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November 8, 2010

The Honorable Michael Mundaca
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111 Constitution Avenue, NW
Washington, DC 20224

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Re: Report on Issues under Section 909

Dear Sirs,

I am pleased to submit the New York State Bar Association Tax Section's Report No. 1223, offering recommendations for future administrative guidance under Section 909 of the Internal Revenue Code of 1986, as amended. Section 909 was enacted as part of P.L. 111-226, which was signed into law on August 10, 2010. Under Section 909, a taxpayer may not credit or deduct otherwise creditable foreign taxes subject to a foreign tax credit "splitting event" before the taxable year in which the related income, as determined for U.S. tax purposes, is taken into account by the taxpayer. Such a splitting event occurs when the income related to the foreign income tax is taken into account by another, "covered," person. Section 909 also provides a similar limitation with respect to the indirect foreign tax credit under Sections 902 and 960.

The attached report offers recommendations for administrative guidance relating to the class of transactions that should be treated as splitting events

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and the timing when the related income should be treated as taken into account in certain complex situations. In addition to these interpretive issues, the report offers recommendations relating to the integration of future administrative guidance under Section 909 with the changes to the legal liability regulations under Section 901 that were proposed in 2006 (REG-124152-06) and the application of Section 909 to indirect foreign tax credits in respect of taxes paid in pre-2011 taxable years.

The report's main recommendations and requests for administrative guidance are as follows:

1. We recommend that splitting events be limited to situations in which the payor of the foreign tax (as determined under the technical taxpayer rule under Section 901) is different from the person that recognizes the related foreign income (as determined for U.S. tax purposes) and that timing or base differences between U.S. and foreign tax law or the use of partnerships or disregarded entities not be treated by themselves as giving rise to splitting events.
2. We recommend that administrative guidance address in detail how Section 909 applies to the use of hybrid instruments and repurchase transactions, but that typical repurchase agreements with an unrelated person not be treated as splitting events.
3. We recommend that administrative guidance address the circumstances in which group relief regimes give rise to splitting events, suggesting some relevant considerations, in particular the degree of likelihood that a loss surrendered under a group relief regime could result in the creation of low and high taxed income.
4. We recommend that transfer pricing adjustments not be treated as giving rise to splitting events.
5. We recommend that administrative guidance expanding the definition of splitting events beyond situations involving combined returns, reverse hybrid entities or hybrid instruments similar to that described in the legislative history of Section 909 generally be prospective only in application, except in abusive situations.
6. We recommend appropriate determinations of the amount of related income deemed taken into account and the timing of allowance of credits (1) in situations where a section 902 corporation pays a foreign tax that is subject to Section 909, but the related income is taken into account by a related U.S. taxpayer without being taken into account by the section 902 corporation that paid the tax; (2) in the case of distributions by a covered person that has losses from other activities; (3) in the case of distributions by a covered person that has earnings and profits in addition to that from the related income; and (4) if the payor of the foreign income tax or the covered person is liquidated or otherwise ceases to exist or the payor and the covered person otherwise cease to be affiliated prior to the related income being taken into account.
7. We recommend finalization of the proposed amendments to the legal liability regulations, subject to appropriate modifications, because they achieve objectives similar to those of Section 909 and are easier to apply.

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8. We recommend simplified rules for identifying splitting events with respect to post-effective date distributions of pre-effective date earnings.

We would be pleased to discuss with appropriate personnel the issues addressed in this report if that would be helpful.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Peter H. Blessing", with a long, sweeping flourish extending to the right.

Peter H. Blessing
Chair

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