

REPORT #807

TAX SECTION

New York State Bar Association

Letter on 1995 Priorities

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October 21, 1994

Hon. Leslie B. Samuels
Assistant Secretary (Tax Policy)
Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, D.C. 20220

Hon. Margaret M. Richardson
Commissioner
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, D.C. 20224

Re: 1995 Priorities

Dear Secretary Samuels and Commissioner Richardson:

On behalf of the New York State Bar Association Tax Section, I am writing to provide you with our list of the areas of the tax law in which we believe guidance is most urgently needed, and that we therefore believe should receive the highest priority for 1995. We have not included in our list the finalization of a number of outstanding proposed regulations that we understand Treasury and the Service already intend to finalize in the near future.

Our priorities are the following, in no particular order:

1. Contingent debt. Proposed and ultimately final regulations should be issued concerning the proper tax treatment of contingent debt. Existing proposed regulation S 1.1275-4 is generally considered unsatisfactory. The lack of certainty of tax treatment hinders development and marketing of nonabusive debt instruments and gives taxpayers opportunities to take positions most

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favorable to themselves. We submitted a report making suggestions for regulations in this area in November 1993.

2. Assumption of contingent liabilities. One of the most important and most intractable areas of the tax law has been the tax consequences to the purchaser and seller of the purchaser's assumption of contingent liabilities in a taxable asset acquisition. Such transactions are extremely common, often involve large sums of money, and could be significantly adversely affected (for no good policy reason) by various interpretations of the law. We believe taxpayers are entitled to know the tax consequences of these transactions before they are entered into rather than risk having these issues be raised on audit with an uncertain outcome. In November 1990 the Tax Section submitted a report on this subject, and in April 1994 we submitted a letter reiterating the need for prompt guidance in this area (and requesting guidance on the assumption of contingent liabilities in section 351 transactions).

3. PFICs The PFIC rules in sections 1291-1297 are designed to tax U.S. shareholders of foreign corporations that have largely passive income or assets. There are a number of important areas under these provisions in need of guidance. We believe the most important of these is the scope of the section 1296(b) exemptions from the PFIC rules for foreign banks and securities dealers. To a significant extent these exemptions are not merely a matter of statutory interpretation, but rather are available only to the extent provided in regulations. The guidance that has been provided in this area (Notice 88-22, 1988-1 C.B. 489; Notice 89-81, 1989-2 C.B. 399) is generally agreed not to be adequate. Guidance in this area has recently become even more important because of the adoption in 1993 of section 956A (dealing with U.S. shareholders of foreign corporations holding "excess passive assets"), since exemption from section 956A for foreign banks and securities dealers is generally determined by reference to exemption from the PFIC rules.

4. LLCs. Almost every state has now adopted legislation authorizing limited liability companies (and in some cases limited liability partnerships). Taxpayers can and will utilize these entities only if they have assurance that the entities will be treated as partnerships for Federal income tax purposes. As a result, taxpayer utilization of these entities will be impeded until the Service issues a revenue procedure providing advance ruling guidelines for partnership classification of these entities (similar to Rev. Proc. 89-12, 1989-1 C.B. 798, providing advance ruling guidelines for limited partnerships). We understand that such a revenue procedure is under active consideration and urge that it be issued as promptly as possible.

We hope that these suggestions are helpful. We would of course be happy to work with the Treasury and the Service in any way that would be helpful to them in the development of guidance in these areas.

Sincerely,

Michael L. Schler
Chair, Tax Section