NEW YORK STATE BAR ASSOCIATION
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January 28, 2011

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

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

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

Re: Report on Section 901(m)

Dear Sirs,

I am pleased to submit the New York State Bar Association Tax Section's Report No. 1231, offering recommendations for future administrative guidance under Section 901(m) of the Internal Revenue Code of 1986, as amended. Section 901(m) was enacted as part of P.L. 111-226, which was signed into law on August 10, 2010. Under Section 901(m), a taxpayer generally is prevented from claiming credits under Sections 901, 902 and 960 for a portion of the foreign taxes that are imposed on income attributable to assets acquired in a "covered asset acquisition" ("CAA"). A CAA is generally defined as (i) a stock purchase where a Section 338 election is made, (ii) a transaction treated as an asset acquisition under the Code but as a stock acquisition (or a nonevent) for foreign tax purposes, (iii) an acquisition of an interest in a partnership that has made a Section 754 election, or (iv) to the extent provided by the Secretary, any other similar transaction.

The attached report offers recommendations for administrative guidance as to transactions to be included within, or expressly excluded from, the definition of a CAA. In addition, the report provides recommendations for guidance that

could address several other interpretive issues arising under Section 901(m), including the method to be used in identifying the income and related foreign tax to which the statute applies, the formula to be used in computing the amount of foreign tax credits disallowed, and rules for coordinating cases where the same assets are held by a number of successive owners.

1. We recommend that administrative guidance provide that a transaction is a CAA only if it results in a step-up in the basis of acquired assets for U.S. tax purposes but not for foreign tax purposes.

2. We recommend that administrative guidance be provided addressing the question of whether a transaction should be a CAA if the seller recognizes gain that is subject to U.S. tax.

3. We recommend that no transaction involving an actual transfer of legal ownership of assets from one party to another be identified in administrative guidance as a CAA. In the event this suggestion is rejected, we recommend that guidance be issued that carefully and clearly identifies limited categories of asset transfers as CAAs, while leaving most asset transfers outside the scope of Section 901(m).

4. We recommend that administrative guidance provide a useful de minimis exception to the definition of a CAA. We suggest that, among other rules, such guidance provide that if assets have been acquired shortly before a transaction that is being tested for CAA status, and the acquirer has taken a stepped-up foreign tax basis in the acquired assets, then the transaction would not be a CAA.

5. We recommend that administrative guidance be provided addressing when a transaction is divided into multiple CAAs, rather than being treated as a single CAA. In general, we believe it would be appropriate to provide that, when a taxpayer acquires an entity with branches in multiple countries, there is a separate CAA for each one of those branches. In addition, if multiple entities are acquired in a single transaction, we believe it would normally be appropriate to treat the transaction as a separate CAA with respect to each acquired entity, subject to limited exceptions. This is true regardless of whether the acquired entities are regarded or disregarded entities for U.S. tax purposes.

6. We recommend that administrative guidance be provided regarding how to determine the income or gain "attributable" to the relevant foreign assets that have been acquired in a CAA, for purposes of Section 901(m)(1). We suggest that such guidance provide for a practical approach in a case where an entity acquired in a CAA later acquires additional assets in transactions unrelated to the CAA.

7. We recommend that administrative guidance provide that taxpayers can elect to compute "basis differences" under Section 901(m) by reference to the difference between the acquired assets' basis for U.S. tax purposes immediately after a CAA, and the assets' tax basis for foreign tax purposes at the time of the CAA.

8. We recommend that administrative guidance provide that when a taxpayer has a net negative basis difference under Section 901(m) in a particular year, that basis difference will be applied to reduce positive basis differences in other years.

9. We recommend that administrative guidance be provided to clarify the meaning of a "disposition" of an asset acquired in a CAA, for purposes of Section 901(m)(3)(B)(ii). We recommend that a taxpayer be treated as having a disposition of that asset when the taxpayer transfers the asset and recognizes gain for foreign tax purposes on the transfer. We also recommend that the taxpayer be treated as having a disposition if the taxpayer transfers the asset and recognizes a loss for U.S. tax purposes on the transfer.

10. We recommend that administrative guidance be provided explaining how Section 901(m) applies when a series of different taxpayers acquire the same assets over time. In particular, we recommend that such guidance provide that, if a taxpayer acquires assets that were the subject of a previous CAA in a transaction that does not qualify as a CAA, then the taxpayer would "step into the shoes" of the previous owner for purposes of the Section 901(m) limitation. If a taxpayer acquires assets that were the subject of a previous CAA in a transaction that qualifies as a CAA, then we believe rules are needed to coordinate the Section 901(m) limitations from the previous CAA and the current CAA.

11. We recommend that administrative guidance be provided clarifying the interaction between Section 901(m) and Section 909, when the same transaction is both a CAA and a "foreign tax credit splitting event" under the latter provision.

We would be pleased to discuss with appropriate personnel the issues addressed in this report if that would be helpful.

Respectfully submitted,

Peter H. Blessing
Chair

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