



New York State Bar Association

One Elk Street, Albany, New York 12207 • 518/463-3200 • <http://www.nysba.org>

TAX SECTION

2003-2004 Executive Committee

ANDREW N. BERG

Chair
Debevoise & Plimpton
919 Third Avenue
New York, NY 10022
212/909-6288

LEWIS R. STEINBERG

First Vice-Chair
212/474-1856

DAVID P. HARITON

Second Vice-Chair
212/558-4248

KIMBERLY S. BLANCHARD

Secretary
212/310-8799

COMMITTEE CHAIRS:

Bankruptcy and Operating Losses

Lawrence M. Garrett
Stuart J. Goldring

Compliance, Practice & Procedure

Ellis W. Reemer
Bryan G. Skarlatos

Consolidated Returns

Karen Gilbreath
Jonathan Kushner

Corporations

Kathleen L. Farrel
Jodi J. Schwartz

Employee Benefits

Karen G. Krueger
Max J. Schwartz

Estates and Trusts

T. Randolph Harris
Jeffrey N. Schwartz

Financial Instruments

Michael S. Farber
Erika W. Nijenhuis

Financial Intermediaries

David M. Schizer
Andrew P. Solomon

Foreign Activities of U.S.

Taxpayers

Peter H. Blessing
David R. Sicular

Multistate Tax Issues

Robert E. Brown
Paul R. Comeau

New York City Taxes

Robert J. Levinschn
Irwin M. Slonka

New York State Franchise and

Income Taxes

Maria T. Jones
Arthur R. Rosen

Partnerships

William B. Brannan
David H. Schnabel

Pass-Through Entities

Patrick C. Gallagher
Gary B. Mandel

Real Property

David E. Kahan
Elliot Pisem

Reorganizations

Andrew R. Walker
Diana L. Wollman

Securitized and Structured

Finance

David S. Miller
Paul R. Wysocki

Tax Accounting

David W. Mayo
Marc L. Siberberg

Tax Exempt Bonds

Stuart L. Rosow
John T. Lutz

Tax Exempt Entities

Dickson G. Brown
Michelle P. Scott

U.S. Activities of Foreign

Taxpayers

Gary M. Friedman
Yaron Z. Reich

MEMBERS-AT-LARGE OF EXECUTIVE COMMITTEE

Edward E. Gonzalez

Alyse Grossman
Sherwin Kamin

Arnold Y. Kapiloff

Barbara T. Kaplan

Charles I. Kingson
Janet B. Korins

Sherry S. Kraus

Jlyeon Lee-Lim

Charles Morgan
Andrew W. Needham

Deborah L. Paul

Matthew A. Rosen

Seth L. Rosen
Joel Scharfstein

Linda Z. Swartz

Gordon Wamka

David E. Watts
Victor Zonana

October 29, 2003

The Honorable Pamela F. Olson
Assistant Secretary (Tax Policy)
Department of the Treasury
Room 3120 MT
1500 Pennsylvania Avenue, N.W.
Washington, D.C. 20220

Mark W. Everson
Commissioner
Internal Revenue Service
Room 3000 IR
1111 Constitution Avenue, N.W.
Washington, D.C. 20224

Dear Assistant Secretary Olson and Commissioner Everson:

I am pleased to submit the New York State Bar Association Tax Section's Report No. 1043 on the U.S. Federal Income Tax Treatment of Reorganizations Involving Insolvent Subsidiaries. The exclusive focus of this report is on out of bankruptcy mergers of domestic or foreign corporate subsidiaries.

The report analyzes both "upstream" and "sideways" restructurings. The report offers suggestions relating to current law and regulations designed to promote greater flexibility for insolvent subsidiaries to undergo business motivated reorganizations. The report is limited to upstream and sideways reorganizations -- downstream transactions, acquisitions of solvent corporations, potential 351 transactions and the like are not considered.

The report sets forth the following objectives as touchstones for its recommendations: (i) providing clarity, (ii) facilitating business motivated

FORMER CHAIRS OF SECTION:

Samuel Brodsky

Edwin M. Jones

Peter Miller

John E. Morrissey, Jr.

Charles E. Heming

Ralph O. Winger

Martin D. Ginsburg

Peter L. Faber

Hon. Renato Beghe

Alfred D. Youngwood

Gordon D. Henderson

David Sachs

J. Roger Mentz

Willard B. Taylor

Richard J. Hiegel

Daie S. Collinson

Richard G. Cohen

Donald Schapiro

Herbert L. Camp

William L. Burke

Arthur A. Feder

James M. Peaslee

John A. Corry

Peter C. Canellos

Michael L. Schler

Carolyn Joy Lee

Richard L. Reinhold

Richard O. Loengard

Steven C. Todrys

Harold R. Handler

Robert H. Scarborough

Robert A. Jacobs

Samuel J. Dilon

restructurings, (iii) limiting opportunities to duplicate or accelerate losses, and (iv) promoting consistency. In furtherance of these objectives, the following recommendations are made.

With respect to upstream restructurings of insolvent companies the report supports maintaining current law which precludes qualification as a liquidation under Section 332. In a consolidated group, we suggest that for purposes of determining qualification as a reorganization, the parent corporation be treated as having contributed any intercompany debt to the subsidiary's capital immediately before the reorganization in a separate transaction. This would facilitate satisfaction of the continuity of interest requirement. Current law requirements concerning business purpose and continuity of business enterprise would, under this proposal, remain unchanged.

Concerning sideways reorganizations within a consolidated group, the report recommends that such transactions generally be treated as tax free reorganizations. As with upstream reorganizations, the report recommends that mechanically the parent corporation be considered as having contributed any intercompany debt to the insolvent subsidiaries' capital immediately before the reorganization transaction in a separate transaction. The recommendations concerning continuity of interest, business purpose and continuity of business enterprise would be the same as in the case of upstream reorganizations.

Concerning both upstream and sideways mergers of non-consolidated corporations, the report suggests an elective regime that would permit tax free reorganization treatment provided all parties to the

October 29, 2003

transaction so elected and agreed to report the transaction consistently with the election. In addition to anti-abuse rules, we also recommend that where no election is made and a worthless stock deduction is claimed, regulations should provide that carryover tax attributes be subject to limitation under section 382.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Andrew N. Berg". The signature is written in a cursive style with a large, stylized initial "A".

Andrew N. Berg
Chair

cc: Eric Solomon, Deputy Assistant Secretary, Regulatory Affairs,
Department of Treasury

Helen M. Hubbard, Tax Legislative Counsel, Department of Treasury

William F. Sweetnam, Jr., Benefits Tax Counsel, Department of
Treasury

Emily A. Parker, Acting Chief Counsel, Internal Revenue Service

Gary Wilcox, Deputy Chief Counsel (Technical), Internal Revenue
Service

William D. Alexander, Associate Chief Counsel (Corporate),
Internal Revenue Service