



NEW YORK STATE BAR ASSOCIATION

One Elk Street, Albany, New York 12207 • 518.463.3200 • www.nysba.org

TAX SECTION

2009-2010 Executive Committee

ERIKA W. NIJENHUIS

Chair
Cleary Gottlieb Steen & Hamilton LLP
One Liberty Plaza
New York, NY 10006
212/225-2980

PETER H. BLESSING

First Vice-Chair
212/848-4106

JODI J. SCHWARTZ

Second Vice-Chair
212/403-1212

ANDREW W. NEEDHAM

Secretary
212/474-1440

COMMITTEE CHAIRS:

Bankruptcy and Operating Losses

Stuart J. Goldring
Russell J. Kestenbaum

Compliance, Practice & Procedure

Bryan C. Skarlatos
Diana L. Wollman

Consolidated Returns

Lawrence M. Garrett
Edward E. Gonzalez

Corporations

David R. Sicular
Karen Gilbreath Sowell

Cross-Border Capital Markets

Douglas R. McFadyen
Andrew Walker

Employee Benefits

Andrew L. Gaines
Andrew L. Oringer

Estates and Trusts

Carlyn S. McCaffrey
Jeffrey N. Schwartz

Financial Instruments

Michael S. Farber
William L. McRae

"Inbound" U.S. Activities of Foreign

Taxpayers

Peter J. Connors
David R. Hardy

Individuals

Paul R. Comeau
Sherry S. Kraus

Investment Funds

David H. Schnabel
Marc L. Silberberg

New York City Taxes

Maria T. Jones
Irwin M. Siomka

New York State Taxes

Robert E. Brown
Arthur R. Rosen

"Outbound" Foreign Activities of

U.S. Taxpayers

Andrew H. Braiterman
Yaron Z. Reich

Partnerships

David W. Mayo
Joel Scharfstein

Pass-Through Entities

James R. Brown
Elliot Pisem

Real Property

Robert Cassanos
Jeffrey Hochberg

Reorganizations

Deborah L. Paul
Linda Z. Swartz

Securitized and Structured

Finance

Jiyeon Lee-Lim
W. Kirk Wallace

Tax Exempt Entities

Elizabeth T. Kessenides
Richard R. Upton

MEMBERS-AT-LARGE OF EXECUTIVE COMMITTEE

S. Douglas Borisky
Kathleen L. Ferrell
Marcy G. Geller
Charles I. Kingson
Donald Korb

Robert J. Levinsohn
Lisa A. Levy
John T. Lutz
Gary B. Mandel
Charles M. Morgan

Regina Olshan
David M. Schizer
Peter F. G. Schuur
Eric Sloan
Andrew P. Solomon

Eric Solomon
Gordon E. Warnke

January 18, 2010

Mr. Michael Mundaca
Acting Assistant Secretary (Tax Policy)
Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

Honorable Douglas H. Shulman
Commissioner
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

Honorable William J. Wilkins
Chief Counsel
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

Re: Possible Tax Relief for Haiti Relief Efforts*

Dear Sirs:

We are all aware of the tragedy in Haiti. It is clear that this disaster, so close to our shores, has had a devastating impact on a substantial number of Americans, and that many Americans would like to contribute to the rescue and recovery efforts. The President has pledged the full support of the United States to the government and people of Haiti, but many people wish to contribute directly. In that regard, we write to recommend that the Treasury Department and Internal Revenue Service

* The principal author of this letter is Andrew Oringer, the co-chair of the New York State Bar Association Tax Section's Committee on Employee Benefits. Helpful comments were received from Erika Nijenhuis, Michael Schler and Diana Wollman. This letter may be cited as New York State Bar Association Tax Section, *Possible Tax Relief for Haiti Relief Efforts* (Report No. 1200, January 18, 2010).

FORMER CHAIRS OF SECTION:

Edwin M. Jones
John E. Morrissey, Jr.
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
Dale S. Collinson
Richard G. Cohen
Donald Schapiro
Herbert L. Camp
William L. Burke

Arthur A. Feder
James M. Peaslee
John A. Cory
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. Dimon
Andrew N. Berg
Lewis R. Steinberg
David P. Hariton

Kimberly S. Blanchard
Patrick C. Gallagher
David S. Miller

consider issuing guidance providing the types of tax relief that have been made available in connection with certain other recent catastrophic events, both in the United States and abroad.¹

In particular, some employers may wish to institute leave-sharing programs in order to permit employees to donate some of their leave-time to other employees with family members in Haiti or leave-donation programs in order to permit employees to donate the value of their accrued leave time to charitable organizations providing assistance in Haiti. Programs of this kind raise issues relating to whether any party to such transactions has taxable income, and the nature and availability of any deductions. The IRS has addressed these issues in several previously issued Notices.

Notices 2001-69 and 2005-68 relate to leave-based donation programs established by employers to aid victims of the September 11 attacks and Hurricane Katrina, respectively. Under these programs, employees elect to forgo vacation, sick, or personal leave in exchange for cash payments an employer makes as charitable contributions. In these Notices, the IRS stated that, under certain conditions, it would not assert that (i) certain cash payments an employer makes in exchange for vacation, sick, or personal leave that its employees elect to forgo constitute gross income or wages of the employees, (ii) the opportunity to make such an election results in constructive receipt to the employees, or (iii) an employer is permitted to deduct these cash payments only as charitable contributions rather than as business expenses.² Certain reporting-relating relief was also provided. These Notices were issued under the general provisions of section 61 of the Internal Revenue Code.

Notice 2006-59 provides tax relief in the case of certain leave-sharing plans that permit employees to deposit leave (of absence) in an employer-sponsored leave bank for use by other employees who have been adversely affected by a "major disaster," as determined pursuant to statute and Presidential declaration. Generally, such a plan allows a leave donor to deposit accrued leave in an employer-sponsored leave bank for use by other employees who have been adversely affected by the disaster. Under that Notice, the IRS generally will not assert that a leave donor who deposits leave in an employer-sponsored leave bank under a disaster leave-sharing plan described in the Notice realizes income or has wages or compensation with respect to the deposited leave. Notice 2006-59 was issued pursuant to section 61 and certain statutory provisions relating to disasters in the United States.³

¹ See Notice 2001-69, 2001-2 C.B. 491 (September 11, 2001 terrorist attacks); Revenue Ruling 2003-12, 2003-1 C.B. 283 (floods); Notice 2005-23, 2005-1 C.B. 732 (Indian Ocean tsunamis); Notice 2005-68, 2005-2 C.B. 622 (Hurricane Katrina); Notice 2006-59, 2006-2 C.B.60 (major disasters); Notice 2008-57, 2008-28 I.R.B. 80 (earthquake in China).

² Notice 2001-69 did not address the constructive receipt issue.

³ In addition to section 61, Notice 2006-59 refers to the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Pub. L. No. 93-288) (the "Stafford Act"), 42 U.S.C. § 5170, which generally provides that the President may declare an event a major disaster in the United States, and Pub. L. No. 105-18, 5 U.S.C. § 6391, which provides that the President may direct the Office of Personnel Management to establish a leave-sharing plan for federal employees who are adversely affected by a disaster or emergency. These

(footnote continued)

Section 139 of the Internal Revenue Code also provides a possible avenue for tax relief, in the case of U.S. taxpayers who may receive qualified disaster relief payments. Section 139(c) provides that a qualified disaster means, among other things, a disaster from any event that the Secretary of the Treasury determines is of a catastrophic nature. The Secretary of the Treasury has issued such determinations previously in the case of the 2005 tsunamis in the Indian Ocean and the 2008 earthquake in China.⁴

As stated above, we believe the Treasury and IRS should consider providing tax guidance of this kind with respect to the Haiti disaster. We appreciate your consideration of our comments. Please let us know if you would like to discuss these matters further or if we can assist you in any other way.

Respectfully submitted,



Erika W. Nijenhuis
Chair

cc: George H. Bostick
Benefits Tax Counsel
Department of the Treasury

J. Mark Iwry
Deputy Assistant Secretary
for Retirement and Health Policy
Department of the Treasury

Emily S. McMahan
Deputy Assistant Secretary (Tax Policy)
Department of the Treasury

(footnote continued)

statutes provide for the determination by the President that an event constitutes a “major disaster” or, in the case of 5 U.S.C. § 6391, an “emergency.” The tax relief provided by the Notice appears, however, to be derived from the IRS’s power to determine what constitutes gross income under section 61.

⁴ Notices 2005-23 and 2008-57; see also Revenue Ruling 2003-12 (floods).

Helen H. Morrison
Acting Deputy Benefits Tax Counsel
Department of the Treasury

Joshua D. Odintz
Acting Tax Legislative Counsel
Department of the Treasury

Clarissa C. Potter
Deputy Chief Counsel -- Technical
Internal Revenue Service

Lon B. Smith
National Counsel to the Chief Counsel for Special Projects
Internal Revenue Service