

REPORT #860

TAX SECTION

New York State Bar Association

Letter on 1996 Business Plan

Table of Contents

Cover Letter: i

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Foreign Activities of U.S. Taxpayers

Reuven S. Avi-Yonah
Philip R. West

Individuals

Victor F. Keen
Sherry S. Kraus

Multistate Tax Issues

Robert E. Brown
Paul R. Comeau

Net Operating Losses

Stuart J. Goldring
Robert A. Jacobs

New York City Taxes

Robert J. Levinsohn
Robert Plautz

New York State Franchise and Income Taxes

James A. Locke
Arthur R. Rosen

New York State Sales and Misc.

Maria T. Jones
Joanne M. Wilson

Nonqualified Employee Benefits

Stuart N. Alperin
Kenneth C. Edgar, Jr.

Partnerships

Andrew N. Berg
William B. Brannan

Pass-Through Entities

Roger J. Baneman
Stephen L. Millman

Qualified Plans

Stephen T. Lindo
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Real Property

Alan J. Tarr
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Reorganizations

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Tax Accounting

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Tax Exempt Bonds

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Tax Exempt Entities

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January 4, 1996

FEDERAL EXPRESS

Glen A. Kohl, Esq.
Tax Legislative Counsel
Department of the Treasury
1500 Pennsylvania Ave., N.W.
Washington, D.C. 20220

Re: 1996 Business Plan

Dear Glen:

In considering topics for the 1996 Business Plan our members have identified a few projects that we believe should be include:

- a) Finalizing Proposed Regulation section 1.1502-15;
- b) Finalizing the proposed securities lending regulations;
- c) Providing guidance on PFIC definitional issues (beyond that already provided for banks and securities dealers); and
- d) Providing guidance on issues presented by the extension of the straddle rules to equity swaps, etc.

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You also asked that we consider your suggestion to reverse the election currently prescribed under Code section 83(b), so that the general rule would be that persons receiving restricted property would be taxed in the year of the transfer, unless an election was made to postpone the income inclusion until the restriction lapsed.

I reviewed that proposal with the Chairs of our Committees on Qualified Plans and Nonqualified Employee Benefits. Their clear consensus was that reversing the section 83(b) election was not a good idea.

First, as a theoretical matter, the current structure of section 83 is more consistent with general income tax principles, in that persons are not presumed to have income unless and until they have an unrestricted right to property. Reversing section 83 would mean people are presumed to have income even though their rights to property are circumscribed, and would require an affirmative election to conform the tax treatment of such persons to their economic position. This seems an unnecessary complication.

Furthermore, while it does seem that many people make section 83(b) elections it also seems these elections tend to be made in cases where something unusual is occurring, such as where stock is received in connection with an acquisition. There are, by contrast, large numbers of employees who receive stock periodically under longstanding "plain vanilla" corporate compensation plans, and who do not, in our experience, routinely elect to treat restricted stock as current income. For these individuals, a reversal of the election requirements of section 83 would mean that they would now have to file elections, perhaps annually, in order to continue the tax treatment they currently receive.

One group or the other is burdened by an affirmative election requirement under section 83(b). On balance, however, it is our view that the current structure of the election is preferable, for it better conforms to general tax principles, and it focuses the need to elect more on the out-of-the-ordinary situations, which are more likely to be the subject of planning and analysis at the individual level. Please call if you would like to discuss any of this in greater detail.

Very truly yours,

Carolyn Joy Lee
Chair