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August 29, 2012

The Honorable Mark Mazur
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1500 Pennsylvania Avenue, NW
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The Honorable Douglas H. Shulman
Commissioner
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1111 Constitution Avenue, NW
Washington, DC 20224

The Honorable William J. Wilkins
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Re: Report on the Application of Treas. Reg. § 1.267(b)-1(b) to Related Party Loss Transactions

Dear Messrs. Mazur, Shulman and Wilkins:

I am pleased to submit the attached report of the Tax Section of the New York State Bar Association on Treas. Reg. § 1.267(b)-1(b) (the "267(b) Regulations"). The report addresses whether the 267(b) Regulations, which were issued in 1958, should be withdrawn in light of subsequent amendments to Sections 267(b) and 707(b) of the Code.

By way of background, the 267(b) Regulations treat a partnership as an "aggregate" of its partners for purposes of Section 267(a). Any sale or exchange of property between a partnership and a person other than a partner is therefore treated as if the sale or exchange had occurred directly between the non-partner and each of the partners of the partnership. To the extent that the non-partner and any partner of the partnership are described in any of the

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categories of related parties under Section 267(b), Section 267 disallows or defers an allocable portion of any loss. For decades following the original promulgation of the 267(b) Regulations in 1958, Section 267 did not apply to loss transactions between partners and partnerships. These transactions were subject to Section 707(b)(1), which disallowed any loss on a sale or exchange between (i) a partnership and a partner who owned more than 50% of the partnership; or (ii) two partnerships in which the same persons owned more than 50% of each partnership.

Between 1982 and 1986, however, Congress amended the related party loss disallowance rules of Sections 707(b) and 267(b) to apply to loss transactions between partnerships and related non-partners. Before these amendments, only the 267 Regulations governed these transactions. As described more fully in the report, these amendments treat a partnership as an entity and not an aggregate. As a result, two conflicting sets of rules now govern many of the same loss transactions. In addition, by excluding loss transactions between partners and partnerships, the 267(b) Regulations result in loss disallowance when the seller or buyer is related to a partner who owns 50% or less of the partnership even though the same loss would be allowed in a transaction directly between the partnership and the actual partner.

We are not aware of any policy rationale for allowing a loss when a party to the sale or exchange is a partner of the partnership but not when the party is merely related to the partner. Although an aggregate approach would disallow a portion of the loss in both cases, the statutory amendments to Sections 267 and 707(b) codified the treatment of a partnership as an entity for this purpose. We therefore recommend that Treasury withdraw the 267(b) Regulations.

We appreciate your consideration of our comments.

Respectfully submitted,

Andrew W. Needham
Chair

Enclosures

cc: Jennifer Alexander
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Messrs. Mazur, Shulman and Wilkins

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