

State & Local Tax **Alert**

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NYS Metropolitan Commuter Transportation Mobility Tax Enacted

New York Governor Paterson recently signed into law the Metropolitan Commuter Transportation Mobility Tax (MCTMT) which imposes **a new permanent payroll tax** on employers, partners of partnerships and other self-employed individuals within the 12 counties of the Metropolitan Commuter Transportation District (MCTD) of New York State (NYS) including the five New York City (NYC) boroughs and Nassau, Suffolk, Westchester, Rockland, Orange, Putnam and Dutchess counties.¹ The NYS Department of Taxation and Finance (“Department”) has released additional guidance with respect to the MCTMT.²

Overview for Employers

Employers are required to pay tax on 0.34 percent of the payroll expense paid to all covered employees for services performed in the MCTD, and the tax is based on Medicare wages under Internal Revenue Code (IRC) Section 3121.³ The term “employer” is defined as an employer required by New York’s withholding tax law to deduct and withhold tax from wages that has a payroll tax in excess of \$2,500 in any calendar quarter, with exceptions for certain government agencies.⁴ Under this law, estimated payments are required to be made on a quarterly basis.⁵

In determining whether an employee is classified as a covered employee (meaning employed within the MCTD), the jurisdiction of employment sourcing rules for state-wide wage reporting are incorporated by reference in the law.⁶ The Department has set forth the following four-part test to assist in this determination:

- If all of the employee’s services are localized in the MCTD (either entirely within the MCTD, or services outside the MCTD are incidental to the services performed within the MCTD), the employee’s services are allocated to the MCTD;

¹ Part C, A.08180 (May 7, 2009).

² TSB-M-09(1)MCTMT (June 1, 2009).

³ N.Y. TAX LAW §§ 801(a), 800(c).

⁴ N.Y. TAX LAW § 800(b).

⁵ N.Y. TAX LAW § 804(a).

⁶ N.Y. TAX LAW § 801(c).

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States

New York

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- If the first test is not met, the employee's services are allocated to the MCTD if the employee's base of operations⁷ is in the MCTD;
- If the first and second tests are not met, the employee's services are allocated to the MCTD if the employee's direction and control emanate from only the MCTD, and the employee performs some services within the MCTD; and
- If the first three tests are not met, the employee's services are allocated to the MCTD if the employee resides in the MCTD and performs some services within the MCTD.⁸

Further, the law makes clear that the MCTMT cannot be passed through to the employees whose payroll expenses comprise the tax base of the MCTMT. The law prohibits an employer from deducting the MCTMT from the wages or compensation provided to an employee.⁹ ***The effective date of the MCTMT on employee wages is generally retroactive to March 1, 2009.***¹⁰

Overview for Individuals and Partners of Partnerships and LLCs

Individuals, partners and members of an LLC treated as a partnership, that have apportioned net earnings from self-employment as defined under IRC Section 1402 that is attributable to the MCTD are subject to tax at 0.34 percent if such earnings exceed \$10,000 for the tax year.¹¹ Apportionment is based on three-factor MCTD apportionment (equally weighted property, payroll and receipts factors in the MCTD/everywhere factors).¹² Partners are required to make quarterly estimated payments of the MCTMT.¹³ The effective date of the MCTMT on self-employment net earnings is generally retroactive to January 1, 2009, although the liability is limited to 10/12 of net earnings for the 2009 tax year.¹⁴

⁷ The term "base of operations" is defined in the Department's guidance as two places: (i) the place in which the employee is not continuously located, but from which the employee customarily starts out to perform functions in or out of the MCTD; and (ii) the place where the employee customarily returns in order to receive instructions from the employer, communications from others, or to replenish stock and materials, repair equipment used, or perform other necessary functions in the exercise of the employee's trade or profession. See TSB-M-09(1)MCTMT.

⁸ TSB-M-09(1)MCTMT.

⁹ N.Y. TAX LAW § 802.

¹⁰ Part C, A.08180, Sec. 23(a)(i).

¹¹ N.Y. TAX LAW § 801(a).

¹² N.Y. TAX LAW § 801(b)(1).

¹³ N.Y. TAX LAW § 804(b).

¹⁴ Part C, A.08180, Sec. 23(a)(ii).

Administrative Requirements

Since the tax on employee wages is due at the same time as the state wage reporting system (generally quarterly), for non-PromptTax filers, the MCTMT is reported and paid for each calendar quarter by the last day of the month following the end of the quarter:

Quarter	Due Date
January 1 - March 31	April 30
April 1 - June 30	July 31
July 1 - September 30	October 31
October 1 - December 31	January 31

For 2009, the initial payment is not due until November 2, 2009 and should include the MCTMT due for the period March 1, 2009 through September 30, 2009. For PromptTax filers, the MCTMT must be paid on the same dates that income tax withholding payments are remitted under the PromptTax program.¹⁵

For partners and self-employed individuals, estimated payments must be made for the MCTMT, which are due on the same dates applicable for employers that are non-PromptTax filers.¹⁶ Partners and self-employed individuals must also file MCTMT returns on the 30th day of the fourth month following the close of the tax year (April 30th for calendar year taxpayers).¹⁷

Group Returns for Partnerships: As an alternative to each partner making estimated MCTMT tax payments and filing separate reconciliation returns, the Department has stated that a partnership that meets certain conditions may file one group reconciliation return on behalf of its partners who elect to participate in the group return. ***A partnership that chooses to file a group reconciliation return must also make group estimated tax payments on behalf of electing partners.***¹⁸ Additional information regarding group returns will be made available by the Department as it is developed.

Nonresident Partner Estimated MCTMT Payments: Partnerships doing business in the MCTD generally are required to make estimated MCTMT payments on behalf of nonresident individual partners. However, estimated tax payments are not required for any partner whose estimated annual MCTMT liability to be paid by the partnership is \$300 or less. Another exception from the estimated tax payment rules is available with respect to partners of the partnership that have elected to be included on a group return. Finally, partnerships are not subject to the estimated MCTMT payment rules with respect to any partner that certifies to the partnership that the partner will comply in his or her individual capacity with the MCTMT estimated tax filing requirements.¹⁹ Department guidance or forms regarding documentation of such certification have not been issued yet.

¹⁵ TSB-M-09(1)MCTMT.

¹⁶ N.Y. TAX LAW § 804(b).

¹⁷ *Id*

¹⁸ TSB-M-09(1)MCTMT.

¹⁹ *Id*

Commentary

Although the Department has issued TSB-M-09(1)MCTMT in order to clarify the enabling legislation and address certain issues raised by tax practitioners, the NYS Society of Certified Public Accountants and other professional groups, open issues still remain requiring guidance and/or corrective measures to more effectively implement the MCTMT. Some issues that could be addressed by the Department in future technical guidance include the following:

Computation of the Wage Base

The MCTMT is levied on an employer using the FICA wages as a base. This would require an employer to calculate four different “wage bases” for NYS payroll-based taxes, as NYS unemployment tax, NYS income tax withholding, NYC income tax withholding, and now the MCTMT, require separate calculations. The definition of “wages” for purposes of the four wage bases also varies. While the NYS and NYC income tax withholding definition of wages is the same, that definition differs from the NYS unemployment tax and the MCTMT conception of the term. The enactment of the MCTMT, which requires an employer to use a separate calculation for the population of employees to whom the tax applies and requires a separate breakdown of the FICA taxable wages from the NYS and/or NYC employee base, increases an already substantial compliance burden on employers. The increased compliance burden could have been mitigated by conforming the MCTMT definition of wages to the definition currently used for NYS and NYC income tax withholding purposes.

Streamlining Return and Estimated Tax Filings

Except for PromptTax Filers, the new law provides that the MCTMT must be reported and paid for each calendar quarter by the last day of the month following the end of the quarter. While these due dates coincide with the due dates for employer quarterly payroll tax filing, for self-employed individuals, these due dates currently are inconsistent with the due dates for their quarterly estimated tax filing due dates (i.e. April 15th, June 15th, September 15th and January 15th). Simplifying the implementation of the reporting and payment of the variety of NYS payroll taxes could have been accomplished by conforming the due dates for these taxes to occur at the same time.

Allocation and Apportionment of the MCTMT

TSB-M-09(1)MCTMT provides four successive tests to determine whether an employer is to allocate the services of an employee to the MCTD. The allocation provision provides an all-or-nothing approach, whereby the services of a covered employee are either wholly within or without the MCTD. Under this allocation regime, the wages of an employee regularly working both within and without the MCTD will be unfairly taxed, in some cases to the state and in others to the taxpayer. While an all-or-nothing approach might be easy to administer, a reasonable apportionment scheme based on the location of employee services could achieve a much fairer result. As partners and partnerships (including an LLC treated as a partnership) are required to apportion the MCTMT using either the partnership’s books and records or a three-factor business allocation percentage, parallel treatment of employers and their employees would again promote a consistent approach.

Miscellaneous

Additional considerations for MCTMT purposes that were not addressed in the law or the recently issued TSB-M include pre-approval and certification requirements for group return and related estimated tax payment reporting requirements. Further guidance on these matters should be issued by the Department to aid taxpayers and practitioners in effectively implementing the MCTMT payroll structure.

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