

REPORT #647

TAX SECTION

New York State Bar Association

ANNUAL REPORT
For the Year Ended
January 18, 1990

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NEW YORK STATE BAR ASSOCIATION

TAX SECTION

ANNUAL REPORT

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NEW YORK STATE BAR ASSOCIATION
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NEW YORK STATE BAR ASSOCIATION

TAX SECTION

ANNUAL REPORT

For the Year Ended January 18, 1990

It is my pleasure to present the Annual Report for the 41st year of the Tax Section of the New York State Bar Association.

Now in its fifth decade, the Tax Section can look back with pride on a history of outstanding service to the improvement of the tax system and tax practice. It has become justly renowned for the public-spirited attitude and incisiveness of its reports and for the high quality of its programs.

No organization prospers by living off its past, however, and I am pleased to be able to confirm to you what many of us already know – there is life after 40. More than that, the vitality and energy of the Tax Section is, if anything, growing. Even by its high standards, I believe that this has been an exceptionally active and productive year.

The heart of the work of the Tax Section has always been the reports and comments filed by its various committees. That has continued to be the case this year, as the attached list of titles shows. The volume is prodigious, the range catholic, and "good read" that the reports may be, as a group they are hardly the kind of light fare you can absorb on the beach. The reports are too numerous for all to be mentioned individually. But there are a few points that I would like to note about this year's reports and, indirectly in passing, the commentary they present on the state of the tax laws and tax system.

Rigorous technical commentary has always been a distinguishing characteristic of the Tax Section's reports. This year has seen a significant increase in the amount of energy expended in that direction, reflecting what I might describe as the operational implementation of the heavy volume of new legislation in the past few years. Illustrative examples would include the report on temporary regulations promulgated under Sections 954 and 957, the report on the 1988 proposed lobbying

regulations affecting charities, the report on certain alternative minimum tax provisions in bankruptcy situations, the report on the 1989 proposed "golden parachute" regulations and the report on the definition of an "activity" and the other provisions in the second installment of proposed passive activity loss regulations.

Similar attention was paid to proposed legislation. At the federal level, we filed comments on a number of the provisions in the House and Senate versions of the Revenue Reconciliation Bill of 1989. The legislation as finally passed and accompanying legislative history reflects many of those comments. At the State and City level, we also filed comments on a number of bills. Again many of those comments were reflected in the final legislation.

Another aspect of note has been the attention paid to tax simplification. Even a perfunctory review of the reports filed by our committees in recent years would reveal an increasing concern with the administrability of the tax laws. This has been a major focus of the work of the Tax Section this year. One project was a revision of the temporary regulations under Section 752 using a different approach to drafting regulations from that which has been in fashion more recently. The proposed revision was recently circulated for comment. It reduced the present regulations from 74 pages (including 29 single spaced pages) to 17 (all double spaced). One may argue about one or another aspect of the proposed revision, but it effectively frames the issue of whether the Internal Revenue Service should radically change its present approach to drafting regulations. I invite you to compare the proposed revision with the existing regulations, particularly since Commissioner Goldberg had indicated an active interest in the question.

While the proposed revision of the Section 752 regulations is perhaps our most dramatic and visible effort at promoting tax simplification, you will find simplification to be a central consideration throughout our reports this year. Last May, for example, the Internal Revenue Service published the first installment of the arbitrage rebate regulations for tax-exempt bonds. The installment ran 243 typed pages. The Tax-Exempt Bond Committee filed a report of similar length, which obviously contained extensive comments. But while it agreed that such detail might be appropriate for large bond issues, it also argued

strongly that a vastly simpler set of rules should be adopted for small bond issues where the potential magnitude of the amounts at issue did not warrant the greater complexity and compliance burden involved. And it made constructive suggestions as to how to simplify the rules for small bond issues.

The attention to tax simplification efforts has not been limited to just our reports. Our fall program in Bermuda included an extremely interesting panel on the legislative/regulatory process. Representatives of the Tax Section also participated in the conference on tax simplification held in Washington last week. You can expect that the question of tax simplification will continue to be a major focus of attention in the work of the Tax Section in the coming year.

This year has also seen considerable attention devoted to state and local tax matters, reflecting the relatively increased importance of those taxes with the decline in the federal tax rates. The heightened importance of state and local taxes is reflected in James W. Wetzler, the State Commissioner of Taxation and Finance, being the featured speaker on the program immediately following the Annual Meeting luncheon.

Among the state tax matters on which the Tax Section's committees commented this year were the merger and acquisitions provisions in the Budget Act (a number of which we opposed because of the technical problems they posed in relation to the revenue and policy effect that could be expected). Comments were also filed on a major overhaul of procedural rules (which we generally supported) to increase conformity among the various state taxes. Additional comments were made on a number of other provisions in the Budget Bills. We also encouraged the State to subject to the franchise tax all corporate limited partners when the partnership is doing business in the State; this recommendation was coupled with recommendation to ease filing burdens and grant relief from the minimum franchise tax.

Some of our comments, particularly those on the merger and acquisition provisions, were unusually critical and received more than the usual publicity, and not all were adopted. But I believe that it is fair to characterize the year as very constructive both in terms of the responsiveness of the State tax administration and the contribution the Tax Section has made.

At the City level, a major issue has been the question of an independent tribunal to hear City tax disputes. We have supported such an independent tribunal for virtually all City taxes (other than property taxes) in a manner designed to assure consistency of interpretation of the same state and city provisions. We have also supported steps to enhance the City's advance rulings program and submitted comments on the City's 1989 Revenue Budget Proposals and on the regulations for reporting income and expenses from real property.

This has also been an active year with respect to operation of the tax system. Reports were filed dealing with such subjects as creation of a national court of tax appeals (which we opposed), ratification of the information exchange provisions of the OECD sponsored Multilateral Convention for Mutual Administrative Assistance in Tax Matters (which we supported), revisions in the rules of practice and procedure before the Tax Court, and revisions in the IRS rulings and other taxpayer guidance programs. We also wrote Congress expressing concern over the effect of low salaries and budgetary constraints on the IRS well before the current publicity those problems have received.

Finally, I would mention that this year has seen a considerable amount of effort invested in looking to the future and dealing with problems that are only starting to impact the tax system. Major attention was devoted to further assessment of the ramifications of the repeal in 1986 of the General Utilities doctrine. Reports addressed the appropriate consequences when a partnership uses appreciated property to acquire shares of a partner, when gain should be recognized by the distributing corporation in a divisive reorganization that is "tax free" to the shareholders, and when a corporation with built-in gains and losses is acquired and becomes a part of a consolidated tax group. The whole area of interrelationship of corporate level and shareholder/creditor level tax is undoubtedly one that will continue to occupy considerable attention in the coming year.

Another burgeoning area where considerable work was done involves the increasing proliferation of financial products and the general internationalization of capital markets. Reports have been filed this year dealing with the taxation of notional principal contracts of various kinds and with the changing rules

for offerings of securities outside the United States. Here, again, we are much closer to the beginning of the road than the end, and further attention can be expected to be given to these and other similar subjects in the coming year.

The formal reports and other written submissions, prolific as they are, do not represent the only way in which the Tax Section contributes to improving the tax laws and system. Each year, including this year, there are a number of meetings and other communications with various parties involved in formulating or administering the federal, state and city tax laws to discuss recommendations that the various committees of the Tax Section have made or areas in which reports might be considered or other information submitted. The effort that goes into preparing for these meetings, attending and following up is significant, and I believe appreciated by those with whom we meet.

In the area of programs, this year has seen a substantial expansion. The Annual Meeting is being held on January 18 in New York City. For the first time, it includes simultaneous panel discussions in the morning. The panels cover the 1989 tax bill and other corporate tax developments, international tax developments, estate freezes and other current estate tax issues and the effect of the new legislation on employee benefits. The afternoon program covers New York State tax issues and current issues before the Internal Revenue Service. Guest speakers include. Kenneth W. Gideon, Assistant Secretary of the Treasury for Tax Policy, who is giving the luncheon address; Terrill A. Hyde, Acting Deputy Tax Legislative Counsel (Regulatory Affairs), Department of the Treasury; Kenneth Klein, Associate Chief Counsel (Technical), Internal Revenue Service; Philip D. Morrison, International Tax Counsel, Department of the Treasury; Bruce N. Davis, Special Assistant to Associate Chief Counsel (International), Internal Revenue Service; Harrison J. Cohen, Legislation Counsel, Joint Committee on Taxation; Frederic E. Grundeman, Attorney Advisor, Passthrough & Special Industries Division, Internal Revenue Service; Melvin C. Thomas, Senior Legislation Counsel, Joint Committee on Taxation; Elaine Church, Price Waterhouse; Richard Shea, Attorney Advisor, Office of Tax Legislative Counsel, Department of the Treasury; Carolyn E. Smith, Legislation Counsel, Joint Committee on Taxation; Robert

E. Culbertson, Assistant Chief Counsel (International), Internal Revenue Service; Glenn Carrington, Chief Branch 5, Corporate Division, Internal Revenue Service; and Thomas F. Wessel, Associate Tax Legislative Counsel, Department of the Treasury. Speakers from the Tax Section include James M. Peaslee, Herbert L. Camp, Stanley I. Rubenfeld, John A. Corry, Richard o. Loengard, Jr., Guy B. Maxfield, Carlyn S. McCaffrey, Kenneth C. Edgar, Jr., James A. Locke, Arthur R. Rosen, Cynthia G. Beer-bower, Peter C. Canellos, and Richard D'Avino.

In place of a single mid-year program, this year the Tax Section held a Spring Program jointly with the Trusts and Estates Section and an expanded Fall Program. The number of attendees at both programs was gratifying. The Spring Program, a three-day meeting at the Sheraton Inn Convention Center in Syracuse on April 27-29, focused on issues related to estate freezes. James W. Wetzler, New York State Commissioner of Taxation and Finance, gave the luncheon address. Program speakers included Robert E. Brown and James A. Locke from the Tax Section and members of the Trusts and Estates Section. Discussions are in progress for another spring program with the Trusts and Estates Section this coming year.

The Fall Program, held at the Sonesta Beach Hotel in Bermuda on September 21-24, featured panel discussions on built-in gains and losses, on trends in the legislative-regulatory process, on international tax developments and on the new 1990 corporate alternative minimum tax rules and other corporate developments. In addition, there was a choice of workshops covering problems in the areas of partnership basis and income allocation rules, employee benefits in transactions, passive activity loss provisions and estate freezes. Edwin S. Cohen, former Under Secretary of the Treasury and a long-standing Tax Section member, was the luncheon speaker and presented a penetrating analysis of the issues and problems in indexing taxation of capital gains. His address has been printed in expanded form in the October 2, 1989 issue of Tax Notes. Other guest speakers included Thomas F. Wessel, Attorney Advisor, Office of Tax Legislative Counsel, Department of the Treasury; Kenneth Klein, Associate Chief Counsel (Technical), Internal Revenue Service; Rom Watson, Attorney Advisor, International Tax Counsel, Department of the Treasury; Carol Doran-Klein, Branch Chief, Internal Revenue Service; Arthur L. Nims, Chief Judge, Tax Court; Ronald A.

Pearlman, Chief of Staff, Joint Committee on Taxation; Dana L. Trier, Acting Deputy Assistant Secretary for Tax Policy, Department of the Treasury; and Harold E. Hirsch, Senior Legislation Counsel, Joint Committee on Taxation. Panel and workshop leaders and other speakers from the Tax Section included Mikel M. Rollyson, Irving Salem, Randall K. C. Kau, Charles M. Morgan, III, Arthur A. Feder, Gordon D. Henderson, Donald Schapiro, Stephen L. Millman, Victor F. Keen, Sherman F. Levey, Susan P. Serota, Robert J. McDermott, and Michael L. Schler.

I hope that what I have laid before you has enhanced your perception of the quality, depth and breadth of contribution of the Tax Section this year and the matters that have been receiving attention. The high regard in which the Tax Section is held is not an accident. The work of the Tax Section represents literally many thousands of hours by some of the most talented senior and junior tax practitioners in the country. I can tell you that seen up close, it is awesome and humbling. I will not try to quantify it in terms of number of pages of reports or number of panels or meetings with public officials. Suffice it to say that none of you would like to have to pay for even a very small fraction of the total effort at the regular billing rates of the contributors.

What is even more remarkable, however, is the public-spirited approach that uniformly pervades the work of the Tax Section. Critical comments frequently challenge legislative proposals as imprudent in terms of a sensible tax system or challenge administrative interpretations as being unworkable or going beyond the legislative mandate. But comments also call attention to loopholes and make corrective suggestions that will increase revenue collection and improve the stated policy objectives Congress is seeking to achieve.

The credit for fostering this spirit goes to the many among the 3,000 Section members who have contributed their time and effort to the work of the Tax Section, and particularly to the members of the Executive Committee. In addition to contributing to the preparation of reports, membership on the Executive Committee involves a commitment to reviewing the reports that are presented at the monthly luncheons, and the discussion is usually lively and invariably constructive. It is not the custom to single out Executive Committee members for their contribution.

Indeed, it would be a derogation of the spirit with which they serve to think anything of that sort was expected. But I do want to express to them the appreciation of the Tax Section and my own personal gratitude for the contribution they have made this year.

I am also particularly appreciative of the chance to have served on the Administrative Committee with three superb chairs, Richard G. Cohen, Donald Schapiro and Herbert L. Camp, and with my three fellow officers this year, Arthur A. Feder, James M. Peaslee and John A. Corry. It has been an experience that I will remember fondly. I leave office confident that, in the hands of Art, Jim, John and Peter C. Canellos, the incoming Secretary, the leadership of the Section is in strong and capable hands.

Respectfully submitted,

Wm. L. Burke
Chair

January 18, 1990

NEW YORK STATE BAR ASSOCIATION
TAX SECTION REPORTS

Reports and Other Submissions During the
1989-1990 Year

A. Federal Tax Matters

1. Report on Temporary Section 954 anti 957 Regulations on Definitions of a Controlled Foreign Corporation, Foreign Base Company Income, and Foreign Personal Holding Company Income by Committee on Foreign Activities of U.S. Taxpayers (February 15, 1989).
2. Report on Application of the Corporate Alternative Minimum Tax in Bankruptcy Settings by Committee on Alternative Minimum Tax (April 11, 1989).
3. Report on The Multilateral Convention on Mutual Administrative Assistance in Tax Matters (April 20, 1989).
4. Report on 1988 Proposed Lobbying Regulations Affecting Charities by Committee on Exempt Organizations (May 12, 1989).
5. Report on the "Same Desk" Rule by Committee on Employee Benefits (June 12, 1989).
6. Letter to Leonard B. Terr, Esq., International Tax Counsel, Department of the Treasury, Proposing Changes in Treasury Regulations to Correlate with Expected Changes in Securities Law Regulations Relating to Offerings of Securities Abroad (June 21, 1989).
7. Report on Allocation of Partnership Debt Regulations by Committee on Partnerships (July 5, 1989).
8. Report on IRS Notice 88-130 (Retirement and Re-Issuance of Tax-Exempt Bonds) by Committee on Tax Exempt Bonds (July 11, 1989).
9. Report on Proposed Amendments to Rules of Practice and Procedures of the United States Tax Court by Committee on Practices and Procedures (August 31, 1989).
10. Report on Sanctions Imposed by the Section 89 Qualification Rules by Committee on Insurance Companies (September 11, 1989).

11. Report on Second Installment of Temporary and Proposed Regulations Under Section 469 by Committees on Personal Income and Income from Real Property (September 18, 1989).
12. Report on Certain Provisions of the Revenue Reconciliation Act of 1989 as Introduced in the House of Representatives on August 4, 1989 (September 18, 1989).
13. Report on 1989 Proposed Regulations Relating to Golden Parachute Payments by Committee on Employee Benefits (September 21, 1989).
14. Report on Tax Accounting for Notional Principal Contracts by Committee on Financial Instruments (September 28, 1989).
15. Letter to Hon. Lloyd Bentsen, Chairman, Senate Finance Committee, relating to disparity between salaries paid to attorneys in private sector and federal government services (October 3, 1989).
16. Report on Proposed Regulations Concerning the Issuance of Bearer Form Debt Obligations (October 5, 1989).
17. Letter to Hon. Lloyd Bentsen, Chairman, Senate Finance Committee, and others Opposing the Enactment of Section 11210 of the Revenue Reconciliation Bill of 1989 (October 17, 1989).
18. Report on Notice 89-37, Dealing with the Use of Partnerships to Avoid the Repeal of the General Utilities Doctrine by Committee on Corporations and the Committee on Partnerships (November 14, 1989).
19. Report on Temporary and Proposed Regulations Relating to Arbitrage Restrictions on Tax-Exempt Bonds by Committee on Tax-Exempt Bonds (November 30, 1989).
20. Report on Modification of Ruling Procedures and Other Taxpayer Guidance Programs by Committee on Practices and Procedures (December 1, 1989).
21. Report on Proposals for Treasury Regulations Under Section 337(d) Relating to Section 355 Distributions, by Committee on Reorganizations (December 7, 1989).
22. Report on National Court of Tax Appeals (January 9, 1990).
23. Report on Simplification of Section 752 Regulations (January 18, 1990).

24. Report on Proposed and Temporary Regulations Relating to Reporting of Treaty-Based Return Positions (January 11, 1990)
25. Report on Section 216(e) of the Internal Revenue Code by Committee on Income From Real Property (January 12, 1990).
26. Report on Built-In Gains and the Investment Adjustment Rules in the Consolidated Return Regulations by Committee on Consolidated Returns (January 17, 1990).

B. New York State Tax Matters

1. Report on Draft Proposed Regulations Relating to Investment Capital Under the New York Corporate Franchise Tax (Article 9-A) by Committee on New York State Tax Matters (February 10, 1989).
2. Report on 1989 Budget Bills relating to S.2447/A.3647 and S.2458/A.3658 by Committee on Sales, Property and Miscellaneous Taxes (March 30, 1989).
3. Letter to William F. Collins, New York State Deputy Commissioner of Taxation and Finance and Counsel, relating to Proposed New York State 1989 Budget Bills S.2446/A.3646 and S.2474/A.3674 (Procedural Matters and Corporate Taxes) (April 4, 1989).
4. Letter to William F. Collins, New York State Deputy Commissioner of Taxation and Finance and Counsel, relating to Proposed New York State 1989 Budget Bill S.2459/A.3659 (Sales Taxes) (April 4, 1989).
5. Letter to Hon. Mario R. Cuomo, Governor of the State of New York, relating to the April 12, 1989 Draft Bill Concerning Tax Treatment of Mergers, Consolidations and Acquisitions (April 14, 1989).
6. Report on 1989 Budget Act Provisions Relating to Corporate Mergers and Acquisitions (June 8, 1989).
7. Letter to James W. Wetzler, New York State Commissioner of Taxation and Finance, supporting adoption of Section 11 of Departmental Bill No. 5R-89 (to give the Commissioner of Taxation and Finance the authority to appeal adverse determinations of the State Tax Appeals Tribunal) (June 19, 1989).

8. Letter to Hon. Tarky Lombardi, Jr., Chairman, New York State Senate Finance Committee, and Hon. Saul Weprin, Chairman, New York State Assembly Ways and Means Committee, regarding Department of Taxation and Finance 1989 Legislative Proposal No. 1 (Uniform Procedures Bill) (June 27, 1989).
9. Report on New York State Department of Taxation and Finance's Uniform Procedure Bill by Committee on New York State Tax Matters (June 28, 1989).
10. Report on New York State Taxation of Corporate Limited Partners by Committee on Interstate Commerce (September 19, 1989).
11. Letter to Marilyn Kaltenborn, Esq., Chief of Tax Regulations, New York State Department of Taxation and Finance, relating to New York State Taxation of Corporate Limited Partners (January 12, 1990).

C. New York City Tax Matters

1. Report on New York City Proposed Regulations Relating to Filing of Income and Expenses for Real Property by Committee on Sales, Property and Miscellaneous Taxes (April 24, 1989).
2. Report on Legislative Proposals for the Establishment of a New York City Tax Appeals Tribunal by Committee on New York City Tax Matters (June 9, 1989).
3. Letter to Hon. Edward I. Koch, Mayor of the City of New York, relating to New York City 1990 Executive Budget Revenue Proposals (June 21, 1989).
4. Letter dated August 31, 1989 to Gordon D. Henderson, Esq. from William L. Burke relating to Position of Executive Committee and Committee of New York City Tax Matters on New York City Conformity to New York State.
5. Letter to Commissioner Mark Friedlander, President, New York City Tax Appeals Tribunal, on Rules of Procedure of the New York City Tax Appeals Tribunal (November 21, 1989).
6. Letter to Kathleen Grimm, New York City Acting Commissioner of Finance, relating to Legislation Concerning New York City Tax Tribunal (January 16, 1990).
7. Letter to Kathleen Grimm, Acting New York City Commissioner of Finance, relating to Issuance of Advance Rulings by New York City Department of Finance (January 16, 1990).