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September 30, 2004

Mr. Gregory F. Jenner
Acting Assistant Secretary (Tax Policy)
Department of the Treasury
Room 3120 MT
1500 Pennsylvania Avenue, N.W.
Washington, DC 20220

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

Dear Acting Assistant Secretary Jenner and Commissioner Everson:

I am pleased to submit the New York State Bar Association Tax Section's Report No. 1069.

This report comments on the Temporary and Proposed Regulations addressing the allocation of creditable foreign tax expenditures. These Regulations reflect the Government's concern with respect to transactions that may result in the separation of foreign taxes from the underlying income in order to enhance a taxpayer's use of credits for such taxes. We believe the Regulations provide an effective framework to address these concerns and commend the Government for issuing them.

Our principal recommendations in respect of the Regulations are as follows:

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1. We believe that the Regulations should expressly state that the general (safe harbor) formulary approach provided therein is presumed to represent the partners' interests in the partnership, but that other allocations may be valid in unusual (but not necessarily extraordinary) cases and in cases in which, at the time the allocation is included in the partnership agreement, no significant federal income tax reduction is reasonably anticipated from the allocation. At the same time, we suggest that the preamble to the final Regulations describe the Regulations as having no impact on taxable periods prior to their effective date.

2. The final Regulations should permit the economic effect equivalence test to be used under the safe harbor as an alternative to the section 704(b) three-factor capital account economic effect test/qualified income offset alternative.

3. Further guidance regarding the functioning of the safe harbor and its interaction with the rules under Treasury Regulation section 1.904-6(a) is needed. For example, the term "distributive shares of income" in the Regulations requires clarification, the reference to section 704(c) should be revised and clarified (as part of a more general clarification of timing and base differences), and examples involving cases in which income as measured for U.S. tax purposes does correspond to a single foreign tax base, as well as cases of differences between U.S. and foreign gross income, should be added.

4. The transition relief from the Regulations' effective date should be liberalized in several respects.

5. We believe that there are policy reasons that guaranteed payments for the use of capital should be treated in the same manner as allocations of gross income for purposes of the Regulations. In order to effectuate that treatment, guidance treating a guaranteed payment as a distributive share for source and section 904(d) purposes to the same extent as would be the case for a gross income allocation by the partnership would be required.

We appreciate your consideration of our recommendations. If you have any questions or comments regarding this report, please feel free to contact us and we will be glad to discuss or assist in any way.

Respectfully submitted,



Lewis R. Steinberg
Chair

cc: Eric Solomon, Deputy Assistant Secretary, Regulatory Affairs,
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