



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. Levinschn
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 Pisem

Reorganizations

Andrew R. Walker
Diana L. Wollman

Securitized and Structured

Finance

David S. Miller
Paul R. Wysocki

Tax Accounting

David W. Mayo
Marc L. Siberberg

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

January 13, 2004

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

The Honorable Mark W. Everson
Commissioner
Internal Revenue Service
Room 3000 IR
1111 Constitution Avenue, N.W.
Washington, D.C. 20224

Dear Secretary Olson and Commissioner Everson:

I am pleased to submit the New York State Bar Association Tax Section's Report No. 1046, identifying issues that should be addressed by regulations under Section 355(e) of the Internal Revenue Code. This report focuses on "non-plan" issues and recommends ways to resolve those issues to provide greater clarity as to the scope and application of Section 355(e).

Section 355(e) and the regulations promulgated thereunder do not clearly describe what kinds of transactions, other than actual acquisitions of stock, may constitute an acquisition of stock for purposes of Section 355(e). The report suggests when ownership for purposes of Section 355(e) should be retested in the absence of a direct acquisition of stock. In general, the report recommends that ownership should be retested only where a shift in vote or value occurs pursuant to a plan or where a subsequent event occurs pursuant to a plan and that event has the effect of increasing the percentage interest, by

FORMER CHAIRS OF SECTION:

Samuel Brodsky

Edwin M. Jones

Peter Miller

John E. Morrissey, Jr.

Charles E. Heming

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

vote or value, represented by shares previously acquired pursuant to a plan. In particular, we provide specific recommendations for dealing with redemptions, recapitalizations and other shifts in vote or value that occur pursuant to a plan.

There is also some confusion as to how percentage ownership calculations should be made. We recommend that “counting” rules be adopted which permit calculations at the ultimate shareholder level based on actually outstanding shares. We do not believe, however, that the purposes of Section 355(e) would be served by adopted a complicated set of rules modeled on Section 382. These recommendations also address problems that arise as a result of overlapping shareholders.

We also recommend that certain aspects of Section 355(e) be clarified so that literal or technical readings of the statute do not result in unintended application of the provisions, in particular, with respect to asset acquisitions, partnership transactions, and other predecessor and successor situations.

Please feel free to contact the undersigned if you wish to discuss any of our suggestions or any other issues relating to the Report.

Respectfully submitted,

A handwritten signature in black ink that reads "Andrew N. Berg". The signature is written in a cursive, slightly slanted style.

Andrew N. Berg
Chair

cc: Eric Solomon, Deputy Assistant Secretary, Regulatory Affairs,
Department of Treasury

Helen M. Hubbard, Tax Legislative Counsel, Department of Treasury

William F. Sweetnam, Jr., Benefits Tax Counsel, Department of
Treasury

Emily A. Parker, Acting Chief Counsel, Internal Revenue Service

Gary Wilcox, Deputy Chief Counsel (Technical), Internal Revenue
Service

William D. Alexander, Associate Chief Counsel (Corporate), Internal
Revenue Service