



NEW YORK STATE BAR ASSOCIATION

One Elk Street, Albany, New York 12207 • 518.463.3200 • www.nysba.org

TAX SECTION

2010-2011 Executive Committee

PETER H. BLESSING

Chair
Shearman & Sterling LLP
599 Lexington Avenue
11th Floor
New York, NY 10022
212/848-4106

JODI J. SCHWARTZ

First Vice-Chair
212/403-1212

ANDREW W. NEEDHAM

Second Vice-Chair
212/474-1440

DIANA L. WOLLMAN

Secretary
212/558-4055

COMMITTEE CHAIRS:

Bankruptcy and Operating Losses

Stuart J. Goldring
Russell J. Kestenbaum

Compliance, Practice & Procedure

Elliot Pisem
Bryan C. Skarlatos

Consolidated Returns

Lawrence M. Garrett
Edward E. Gonzalez

Corporations

David R. Sicular
Karen Gilbreath Sowell

Cross-Border Capital Markets

Andrew Walker
Gordon Warnke

Employee Benefits

Régina Olshan
Andrew L. Oringer

Estates and Trusts

Amy Heller
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
John Lutz

Real Property

Robert Cassanos
Jeffrey Hochberg

Reorganizations

Deborah L. Paul
Linda Z. Swartz

Securitized and Structured

Finance

Jiyeon Lee-Lim
W. Kirk Wallace

Tax Exempt Entities

Elizabeth T. Kessenides
Richard R. Upton

S. Douglas Borisky
Kathleen L. Ferrell
Marcy G. Geller
Charles I. Kingson
Stephen Land

MEMBERS-AT-LARGE OF EXECUTIVE COMMITTEE

Robert J. Levinsohn
Lisa A. Levy
Vadim Mahmudov
Gary B. Mandel
Douglas McFadyen

Charles M. Morgan
David M. Schizer
Peter F. G. Schuur
Ansgar Simon
Eric Sloan

Andrew P. Solomon
Eric Solomon

November 16, 2010

The Honorable Michael Mundaca
Assistant Secretary (Tax Policy)
Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

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

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

Re: Report on Notice 2010-60

Dear Sirs,

I am pleased to submit the New York State Bar Association Tax Section's Report No. 1224, offering comments in response to Notice 2010-60 (IRB 2010-37, September 13, 2010) (the "Notice"). Notice 2010-60 provides preliminary guidance from the Internal Revenue Service and the Treasury Department regarding certain priority issues that are raised by Chapter 4 of the Internal Revenue Code, and solicits public comments on certain other identified aspects of Chapter 4.

The attached report offers recommendations and comments on the topics addressed in the Notice, along with certain observations on subjects that we believe may assist you in developing final guidance.

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. 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
Erika W. Nijenhuis

The report's principal comments and recommendations are as follows:

1. We recommend that the Internal Revenue Service and Treasury Department issue further administrative guidance to clarify which obligations should be treated as "grandfathered obligations."
2. We recommend that the Internal Revenue Service and the Treasury Department provide a mechanism for financial institutions to identify entities that are exempted from Chapter 4 withholding and information reporting, but in the absence of such an exemption would be treated as foreign financial institutions ("FFIs") (such as holding companies and hedging centers).
3. We recommend that the Internal Revenue Service and the Treasury Department make clear that a non-financial foreign entity ("NFFE") that qualifies for "excepted NFFE" status is excepted for all Chapter 4 purposes, and issue further guidance regarding the treatment of NFFEs that are not "excepted."
4. We recommend that the Treasury Department and the Internal Revenue Service permit NFFEs to self-certify their eligibility for the active trade or business exception proposed in the Notice, potentially subject to providing documentary evidence of business activity.
5. We recommend that the Internal Revenue Service and the Treasury Department consider modifying the rule that generally excepts an NFFE with an active trade or business from Chapter 4 by permitting an NFFE to qualify for excepted NFFE status only if its active trade or business is substantial (either absolutely or in relation to its other activities), and consider whether entities that issue certain types of "tracking stock" should be treated as excepted NFFE.
6. With respect to the application of the Chapter 4 rules to insurance companies we recommend that the Internal Revenue Service and the Treasury Department issue rules that focus on insurance products rather than insurance companies and, in particular, rules that focus on offshore insurance products that do not cover home country risk rather than other insurance products.
7. We recommend that the Internal Revenue Service and the Treasury Department broaden the scope of the rules in the Notice that would, under the Notice, permit certain entities with certain "identified owners" to be treated as deemed-compliant FFIs.
8. We recommend that the Internal Revenue Service and the Treasury Department provide reasonable rules to determine who holds an interest in a foreign trust in which beneficiaries do not have fixed interests;
9. We recommend that the scope of retirement plans that are exempted from Chapter 4 information reporting and withholding be expanded, and that payments made to retirement plans that qualify under Code Section 892 be exempted from Chapter 4.

10. We recommend that properly documented charitable organizations be excused from Chapter 4 information reporting and withholding, and that certain securitization vehicles be treated as “deemed compliant” FFIs.
11. We recommend that guidance be issued to clarify whose treaty rights are waived if a Participating FFI elects out of withholding responsibility.
12. We recommend that the Treasury Department and the Internal Revenue Service limit the scope of the “passthru payment” rule to payments that are directly related to payments of U.S.-source income and address the treatment of U.S. financial institutions that receives pass thru payments on behalf of non-U.S. accounts.
13. We recommend that the Treasury Department and Internal Revenue Service issue guidance providing that partnerships and other pass-through entities are not barred from receiving a refund of Chapter 4 withholding if such a prohibition would be inconsistent with a treaty obligation of the United States, and in other cases where such a denial is excessively harsh.
14. We recommend that exemptions be provided to the “account closure” rules of Chapter 4 for cases where legal restrictions prevent a Participating FFI from closing an account.
15. We recommend that the Treasury Department and Internal Revenue Service reflect upon the potential for international automatic information exchange programs to supersede the need for, and value of, Chapter 4 reporting, and build flexibility into any guidance issued to limit the amount of duplicative information that Participating FFIs must report.

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

Respectfully submitted,



Peter H. Blessing
Chair

Honorable Michael Mundaca, Honorable Douglas H. Shulman and Honorable William J. Wilkins
November 16, 2010
Page 4

cc: Michael Caballero
Deputy International Tax Counsel
Department of the Treasury

Manal Corwin
International Tax Counsel
Department of the Treasury

Michael Danilack
Deputy Commissioner (International)
Internal Revenue Service

Jesse F. Eggert
Attorney-Advisor
Office of International Tax Counsel
Department of Treasury

Itai Grinberg
Attorney-Advisor
Office of International Tax Counsel
Department of Treasury

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

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

Michael Plowgian
Attorney-Advisor
Office of International Tax Counsel

Clarissa C. Potter
Deputy Chief Counsel (Technical)
Internal Revenue Service

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

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

John Sweeney
Attorney-Advisor
Office of Associate Chief Counsel (International)
Internal Revenue Service

Jeffrey Van Hove
Acting Tax Legislative Counsel
Department of the Treasury