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New York State Bar Association

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March 2, 2006

Hon. Andrew Eristoff
Commissioner
NYS Department of Taxation and Finance
State Campus, Building 9
Albany, NY 12227

Hon. Martha Stark
Commissioner
NYC Department of Finance
One Centre Street, Room 500
New York, NY 10007

Re: Proposed Amendments to Article 9-A Regulations
Relating to the Taxation of Corporate Partners

Dear Commissioners Eristoff and Stark:

I am pleased to submit the New York State Bar Association Tax Section's Report No. 1105 (the "Report") on the proposed amendments to the Article 9-A regulations relating to the taxation of corporate partners.

The Tax Section commends the Department for undertaking this important project, and for doing so in a collaborative effort with others outside the Department. As you know, several members of the Tax Section participated in the working group that the Department assembled to consult about these proposed amendments.

We generally support the proposed amendments, in particular the preference they accord to the use of the aggregate approach in taxing corporate partners. Under the amendments, the aggregate method would be required unless the partner is unable to gain access to the partnership information necessary to report under that method. We understand that, although not reflected in the current draft amendments, the Department proposes to require partnerships that file New York partnership returns to furnish the necessary information to their partners using a prescribed form. Because we believe that the aggregate method is the best method and will generally produce results that are fair to taxpayers and fair to the State, we endorse this plan.

We also understand that one other aspect of the draft proposals will be changed. The draft amendments contain six presumptions of access to information, e.g., a general partner is presumed to have access to the requisite information. As currently drafted, the amendments would require a partner to establish to the satisfaction of the Commissioner that it is unable to obtain the required information from the partnership, even if none of those six presumptions was met. Moreover, exactly the same rebuttal standard is applied where one or more of the presumptions is met, effectively rendering the presumptions a nullity. We understand that this aspect of the draft amendments will be changed so that if none of the presumptions is met, a partner need not establish that it lacks access to the requisite information.

The Report contains several recommendations for further revisions of the regulations. In particular, we believe that the presumption of access to information that applies to any one percent or greater partner is too low especially as applied to a limited partner. We recommend that a 10 percent threshold be adopted instead.

We also believe that the Department should consider establishing higher levels of proof for demonstrating lack of access to information in some cases and lower levels in others. For example, we believe that the burden of proof should be higher on a general partner, a partner with a very significant stake in a partnership or a partner engaged in a unitary business with the partnership, than the burden would be on a limited partner with a less significant interest in the partnership.

Another issue addressed by the Report is the rule in the draft amendments that imposes a blanket prohibition on a corporate partner treating its proportionate share of a partnership's stock investments as an item of subsidiary capital. We believe that the failure to look through a partnership in order to determine whether a corporate partner owns, beneficially, at least 50% of the voting stock of a partnership's corporate subsidiary is inconsistent with the aggregate method and leads to results unsupported by any policy rationale. We also believe that there is nothing in the Tax Law that requires such a result. Thus, for example, if a corporation owns more than 50% of a partnership and that partnership holds 100% of the voting stock of a lower-tier corporation, we see no reason in law or policy to prevent the corporate partner from treating that underlying investment as an investment in subsidiary capital.

We have several other recommendations, all of which, as well as the recommendations above, are described more fully in the Report. We appreciate your consideration of our comments and would be pleased to discuss them with you further. We would be happy to provide any other assistance that you would find helpful.

Respectfully submitted,

Kimberly S. Blanchard
Chair

Cc: Marilyn Kaltenborn,
Technical Services Division,
NYS Department of Taxation and Finance

John Bartlett,
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NYS Department of Taxation and Finance