



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. Levinson
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. Kahen
Elliot Piser

Reorganizations

Andrew R. Walker
Diana L. Wolfman

Securitized and Structured

Finance

David S. Miller
Paul R. Wysocki

Tax Accounting

David W. Mayo
Marc L. Silberberg

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 9, 2003

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

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

Dear Assistant Secretary Olson and Commissioner Everson:

I am pleased to enclose New York State Bar Association Section Report No. 1040 concerning Announcement 2003-35, which requests comments on a proposal to permit taxpayers to use the valuations they report on their financial statements for section 475 purposes if three principles are satisfied – a “consistency principle” that would require the methodology used for the financial statement valuation to be “sufficiently consistent” with mark-to-market methodology under section 475; an “incentive principle” that would require the taxpayer to have a “strong incentive” to report accurately the values on its financials; and a “verification principle” that would require the taxpayer to maintain certain records.

We believe that guidance for valuations under section 475 is important, and we agree with the IRS and Treasury that a safe harbor that permits taxpayers

FORMER CHAIRS OF SECTION:

Samuel Brodsky

Edwin M. Jones

Peter Miller

John E. Morrissey, Jr.

Charles E. Hering

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. Schier

Carolyn Joy Lee

Richard L. Reinhold

Richard O. Loengard

Steven C. Todrys

Harold R. Handler

Robert H. Scarborough

Robert A. Jacobs

Samuel J. Dilon

to use financial statement valuations for section 475 purposes would significantly reduce administrative burdens and controversy. We also agree with the IRS that the three principles expressed in Announcement 2003-35 are appropriate.

We believe that a methodology – such as GAAP’s – used to report valuations in financials should satisfy the consistency principle if it is “materially consistent” with the methodology required by section 475, even if the methodology is not precisely what section 475 would require. We recommend that the IRS evaluate U.S. GAAP’s methodology for valuing derivatives and other securities to determine which aspects and variants of GAAP satisfy this standard and which do not. If the IRS were to determine that GAAP’s valuation methodology is generally materially consistent with section 475 principles, but one or more aspects of GAAP are materially inconsistent with section 475 principles, then taxpayers using the impermissible aspects or variants would be required to adjust their GAAP valuations with respect to these aspects in order to satisfy the consistency principle.

We believe that a taxpayer that reports valuations for a meaningful amount of its derivatives and other securities in financials submitted to the SEC or another “approved regulator” should satisfy the incentive principle. If the consistency and verification principles are also satisfied, the taxpayer should be entitled to a conclusive presumption that the valuations are accurate for section 475 purposes.

For financials that are not submitted to an approved regulator, the taxpayer should satisfy the incentive principle if the taxpayer can demonstrate a significant non-tax business purpose that helps assure the accuracy of the valuations. However, these taxpayers should be entitled only to a rebuttable presumption that the valuations reflected in the financials are accurate for section 475 purposes (assuming the consistency and verification principles are also satisfied).

We also recommend that regulations provide some “normative” guidance on section 475 valuation methodology for those taxpayers that are not eligible for the safe harbor.

Finally, we believe that all taxpayers, including securities traders, commodities dealers and traders, and other mark-to-market taxpayers, should be entitled to the safe harbor and normative section 475 guidance. We endorse use of the IRS’s “Accelerated Issue Resolution” program for resolving section 475 valuation issues because we believe that it is a useful tool for the IRS to gain important industry knowledge and it permits taxpayers to develop stable and workable procedures.

Respectfully submitted,



Andrew N. Berg
Chair

cc: Helen M. Hubbard (Tax Legislative Counsel)
Michael S. Novey (Associate Tax Legislative Counsel)
Emily A. Parker (Acting Chief Counsel)
Lon B. Smith (Associate Chief Counsel (Financial Institutions and Products))
Eric Solomon (Deputy Assistant Secretary for Regulatory Affairs)