK TAX REPORTS, ¶407-144)

• *Financial services industry*

The financial services investment tax credits are available until October 1, 2015, for qualified property that is principally used in the ordinary course of a taxpayer's business (Sec. 210(12)(b), Tax Law; TSB-M-09(3)C, January 16, 2009, CCH NEW YORK TAX REPORTS, ¶406-296):

— as a broker or dealer in connection with the purchase or sale of stocks, bonds, other securities, or commodities or in providing lending, loan arrangement, or loan origination services to its customers in connection with the purchase or sale of securities;

— as a provider of investment advisory services for a regulated investment company (as defined in Internal Revenue Code (IRC) section 851); or

— for Article 9-A taxpayers, as an exchange registered as a national securities exchange within the meaning of sections 3(A)(1) and 6(A) of the Securities Exchange Act of 1934, as a board of trade as defined in section 1410(a)(1) of the Not-for-Profit Corporation Law, or as an entity that is wholly owned by and that provides automation or technical services to one or more such national securities exchanges or boards of trade.

For taxable years ending on or after January 1, 2008, a taxpayer will be allowed the credits if one of the following eligibility tests are met (Sec. 210(12)(b), Tax Law; TSB-M-09(3)C, January 16, 2009, CCH NEW YORK TAX REPORTS, ¶406-296):

— 80% or more of the employees performing the administrative and support functions resulting from or related to the qualifying uses of the property are located in New York; or

— the average number of employees that perform the administrative and support functions resulting from or related to the qualifying uses of the property and are located in New York during the taxable year the credit is claimed is equal to or greater than 95% of the average number of employees that perform these functions and are located in New York State during the 36 months immediately preceding the taxable year for which the credit is claimed; or

— the number of New York employees employed during the current taxable year must be equal to or greater than 90% of the New York State employees on December 31, 1998 (if the taxpayer was a calendar year filer taxable in New York State in 1998); or the last day of its first taxable year ending after December 31, 1998, if the taxpayer was not a calendar year filer in 1998, or was not subject to tax in New York State for 1998.

However, if the taxpayer first becomes subject to tax in New York State after the taxable year beginning in 1998, then the taxpayer is not required to satisfy any of these eligibility tests for its first taxable year.

Additionally, property purchased by a taxpayer affiliated with a registered investment advisor or property leased by a taxpayer to an affiliated registered investment advisor is also eligible for the credit(s) if the property is principally used by the affiliate in a qualifying activity. For purposes of determining if the property is principally used by the taxpayer in a qualifying activity, the taxpayer may aggregate its uses as (1) a broker or dealer and (2) a provider of investment advisory services. In addition, the taxpayer may aggregate its uses for either or both of those activities with its affiliated regulated broker, dealer, and registered investment advisor. (Sec. 210(12)(b), Tax Law; TSB-M-09(3)C, January 16, 2009, CCH NEW YORK TAX REPORTS, ¶406-296)

¶925 Employment Incentive Tax Credit

Law: Sec. 210, Tax Law (CCH NEW YORK TAX REPORTS, ¶12-070).

Forms: CT-46, Claim for Investment Tax Credit.

A taxpayer qualifying for the investment tax credit (¶924) (other than at the optional rate applicable to research and development property) with respect to property the acquisition, construction, reconstruction, or erection of which began on or after January 1, 1987, is allowed an employment incentive credit for each of the two years next succeeding the taxable year for which the investment credit is allowed with respect to such property. (Sec. 210(12-D)(a)(1), Tax Law) The credit is allowed only if the average number of employees during the taxable year (except general executive officers) is at least 101% of the average number of employees during the employment base year (the taxable year immediately preceding the taxable year for which the investment tax credit was allowed).

Computation of credit: When the investment tax credit is allowed for a taxable year beginning after 1990, the credit is (1) 1.5% of the investment credit base if the average number of employees during the taxable year is less than 102% of the average number of employees in the employment base year, (2) 2% of the investment credit base if the average number of employees during the taxable year is at least 102% and less than 103% of the average number of employees in the employment base year, and (3) 2.5% of the investment credit base if the average number of employees during the taxable year is at least 103%. The computation of the average number of employees is specified in the statute. A parent corporation filing a combined report with a subsidiary is not required to determine employment levels on a combined basis. (Sec. 210(12-D), Tax Law)

Caution: For tax years 2010, 2011, and 2012, taxpayers with more than $2 million in aggregated business tax credits are required to defer the amounts above $2 million until 2013. The total amount of credits deferred will be paid back to taxpayers over tax years 2013, 2014, and 2015. (Secs. 33, 34, Tax Law; TSB-M-10(5)C, New York Department of Taxation and Finance, September 13, 2010, CCH NEW YORK TAX REPORTS, ¶406-976)

Limitations and carryovers: The credit may not reduce the tax to less than the higher of the minimum taxable income base (repealed for taxable years beginning after 2014) or the fixed dollar minimum. (Sec. 210(1)(c), (d), Tax Law) If the credit does reduce the tax to such amount, any remaining unused credit may be carried over to the next 15 taxable years.

A "qualified film production facility" is a film production facility in New York that contains at least one sound stage having a minimum of 7,000 square feet of contiguous production space.

A "qualified film production company" is a corporation, partnership, limited partnership, or other entity or individual principally engaged in the production of a qualified film and in control of the qualified film during production. Members of a partnership that is a qualified film production company may claim the credit.

• *Credit amount*

The amount of the credit is 30% of the qualified production costs paid or incurred in the production of a qualified film; provided that the qualified production costs (excluding post production costs) attributable to the use of tangible property or the performance of services at a qualified film production facility in the production of the qualified film equal or exceed 75% of the production costs (excluding post production costs) paid or incurred that are attributable to the use of tangible property or the performance of services at any film production facility within and without New York in the production of the qualified film. (Sec. 24(a)(2), Tax Law)

If the qualified production costs (excluding post production costs) attributable to the use of tangible property or the performance of services at a qualified film production facility in the production of the qualified film is less than $3 million, then the portion of the qualified productions costs attributable to the use of tangible property or the performance of services in the production of the qualified film outside of a qualified film production facility is allowed only if the shooting days spent in New York outside of a film production facility in the production of the qualified film equal or exceed 75% of the total shooting days spent within and without New York outside of a film production facility in the production of the qualified film. (Sec. 24(a)(2), Tax Law)

If the amount of the credit is between $1 million and $5 million, the credit is paid out in two equal installments over a two year period beginning in the taxable year in which the production of the qualified film is completed. If the credit is greater than $5 million, it is paid out in three equal installments in consecutive years beginning with the taxable year in which the production of the qualified film is completed.

Effective July 24, 2012, the qualified film and television post-production credit increased from 10% to 30% in the New York metropolitan commuter region, including New York City and Albany, Dutchess, Nassau, Orange, Putnam, Rockland, Schnectady, Suffolk and Westchester Counties (Sec. 31(a)(2), Tax Law). An additional 5% (for a total of 35%) in tax credits would be available for post-production expenditures in locations elsewhere in the state (Sec. 31(c), Tax Law).

Upstate credit enhancement: In 2015 through 2019, film and post production projects are eligible for an additional credit equal to 10% of the wages or salaries of individuals employed by a qualified film or independent film production company for services performed in counties outside the metropolitan commuter region.

Note: The film production credit was not subject to deferral of tax credits for tax years 2010, 2011, and 2012. (Secs. 33, 34, Tax Law; TSB-M-10(5)C, New York Department of Taxation and Finance, September 13, 2010, CCH NEW YORK TAX REPORTS, ¶406-976)

Maximum credit: The maximum amount of the credits allowed in any calendar year is $65 million in 2008, $75 million in 2009, $85 million in 2010, $90 million for both 2011 and 2012, and $110 million in 2013.

New York budget legislation in 2010 and 2013 provides $420 million annually over tax years 2010 through 2019, with $7 million of the annual allocation available for a separate post-production tax credit. Starting in 2015, the allocation dedicated to the post production credit increases from $7 million to $25 million annually.

• *Planning considerations*

If the amount of the credit allowable for any taxable year exceeds the taxpayer's tax for that year, the excess is treated as an overpayment of tax to be credited or refunded, with no interest. The balance of the credit not credited or refunded may be carried over to the immediately succeeding tax year and may be deducted from the taxpayer's tax for that year.

¶945 Credit for Fuel Cell Electric Generating Equipment (Expired)

Law: Sec. 210(37), Tax Law (CCH NEW YORK TAX REPORTS, ¶12-001).

For taxable years beginning before 2009, a credit was allowed for the cost of qualified fuel cell electric generating equipment for use by the taxpayer in New York (Sec. 210(37), Tax Law). The credit could not exceed $1,500 per generating unit for any tax year. Credits exceeding the tax due for a given year may be carried over to subsequent years.

¶946 Credit for Security Training

Law: Secs. 26, 210(37), Tax Law; Reg. Secs. 1000.1, 1000.2, and 1000.3 (CCH NEW YORK TAX REPORTS, ¶12-001).

Qualified building owners may claim a refundable security training tax credit. (Sec. 210(37), Tax Law)

• *Qualifications*

Qualified security officers must have completed a qualified security training program. (Sec. 26, Tax Law) "Qualified building owner" means a building owner whose building entrances, exits, and common areas are protected by security personnel licensed under Article 7-A of the General Business Law, whether or not such personnel are employed directly by the building owner or indirectly through a contractor.

• *Credit amount*

The credit amount equals the sum of the number of qualified security officers providing protection to buildings owned by the taxpayer, multiplied by $3,000. (Sec. 26, Tax Law) Any credit amount not deductible in a taxable year will be treated as an overpayment of tax to be credited or refunded without interest.

Caution: For tax years 2010, 2011, and 2012, taxpayers with more than $2 million in aggregated business tax credits are required to defer the amounts above $2 million until 2013. The total amount of credits deferred will be paid back to taxpayers over tax years 2013, 2014, and 2015. (Secs. 33, 34, Tax Law; TSB-M-10(5)C, New York Department of Taxation and Finance, September 13, 2010, CCH NEW YORK TAX REPORTS, ¶406-976)

• *Planning considerations*

The New York Division of Homeland Security may issue credit certifications for taxpayers meeting the applicable standards and demonstrating that they have provided (or will provide within the year) the appropriate training to all employees for whom the credit will be claimed. (Sec. 26, Tax Law) Any credit amount not deductible in a taxable year will be treated as an overpayment of tax to be credited or refunded without interest. (Sec. 210(37), Tax Law)

The maximum aggregate amount of tax credits allowed in any calendar year will be $5 million.

(2) elect to treat all income from QFIs as taxable business income and apportion 8% of the net income (dividend income, interest income, and net gains), not less than zero, from QFIs to New York.

— The 8% QFI election must be made on an annual basis, is irrevocable, and applies to all the QFI income of all members of a combined group.

— Non-qualified financial instruments (non-QFIs) are all financial instruments that do not meet the definition of QFI and the related income is subject to customer-based sourcing.

In cases where sourcing rules for financial transactions rely on commercial domicile, taxpayers are required to use the following hierarchy:

— location of the treasury function;

— seat of management and control; and

— billing address of the customer.

Receipts constituting the primary spread of selling concession from underwritten securities are sourced to the customer's location.

Receipts from credit card authorization processing and clearing and settling processing are sourced to the location where the credit card processor's customer accesses the processor's network.

All other credit card processing receipts are sourced to New York using the average of 8% and the percentage of New York access points.

Receipts from services are generally sourced to New York if the customer receives the benefit of the service in the state.

The special apportionment rules for trucking, railroad, transportation of gas through pipes, and aviation are used as the basis for the new receipts rules for these industries.

Existing sourcing rules continue generally for the following:

— sales of tangible personal property;

— rentals of real and tangible personal property;

— broker/dealer activities, except as described above;

— interest, fees, penalties, service charges, merchant discounts, and credit card fees;

— services provided to a Regulated Investment Company (RIC); and

— advertising.

(Sec. 210-A, Tax Law; *Corporate Tax Reform*, New York Department of Taxation and Finance, **http://www.tax.ny.gov/bus/ct/corp_tax_reform.htm**).

• *Apportionment factors for special industries*

New York has adopted special rules not found in the Uniform Division of Income for Tax Purposes Act (UDITPA) or the Multistate Tax Commission (MTC) regulations for the apportionment of income for the following industries and activities:

Newspaper and magazine advertising: In the case of taxpayers engaged in the business of publishing newspapers or periodicals, receipts arising from sales of advertising contained in the newspapers and periodicals are deemed to arise from services performed within New York to the extent that the publications are delivered to points within New York. (Sec. 210(3)(a)(2)(B), Tax Law; Reg. Sec. 4-4.3)

Online advertising: A Department of Taxation and Finance advisory opinion concludes that receipts from advertisers that have a cost-per-click (CPC) price structure arrangement should be allocated to New York when a New York subscriber

clicks on the advertisement. The company's receipts from advertisers that have fee structures based on cost-per-thousand impressions (CPM) arrangements should be allocated to New York based on the ratio of New York subscribers to subscribers everywhere. (TSB-A-09(5)C, March 9, 2009, CCH NEW YORK TAX REPORTS, ¶406-352)

Practitioner Comment: Allocating Receipts to Internet Activity

As noted above, receipts from activities occurring through the Internet must be sourced to New York based on the percentage of New York viewers who read or click on (for a CPC price structure) an advertisement. Based on the nature of the Internet, a taxpayer may have no idea of the location of the customers that view or click on their advertising. In that case, a "reasonable method" of allocation must be devised. (*SmarTax, LLC*, TSB A 09(8)C), New York Commissioner of Taxation and Finance, June 16, 2009, CCH NEW YORK TAX REPORTS, ¶406-430). This is often based on New York population statistics.

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Management services rendered to RICs: Services provided to regulated investment companies (mutual funds) are allocated on the basis of the domicile of the shareholders of the mutual fund. The New York percentage of shareholders is determined by averaging monthly percentages reflecting the number of shares held by New York domiciliaries compared to the number of shares held by domiciliaries outside New York State. (Sec. 210(3)(a)(6), Tax Law; Reg. Sec. 4-4.3)

Airlines: An airline's entire net income allocated to New York is calculated by multiplying the airline's business income by an allocation percentage that is the average of the following three percentage calculations: (1) divide 60% of aircraft arrivals and departures in New York by total aircraft arrivals and departures everywhere; (2) divide 60% of revenue tons handled at New York airports by total revenue tons handled everywhere; and (3) divide 60% of originating revenue within New York by total originating revenue everywhere. (Sec. 210(3)(a)(7), Tax Law)

Foreign air carriers: In determining their business allocation percentages, qualified foreign air carriers must exclude property, receipts, salaries, wages, and other personal service compensation to the extent employed in, or attributable to, the generation of income excluded from entire net income (¶1003).

Air freight forwarders: In the case of taxpayers principally engaged in the activity of air freight forwarding acting as principal and like indirect air carriage, receipts arising from the activity from services performed within New York State are determined as follows: 100% of the receipts if both the pick up and delivery associated with the receipts are made in New York State and 50% of the receipts if either the pick up or delivery associated with the receipts is made in New York State. (Sec. 210(3)(a)(2)(B), Tax Law)

Railroad and trucking companies: Railroad and trucking companies that elect to be taxed under the Art. 9-A entire net income basis of taxation for taxable years beginning after 1997 (¶922) must use a single-factor allocation percentage to allocate income to New York. The percentage is determined by dividing the taxpayer's mileage within New York for the period covered by its report by its mileage within and without New York during the same period. (Sec. 210(3)(a)(8), Tax Law)

Security and commodity brokers (including OTC derivatives dealers): The income allocation formula for registered securities and commodities brokers and dealers provides for the allocation of certain receipts to the domicile of the customer rather than the mailing address of the firms' offices of record. Specifically, these provisions apply to brokerage commissions, margin interest, account maintenance fees, management or advisory service fees, interest on certain loans and advances, and gross income, including accrued interest or dividends, from certain principal transactions (Secs. 210(3)(a)(2)(B), Tax Law, 210(3)(a)(9), Tax Law, *TSB-M-00(5)C*, Department of Taxation and Finance, December 27, 2000, CCH NEW YORK TAX REPORTS, ¶300-335).

¶1610 International Banking Facilities

Law: Secs. 1450, 1453, Tax Law (CCH NEW YORK TAX REPORTS, ¶14-060).

An international banking facility is allowed a deduction from entire net income for adjusted eligible net income received from international banking. The deduction is phased in over a 10-year period to maintain tax revenues.

¶1611 Limited Liability Investment Companies

Law: Sec. 601, Tax Law (CCH NEW YORK TAX REPORTS, ¶10-240).

New York permits certain investment companies that are established and regulated under Article 12, Banking Law, to organize themselves as limited liability investment companies (LLICs). The option is open only to Article 12 investment companies that serve as holding companies for foreign banking operations.

For New York tax purposes, LLICs are regarded as limited liability companies. Accordingly, an LLIC that is treated as a partnership for federal tax purposes is treated as a partnership for New York State income tax purposes. Members of LLICs that are classified as partnerships for federal purposes are taxed as partners in a partnership, and are liable for personal income tax in their separate or individual capacities.

LLICs that are treated as partnerships for federal tax purposes are subject to the same annual filing fees that apply to limited liability companies (¶112).

¶1612 Investment Tax Credit

Law: Sec. 1456(i), Tax Law (CCH NEW YORK TAX REPORTS, ¶14-088).

Taxpayers may claim a credit against the bank franchise tax with respect to tangible personal property and other tangible property, including buildings, placed in service on or after October 1, 1998, and before October 1, 2015. (Sec. 1456(i), Tax Law; TSB-M-09(3)C , January 16, 2009, CCH NEW YORK TAX REPORTS, ¶406-296)

Eligibility requirements: The credit is allowed with respect to tangible personal property and other tangible property, including buildings, that (1) are depreciable pursuant to IRC Sec. 167, (2) have a useful life of four years or more, (3) are acquired by purchase as defined in IRC Sec. 179(d), (4) has a situs in New York State, and (5) are (a) principally used by the taxpayer in the ordinary course of business as a broker or dealer in connection with the purchase or sale of stocks, bonds, or other securities as defined in IRC Sec. 475(c)(2) or commodities as defined in IRC Sec 475(e), or (b) are principally used by the taxpayer in the ordinary course of the taxpayer's business of providing investment advisory services for a regulated investment company as defined in IRC Sec. 851.

A credit is not allowed for otherwise qualified property that is leased by the taxpayer to another unless the property is leased to an affiliated broker or dealer and used in a qualified manner.

Computation of credit: The amount of the credit for taxable years beginning after 1997 is 5% with respect to the first $350 million of the investment credit base and 4% with respect to the investment credit base in excess of $350 million.

The "investment credit base" is defined as the cost or other basis, for federal income tax purposes, of tangible personal property and other tangible property less the amount of any nonqualified nonrecourse financing with respect to the property to the extent such financing would be excludable from the credit base under federal law.

Credit limitations, carryovers, and recapture of the investment tax credit are the same as provided for the corporation franchise (income) tax, discussed at ¶924.

CCH Advisory: Loan Originations Insufficient for Credit

It was proper for the Division of Taxation to disallow the investment tax credit claimed by a financial corporation with respect to its acquisition and improvement of a building. Loan originations, without sales of the resulting securities, could not be considered broker or dealer activities as required for purposes of the credit. The corporation argued, in the alternative, that its other activities of purchasing, selling, and terminating positions in securities satisfied the principal usage test in order to qualify for the credit. Based on a review of square footage calculations, however, this alternative argument was rejected. *Astoria Financial Corp.*, New York Division of Tax Appeals, Administrative Law Judge Unit, DTA No. 820197, August 10, 2006, CCH NEW YORK TAX REPORTS, ¶405-444.

Application of the credit to financial services organizations is discussed in detail at ¶924.

¶1613 Defibrillator Credit

Law: Sec. 1456(j), Tax Law (CCH NEW YORK TAX REPORTS, ¶14-094).

Forms: CT-250, Claim for Purchase of an Automated External Defibrillator.

A credit against bank franchise (income) tax is available for the purchase of automated external defibrillators. (Sec. 1456(j), Tax Law) Discussion at ¶937 applies.

¶1614 Long-Term Care Insurance Credit

Law: Sec. 1456(k), Tax Law (CCH NEW YORK TAX REPORTS, ¶14-095).

Forms: CT-249, Claim for Long-Term Care Insurance Credit.

A credit is allowed against bank franchise (income) tax for 20% of the premium paid for approved long-term care insurance during the taxable year. (Sec. 1456(k), Tax Law) Discussion at ¶939 applies.

¶1615 Excelsior Jobs Program

Law: Sec. 350 *et seq.*, Economic Development Law; Sec. 1456(u), Tax Law (CCH NEW YORK TAX REPORTS, ¶14-090a).

Forms: CT-607.

Legislation effective July 1, 2010, enacted the Excelsior Jobs Program, which includes the following corporate franchise, bank franchise, insurance franchise, and personal income tax credits:

— a jobs tax credit of up to $5,000 per job;

— an investment tax credit, equal to 2% of qualified investments;

— a 10% research and development credit, based on the federal credit; and

— a real property tax credit.

The Excelsior program replaced the expired Empire Zones program to provide job creation and investment incentives to firms in targeted industries. (Ch. 59 (A.B. 9709), Laws 2010)

For additional information about this credit, see ¶940.

¶1616 Low-Income Housing Credit

Law: Secs. 18, 1456(l), Tax Law; Secs. 21(5), 22, Public Housing Law (CCH NEW YORK TAX REPORTS, ¶14-093).

Comparable Federal: Sec. 42 (U.S. MASTER TAX GUIDE ¶1334).

Forms: DTF-624, Low-Income Housing Credit; DTF-625, Low-Income Housing Credit Allocation Certification; DTF-625-ATT, Low-Income Housing Annual Statement.

A credit against bank franchise (income) tax is allowed for the construction or rehabilitation of qualified low-income housing. (Secs. 18, 1456(l), Tax Law; Secs. 21(5), 22, Public Housing Law) Discussion at ¶941 applies.

• *Security services*

Tax is imposed on the sale of protective and detective services (Sec. 1105(c)(8), Tax Law). Such services include, but are not limited to: the operation of alarm and protection systems or services of whatever nature (i.e., fire, burglar, medical, contamination, mechanical breakdown or malfunction, or any similar alarm or protection system or service); detective agency services; private investigator services; armored car services; bonded courier services; watchman and patrol services; fingerprinting services; lie detection services; guard services; bodyguard services; and guard dog services (Sec. 1105(c)(8), Tax Law). However, the term protective and detective services does not include those services performed by a licensed port watchman (Sec. 1105(c)(8), Tax Law).

• *Storage and moving services*

The storing of tangible personal property not held for sale in the regular course of business and the rental of safe deposit boxes or similar space are taxable services (Sec. 1105(c)(4), Tax Law; *TB-ST-340*, New York Department of Taxation and Finance, March 18, 2011, CCH NEW YORK TAX REPORTS, ¶407-172). However, the rental of self-service mini-storage units is not deemed to be a taxable storage service. The storage of automobiles is taxable under this provision.

Portable storage containers: All transportation charges relating to the rental of portable storage containers to and from a customer's storage location are subject to sales and use tax as part of the receipt for the rental of tangible personal property under Sec.1101(b)(3), Tax Law. The general transportation service of moving the container from one customer location to another customer location would not be taxable. The rental of the portable storage containers, the sale of moving supplies and equipment, storage fees, warehouse access fees, and cancellation fees are all taxable. Insurance charges, container cleaning fees, and the charge for container repair services are not subject to sales and use tax. (TSB-A-08(64)S, November 19, 2008, released January 2009, CCH NEW YORK TAX REPORTS, ¶406-281)

Moving services: The service of transporting household goods (moving service) is not subject to sales tax unless the charge is included as part of the bill for the sale of taxable property or services (*i.e.*, a charge for shipping as part of the sale of taxable tangible personal property). Moving services include moving household goods to and from any destination. It also includes moving items from a building to a truck, from a truck to a building, or moving items within a building, whether or not transportation is provided. Office moves are treated the same as household moves. (TB-ST-341, Department of Taxation and Finance, March 18, 2011, CCH NEW YORK TAX REPORTS, ¶407-173)

Practitioner Comment: Transportation of Items in Storage

Although "stand-alone" transportation charges are not subject to tax, delivery charges imposed by a property storage company to pick up, deliver or move property to a customer's designated location are all subject to tax. Under New York's rules, transportation charges are subject to tax if they are imposed by a vendor in connection with any taxable service (*SAM (Store and More), LLC*, TSB A 08(64)S), November 19, 2008, CCH NEW YORK TAX REPORTS, ¶406-281).

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• *Telecommunication services*

Telephonic and telegraphic entertainment and information services: Charges for entertainment and information services (other than cable television services) furnished, provided, or delivered by telephonic or telegraphic means are subject to tax if they would otherwise be taxable as an information service furnished by printed, mimeographed, or multigraphed matter or by duplicating written or printed matter

in any other manner. Such services include entertainment and information services provided through 800- or 900-numbers, mass announcement services or interactive information network services (Sec. 1105(b), Tax Law; Reg. Sec. 527.2(d)(1)). Sales by a telecommunication provider of wallpaper, music and sounds are not subject to state and local sales taxes on mobile telecommunications service under Sec. 1105(b)(2), Tax Law. However, receipts from the sale of games are taxable under Sec. 1105(a), Tax Law (TSB-A-08(8)C and TSB-A-08(63)S, November 24, 2008, CCH NEW YORK TAX REPORTS, ¶406-278).

An additional tax is imposed at the rate of 5% on taxable entertainment and information services that are furnished, provided, or delivered by means of interstate or intrastate telephony, telegraphy, or telephone or telegraph services, and that are received by the customer exclusively in an aural manner (Sec. 1105(c)(9), Tax Law).

The New York Department of Taxation and Finance has advised that the additional 5% tax on information and entertainment services applies only to services that are provided exclusively aurally (*Release No. 34*, October 17, 1993, CCH NEW YORK TAX REPORTS, ¶401-246). Accordingly, information and entertainment services that involve a written component, such as those that are provided from computer to computer or computer to written format, are not subject to the additional tax. This interpretation excludes from the additional tax informational computer services, but applies the tax to services that are exclusively heard by the customer.

Telephonic and telegraphic services: "Telegraphy and telephony" are taxable. The term includes use or operation of any apparatus for transmission of sound, sound reproduction, or coded or other signals (Reg. Sec. 527.2(d)(2)). The tax applies to every charge for telephone and telegraph services, including the monthly message charge, intrastate toll charges, and charges for special services (*i.e.*, installation, change of location, conference connections, tie-lines, WATS lines, and the furnishing of equipment) (Reg. Sec. 527.2(d)(5)).

Internet access services: Telecommunications services, including internet access services purchased, used or sold by an Internet service provider to provide Internet access are generally exempt from sales and use taxes and from telecommunications excise tax (see TSB-M 08(2)S, May 2, 2008, CCH NEW YORK TAX REPORTS, ¶406-042, as revised by TSB-M 08(2.1)S, August 29, 2008, CCH NEW YORK TAX REPORTS, ¶80-420). For the definition of "Internet access" and additional discussion, see ¶2006.

Practitioner Comment: Taxation of VoIP Services

New York State's Department of Taxation and Finance confirmed that it will impose tax on charges for Voice over Internet Protocol (VoIP) services used to make intrastate calls. The use of the internet or internet routing protocols for transmission of all or part of those calls does not affect the result. More importantly, under New York's tax rules, all VoIP calls billed to New York users will be presumed taxable unless the provider can establish otherwise. (NYT G-07(2)C and (3)S). See also ¶2006.

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Prepaid (debit) telephone cards: Prepaid telephone calling services other than for resale are taxable (Sec. 1105(b), Tax Law; Sec. 1110, Tax Law). However, receipts from the actual delivery of telephone service under a prepaid telephone calling plan (*e.g.*, receipts represented by a debit to a prepaid account) are excluded from tax. In addition, a sale of telephone service is deemed to be an exempt sale for resale if purchased by a vendor that resells it as a component of a prepaid telephone calling service.

"Prepaid telephone calling service" means the right to exclusively purchase telecommunication services that enable the origination of intrastate, interstate, or

repairs, and flight simulators purchased by commercial airlines are exempt. Services rendered with respect to such aircraft, machinery or equipment to be installed on such aircraft, and property for maintenance and repairs of such aircraft are also exempt (Sec. 1105(c)(3)(v), Tax Law).

Aircraft fuel: Fuel sold to airlines for use in airplanes is exempt (Sec. 1115(a)(9), Tax Law).

• *Clothing and footwear*

Except as noted below, sales of clothing and footwear are subject to tax as retail sales of tangible personal property (Sec. 1105(a), Tax Law; Reg. Sec. 526.8(a)(2); *TSB-M-11(3)S*, New York Department of Taxation and Finance, March 14, 2011, CCH NEW YORK TAX REPORTS, ¶407-159; *Publication 718-C*, New York Department of Taxation and Finance, CCH NEW YORK TAX REPORTS, ¶65-908; see also *TB-ST-122*, March 10, 2014, CCH NEW YORK TAX REPORTS, ¶408-042 and *TB-ST-530*, March 10, 2014, CCH NEW YORK TAX REPORTS, ¶408-043).

Clothing and footwear: The state and MCTD exemption for sales of clothing and footwear costing less than $110, including items used or consumed to make or repair such clothing and that become a physical component part of such clothing, was temporarily suspended from October 1, 2010, through March 31, 2011. Beginning April 1, 2011, the exemption was reinstated for clothing and footwear costing less than $55 per item until March 31, 2012. The exemption reverted to $110 on April 1, 2012. Local governments are given the option to maintain their current exemptions or opt into the new exemption schedule. (*TSB-M-10(16)S*, September 7, 2010, CCH NEW YORK TAX REPORTS, ¶406-968)

The exemption generally applies to articles of clothing worn on the body, although it does not apply to jewelry, watches, precious stones, or sporting equipment. It also applies to most items that become a physical component part of exempt clothing or that are used to make or repair exempt clothing, such as most fabric, thread, yarn, buttons, snaps, hooks, zippers, and like items. If exempt clothing or footwear is sold with other taxable merchandise as a single unit, the full price is subject to sales or use tax, unless the price of the clothing or footwear is reasonable and separately stated.

Delivery, shipping, and handling charges: Reasonable, separately stated charges for delivery of eligible clothing and footwear are not taken into account in determining if the cost of an item is less than $110 (*TSB-M-06(6)S*, March 29, 2006, CCH NEW YORK TAX REPORTS, ¶300-506).

Coupons: Manufacturer's coupons do not reduce the selling price for purposes of determining whether an item is less than $110. However, store coupons (for which the store receives no reimbursement) do reduce the selling price for purposes of determining whether an items is less than $110.

Local exemptions: Any county or city in New York is authorized to enact the sales tax exemption for clothing and footwear costing less than $110 or to adopt the state's revised exemption schedule. For a complete listing of local exemptions, see *Publication 718-C*, New York Department of Taxation and Finance, CCH NEW YORK TAX REPORTS, ¶65-908.

The New York City exemption for clothing and footwear is the same as the statewide exemption. For details and New York City rates, see ¶3301.

Special reporting requirements: Vendors who make sales of exempt clothing, footwear, and items used to make or repair exempt clothing must file Schedule H to report those sales. All sales of these items must be separately reported on Schedule H for the locality in which the sales were made. Sales of exempt clothing, footwear, and items used to make or repair exempt clothing must be reported, by locality, whether they are subject to local tax or are exempt from both state and local taxes (*TSB-M-06(6)S*, March 29, 2006, CCH NEW YORK TAX REPORTS, ¶300-506).

CCH Advisory: Yardgoods and Clothing Components

The exemption for clothing costing less than $110 also applies to each item of fabric, thread, yarn, buttons, and the like that become a part of exempt clothing (*TSB-M-00(1)S*, January 24, 2000, CCH NEW YORK TAX REPORTS, ¶300-312). When fabric is purchased by the yard, the exemption is based on the total cost of fabric purchased as a single item, not the cost per yard. Therefore, a single-item purchase of five yards of a $50 per yard fabric does not qualify for the exemption, because the total cost of the purchase exceeds $110 (*Hoffman (Advisory Opinion)*, TSB-A-01(10)S, April 12, 2001, CCH NEW YORK TAX REPORTS, ¶403-929).

• *Computers and software*

Computer software, generally taxable, is exempt if designed and developed to the specifications of a specific purchaser, and transferred, directly or indirectly, by the purchaser to a corporation that is a member of an affiliated group or to a partnership in which the purchaser and other members of the affiliated group have at least a 50% capital or profits interest, provided that the transfer is not in pursuance of a plan having tax avoidance or evasion as its principal purpose. The exemption does not apply to pre-written computer software that is available for sale to customers in the ordinary course of the seller's business. Prewritten software that is modified or enhanced to meet the specifications of individual purchasers is also taxable, except to the extent the charges for the modification are reasonable and separately stated on the customer's invoice (Sec. 1101(b)(14), Tax Law; see also *TB-ST-128*, August 5, 2014, CCH NEW YORK TAX REPORTS, ¶408-177).

Practitioner Comment: Occasional Sales

Two isolated sales of customized software did not necessarily result in a conclusion that the software was offered for sale in the regular course of the seller's business. As a result, the use of the software was not subject to tax (*ITG, Inc.*, TSB-A-01(6)S, CCH NEW YORK TAX REPORTS, ¶403-885).

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Computer hardware: Computer system hardware that is used or consumed directly and predominantly in designing and developing computer software for sale is exempt (Sec. 1115(a)(35), Tax Law), as is computer system hardware used in an Internet data center (see below). The exemption applies to purchases, leases, and rentals of such hardware. In addition, hardware used in providing the service, for sale, of designing and developing Internet websites is also exempt from sales and use tax (Sec. 1115(a)(35), Tax Law; *TB-ST-243*, August 7, 2014, CCH NEW YORK TAX REPORTS, ¶408-180).

Software services: Charges for services provided to a customer in connection with the sale of computer software are exempt, provided such charges are reasonable and are separately stated on an invoice or other statement of the price given to the purchaser (Sec. 1115(o), Tax Law). If the software maintenance charge involves a prewritten software upgrade, the charge is subject to tax.

The service of designing and developing web pages is exempt.

Internet access: Charges for internet access are not services enumerated in the New York Tax Law and, thus, are not subject to state and local sales tax. Communications/navigation software, e-mail privileges, news headlines, and certain webpage services furnished as part of a combined Internet access service are incidental to the provision of Internet access, and the charge is not subject to tax. See *TSB-M-97(1)C and TSB-M-97(1)S*, CCH NEW YORK TAX REPORTS, ¶300-224. For additional information, see ¶2006.

Practitioner Comment: Delinquent Taxpayers' Filing Requirements

New York's Tax Department has begun to impose additional filing requirements on taxpayers with a history of late filing or payment of sales taxes. Once notified by the Department, affected taxpayers may be required to deposit collected sales taxes into a separate bank account at a Tax Department-approved bank. The State may also require deposits be made on a weekly basis and that the taxpayer begin filing monthly sales tax returns instead of quarterly or less frequently. Failure to comply with these requirements could cause the business's certificate of authority to be suspended or revoked. (*TSB M 11(9)S*). Department of Taxation and Finance, June 10, 2011, CCH CCH NEW YORK TAX REPORTS, ¶407-285)

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Purchasers' returns: Persons not required to file periodic returns, who purchase or use taxable property or services without paying tax to the seller, must file returns within 20 days from the date of purchase.

Casual sales: Reports of casual sales must also be filed by persons not required to file periodic returns who make taxable sales of tangible personal property or services. Reports of casual sales must show the amount of sales of tangible personal property and services, food and drink, amusement charges, and rents and the amount of purchases subject to use tax, for each jurisdiction, as well as totals of all jurisdictions (Reg. Sec. 533.3(g)).

Sales for resale: Persons required to register only because they are purchasing or selling tangible property for resale, and who are not required to collect any tax or pay any tax directly to the Commissioner, must file an annual information return (Sec. 1136(a), Tax Law).

Sales to itinerant vendors: The Commissioner of Taxation and Finance is authorized to adopt regulations requiring persons registered or required to be registered under Sec. 1134, Tax Law, to file reports regarding sales for resale within the state of tangible personal property or services to itinerant vendors (Sec. 1136(h), Tax Law).

Show promoters and entertainment promoters: Every show and entertainment promoter must file a monthly report within 20 days after the end of the preceding month for all shows or all entertainment events, respectively, for which the person was a promoter during the preceding month. Such reports must list the date and place of each show or event and the name, address and certificate of authority number, by show or event, of every person permitted to display for sale or who made sales of tangible personal property or services subject to tax at the show or event (Sec. 1136(f), Tax Law).

Signature methods of tax return preparers: Tax return preparers are authorized to sign original tax returns, amended tax returns, claims for refund, and requests for extension of time to file manually or by means of a rubber stamp, mechanical device, or computer software program. These alternative methods of signing must include either a facsimile of the individual preparer's signature or the individual preparer's printed name.

Electronic filing: Some taxpayers must use Sales Tax Web File to file their quarterly sales and use tax returns. Taxpayers may electronically file their sales tax return early and schedule their payment through the due date. As a quarterly sales tax filer, a taxpayer must Web File if its business meets all three of the following conditions:

— it does not use a tax preparer to prepare the required filings;

— it uses a computer to prepare, document or calculate the required filings or related schedules or is subject to the corporation tax e-file mandate; and

— it has broadband Internet access.

(*Release*, New York Department of Taxation and Finance, May 31, 2011)

To use Sales Tax Web File to electronically file quarterly or part-quarterly returns, taxpayers should visit the Department's Web site at **www.nystax.gov** and register on the Online Tax Center.

• *Information returns*

Annual information returns are required from persons required to register solely because they are purchasing or selling tangible personal property for resale and who are not required to collect or pay any tax directly to the Commissioner (Sec. 1136(a), Tax Law). The annual return covers the period from March 1 through the end of the following February.

In addition to all other returns, the following persons must file annual information returns:

— every insurer licensed to issue motor vehicle physical damage or motor vehicle property damage liability insurance for motor vehicles registered in New York if, during the period covered by the return, it has paid consideration or an amount under an insurance contract for the servicing or repair of a motor vehicle on behalf of an insured. For each person to whom the insurer paid the consideration, the return must report the total amount paid for that period, along with other required information (TSB-M-09(8)S, July 2, 2009, CCH NEW YORK TAX REPORTS, ¶406-438);

— every franchisor that has at least one franchisee that is required to be registered for sales and use tax purposes. For each franchisee, the return must include the gross sales of the franchisee in New York reported by the franchisee to the franchisor, the total amount of sales by the franchisor to the franchisee, and any income reported to the franchisor by each franchisee, along with additional information (TSB-M-09(9)S, July 7, 2009, CCH NEW YORK TAX REPORTS, ¶406-439); and

— every wholesaler, if it has made a sale of an alcoholic beverage, without collecting sales or use tax during the period covered by the return, except (i) a sale to a person that has furnished an exempt organization certificate to the wholesaler for that sale; or (ii) a sale to another wholesaler whose license under the alcoholic beverage control law does not allow it to make retail sales of the alcoholic beverage (TSB-M-09(8)S, July 7, 2009, CCH NEW YORK TAX REPORTS, ¶406-440).

For each vendor, operator, or recipient to whom the wholesaler has made a sale without collecting sales or compensating use tax, the return must include the total value of those sales made during the period covered by the return and the vendor's, operator's or recipient's state liquor authority license number, along with other information. (Sec. 1136(i)(2), Tax Law)

Exemption: Licensed farm wineries, farm distilleries, and/or farm breweries are exempt from the sales tax annual information return filing requirements imposed by Sec. 1136(i), Tax Law. See also *TSB-M-12(12)S*, October 24, 2012, CCH NEW YORK TAX REPORTS, ¶407-674.

Due dates: Annual information returns are due on or before March 20th of each year, covering the period from March 1 of the previous year through February 28 or 29 of the current year. (Sec. 1136(i)(1), Tax Law)

• *Penalties*

Any person failing to file a return or to pay over any tax due within the time required may be subject to civil penalties and interest. In addition, any person who willfully fails to make a required return or report (other than a return of compensat-

• *Decedents dying on and after April 1, 2014*

Effective for decedents dying on and after April 1, 2014, the New York state estate tax rates are as follows:

New York Taxable Estate					
From	To	Tax =	+	%	Of Excess Over
$0	$500,000	$0		3.06	$0
500,000	1,000,000	15,300		5.0	500,000
1,000,000	1,500,000	40,300		5.5	1,000,000
1,500,000	2,100,000	67,800		6.5	1,500,000
2,100,000	2,600,000	106,800		8.0	2,100,000
2,600,000	3,100,000	146,800		8.8	2,600,000
3,100,000	3,600,000	190,800		9.6	3,100,000
3,600,000	4,100,000	238,800		10.4	3,600,000
4,100,000	5,100,000	290,800		11.2	4,100,000
5,100,000	6,100,000	402,800		12.0	5,100,000
6,100,000	7,100,000	522,800		12.8	6,100,000
7,100,000	8,100,000	650,800		13.6	7,100,000
8,100,000	9,100,000	786,800		14.4	8,100,000
9,100,000	10,100,000	930,800		15.2	9,100,000
10,100,000	- - - - - -	1,082,800		16.0	10,100,000

(Sec. 952(b), Tax Law)

Decedents dying before April 1, 2014.—A tax is imposed on the transfer of the New York taxable estate of every decedent who was a resident of New York State at the time of death. For decedents dying on or after February 1, 2000, the tax is equal to the maximum amount allowable against the federal estate tax as a credit for state death taxes under IRC Sec. 2011, as amended through July 22, 1998. (Sec. 952, Tax Law) In other words, as of February 1, 2000, the New York estate tax purports to become a pickup tax, whereby the only portion of an estate tax owed is the amount that is allowed as a credit against the tax paid to the federal government, which if not paid to the state would be included in the tax paid to the federal government. Because of the subsequently enacted phase-out of the federal estate tax and reduction of the credit for state death taxes, however, the New York tax will exceed the federal credit in some circumstances. Since with respect to decedents dying after January 31, 2000, the N.Y. tax is equal to the federal credit for state death taxes, no deductions or credits not already included in the federal calculation are needed to be made to the federal taxable amount, thus the unified credit, and every other credit previously granted by N.Y. law, was repealed. (Sec. 952, Tax Law) For decedents dying after January 31, 2000, and before January 1, 2002, the N.Y tax is a pick up tax, as intended, and is equal to the amount allowed on the federal return as a credit for state death taxes paid (subject to certain adjustments for state death taxes paid to other states). For decedents dying after December 31, 2001, however, the federal credit allowable is determined by multiplying the applicable credit by the appropriate applicable percentage: 75% for decedents dying in 2002, 50% for decedents dying in 2003, and 25% for decedents dying in 2004. No credit will be allowed for state death taxes against the federal estate tax for decedents dying after 2004, although a deduction will be available. (IRC Sec. 2011(b).) The New York estate tax, however, is calculated in all years using the same rates and tables as would be used for a decedent dying in 2001. (TSB-M-02(2)M)

The provisions of EGTRRA are due to expire and revert to their pre-EGTRRA status with respect to the estates of decedents dying after 2010, unless Congress acts to change the sunset provision. (Pub L No 107-16, 107th Cong, 1st Sess (June 7, 2001) Therefore, absent any affirmative act by Congress, the estates of decedents dying after 2010 will be governed by the same federal laws and subject to the same federal tax situation as the estates of decedents dying after January 31, 2000, and before

January 1, 2002, as discussed above. The New York estate tax at that time, will once again become a "pickup tax" situation, assuming no additional action on the part of the state legislature.

Property in other states.—For estates of decedents dying on or after January 1, 2002, the adjustment for tax paid to other states is amended to eliminate the limitation based on tax actually paid. Instead, the amount is computed solely by multiplying the federal credit for state death taxes by the ratio of non-New York property to total property. (Sec. 952, Tax Law) This amendment will avoid New York's imposing a potentially unconstitutional tax on non-New York property located in states having lower estate taxes than New York's. (*Summary of Tax Provisions in SFY 2004-05 Budget*, New York Department of Taxation and Finance, August 2004)

• *Minimum tax equal to federal credit*

For decedents dying before February 1, 2000, if the maximum federal estate tax credit for state death taxes allowable to a resident decedent's estate exceeded the tentative tax, the amount of the excess had to be added to the New York estate tax. (Sec. 952(c), Tax Law)

However, if the transfer of any part of the estate was subject to a death tax imposed by any other state, for which a credit against the federal tax was allowed, the amount of the maximum federal estate tax credit, for purposes of the New York calculation, was reduced by the lesser of the amount of the death tax paid to the other state and credited against the federal estate tax, and an amount computed by multiplying the federal credit by the fraction of the value of the real and tangible personal property located in the other state and subject to the other state's death tax divided by the value of the decedent's New York adjusted gross estate.

These adjustments did not apply if a federal credit for tax on prior transfers was applicable and that federal credit was limited by IRC Sec. 2013(c).

For estates of decedents dying on or after February 1, 2000, the amount of New York estate tax payable to the state is limited to the maximum amount allowed on the federal estate tax return as a credit for state death taxes under the Internal Revenue Code as amended through July 22, 1998. Thus, the total amount of the New York estate tax paid will be available as a credit against any federal estate tax that may be payable for decedents dying in 2001 or after 2009; a lesser amount will be available as a credit against federal estate tax for decedents dying in 2002, 2003, and 2004, and a deduction will allowed against the federal taxable estate for decedents dying after 2004 and before 2010. (TSB-M-97(8)M, TSB-M-02(2)M)

Effective for estates of decedents dying in 2010, a provision has been added to the Estates, Powers, and Trusts Law to alleviate difficulties caused by the repeal of the federal estate and generation-skipping transfer tax law for taxable transfers occurring during 2010. Formulas based on the amount that can pass free of federal estate or generation-skipping transfer taxes will be deemed to refer to the taxes as they applied with respect to the estates of decedents dying on December 31, 2009.

¶2308 Credits Against Tax

Discussed below are various credit provisions.

CCH Comment: Unified Credit, Filing Threshold for 2010 Dates of Death

The New York Department of Taxation and Finance has issued a memorandum that explains recent amendments to estate tax provisions and the independent unified credit allowed in 2010 and thereafter. For dates of death on or after January 1, 2010, the unified credit is fixed at the amount allowable as if the federal applicable exclusion amount were $1 million. Therefore, the maximum unified credit is fixed at $345,800. In addition, since the unified credit is also used as a reference for the estate tax filing threshold for individuals who are residents or citizens of the United States, the New York estate tax filing threshold is also fixed at $1 million. The memorandum also addresses filing requirements for 2010 dates of death. (*TSB-M-10(12)M*, New York Department of Taxation and Finance, Office of Tax Policy Analysis, Taxpayer Guidance Division.)

director of real property tax services (or the commissioner of finance in New York City) no later than 10 years after the levy of taxes on the assessment roll. The assessed value of the property will be multiplied by the tax rate or rates that were applied to that assessment roll, and interest will be added to the product for each month or portion thereof since the levy of taxes on the assessment roll. The property owner must pay the total amount due to the county treasurer within 15 days of the mailing of the form. (Sec. 496, Real Property Tax Law)

Property tax freeze credit: A personal income tax credit (see ¶122) is available to homeowners who are eligible for the STAR exemption, and live in a taxing jurisdiction that (1) limits any increase in its tax levy to a property tax cap set by state law (see ¶2505), and (2) develops and implements a Government Efficiency Plan determined to be compliant by the New York State Division of Budget. Qualified homeowners will receive a freeze credit equal to the greater of the actual increase in their homeowner's tax bill or the previous year's tax bill multiplied by an inflation factor. In the first year of the program, homeowners will receive the credit if their local government or school district stays within the property tax cap. In the second year, homeowners will receive the credit for taxes from any taxing jurisdictions in which the homeowner resides that stay within the property tax cap and put forward a compliant plan to save 1% of their tax levies in each of the following three years. New York City homeowners are not eligible for the freeze credit because New York City is not subject to the property tax cap. (Sec. 606(bbb), Tax Law; *Publication 1030*, New York Department of Taxation and Finance, July 14, 2014, CCH NEW YORK TAX REPORTS, ¶408-134)

• *Senior citizens*

Local governments may provide for an exemption allowing persons 65 years of age or older to exclude up to 50% of the assessed value of property used for residential purposes, provided certain income limitations are met (Sec. 467, Real Property Tax Law). Proceeds from a reverse mortgage are not considered income for purposes of calculating eligibility.

If the property is owned by a husband and wife or by siblings, the exemption will be permitted if at least one spouse or sibling is 65 years of age. Divorced or separated property-owners may also qualify for relief, provided the property previously qualified for, and received, the senior citizen exemption when occupied by both spouses.

Title to cooperative apartments owned by a cooperative apartment corporation is deemed to be vested in the corporation's tenant-shareholders. Therefore, if an apartment owned by a cooperative apartment corporation and occupied by a tenant-shareholder is eligible for a tax exemption, the amount of the exemption must be credited against the assessed valuation of the property, and the resulting tax reduction must be credited by the corporation against the amount of the taxes otherwise chargeable to or payable by the tenant-shareholder.

Optional exemption: One or more owners of real property who qualify for the property tax exemption for disabled persons and/or the exemption for senior citizens may choose the more beneficial exemption of the two (Secs. 455, 459-c, Real Property Tax Law).

Senior citizen or disabled persons rent increase exemptions (SCRIE and DRIE): Local governments may also provide for limited tax abatements for rent-controlled and rent-regulated property occupied by senior citizens or disabled persons with limited incomes. The abatement amount is equal to the portion of any increase in the legal regulated rent that causes it to exceed one-third of the combined income of all members of the household, or if the senior citizen or disabled person receives a monthly allowance for shelter pursuant to the social services law, the amount of any increase in maximum rent or legal regulated rent that is not covered by the maximum

allowance for shelter that the senior citizen is entitled to receive. The amount of the abatement is deducted from the legal maximum rent or legal regulated rent for the dwelling unit of the senior citizen. (Sec. 467-b(3), Real Property Tax Law) No abatement is allowed if the combined income of all members of the household for the income tax year immediately preceding the date of application exceeds $4,000 or the income limit set by the local law, which may not exceed $50,000 ($29,000 prior to July 1, 2014). (Secs. 467-b; 467-c, Real Property Tax Law).

Granny units: A county, city, town, village, or school district may exempt any increase in the assessed value of residential property resulting from the construction or reconstruction of the owner's principal residence for the purpose of providing living quarters for the owner's parent or grandparent who is age 62 or older (Sec. 469, Real Property Tax Law).

The exemption must not exceed the lesser of (1) the increase in assessed value resulting from the construction or reconstruction, (2) 20% of the total assessed value of the improved property, or (3) 20% of the median sale price of residential property in the county. If granted, the exemption is applicable only to construction or reconstruction that occurs after August 30, 2000, and only during taxable years in which at least one parent or grandparent maintains a primary place of residence in the living quarters.

Certain municipalities are empowered to exempt residential real property to the extent of any increase in assessed value resulting from the construction or reconstruction of the property for the purposes of providing living quarters for a senior citizen who is 65 years of age or older, or individuals considered disabled and receiving social security disability benefits (Sec. 467-d, Real Property Tax Law).

• *Veterans*

Local governments are authorized to exempt up to 15% of the assessed value of the primary residence owned by (or held in trust for the benefit of) a war veteran, the veteran's spouse, or the veteran's unremarried surviving spouse. If there is no unremarried surviving spouse, the exemption will apply if the property passes by devise or descent to the veteran's dependent father, mother, or children under 21 years of age, and is used by at least one as his or her primary residence. The maximum amount of the exemption may not exceed the lesser of $12,000, or the product of $12,000 multiplied by the latest state equalization rate (or, in the case of a special assessing unit, the latest class ratio). Veterans are not required to refile annually for the exemption. Seriously disabled veterans are also exempt from special district charges and assessments, and special ad valorem levies. (Sec. 458-a.2, Real Property Tax Law).

Additional exemption: Veterans who received a campaign ribbon, service medal, or expeditionary medal from the armed forces, the navy, or the marine corps, or a global war on terrorism expeditionary medal, as a result of service in a combat theatre or combat zone of operation may be entitled to an additional residential property exemption equal to 10% of the assessed value of the property, subject to a maximum of $8,000, or the product of $8,000 multiplied by the latest state equalization rate (or, in the case of a special assessing unit, the latest class ratio) (Sec. 458-a.2, Real Property Tax Law).

Qualifying veterans are those who served in the active military, naval or air service during a period of war (Sec. 458-a.1, Real Property Tax Law). The exemption is also available to reserve members of the U.S. armed forces who have served on federal active duty during a period of war, and who remain affiliated with their reserve component unit.

Gross earnings tax: The additional tax on intrastate gross earnings is imposed at the rate of 0.375% on gross earnings from all sources within New York. Unlike the Sec. 183 tax, there is no minimum tax. (Sec. 184.1, Tax Law)

Subject to certain limitations, railroads whose property is leased to other railroads will be taxed at the rate of 4½% on dividends paid during the calendar year that exceed 4% of the amount of capital stock. (Sec. 184.3, Tax Law)

The gross earnings tax on telecommunication providers is limited to entities formed for or principally involved in the conduct of a local telephone business; these companies must exclude from earnings 30% of separately charged inter-LATA, interstate or international telecommunication service derived from sales for ultimate consumption of telecommunication service to its customers. (Sec. 184.1, Tax Law)

Metropolitan Commuter Transportation District surcharge: Similar to corporation franchise (income) provisions (¶905).

For purposes of calculating the surcharge, the tax imposed under Sec. 184 is deemed to be imposed at a rate of 0.75% except that for eligible corporations, joint stock companies or associations that elect to be subject to the provisions of Sec. 183, the Sec. 184 tax is deemed to have been imposed at a rate of 0.6%.

Credits: The following credits are allowed:

Foreign corporation annual maintenance fees: Foreign transportation and transmission companies were allowed a credit against Secs. 183 and 184 taxes for the amount of former annual maintenance fees paid for the calendar year (¶2714).

Special additional mortgage recording tax credit: Similar to corporation franchise (income) provisions (¶927). (Sec. 187, Tax Law)

Credit for employing disabled persons: Similar to corporation franchise (income) tax provisions (¶928). However, in applying the credit to the transportation and transmission companies taxes, it must first be applied to the Sec. 183 franchise tax and then any excess may be applied against the Sec. 184 additional franchise tax. (Sec. 187-a, Tax Law)

Alternative fuels tax credit: Generally, this credit is similar to corporation franchise (income) tax provisions (¶935). (Sec. 187-b, Tax Law)

Long-term care insurance: A credit is allowed for 20% of the long-term care insurance premiums paid during the taxable year. See the discussion at ¶939. (Sec. 190, Tax Law)

Green buildings: A credit is available to enhance the supply of environmentally sound buildings in New York. The credit includes six components, which are based on the capitalized costs (excluding land costs) of constructing green buildings, rehabilitating buildings to become green buildings, and purchasing and installing fuel cells, photovoltaic modules, and environmentally sensitive non-ozone depleting refrigerants. See the discussion at ¶942. (Sec. 187-d, Tax Law)

Brownfield credits: Three refundable brownfield credits are available. The credits are designated the brownfield redevelopment tax credit, credit for remediated brownfields, and environmental remediation insurance credit. The credits are available to taxpayers that own or develop a qualified site for which a certificate of completion has been issued to the taxpayer by the Commissioner of Environmental Conservation. For details of the credits, see ¶943.

Credit for security training: For qualified building owners, a security training tax credit is allowed. (Secs. 26, 187-n, Tax Law) The credit amount equals the sum of the number of qualified security officers providing protection to buildings owned by the taxpayer, multiplied by $3,000. Any credit amount not deductible in a taxable year will be treated as an overpayment of tax to be credited or refunded without interest.

Returns and payment of tax: Transportation and transmission companies must file written reports with the Commissioner of Taxation and Finance on or before March 15 of each year, stating the company's condition at the close of the preceding year. Payment of tax accompanies the filing of the return.

Estimated tax: Transportation and transmission companies subject to the additional tax on gross earnings (Sec. 184, Tax Law) must file declarations of estimated tax if their estimated tax for the current year can reasonably be expected to exceed $1,000. See discussion at ¶1405.

• *Water, gas, steam, and electric companies*

Corporations, joint stock companies, associations, and publicly traded partnerships taxable as corporations that are formed for, or principally engaged in, the business of supplying electricity or water, steam, or gas (when delivered through mains or pipes) were subject to an annual franchise tax (Sec. 186 tax) that was repealed for taxable years ending after January 1, 2000. The Metropolitan Commuter Transportation District Surcharge imposed by Sec. 186-b, Tax Law, was also repealed. Taxpayers subject to the repealed tax are now generally subject to the corporation franchise (income) tax (Article 9-A, Tax Law, beginning at Chapter 9). For transitional provisions, see CCH NEW YORK TAX REPORTS, ¶80-101. In some unusual cases, a corporation that is a subsidiary of a banking corporation will be subject to the Article 32 franchise tax on banking corporations, rather than Article 9-A.

Certain independent power producers subject to Sec. 186, but not Sec. 186-a, have the option of remaining subject to Sec. 186 until existing output contracts are scheduled to expire.

• *Tax on furnishing of utility services*

Utilities doing business within New York that are subject to the jurisdiction of the Department of Public Service ("first class utilities"), and utilities *not* subject to the jurisdiction of the Department of Public Service that sell gas, electricity, steam, water, or refrigeration, delivered through mains, pipes, or wires, or furnish gas, electric, steam, water, or refrigerator service, by means of mains, pipes, or wires ("second class utilities"), are subject to an additional annual franchise tax. (Sec. 186-a tax)

Exclusion: An exclusion from gross income applies to receipts from the transportation, transmission, or distribution of gas or electricity (*i.e.*, noncommodity charges) to nonresidential customers. (Sec. 186-a.2(c)(1), Tax Law).

Practitioner Comment: Special Exceptions to Gross Receipts Tax

Section 186-a.2(c) of the Tax Law imposes a gross receipts tax on a utility's receipts from services as well as from the "profits from any transaction . . . within New York State whatsoever." However, when applying this language to sales of real property, other than inventory, profit is measured by reducing the selling price of the realty by its original cost, without any deduction attributable to depreciation. Expenses of the sale are also deductible. Additionally, if the utility is divesting itself of substantial assets, its "profit" can be computed on an aggregate basis, not on the sale of each individual asset (*Niagara Mohawk Power Corp.*, TSB-A-99(9)C, CCH NEW YORK TAX REPORTS, ¶403-314).

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Exemptions: The following utilities are exempt from tax:

— first class utilities with gross income for the calendar year of $500 or less; (Sec. 186-a.1, Tax Law)

— second class utilities with gross operating income for the calendar year of $500 or less; (Sec. §186-a.1, Tax Law)

current supplemental tax rate and the then current surcharge rate. The credit or reimbursement must first be applied against tax liability for the same period during which the credit or reimbursement arose. Excess credit or reimbursement may then be carried forward to subsequent periods. (Secs. 301-c(i); 300(k), Tax Law)

The amount of the commercial gallonage credit/reimbursement is listed in the above chart.

Minimum tax: There is no minimum tax.

• *Returns and payment*

Returns and payment of tax are due on or before the 20th day following the close of the taxable month. (Sec. 308(a), Tax Law)

Quarterly returns: The Commissioner of Taxation and Finance may permit quarterly, rather than monthly, returns by diesel motor fuel distributors that only make sales of diesel motor fuel for residential heating purposes and businesses registered as "distributors of kero-jet fuel only."(Sec. 308(a) Tax Law)

Electronic funds transfer payment: Taxpayers liable for more than $5 million of petroleum business taxes during the preceding one-year period are required to make payment of tax by electronic funds transfer or certified check. The amount of payment by such method is 3/4 of the total liability for petroleum business taxes payable by the taxpayer for the comparable month of the preceding year, *or* the taxpayer's total liability for such taxes during the period ending on the 22nd day of each month. (Secs. 308(b); 10(b)(1), (2); Sec. 308(a)) For additional information on EFT payments, see ¶3602.

Reimbursement of tax: Purchasers of diesel motor fuel in New York who subsequently sell such fuel to consumers exclusively for residential heating purposes are eligible for a reimbursement of tax, subject to certain limitations. Purchasers of diesel motor fuel or motor fuel in New York who subsequently sell such fuel to the state of New York or the United States are eligible for reimbursement, provided that (1) the fuel is for the government organization's own use and consumption, (2) the tax has been paid on the fuel and the entire amount has been absorbed by the purchaser, and (3) the purchaser possesses documentary proof satisfactory to the Commissioner of Taxation and Finance evidencing the absorption by it of the entire amount of the tax. (Sec. 301-c(a), (b), Tax Law)

CCH Advisory: Government Credit Card Sales

Credit card companies and motor fuel or motor diesel fuel distributors that finance the purchase of such fuel by governmental entities using credit cards are allowed a credit or refund of New York motor fuel, petroleum business, and sales and use taxes on such purchases. According to the sponsor's memorandum, this provision is intended to conform to federal tax legislation that creates a system for credit card issuers and fuel distributors to receive refunds of the federal excise tax on fuel purchases by governmental entities using credit cards. Applicants must file Form FT-505.1, Government Entity Credit Card Refund or Credit Election. (Sec. 289-c(3)(h), Tax Law; TSB-M-08(12)S and TSB-M-08(9)M, November 5, 2008, CCH NEW YORK TAX REPORTS, ¶406-212)

Refunds for uncollectible debts: Petroleum businesses may apply for refunds of petroleum business taxes (including the supplemental tax) with respect to taxes paid for sales on accounts determined to be uncollectible. The refund will be permitted if (1) the gallons have been included in reports filed by the petroleum business and the tax paid, (2) the gallonage was sold in bulk by the petroleum business to a purchaser for the purchaser's own use and consumption, and (3) the sale gave rise to a debt that (a) is worthless and (b) is deducted as a worthless debt for federal income tax purposes for the taxable year covering the month in which the state refund claim is filed. (Sec. 301-1, Tax Law)

• *Carriers*

Imposition of tax: A monthly tax is imposed on motor fuel and diesel motor fuel imported into New York by carriers in the fuel tanks of vehicular units. (Sec. 301-h, Tax Law)

Basis and rate: The tax is measured by the number of gallons of motor fuel and diesel motor fuel imported into New York in the fuel tanks of vehicular units that have not previously been included in the measure of the tax on petroleum businesses and are consumed in New York in the operation of the vehicular unit, multiplied by the sum of the motor fuel and automotive-type diesel motor fuel rates applicable to petroleum businesses and the supplemental petroleum business tax rate. (Sec. 301-h(a), Tax Law)

Credit: A credit is allowed equal to the tax absorbed by the carrier with respect to any excess of gallonage purchased in New York during the reporting period, over the gallonage consumed in the state during such period. The credit may be claimed against the tax for which the carrier would otherwise be liable for the eight succeeding calendar quarters commencing with the end of the reporting period for which the excess was derived.

In lieu of a credit, a claim for a refund may be filed. The claim must be filed within two years from the end of the reporting period for which the excess was derived and may not be filed more than quarterly. (Sec. 301-h(a), Tax Law)

• *Aviation fuel businesses*

Imposition of tax: A monthly tax is imposed on aviation fuel businesses for the privilege of engaging in business, doing business, employing capital, owning or leasing property or maintaining an office in New York. (Sec. 301-e(a), Tax Law)

An "aviation fuel business" is a corporation or unincorporated business that (1) imports or causes aviation gasoline or kero-jet fuel to be imported (including importing in aviation fuel tanks) into New York for use, distribution, storage or sale in the state, (2) produces, refines, manufactures, or compounds aviation gasoline or kero-jet fuel in the state, (3) sells or uses kero-jet fuel in New York (other than a retail sale not in bulk or self-use of kero-jet fuel that was sold to the corporation or unincorporated business at retail), or (4) is registered as a distributor of kero-jet fuel only. (Secs. 301-e(e); 300(b), Tax Law)

"Kero-jet fuel and aviation gasoline consumed in this state" is presumed to mean all such fuel consumed during takeoffs from points in New York.

Exemption: An exemption applies to an aviation fuel business servicing four or more cities in New York with nonstop flights between such cities.

Basis and rate: The tax on aviation fuel businesses is equal to the sum of the aviation gasoline component and the kero-jet fuel component. A supplemental tax is imposed on the aviation gasoline component of the tax. The components of the tax are determined as follows:

Aviation gasoline component: The aviation gasoline component is determined by multiplying the aviation gasoline rate by the number of gallons of aviation gasoline imported or caused to be imported into New York for use, distribution, storage, or sale in the state, or produced, refined, manufactured, or compounded in New York by the aviation fuel business.

Kero-jet fuel component: The kero-jet fuel component is determined by multiplying the kero-jet fuel rate by (1) the number of gallons of kero-jet fuel imported or caused to be imported into New York by an aviation fuel business and consumed in

taxable year of the corporation, multiplied by a fraction, the numerator of which is the net total of the corporation's distributive share of income, gain, loss and deductions of, and guaranteed payments from, the unincorporated business for the taxable year, and the denominator of which is the sum, for the taxable year, of the net total distributive shares of income, gain, loss and deductions of, and guaranteed payments to, all partners in the unincorporated business for whom or which the net total (as separately determined for each partner) is greater than zero. If the corporation is liable for general corporation tax based on entire net income plus certain salaries and other compensation, the amount so determined must be multiplied by $^{2655}/_{4000}$; or

— if, before the application of any credits, the corporation is liable for (a) the tax based on entire net income, the excess of the tax so computed, without the allowance of any credits, over the tax so computed, determined as if the corporation had no distributive share or guaranteed payments with respect to the unincorporated business, multiplied by $^{400}/_{885}$, or (b) the tax based on entire net income plus certain salaries and other compensation, the excess of the tax computed, without allowance of credits, over the tax so computed, determined as if the corporation had no such distributive share or guaranteed payments with respect to the unincorporated business. The amount so determined may not be less than zero.

For additional information, see *Update on Audit Issues*, New York City Department of Finance, June 2008, CCH NEW YORK TAX REPORTS, ¶600-661.

Credit limitations: The sum of the credits allowed to a corporation for a taxable year with respect to all unincorporated businesses in which the corporation is a partner may not exceed (1) in the case of a corporation that, before the application of any credits, is liable for general corporation tax computed on entire net income, the tax so computed, without any allowance of any credits, multiplied by $^{400}/_{885}$, and (2) in the case of a corporation that, before the application of any credits, is liable for general corporation tax computed on entire net income plus certain salaries and other compensation, the tax so computed without allowance of any credits.

Corporations filing combined reports: Corporations that file combined reports must compute the credit as if the combined group were the partner in each unincorporated business from which any of the members of the group had a distributive share or guaranteed payments. However, if more than one member of the combined group is a partner in the same unincorporated business, for purposes of the calculation required above, the numerator of the fraction must be the sum of the net total distributive shares of income, gain, loss and deductions of, and guaranteed payments from, the unincorporated business of all of the partners of the unincorporated business within the combined group for which the net total (as separately determined for each partner) is greater than zero, and the denominator must be the sum of the net total distributive shares of income, gain, loss and deductions of, and guaranteed payments from, the unincorporated business of all partners in the unincorporated business for whom or which such net total (as separately determined for each partner) is greater than zero.

• *Sales and compensating use tax credit*

A credit is allowed against general corporation tax equal to the amount of sales and compensating use taxes paid with respect to the purchase or use of the services of installing, repairing, maintaining or servicing machinery, equipment, parts, tools, or supplies used directly and predominantly in the production of tangible personal property, gas, electricity, refrigeration, or steam for sale, or certain telephone central office equipment or station apparatus or comparable telegraph equipment. Interest paid in connection with such taxes is also allowed as a credit.

• *Credit for sales and use taxes paid on production machinery*

A credit is allowed for sales and use taxes paid with respect to the purchase or use by a taxpayer of machinery or equipment for use or consumption directly and predominantly in the production of tangible personal property, gas, electricity, refrigeration, or steam for sale. (Sec. 11-604(12), NYC Adm. Code) Parts having a useful life of one year or less, and supplies used in connection with the production equipment, are not eligible for the credit.

• *Film production credit*

New York City allows the empire state film production credit against general corporation tax through 2019 (Sec. 11-604(20), NYC Adm. Code). The credit is substantially identical to the state credit, except that the percentage of qualified production costs used to calculate the credit is 5%, instead of 10%. Up to $30 million in tax credits will be available each calendar year. For a discussion of the state credit, see ¶944.

• *Industrial business zone relocation credit*

Credits against the New York City general corporation tax and unincorporated business tax are available to eligible taxpayers that are engaged in industrial and manufacturing activities and that relocate to an industrial business zone (Sec. 11-604(17-b), NYC Adm. Code). The credit amount equals $1,000 per full-time employee, not to exceed the lesser of actual relocation costs or $100,000.

The Industrial Business Zone Boundary Commission is authorized to designate industrial business zones (Sec. 22-625, NYC Adm. Code).

• *Biotechnology credit*

A refundable credit against the New York City general corporation tax and unincorporated business tax is available for biotechnology businesses. In order to claim the credit, a biotechnology firm must be a qualified emerging technology company (QETC) and must meet the following requirements (Sec. 11-604(21), NYC Adm. Code):

— have 100 or fewer full-time employees, with at least 75% of those employees employed in New York City;

— have a ratio of research and development funds to net sales of at least 6%; and

— have gross revenues not exceeding $20 million for the immediately preceding year.

Credit amount: For biotechnology firms that have increased their employment in the city by at least 5%, are newly formed, or are newly located to the city, the credit is provided as follows, up to $250,000:

— 18% for the acquisition of research and development property and related costs and fees;

— 9% for qualified research expenses; and

— 100% of certain training expenses, up to $4,000 per employee.

Planning considerations: Existing biotechnology firms that have not increased their employment by at least 5% are eligible for the credit, but at half the rate, up to $125,000. The total credits for a given year are capped at $3 million. If credits in a given year exceed the cap, the credit will be allocated on a prorated basis by the New York City Department of Finance. The credit is allowed for three consecutive years and is applicable for taxable years beginning on or after January 1, 2010, and before January 1, 2016. (Sec. 11-604(21), NYC Adm. Code)

—In the case of a taxpayer that is an unincorporated entity described in Sec. 11-502(c)(4)(b), NYC Adm. Code, the amount allowed as an exclusion or deduction in determining federal gross income of any loss realized from the sale or other disposition of an interest in another unincorporated entity if, and to the extent that, such loss is attributable to activities of such other unincorporated entity not deemed an unincorporated business carried on by the taxpayer pursuant to Sec. 11-502(c);

—The amount allowed as an exclusion or deduction in determining federal gross income of any loss realized from the holding, leasing or managing of real property if, and to the extent that, such holding, leasing or managing of real property is not deemed an unincorporated business carried on by the taxpayer pursuant to Sec. 11-502(d), NYC Adm. Code; and

—The amount allowed as an exclusion or deduction in determining federal gross income of any loss realized from the provision by an owner, lessee or fiduciary holding, leasing or managing real property of the service of parking, garaging or storing of motor vehicles on a monthly or longer term basis to tenants at such real property if, and to the extent that, the provision of such services to such tenants is not deemed an unincorporated business carried on by the taxpayer pursuant to 11-502(d), NYC Adm. Code;

—*Royalties:* Certain royalty payments made by the taxpayer to a related member during the taxable year must be added back, to the extent deductible in calculating the taxpayer's federal taxable income. For additional information, see ¶1002.

CCH Advisory: "Bonus" Depreciation

The accelerated depreciation deductions allowed by IRC Sec. 168(k) must be added back to federal taxable income for New York City business tax purposes. However, the federal accelerated depreciation is allowed for businesses located in the Resurgence Zone or the Liberty Zone (Ch. 93 (A.B. 11817), Laws 2002; NYC Local Law 17 (Introductory Number 220-A), Laws 2002; Finance Memorandum 02-3, New York City Department of Finance, September 26, 2002, CCH NEW YORK CITY TAX REPORTS, ¶600-458).

Sport utility vehicles (SUVs): For depreciation and expensing provisions applicable to SUVs, see ¶2807.

• *Subtractions from federal gross income*

The following subtractions are made from the federal gross income of an unincorporated business in connection with items attributable to the business (Sec. 11-506(c), N.Y.C. Adm. Code):

—Interest on bonds of the United States and its possessions to the extent includible in federal gross income;

—Interest or dividends on bonds of any authority, commission or instrumentality of the United States that is includible in federal gross income, but which is exempt from state or local income taxes by federal statute;

—Interest or dividend income exempt by the New York State or New York City law authorizing the issuance of the obligations or securities on which paid, to the extent includible in federal gross income;

—Any tax refund or credit for overpayment of income taxes levied by New York State, New York City or any other taxing jurisdiction or the petroleum business tax imposed by Article 13-A, Tax Law, to the extent includible in federal gross income;

—Gain on the sale or other disposition of property where the January 1, 1966, fair market value is higher than the federal basis;

—For taxable years beginning in 1982, except for qualified mass commuting vehicles, the amount properly includible in federal gross income solely as a result of a safe harbor lease election made under IRC Sec. 168(f)(8) as it was in effect for agreements entered into prior to January 1, 1984;

—Upon disposition of property (except for property subject to the provisions of IRC Sec. 168 placed in service in New York State for taxable years beginning after 1984 and property subject to IRC Sec. 280-F, concerning luxury automobiles), the amount, if any, by which the aggregate accelerated cost recovery systems deduction under IRC Sec. 168 exceeds the aggregate of the depreciation deduction under IRC Sec. 167;

—Fifty percent of dividends to the extent includible in federal gross income and not otherwise subtracted, other than (1) amounts described in Sec. 11-602(8)(b)(13) and (15), NYC Adm. Code (dividends related to sale of assets by target corporations), and (2) dividends from stock described in Sec. 11-602(3)(b) and (c), NYC Adm. Code. *Note:* The foregoing provisions of Sec. 11-602 were repealed for taxable years beginning after 1999. No subtraction is allowed for any portion of a stock dividend with respect to which a dividend deduction would have been disallowed by IRC Sec. 246(c) (relating to the dividends received deduction) if the unincorporated business were a corporation;

—The amount of any income or gain (to the extent includible in gross income for federal tax purposes) realized by an owner of real property, a lessee or a fiduciary from the holding, leasing or managing of real property to the extent that such holding, leasing or managing is not deemed to constitute an unincorporated business carried on by the taxpayer;

—The amount of any income or gain (to the extent includible in gross income for federal income tax purposes), including but not limited to, dividends, interest, payments with respect to securities loans, income from notional principal contracts, or income and gains, other than as a dealer, from the holding, sale, disposition, assumption, offset or termination of a position in, property, or other substantially similar income from ordinary and routine trading or investment activity to the extent determined by the Commissioner of Finance, realized in connection with activities described in Sec. 11-502(c)(2), NYC Adm. Code, if, and to the extent that, such activities are not deemed an unincorporated business carried on by the taxpayer pursuant to Sec. 11-502(c);

—In the case of a taxpayer that is an unincorporated entity described in Sec. 11-502(c)(4)(b), NYC Adm. Code, the amount of any income or gain (to the extent includible in gross income for federal income tax purposes) realized from the sale or other disposition of an interest in another unincorporated entity if, and to the extent that, such income or gain is attributable to activities of the other unincorporated entity not deemed an unincorporated business carried on by the taxpayer pursuant to Sec. 11-502(c); and

—The amount of any income or gain (to the extent includible in gross income for federal income tax purposes) realized from the provision by an owner, lessee or fiduciary holding, leasing or managing real property of the service of parking, garaging or storing of motor vehicles on a monthly or longer term basis to tenants at such real property if, and to the extent that, the provision of such services to such tenants is not deemed an unincorporated business pursuant to Sec. 11-502(d), NYC Adm. Code.

• *Deductions*

The starting point for determination of New York City unincorporated business deductions is the items of loss or deduction directly connected with, or incurred in the conduct of, the business, or with any property employed in the business, to the extent those loss and deduction items are allowed for federal income tax purposes in the taxable year. Items of loss or deduction are subject to the following modifications (Sec. 11-507, N.Y.C. Adm. Code):