



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. Slomka

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

Securitizations 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

September 25, 2009

Mr. Michael Mundaca
Acting Assistant Secretary for Tax Policy
Department of the Treasury
1500 Pennsylvania Avenue, N.W.
Washington, DC 20220

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

Re: Report on Temporary and Proposed Regulations Regarding All-Cash Acquisitive D Reorganizations

Dear Sirs:

We write to comment on temporary and proposed regulations issued on December 18, 2006 that address the qualification and treatment of certain acquisitive transactions as reorganizations under section 368(a)(1)(D) ("acquisitive D reorganizations") where there is no actual issuance of stock and/or securities of the acquiring corporation.

Subject to certain other requirements, section 368(a)(1)(D) governs the sale of all or a part of the assets of one corporation to another corporation if immediately after the transfer the transferor corporation, or one of its shareholders, or any combination thereof, is in control of the acquiring corporation; but only if, in pursuance of the plan, stock or securities of the acquiring

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

corporation are distributed in a transaction which qualifies under section 354 or 356. In general, Temporary Regulations Section 1.368-2T(l) and Proposed Regulations Section 1.368-2(l) (together, the "Regulations") provide that a transaction otherwise described in section 368(a)(1)(D) but for the lack of any stock consideration may qualify as an acquisitive D reorganization, provided the same persons own, directly or indirectly, all of the stock of both the transferor and acquiring corporations in identical proportions. In such cases, the acquiring corporation is deemed to issue a nominal share of stock to the transferor corporation. Notably, the examples in the Regulations all involve cases where the acquiring corporation pays the transferor corporation the full fair market value for its assets in cash, so that the nominal share has a value of zero.

In light of the fact that the Temporary Regulations are scheduled to sunset on December 18, 2009, the scope of the report is deliberately narrow and does not address broader issues that arise with respect to D reorganizations and on which the Treasury Department has requested comments. Our principal recommendations with respect to the Regulations are as follows:

1. We agree with the Regulations that all-cash transactions meeting the requirements of the Regulations are properly categorized as acquisitive D reorganizations, notwithstanding that there is no actual issuance of stock and/or securities of the acquiring corporation. Moreover, the Regulations appropriately mandate reorganization treatment even where the cash consideration received by the transferor corporation equals the full fair market value of the property transferred, such that any shares deemed issued as consideration would have zero or nominal value.
2. The deemed issued share construct as implemented by the Regulations may eliminate any concerns about possible basis shifting. However, the deemed issued share approach of the Regulations could subject taxpayers to adverse and unintended consequences. We believe that the merits of preventing basis shifting in acquisitive D reorganizations should be considered and determined as part of Treasury's continuing and evolving efforts in the proposed basis allocation regulations and that the Regulations should be finalized in the interim in revised form in order to address the problems discussed in the report. Once the more general rules have been issued, the Regulations can be revised to conform to them.

We have identified two ways in which Treasury could address the problems with the deemed issued share approach. First, the deemed issuance construct set forth in the Regulations could be discarded in favor of an approach whereby the statutory requirements of a D reorganization are simply deemed satisfied without the fiction of a nominal share. Alternatively, the deemed issued share approach could be retained and any unintended problems created by such construct could be mitigated through targeted rules.

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

Enclosure

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

Lawrence M. Axelrod
Special Counsel to the Associate Chief
Counsel (Corporate)
Internal Revenue Service

Donald Bakke
Office of Tax Legislative Counsel
Department of the Treasury

Bruce A. Decker
Office of Associate Chief Counsel
(Corporate)
Internal Revenue Service

Lisa A. Fuller
Office of Associate Chief Counsel
(Corporate)
Internal Revenue Service

Lee A. Kelley
Deputy Associate Chief Counsel
(Corporate)
Internal Revenue Service

Emily S. McMahon
Deputy Assistant Secretary for
Tax Policy
Department of the Treasury

Joshua Odintz
Tax Legislative Counsel
Department of the Treasury

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

William J. Wilkins
Chief Counsel
Internal Revenue Service