§ 9111-c. Temporary franchise tax on certain insurance companies. (a) Imposition. (1) For the privilege of conducting business in this state and in addition to any other requirements therefor, every insurance company subject to the franchise tax imposed by subdivision (a) of section fifteen hundred ten of the tax law, other than insurance companies whose premiums are received solely as consideration for accident and health insurance policies, shall pay a franchise tax of two percent of all gross direct premiums, less return premiums thereon, written during the "event year" as such term is defined in the following sentence on risk located or residing in this state. For the purposes of this section, "event year" shall mean (A) the calendar year preceding any calendar year in which the association fails to make transfers and deposits to the miscellaneous special revenue fund that have been authorized by subsections (a) and (b) of section five thousand five hundred sixteen-f of this chapter or (B) the calendar year preceding the year in which a final judicial determination invalidating some or all of the provisions of such section five thousand five hundred sixteen-f requires a return from the miscellaneous special revenue fund of any or all of the amounts transferred and deposited in such miscellaneous special revenue fund pursuant to such section five thousand five hundred sixteen-f.

(2) Determination of direct premiums general provisions. (A) The term "premium" includes all amounts received as consideration for insurance contracts or reinsurance contracts, other than for annuity contracts, and shall include premium deposits, assessments, policy fees, membership fees, and every other compensation for such contract. In ascertaining the amount of direct premiums upon which a tax is payable under this section there shall be first determined the amount of total gross premiums or deposit premiums or assessments, less return thereon, on all policies, certificates, renewals, policies subsequently cancelled, insurance and reinsurance executed, issued or delivered on property or risks located or resident in this state, including premiums for reinsurance assumed, and also including premiums written, procured or received in this state on business which cannot specifically be allocated or apportioned and reported as taxable premiums or which have been used as a measure of a tax on business of any other state or states. Provided, however, in the case of special risk premiums, direct

premiums shall include only those premiums written, procured or received in this state on property or risks located or resident in this state. The reporting of premiums for the purpose of the tax imposed by this section shall be on a written basis or on a paid-for basis consistent with the basis required by the annual statement filed with the superintendent pursuant to section three hundred seven of this chapter.

(B) The term "gross direct premiums," as used in this section, shall not include premiums for policies issued pursuant to section four thousand two hundred thirty-six of this chapter and premiums for insurance upon hulls, freights, or disbursements, or upon goods, wares, merchandise and all other personal property and interests therein, in the course of exportation from, importation into any county, or transportation coastwide, including transportation by land or water from point of origin to final destination in respect to, appertaining to, or in connection with, any and all risks or perils of navigation, transit or transportation, and while being prepared for, and while awaiting shipment and during any delays, storage, transshipment or reshipment incident thereto, including war risks and marine builder's risks.

(C) After determining the amount of total gross premiums, less returns thereon, as provided in this subsection, there shall be deducted the following items:

(i) Such premiums, less return premiums thereon, which have been received by way of reinsurance from corporations or other insurers authorized to transact business in this state;

(ii) Dividends on such direct business, including unused or unabsorbed portions of premium deposits paid or credited to policyholders, but not including deferred dividends paid in cash to policyholders on maturing policies, nor cash surrender values.

(D) In determining the amount of direct premiums taxable in this state, all such premiums written, procured, or received in this state shall be deemed written on property or risks located or resident in this state except such premiums as are properly allocated or apportioned and reported as taxable premiums or which have been used as a measure of a tax of any other state or states, provided, however, in the case of special risk premiums, direct premiums shall include only those premiums written, procured or received in this state on property or risks located or resident in this state.

(b) Payment. Taxes due under this section shall be paid to the superintendent in such manner as the superintendent shall prescribe. The tax shall be paid in two installments. The first installment shall be due in thirty days of the time at which the superintendent determines such tax is to be paid and shall be no less than ninety percent of the tax ultimately determined to be due under this section. The balance of any tax due shall be paid on the next succeeding March twenty-fifth. The superintendent is hereby authorized and directed to deposit payments made under this section, and any interest and penalties thereon, into the miscellaneous special revenue fund.

(c) Returns and reports. A return, in a form prescribed by the superintendent, shall accompany the tax payment due March twenty-fifth. In addition, the superintendent may prescribe a return to accompany the first installment.

(d) Interest and penalties. (1) Interest. If any amount of tax is not paid on or before the date prescribed for payment thereof in paragraph two of this subsection, interest on such amount of tax at the underpayment rate set by the commissioner of taxation and finance pursuant to section one thousand ninety-six of the tax law, plus one percentage point, shall be paid to the superintendent for the period from the date prescribed for payment until the date paid.

(2) Underpayment penalty. If the amount of tax paid by March twenty-fifth is less than ninety-five percent of the tax ultimately determined to be due pursuant to this section, a penalty is hereby imposed equal to one hundred percent of the difference between the amount of tax actually paid and ninety-five percent of the tax ultimately determined to be due. In addition, this penalty shall bear interest at the rate set forth in paragraph one of this subsection for the period from the due date until the date the penalty is paid.

(e) Coordination with other laws. Notwithstanding the provisions of section one thousand one hundred twelve of this chapter, taxes paid pursuant to this section shall not be considered in the calculation of reciprocal taxes due this state pursuant to section one thousand one hundred twelve of this chapter. Notwithstanding the provisions of subdivision (c) of section fifteen hundred eleven of the tax law, taxes paid to other states on account of the imposition of the tax imposed by this section shall not be included in the calculation of the tax credit

provided for by subdivision (c) of section fifteen hundred eleven of the tax law.

(f) Return of excess collections. In the event that total collections from the assessment levied pursuant to this section shall exceed the amount required to be transferred and deposited by the medical malpractice insurance association into the miscellaneous special revenue fund pursuant to section five thousand five hundred sixteen-f of this chapter, amounts in excess of such amount shall be returned to the companies that paid such assessment on a pro rata basis. Provided, further, that the amount required to be so transferred and deposited as used in the preceding sentence shall be reduced by the "retained amount", if any, as such term is defined in the following sentence. For the purposes of this section, the term "retained amount", shall mean any amount paid into the miscellaneous special revenue fund in accordance with the provisions of section five thousand five hundred sixteen-f of this chapter which is not the subject of any state or federal judicial challenge at the time the calculation of amounts to be returned to insurers pursuant to this subsection is to be made.

(g) Conditional application of tax. The provisions of subsections (a) through (e) of this section shall apply to all premiums written during the "event year" as such term is defined in paragraph one of subsection (a) of this section. Provided, however, that if the portion of amounts received by the miscellaneous special revenue fund from the medical malpractice insurance association pursuant to the requirements of section five thousand five hundred sixteen-f of this chapter is not less than the amount required to be transferred and deposited to the miscellaneous special revenue fund pursuant to section five thousand five hundred sixteen-f of this chapter then the superintendent shall certify to the commissioner of taxation and finance no later than February fifth following the calendar year in which transfer and deposit is required to be made by the medical malpractice insurance association that the required transfer and deposit of such amounts has been made to and received by the miscellaneous special revenue fund and in such event the tax otherwise imposed by subsections (a) through (e) of this section shall not be imposed and the provisions of such subsections (a) through (e) shall in such event not be applied. Provided further, however, that if there is a final judicial determination invalidating some or all of

the provisions of section five thousand five hundred sixteen-f of this chapter and requiring a return from the miscellaneous special revenue fund of any or all of the amounts transferred and deposited to it pursuant to such section five thousand five hundred sixteen-f, then the tax imposed pursuant to the provisions of subsections (a) through (e) of this section shall be reinstated and the provisions of such subsections (a) through (e) shall in such event be applied. In such event, the superintendent shall notify the commissioner of taxation and finance that such amounts have been returned from the miscellaneous special revenue fund and the taxes imposed pursuant to subsections (a) through (e) of this section as modified by subsection (f) of this section shall be due and payable within thirty days of such notification.

(h) Judicial review. Notwithstanding any other law:

(1) Application for judicial review of final determination time limitation; deposit; undertaking. Any final determination of the amount of any tax payable under subsections (a) through (e) of this section shall be reviewable for error, illegality or unconstitutionality or any other reason whatsoever by a proceeding under article seventy-eight of the civil practice law and rules if application therefor is made to the supreme court within four months after the giving of the notice of such final determination, provided, however, that any such proceeding under article seventy-eight of the civil practice law and rules shall not be instituted unless (A) the amount of any tax sought to be reviewed, with such interest and penalties thereon as may be provided for by such law, shall be first deposited with the superintendent and there is filed an undertaking, issued by a surety company authorized to transact business in this state and approved by the superintendent as to solvency and responsibility, in such amount as a justice of the supreme court shall approve to the effect that if such proceeding be dismissed or the tax confirmed the petitioner will pay all costs and charges which may accrue in the prosecution of such proceeding or (B) at the option of the petitioner, such undertaking may be in sum sufficient to cover the taxes, interest and penalties stated in such determination, plus the costs and charges which may accrue against it in the prosecution of the proceeding, in which event the petitioner shall not be required to deposit such taxes, interest or penalties as a condition precedent to the application.

(2) Judicial review of superintendent's denial of timely application for refund or revision, time limitation; undertaking. Where any tax imposed under such subsections (a) through (e) of this section is asserted to have been erroneously, illegally or unconstitutionally assessed or collected and application for the refund or revision thereof timely made to the superintendent, and the superintendent shall have made a determination denying such refund or revision, such determination shall be reviewable by a proceeding under article seventy-eight of the civil practice law and rules, provided (A) that such proceeding is instituted within four months after giving of the notice of such denial, (B) that a final determination of tax due was not previously made, and (C) that an undertaking is filed with the superintendent in such amount and with such sureties as a justice of the supreme court shall approve to the effect that if such proceeding be dismissed, or the tax confirmed, the petitioner will pay all costs and charges which may accrue in the prosecution of such proceeding.

(3) Exception. Action for declaratory judgment; time limitation; deposit; undertaking. Except as provided in paragraphs one and two of this subsection, no determination or proposed determination of tax imposed under subsections (a) through (e) of this section shall be enjoined or reviewed by an action for declaratory judgment, an action for money had and received or by any action or proceeding under article seventy-eight of the civil practice law and rules, provided, however, that a taxpayer may proceed by declaratory judgment, if suit is instituted within thirty days after issuance of a notice of tax due and the amount of the tax in controversy, with such interest and penalties thereon as may be provided by such law, shall be deposited with the superintendent and there is filed an undertaking, issued by a surety company authorized to transact business in this state and approved by the superintendent as to solvency and responsibility, in such amount as a justice of the supreme court shall approve to the effect that if such proceeding be dismissed or the tax confirmed the petitioner will pay all costs and charges which may accrue in the prosecution of such proceeding or at the option of the petitioner, such undertaking may be in a sum sufficient to cover the taxes, interest and penalties stated in such notice, plus the costs and charges which may accrue against it in the prosecution of the proceeding, in which event the petitioner shall not

be required to deposit such taxes, interest or penalties as a condition precedent to the application.

(4) Venue for any action or proceeding. Venue for any declaratory judgment action, article seventy-eight proceeding or any other action or proceeding in relation to this section shall be in the supreme court, Albany county, and any such action or proceeding shall be entitled to a preference both at trial and in any appeal.