



# 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. Wamke

November 16, 2009

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

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

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

Re: Report on IRS Announcement 2008-115 On FIRPTA Treatment of Rights Granted by a Governmental Unit

Dear Sirs:

We are enclosing a report providing comments on IRS Announcement 2008-115, issued on December 1, 2008 (the "Announcement"). The Announcement requested comments in advance of the issuance of proposed rulemaking on whether certain governmentally granted rights to operate infrastructure assets are related to real property.

The Announcement describes as an example of the type of infrastructure at issue a toll road or toll bridge. In the case of a toll road, the right to operate (the "toll right") is often granted together with a lease or sale of the land on which the road and various improvements are located. The land, improvements, and the right to toll the road, may be owned, directly or indirectly, by a U.S. corporation that has non-U.S.

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

#### FORMER CHAIRS OF SECTION:

Arthur A. Feder  
James M. Peaslee  
John A. Corry  
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

investors. Since the land and improvements constitute United States real property interests (“USRPIs”), a U.S. corporation whose sole asset is a toll road may be treated as a U.S. real property holding corporation (“USRPHC”) unless (a) the toll right is an asset that is separate from the lease or fee interest in the underlying property, (b) the toll right, as a separate asset, is not itself a USRPI, and (c) the value of the toll right is more than the value of the land and improvements.

The Announcement states that the IRS and Treasury Department believe investors are taking the position that the governmentally granted right to toll is an asset separate from the land and improvements, is not a USRPI, and a significant portion of the value of the assets held by the corporation inheres in the toll right and not the land and improvements. Therefore, such a corporation would not be a USRPHC and a non-U.S. investor would not generally be subject to U.S. federal income tax on a sale of its stock.

The report has four principal recommendations:

1. Consistency. The treatment of a toll right under FIRPTA should be consistent with its treatment throughout the Code (e.g., Sections 197, 1031, the REIT provisions of the Code, etc.) to the extent feasible unless there is a clear policy rationale for inconsistent treatment. The report provides examples of how inconsistent treatment could lead to results unlikely to be consistent with Congressional intent. For example, if it were concluded that toll rights are not USRPIs but are treated as real estate assets for REIT purposes, it may be possible to create a structure in which little or no corporate-level tax is paid on the operations of the toll road and either (x) no tax is paid by foreign REIT shareholders on disposition (if stock is sold) even if the REIT is not domestically controlled or (y) most gain allocable to foreign REIT shareholders is exempt from tax even though the buyer gets a stepped-up basis (if assets are sold).

2. Inseparability from Real Property. A toll right, particularly of the type described in the Announcement, should be treated as part of a single asset, inseparable from the underlying real property to which it relates. This conclusion is founded in part on the belief that, unlike other cases where similar technical issues arise in connection with government grants of rights to use property, in the case of toll roads the real property (the road) cannot realistically be used for any purpose other than as a road. In fact, the lease of such a road may well be a liability if accompanied with obligations to maintain and improve it without any grant of authority to use the road in a profit making business. As a result, we do not believe that it is meaningful to treat the road as separate from the tolling right.

3. USRPI. If, contrary to our recommendation, the Service finds a toll right to be an asset severable from underlying real property, a toll right of the type described in the Announcement should be treated as a USRPI.

4. Valuation. If the Service concludes further that as a separate asset, a toll right is not a USRPI, we recommend the Service provide taxpayers with a clear valuation policy. We recommend the Service consider adopting a rebuttable presumption, described in more detail in the attached report.

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: Manal Corwin  
International Tax Counsel  
Department of the Treasury

Jeffrey P. Cowan  
Attorney-Advisor  
Associate Chief Counsel (International)  
Internal Revenue Service

Steven A. Musher  
Associate Chief Counsel (International)  
Internal Revenue Service

Michael Plowgian  
Attorney-Advisor  
Office of International Tax Counsel  
Department of the Treasury

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

Stephen E. Shay  
Deputy Assistant Secretary for  
International Tax Affairs  
Department of the Treasury

Lon B. Smith  
National Counsel to the Chief  
Counsel for Special Projects  
Internal Revenue Service