

REPORT #713

TAX SECTION

New York State Bar Association

ANNUAL REPORT

For the Year Ended January 30, 1992

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NYSBA

NEW YORK STATE BAR ASSOCIATION

TAX SECTION

ANNUAL REPORT

January 30, 1992

NEW YORK STATE BAR ASSOCIATION
Tax Section Executive Committee for 1991-1992

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NEW YORK STATE BAR ASSOCIATION

TAX SECTION

ANNUAL REPORT

For the Year Ended January 30, 1992

This last year was the 43rd year of the Tax Section. It was also the first session of the 102nd Congress. Fortunately for the tax bar, the budget treaty worked out at Andrews Air Force base in 1990 frustrated law making (to say nothing of lawmakers), and the year came and went without a major tax bill. Nevertheless, tax acts from earlier years, legislative proposals for next year, a plethora of rule making by the Internal Revenue Service, and a few of our own initiatives afforded the Tax Section ample opportunities to add to the volumes of tax commentary; hopefully, we made some noticeable contribution to the betterment of our federal, New York State and New York City tax systems.

During the year, the Tax Section submitted twenty-three reports and other commentaries on federal tax topics, and ten on New York State and City issues. (The submissions are listed at the end of this Annual Report.) We also testified before the Ways and Means Committees of the U.S. House of Representatives and the State Assembly. The other activities of the Section included a summer meeting in July in Saratoga Springs and the Annual Meeting on January 30.

One of the ironies confronting the Tax Section is whether we can as a group speak out in favor of a simpler, or to use the stock phrase of the 1980s "lighter", Internal Revenue Code and still disgorge each year hundreds of pages of technically dazzling, but somewhat indigestible, commentary. Some

members of the Executive Committee have raised this question on more than one occasion, and the argument strikes in many a responsive chord. To address the concern, we have consciously undertaken in our reports to weigh the practical demands of the tax system against the desire for technical purity and our own intellectual curiosity. It should also be noted that some simplification proposals we have promoted have been a success. At bottom, however, we, like the government, are mired in the tax system as it is. Slowing down the commentary will not make a better world any more than unilateral disarmament will stop wars.

Federal Taxation

The reports in the federal area covered a wide range of topics. These included bankruptcy and insolvency, financial products, international taxation, corporate taxation, consolidated returns, tax procedure and compliance, employee benefits, partnerships and other pass-through entities, and the amortization of acquired intangibles.

Bankruptcy and insolvency. Reflecting the economic climate, we submitted several reports dealing with financially troubled taxpayers. Two of these commented on proposed regulations under sections 108(e)(4) and 108(e)(8), dealing, respectively, with acquisitions of debt by parties related to the debtor and exchanges of debt for "nominal or token" stock. We also submitted a comprehensive report addressing the tax consequences of debt-for-debt exchanges following the repeal of section 1275(a)(4) by the Revenue Reconciliation Act of 1990 ("1990 Act"). The report described with a tone of urgency the need for guidance on a number of important points, but as yet there has been no response. Near the end of the year, we addressed a private letter ruling holding that a pledge of stock

that did not fall within a specific exception in the section 382 regulations was an option for purposes of section 382.

Financial products. The Service has made valiant efforts in recent years to come to terms with the tax treatment of complex financial products, some of which are becoming commonplace. We commented on proposed regulations that would bifurcate contingent debt into noncontingent debt and other financial instruments, and also submitted a detailed report responding to proposed regulations on the timing and character of income from notional principal contracts. In a related area, we recommended that the Service clarify that income from swaps realized by pension plans and other tax-exempt taxpayers was not subject to the unrelated business income tax. Regulations that for the most part followed these recommendations were issued later in the year.

International matters. In the international area, reports were submitted on regulations proposed under section 163(j) (earnings stripping), and section 367 (which limits the application of the reorganization and other corporate nonrecognition rules to transfers of property into and out of the United States). We also commented on a proposed change relating to FIRPTA withholding on corporate distributions included in a pending technical corrections bill.

Corporate taxation. In order to assist the government in preparing regulations in areas that, although important, have not yet received much attention in official circles, we submitted reports dealing with the tax treatment of discount preferred stock under section 305(c) (which was substantially amended by the 1990 Act) and section 336(e). Section 336(e), which was enacted in 1986, generally allows regulations to be issued

treating sales or other dispositions by a parent corporation of all of the stock it owns in an 80-percent-or-greater-owned subsidiary as a sale of the subsidiary's assets under principles similar to section 338(h)(10). We recommended full implementation of the section, subject to some limitations.

Consolidated returns. The first report of the year was the concluding entry in a series of reports dealing with the very controversial consolidated return loss disallowance regulations. We also commented on proposed regulations issued during the year governing the SRLY and CRCO rules.

Procedure and tax compliance. In the area of procedure and tax compliance, we prepared a report dealing with "hot interest" (interest on corporate tax deficiencies imposed at an elevated rate after certain stages are reached in a tax controversy). The hot interest rule was added by the 1990 Act. We also prepared a report commenting on regulations proposed under section 6662 dealing with the accuracy-related penalty (which was substantially revised in 1989).

Employee benefits. In the employee benefits area, we submitted an extensive report addressing the separate line of business rules in section 414(r), and a letter dealing with the treatment of payments for local transportation as a nontaxable fringe benefit.

Partnerships and other pass-through entities. We filed a report on the proposed section 707(a)(2)(B) regulations concerning disguised sales of property through partnerships. Further, at the beginning of the year, we added our voice to the chorus of those objecting to the first version of the proposed subchapter S one class of stock regulations. These regulations

have been withdrawn and replaced with a more palatable set of proposals.

Amortization of intangibles. One area where we attempted to anticipate future tax law developments, but were to some degree overtaken by events, concerns the amortization of purchased intangibles (particularly customer based intangibles that are akin to good will). We formed an ad hoc group in the spring to study this area chaired by Richard Cohen. The group had largely completed their work by July, when Chairman Rostenkowski introduced H.R. 3035. This bill proposes the adoption of a single 14-year amortization life for a broad group of intangibles. The report was quickly revised to focus on the bill which, in concept, we enthusiastically endorsed. The Chair and Mr. Cohen testified at a Ways and Means Committee hearing in support of the measure in October. In addition, a group from the Tax Section met with the staff of the Joint Committee on Taxation to discuss our report.

New York State and City Matters

The Tax Section also had an active year with regard to New York State and City matters. In the early spring, we sent in a general report commenting on a number of technical aspects of the tax law changes included in the then pending budget bill.

In March, we testified before the Assembly Ways and Means Committee in support of legislation changing the venue for criminal tax prosecutions. We also testified before the same body, in a hearing on tax compliance, in support of the enactment of the uniform procedure and technical corrections bills and the government's right to appeal adverse Tax Tribunal decisions. The last legislative item concerned a bill that had been passed by

the legislature providing for the direct collection of sales taxes by Nassau and Suffolk counties (rather than by the State). We sent a letter to Governor Cuomo urging that he veto the bill. An accommodation was reached with the affected counties, and the bill was not enacted.

The budget proposed a cut in the funds available to the New York State Tax Tribunal, which resulted in a decision to hold tribunal proceedings only in Troy, and not, as had been the practice, in New York City and other parts of the State. We submitted a letter protesting this proposed change, and suggested that, if necessary, a fee be imposed to pay for the cost of holding hearings in New York City and other locations.

One topic that has gained greater practical importance in recent years is the State and City tax treatment of discharge of indebtedness income. We submitted a letter to the State and City concerning how such income should be allocated for purposes of the State and City corporate franchise taxes. In a similar vein, the Tax Section, together with the Committee on State and Local Taxation of the Association of the Bar of the City of New York, submitted a substantial report to the State dealing with the application of the ten percent real property gains tax to troubled real estate. The report, which had been requested by the Department of Taxation and Finance, focused on changes that could be implemented administratively.

The Tax Section has been for years a strong supporter of the creation of independent bodies to adjudicate State and City tax disputes. This goal has been achieved at the State level with the Tax Tribunal, but not in the City. Although a City Tax Tribunal exists, it does not have jurisdiction over the principal City business taxes. We commented on the most recent version of a

State bill providing for the creation of a City tribunal with jurisdiction over business taxes. We also commented on a competing proposal to establish a joint State and City tribunal.

Finally, many practitioners find it difficult to research State and City tax issues. We issued a report describing the available primary and secondary sources, and providing practical advice on how to conduct such research. We received helpful comments from the State and City in preparing this report.

Summer Meeting

A summer meeting was held at the Gideon Putnam Hotel in Saratoga Springs from July 26-28. The session gave us a chance to observe the onset of thoroughbred racing in all its splendor. We also managed to devote a fair amount of time to tax matters. Panels were held dealing with partnerships (including the new section 707 disguised sale regulations), current developments in federal and New York State and City taxation, and bankruptcy tax issues. The bankruptcy panel included not only tax lawyers but also bankruptcy experts. Our luncheon speaker was Harry Gutman, the newly installed Chief of Staff of the Joint Committee on Taxation. (The participants in the panels for the summer and annual meeting are listed in the appendix.)

Annual Meeting

The annual meeting featured as a luncheon speaker the Honorable James W. Wetzler, Commissioner of Taxation and Finance of New York State, who spoke about federal tax policy issues. We also heard panel presentations dealing with partnerships and S corporations, international tax issues, intangibles

(controversies and proposed legislation) and current developments before the Internal Revenue Service and Treasury.

Acknowledgements

Although I am not a disinterested observer, having reviewed all of the reports and other submissions by the Tax Section over the year, I can attest to the fact that they were of a very high quality and represented many hours of work and thought by a great number of people. Those who read and rely on the reports owe a debt to this group. The Tax Section has the advantage of being able to draw on a large body of dedicated and capable practitioners who are willing to commit their time and energy to the task of furthering tax policy objectives without seeking to advance client interests.

The work of the Tax Section was carried out under the direction of our Executive Committee. Although the principal contributors included many veterans, there were also a good number of new faces, which is a promising development. The continuing vitality of the Tax Section demands that we seek out the most talented and energetic younger members of the tax bar to participate in or lead the writing of reports and to join the Executive Committee. In 1990, the Tax Section held a reception for younger lawyers to send out the message that their help is needed and most welcome. In addition, a special effort was made to encourage attendance by younger members at the summer meeting in Saratoga Springs, and this effort met with considerable success. We intend to hold another reception for younger lawyers in 1992.

Finally, the success of the Tax Section this last year has been attributable in no small part to the efforts of John

Corry (First Vice-Chair), Peter Canellos (Second Vice-Chair) and Michael Schler (Secretary). They have been a bountiful source of ideas and direction and have helped enormously to ensure the high quality of our work product. I also wish to acknowledge the contributions of Arthur Feder, William Burke and Herbert Camp, who are the other officers with whom I have served over the past four years. It has been a great pleasure for me to be associated with such a talented bunch.

The Making of Tax Law 1991

In last year's Annual Report, Arthur Feder was quite critical of the tax legislative process. His remarks reflected the recent experience with the Revenue Reconciliation Act of 1990, which was the product of round-the-clock negotiations at Andrews Air Force Base. The bill included a number of provisions in the nature of technical tax law amendments that were adopted without much opportunity for comment, and for the most part changed the law for the worst in order to raise revenues without hiking rates. Two of these changes, the repeal of section 1275(a)(4) and the "hot interest" rule, were the subject of critical reports.

The 1991 session of Congress was more of a success. While a cynic could reach this conclusion simply by noting that no major tax bills were passed during the year, there were in fact some positive developments. Chairman Rostenkowski introduced a number of simplification bills. The substantive merit of the proposals varied widely, but the bills represented a sincere effort to enact revenue neutral legislation to improve the workings of the Code. Perhaps the most impressive offering in this group was H.R. 3035, introduced in July. As noted above, this bill would simplify the tax treatment of intangibles by

providing a single 14-year amortization life for a wide range of acquired intangibles. Apart from the bill's considerable substantive merit, it is worth examining as an example of how law should be made. The proposal surfaced in July not as a sketchy idea but with statutory language and a detailed explanation. Comments were solicited from the public, and two days of public hearings were held on the bill in October. This schedule allowed the Tax Section to submit a comprehensive report commenting on the bill as introduced. While we firmly supported the basic idea, we thought that a number of technical changes were required. We also testified at the hearings and, at the invitation of the Joint Committee staff, attended a meeting with the staff to go over points in our report and other related issues. Many other groups that would be affected by the bill have made their views known and presumably some of their suggestions will find their way into the final bill and some will not. To date at least, the whole process has been laudable. In addition, the bill evidences that there are people who favor improvements in the tax system that are not fueled by revenue considerations or political expediency.

The interesting question is whether the intangibles bill or the 1990 Act will serve as the model for coming years. It is likely that 1992 will see a major tax bill that will seek to provide middle class tax relief without a material increase in marginal rates. The brinkmanship required to achieve, or at least appear to achieve, these goals virtually assures that the bill that emerges from the 1992 Congress will be more a ragtag survivor of political wars than the harbinger of a new age of civic-minded reform, but only time will tell.

1991 also saw some improvements in the administration of the tax law by the Service. An effort was clearly made to adopt

fewer regulations in temporary form and more as proposed regulations that are finalized after a reasonably short comment period. This development is encouraging, although the Service will have to restrain itself from adopting proposed regulations that are effective upon issuance. Because taxpayers cannot rely on proposed regulations in their favor in planning transactions, it is only fair that adverse tax consequences not be imposed before regulations become final. The cases where immediate effective dates are really needed to stem abuse seem to us to be few and far between, particularly if final regulations will follow proposed regulations within a reasonable period of time. We hope to comment on this issue in 1992.

One very welcome development at the end of 1991 was the adoption of final, simplified regulations under section 752. In 1989, the Tax Section submitted to the Service a draft of simplified section 752 regulations, and it was gratifying to see that the Service chose to adopt streamlined regulations that were inspired in part by our efforts. The section 707 regulations proposed during the year also reflected a new and, in my view, better way of thinking. These regulations and the section 752 regulations are simpler in large part because they rely more on principles than on detailed rules. In addition to being easier to grasp, they are less likely to produce unintended results and thus more likely to stand the test of time.

Pro Bono Work

Lastly, one topic that tax lawyers will need to revisit in the very near term is their obligation to provide legal services to the poor for free. In 1989, a committee formed by Chief Judge Sol Wachtler of the New York State Court of Appeals proposed to require all private New York lawyers to perform a

minimum amount of pro bono service. Following the recommendations of a study group, the New York State Bar Association responded with a comprehensive plan to strengthen full-time staff legal services programs and to demonstrate that a voluntary pro bono effort could address the unmet legal needs of the State's poor as well as—or better than—mandatory minimums. In May of 1990, the Chief Judge announced that he would defer until May, 1992 a decision whether to impose mandatory pro bono service requirements. In effect, he agreed to allow the private bar two years to demonstrate that voluntary efforts could be increased sufficiently to obviate a mandatory plan.

Since 1989, the NYSBA has mounted a sizeable campaign to foster greater commitments by lawyers in all areas of practice—including tax law—to pro bono work. While some lawyers in our field may believe that because they are primarily income tax lawyers, they have little to offer those without much income, there are in fact areas where the services of tax lawyers can benefit the poor; and of course lawyers can and often do engage in pro bono activities outside of their principal areas of expertise. Whether or not a mandatory pro bono rule is adopted, we will need, both as individuals and through the Tax Section, to give more attention to this important area.

Respectfully submitted,

JAMES M. PEASLEE

Chair

January 30, 1992

Reports, Letters and Testimony

A. Federal Matters

1. Letter to Hon. Fred. T. Goldberg, Jr., Commissioner of Internal Revenue, on proposed regulation section 1.1502- 20 issued on November 19, 1990 (modified loss disallowance) (January 29, 1991)
2. Report on Proposed Subchapter S One Class of Stock Regulations (March 6, 1991)
3. Report on Provisions of the Revenue Reconciliation Act of 1990 Affecting Debt-for-Debt Exchanges (March 25, 1991)
4. Report on Notice 90-41 and Certain Other Issues Arising Under Section 514(c)(9) Relating to Debt Financed Real Estate Investments by Tax-Exempt Organizations (March 26, 1991)
5. Report on Unrelated Business Income Taxation of Income from Interest Rate Swaps and Similar Instruments (April 26, 1991)
6. Report and Letter on Proposed Section 1275 Regulations Concerning Contingent Debt Instruments (April 30, 1991)
7. Report on Section 6621(e) Providing for Increased Interest Rate on Large Corporate Deficiencies and Temporary Regulation Section 301.6621-3T (June 7, 1991)
8. Report on Acquisitions of Discount Debt by Related Parties Under the New Section 108(e)(4) Regulation (June 21, 1991)

9. Report on Regulations to be Issued Implementing the Changes to Section 305(c) Made by the Revenue Reconciliation Act of 1990 (July 1,1991)
10. Letter to Hon. Fred T. Goldberg, Jr. concerning Proposed Technical Corrections Act Amendment to Section 1445(e)(3) (FIRPTA Withholding on Corporate Distributions) (July 3, 1991)
11. Report on Proposed Regulations Relating to Separate Lines of Business (July 9, 1991)
12. Letter to Hon. Fred T. Goldberg, Jr. on Proposed Regulations Section 1.61 -21 (k) (July 9, 1991)
13. Report on Proposed Regulations Under Section 108(e)(8)(A) ("Nominal or Token" Stock) (July 18, 1991)
14. Report on Proposed Regulations Relating to the Accuracy-Related Penalty (September 10, 1991)
15. Report on Proposed Legislation on Amortization of Intangibles (H.R. 3035) (September 30, 1991)
16. Testimony of James M. Peaslee on behalf of the Tax Section before the House Ways and Means Committee in support of H.R. 3035 relating to the amortization of intangibles (October 2, 1991)
17. Report on Proposed Regulations Under Section 163(j) (October 23,1991)
18. Report on Proposed Section 707 Regulations Concerning Disguised Sales of Property Through Partnerships (October 25, 1991)

19. Report on Proposed Regulations Sections 1.1502-15,-21 and -22 (December 13, 1991)
20. Report on Regulations to be Issued Implementing Section 336(e) (January 6, 1992)
21. Report on Proposed Regulations on Methods of Accounting for Notional Principal Contracts (January 6, 1992)
22. Report on Proposed Regulations Under Section 367 (January 24, 1992)
23. Letter to Hon. Fred T. Goldberg, Jr. re treatment of pledges as options for purposes of Section 382 (January 30, 1992)

B. New York State

24. Letter to Governor Mario M. Cuomo objecting to decision of Division of Tax Appeals to hold hearings only in Troy (February 21, 1991)
25. Testimony of Robert Brown on behalf of the Tax Section before the Assembly Ways and Means Committee regarding tax compliance and supporting uniform procedure bill, government appeals of adverse decisions of the Tax Tribunal, and technical corrections legislation (March 5, 1991)
26. Testimony of Robert Plautz on behalf of the Tax Section before the Assembly Ways and Means Committee in support of legislation dealing with venue for criminal tax prosecutions (March 6, 1991)
27. Report on Tax Proposals in Governor's 1991 Budget (March 22, 1991)

28. Letter to Hon. James W. Wetzler, Commissioner, New York State Department of Taxation and Finance, concerning how cancellation of debt income should be treated under the franchise tax imposed by Article 9-A of the New York Tax Law (May 29, 1991)
29. Letter to Governor Mario M. Cuomo urging a veto of A.6987-B relating to the collection of sales taxes by Nassau and Suffolk Counties (July 11, 1991)
30. Report on Application of the New York State 10% Tax on Gains Derived from Certain Real Property Transfers to Transfers Involving Interests in Troubled Real Estate (September 25, 1991) (joint report with New York City Bar Association)
31. Report on New York State and City Tax Research (January 30, 1992)

C. New York City

32. Letter to Hon. Carol O'Cleireacain, Commissioner, New York City Department of Finance, concerning how cancellation of debt income should be treated under the New York City General Corporation Tax (June 10, 1991)
33. Letter to Hon. Carol O'Cleireacain concerning New York City Tax Appeals Tribunal (August 21, 1991)
34. Report on New York State and City Tax Research (January 30, 1992)

Programs

A. Summer Meeting, Saratoga Springs, July 26-28, 1991

1. Sections 707 & 704(c) and Other Partnership Issues

Richard G. Cohen-Winthrop, Stimson, Putnam & Roberts R.
Donald Turlington-Brown & Wood

Abraham N.M. Shashy, Jr.-Chief Counsel, Internal Revenue
Service

Robert R. Wootton-Tax Legislative Counsel, Department of
the Treasury

2. Current Developments in Federal Taxation-Legislation, Regulations and Rulings

Richard L. Reinhold-Cahill, Gordon & Reindel

Dana L. Trier-Cleary, Gottlieb, Steen & Hamilton Stuart
L. Brown-Associate Chief Counsel (Technical) Internal
Revenue Service

Robert R. Wootton-Tax Legislative Counsel, Department of
the Treasury

3. Current Developments in New York State and City Taxation

James A. Locke-Phillips, Lytle, Hitchcock, Blaine &
Huber

Arthur R. Rosen-Morrison & Foerster

William F. Collins-Deputy Commissioner and Counsel, New
York State Department of Taxation and Finance Susan
Grossman-Acting Deputy Commissioner for Legal Affairs,
New York City Department of Finance

4. Financially Troubled Companies—Section 108(e)(4) and Other Substantive Tax Issues; The Handling of IRS Claims in Bankruptcy

Peter C. Canellos—Wachtell, Lipton, Rosen & Katz
Stuart J. Goldring—Weil, Gotshal & Manges
Alan B. Miller—Weil, Gotshal & Manges
Andrew J. Dubroff—Attorney Advisor, Tax Legislative Counsel's Office, Department of the Treasury

The luncheon speaker was Harry L. Gutman, Chief of Staff, Joint Committee on Taxation

B. Annual Meeting, New York City, January 30, 1992

1. Partnerships and Subchapter S Corporations

Elliot Pisem—Roberts & Holland
Professor Deborah Schenk—New York University School of Law
Larry S. Wolf—Roberts & Holland
Mary L. Harmon—Special Counsel to Chief Counsel, Internal Revenue Service

2. International Tax Issues

William L. Burke—Hughes, Hubbard & Reed
Esta E. Stecher—Sullivan & Cromwell
Harrison J. Cohen—Legislation Counsel, Joint Committee on Taxation
Marlin Risinger, III—Acting Deputy International Tax Counsel, Department of the Treasury

Charles S. Triplett—Deputy Associate Chief Counsel
(International)

3. Intangibles (Controversies and Proposed Legislation)

Reuven Avi-Yonah—Wachtell, Lipton, Rosen & Katz Michael
L. Schler—Cravath, Swaine & Moore

Patti Burquest-Fultz—Senior Attorney, Office of Special
Counsel (Large Case)

Peter v. Z. Cobb—Business Tax Counsel, Joint Committee
on Taxation

4. Current Issues Before the Treasury and the Internal
Revenue Service

Kenneth H. Heitner—Weil, Gotshal & Manges

Ronald A. Pearlman—Covington & Burling

Dennis E. Ross—Davis, Polk & Wardwell

James F. Malloy—Associate Chief Counsel (Financial
Institutions & Products), Internal Revenue Service John
H. Parcell—Associate Tax Legislative Counsel, Department
of the Treasury

Eric Solomon—Assistant Chief Counsel (Corporate),
Internal Revenue Service

The luncheon speaker was Hon. James W. Wetzler,
Commissioner of Taxation and Finance of New York State