



NEW YORK STATE BAR ASSOCIATION

One Elk Street, Albany, New York 12207 PH 518.463.3200 www.nysba.org

TAX SECTION

2015-2016 Executive Committee

DAVID R. SICULAR

Chair
Paul, Weiss, Rifkind, Wharton & Garrison LLP
1285 Avenue of the Americas
New York, NY 10019-6064
212/373-3082

STEPHEN B. LAND

First Vice-Chair
212/692-5991

MICHAEL S. FARBER

Second Vice-Chair
212/450-4704

KAREN GILBREATH SOWELL

Secretary
202/327-8747

COMMITTEE CHAIRS:

Bankruptcy and Operating Losses

Stuart J. Goldring
David W. Mayo

Compliance, Practice & Procedure

Elliot Pisem
Bryan C. Skarlatos

Complexity and Administrability

Edward E. Gonzalez
Joel Scharfstein

Consolidated Returns

Andrew H. Braiterman
Kathleen L. Ferrell

Corporations

Eric Solomon
Linda Z. Swartz

Cross-Border Capital Markets

David M. Schizer
Andrew Walker

Cross-Border M&A

Yaron Z. Reich
Ansgar A. Simon

Employee Benefits

Lawrence K. Cagney
Eric W. Hilfers

Estates and Trusts

Alan S. Halperin
Joseph Septimus

Financial Instruments

William L. McRae
Andrew P. Solomon

"Inbound" U.S. Activities of Foreign

Taxpayers

Peter J. Connors
Peter F. G. Schuur

Individuals

Steven A. Dean
Sherry S. Kraus

Investment Funds

John C. Hart
Amanda H. Nussbaum

New York City Taxes

María T. Jones
Irwin M. Slomka

New York State Taxes

Paul R. Comeau
Arthur R. Rosen

"Outbound" Foreign Activities of

U.S. Taxpayers

William G. Cavanagh
Phillip R. Wagman

Partnerships

Marcy G. Geller
Eric Sloan

Pass-Through Entities

James R. Brown
Charles Morgan

Real Property

Robert Cassanos
Phillip J. Gall

Reorganizations

Neil J. Barr
Joshua M. Holmes

Securitizations and Structured

Finance

John T. Lutz
W. Kirk Wallace

Spin Offs

Lawrence M. Garrett
Deborah L. Paul

Tax Exempt Entities

Stuart L. Rosow
Richard R. Upton

Treaties and Intergovernmental Agreements

Lee E. Allison
David R. Hardy

MEMBERS-AT-LARGE OF EXECUTIVE COMMITTEE:

William D. Alexander	Amy Heller	Jack Trachtenberg
Jason R. Factor	Charles I. Kingson	Gordon E. Warnke
Robert C. Fleder	Matthew A. Rosen	
Peter A. Furci	Stephen E. Shay	

December 22, 2015

The Honorable Mark Mazur
Assistant Secretary
(Tax Policy)
Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

The Honorable John Koskinen
Commissioner
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

The Honorable William J. Wilkins
Chief Counsel
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

Re: Report No. 1336 on Notice 2015-54, Transfers of Property to Partnerships with Related Foreign Partners and Controlled Transactions Involving Partnerships

Dear Messrs. Mazur, Koskinen and Wilkins:

I am pleased to submit the attached report of the Tax Section commenting on Notice 2015-54 issued August 6, 2015. Notice 2015-54 announced that the Treasury and Internal Revenue Service intend to issue regulations denying nonrecognition treatment under section 721(a) of the Internal Revenue Code to certain transfers of appreciated property by a U.S. taxpayer to a partnership with foreign related partners if the U.S. transferor and foreign related partnerships own more than 50% of capital, profits, deductions or losses, unless the partnership adopts the "Gain Deferral Method" set forth in the Notice.

We understand that the Notice was motivated by a concern that "certain taxpayers purport to be able to contribute, consistently with sections 704(b), 704(c) and 482, property to a partnership that allocates the income or gain from the contributed property to related foreign partners that are not subject to U. S.

FORMER CHAIRS OF SECTION:

Peter L. Faber	Herbert L. Camp	Carolyn Joy Lee	Andrew N. Berg	Peter H. Blessing
Alfred D. Youngwood	William L. Burke	Richard L. Reinhold	Lewis R. Steinberg	Jodi H. Schwartz
Gordon D. Henderson	Arthur A. Feder	Steven C. Todrys	David P. Hariton	Andrew W. Needham
David Sachs	James M. Peaslee	Harold R. Handler	Kimberly S. Blanchard	Diana L. Wollman
J. Roger Mentz	John A. Corry	Robert H. Scarborough	Patrick C. Gallagher	David H. Schnabel
Willard B. Taylor	Peter C. Canellos	Robert A. Jacobs	David S. Miller	
Richard J. Hiegel	Michael L. Schler	Samuel J. Dimon	Erika W. Nijenhuis	

The Honorable Mark Mazur
The Honorable John Koskinen
The Honorable William J. Wilkins
December 22, 2015

tax”. The rules described in the Notice that relate primarily to section 721 are generally effective as of August 6, 2015. The Notice also states that Treasury and the IRS will issue regulations under section 482 to address transfers of appreciated property on other than arm’s-length terms. These regulations as well as certain additional reporting requirements will be effective upon the issuance as specified in the regulations.

In this Report we address the portion of the Notice that relates to the provisions of Subchapter K. We intend to address the Notice’s provisions relating to section 482 in a subsequent report.

We support the Treasury and the Internal Revenue Service in their efforts to provide rules limiting the ability of taxpayers to escape recognition of the built-in gain with respect to appreciated property contributed to a partnership with foreign related partners. In particular, we agree with the Treasury and the IRS that it is appropriate to require the use of the remedial allocation method under section 704(c) in these transactions in order for a taxpayer to avoid immediate recognition of the built-in gain on contributed property. Use of the remedial allocation method will generally insure that the contributing partner will ultimately recognize the build-in gain over a reasonable time period.

Our comments are intended to support that effort and include a number of suggestions intended to focus the rules on abusive situations while not interfering with legitimate business transactions. Our principal recommendations are following:

1. Regulations should be issued promptly in temporary and proposed form. Because the Notice is currently effective, there is a critical need for guidance to permit taxpayers to proceed with transactions that are motivated by legitimate business needs and to be able to determine the tax consequences of those transactions.

2. While we generally support the rules setting forth the partnerships to be covered, we believe the definition of a Section 721(c) Partnership should exclude those partnerships in which there is limited or no opportunity for abuse. These exempted partnerships would include partnerships where all or substantially all of the income is effectively connected income or where there is a relatively small interest held by related foreign partners and there is also a sufficient economic interest of an unrelated party with an adverse tax interest to prevent a shifting of built-in gain.

3. We recommend that the rules governing the Gain Deferral Method should be revised.

(a) We believe that the regulations should replace the proportionate allocation rule with an anti-abuse rule, under which allocations would be presumed to be abusive in any taxable year if either (i) the U.S. transferor’s distributive share of partnership income is not at least equal to the difference between the Section 704(b) depreciation or

The Honorable Mark Mazur
The Honorable John Koskinen
The Honorable William J. Wilkins
December 22, 2015

amortization from the Section 721(c) property and the tax depreciation or amortization with respect to such property (such difference, the “Minimum Inclusion Amount”) or (ii) the U.S. transferor’s distributive share of partnership income does not exceed its share of Section 704(b) income by an amount at least equal to the Minimum Inclusion Amount. The presumption can be overcome if the U.S. transferor can establish that the failure to meet the tests was attributable to unforeseen events or circumstances.

(b) To the extent that the proportionate allocation rule is retained in the regulations as a requirement under the Gain Deferral Method, the application of the rule should be clarified through examples and the rule should have certain exceptions. For example, certain regulatory allocations (e.g., allocations of creditable foreign tax expenditures) should generally not cause violations of the rule

(c) Finally, the rules need to address the interaction between the Gain Deferral Method’s required use of the remedial allocation method under section 704(c) and the anti-churning rules under section 197.

4. While we support defining Acceleration Events broadly to include any transaction that would avoid or defer recognition of the built-in gain, the regulations should contain certain limits and exceptions. For example, partnership terminations under section 708(b)(1)(B) should not generally cause an Acceleration Event. In addition, the amount of built-in gain recognized as a result of an Acceleration Event should be limited to the amount of the positive basis adjustments under section 734 made with respect to the Section 721(c) property, rather than the entire remaining built-in gain. Certain members also believe that a distribution of the Section 721(c) property to an unrelated partner should not be an Acceleration Event.

5. We support enhanced reporting requirements and suggest that the reporting rules require detailed disclosure of the value, method used to determine value and the basis of computation of the remedial allocation method for property contributed with built-in gain.

We appreciate your consideration of our recommendations. If you have any questions or comments on this report, please feel free to contact us and we would be happy to assist in any way.

Respectfully submitted,

David R. Sicular
Chair

Enclosure

The Honorable Mark Mazur
The Honorable John Koskinen
The Honorable William J. Wilkins
December 22, 2015

CCs: Ossie Borosh
Attorney-Advisor (Tax Legislative Counsel)
Department of the Treasury

Ryan Bowen
(Attorney-Advisor)
Internal Revenue Service

Erik H. Corwin
Deputy Chief Counsel (Technical)
Internal Revenue Service

Kenneth Jeruchim
(Attorney-Advisor)
Internal Revenue Service

Emily S. McMahon
Deputy Assistant Secretary
(Office of Tax Policy)
Department of the Treasury

Steven Musher
Associate Chief Counsel (International)
Internal Revenue Service

Kevin Nichols
Attorney-Advisor
(Office of International Tax Counsel)
Department of the Treasury

Danielle Rolfes
International Tax Counsel
Department of the Treasury

Marjorie Rollinson
Deputy Associate Chief Counsel
(International-Technical)
Internal Revenue Service

Elena Virgadamo
Attorney-Advisor
(Office of International Tax Counsel)
Department of the Treasury

The Honorable Mark Mazur
The Honorable John Koskinen
The Honorable William J. Wilkins
December 22, 2015

Thomas C. West, Jr.
Tax Legislative Counsel
Department of the Treasury

Curtis G. Wilson
Associate Chief Counsel
(Passthroughs and Special Industries)
Internal Revenue Service

Brenda Zent
Taxation Specialist
Office of International Tax Counsel
Department of the Treasury