



**NEW YORK STATE BAR ASSOCIATION**

**TAX SECTION**

**ANNUAL REPORT**

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***January 16, 1986***

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# NEW YORK STATE BAR ASSOCIATION

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# **NEW YORK STATE BAR ASSOCIATION**

## **TAX SECTION**

### **ANNUAL REPORT**

**For the Eleven Months Ended January 16, 1986**

It is my privilege to deliver the Annual Report of the Tax Section of the New York State Bar Association.

#### **INTRODUCTION**

Before proceeding to a summary of the Tax Section's activities this past year, I would like to reflect on certain institutional issues that seem to recur in varying degrees every year. In my experience, the strength of the Tax Section rests on its ability to maintain a certain balance in dealing with these issues, as well as on the abilities and prodigious efforts of its members. Indeed, one may say that the Tax Section as an institution commands the devotion and efforts of its members largely because of its success over the years in dealing with these issues.

The first set of issues—for which the code words are “participation”, “representation”, “leadership”, and “centralization”—spring from the relationship between a 3,000 plus member Tax Section and a 60-70 member Executive Committee. The Tax Section is organized so that its reports are prepared by committees in which every member may participate, but all reports are reviewed by an Executive Committee that can take a position different from or even opposite to the position of the originating committee. This structure attempts a balance among the competing, but not necessarily inconsistent goals, of participation, representation, leadership, and centralization of decision making. The degree of centralization enables the Tax Section to respond promptly to developments in Washington and Albany, and this is a major advantage of the Tax Section over many other professional associations; but this structure creates the risk that the views espoused on behalf of the Tax Section will not be sufficiently representative of the views of the Section's members. To make the system work, a constant effort is

required by the committee chairs to encourage participation in the preparation of reports and by the Executive Committee to ensure that adequate weight is given to the efforts and opinions of the committee members.

A second set of issues is presented by the relationship between our professional activities on behalf of clients and our involvement in the development of Tax Section positions, which may support or conflict with client interests. In general, we do not believe that experience with substantive tax issues as a result of client representation disqualifies tax practitioners from active work on related Tax Section reports. Indeed, our ability to draw the connection between technical tax questions and practical experience constitutes one of our most potent contributions. But we must be continually vigilant to assure that our reports reflect, to the greatest extent possible, a broad view of sound tax policy—in contrast to a narrow industry position. As the tax law becomes ever more complex, and each individual's tax practice becomes increasingly specialized, we have found that it sometimes is difficult for the Executive Committee as a whole to review certain particularly specialized reports. To maintain the independence and impartiality of our reports, it is important that the members of the Executive Committee represent a wide diversity of substantive tax specializations and practice backgrounds (law firm and corporate tax departments, law faculties, and government officials) and that the committees similarly seek diversity as well as specialized expertise.

A third set of issues arises from our personal interests as taxpayers and from our relationship to the New York State Bar Association. Here we have followed, I believe, three basic precepts. First, we have not considered the Tax Section to be disqualified from taking a position merely because it affects the personal interests of the Section's members as taxpayers. Second, we have felt an obligation to alert the Association of tax issues particularly affecting lawyers, such as the Administration's proposal to require most cash basis businesses to switch to the accrual method. Third, we have

attempted to the best of our ability to base our positions on sound tax policy principles.

In dealing with specific institutional questions, we are not always in complete agreement. But we are always striving to reach a proper balance, and so long as that effort is maintained, the Tax Section will be vigorous and true to its traditions.

### **Tax Reform Legislation**

During the past eleven months, we have witnessed the publication of the President's tax reform proposals and the Ways and Means staff options, as well as the passage of H.R. 3838 by the House of Representatives. At the outset of this process the Tax Section made a conscious decision not to prepare reports on all aspects of the pending tax reform proposals. Given the lack of technical details for most of the proposals and their uncertain political future, such a massive effort seemed to us to be premature.

The Section did, however, express its views on two proposals that particularly affected the interests of its members as taxpayers. In letters to Administration officials and members of Congress, we opposed the Administration's proposal to put large service businesses, such as law partnerships, on the accrual method of tax accounting. We pointed out that, contrary to Administration arguments, the cash method was strongly based on the ability to pay principle, which has continuing validity. We also noted the peculiar billing problems of service businesses, which bill on the basis of time, effort and result rather than catalogue prices and, as a consequence, frequently adjust bills through negotiation. Thus, accrual of income on a billing basis would result in overstatement of income, particularly if a companion proposal to eliminate bad debt reserve deductions was also adopted. Finally, we noted that most law partnerships determine distributions and other economic relationships among partners on the cash basis and that compelling use of the accrual method could be disruptive of those economic relationships. Because the accrual method proposal had

implications for the legal profession as a whole, the Tax Section brought this issue to the attention of the Association; and the position of the Tax Section was approved by the Executive Committee of the Association as representing Association policy. We are, of course, pleased that H.R. 3838 exempts law firms and most other service businesses from the accrual method proposals and that H.R. 3838 adopts the time of billing as the time of accrual for accrual method service businesses (the use of the billing basis for accrual having expressly been left open by the President's proposals).

The Tax Section also opposed the Administration's proposal to eliminate the deduction for State and local income taxes. We pointed out that the deduction represented a sound allocation of taxing jurisdiction between the federal government and State and local governments and, as such, had been allowed since the origins of the federal income tax system. Predicting that in the long run disallowing the deduction would simply cause State and localities to shift to deductible payroll-based business taxes, we questioned the claimed revenue potential of the proposal. We also noted the incongruity between the Administration's position favoring continued deductibility of charitable contributions while opposing the deductibility of State and local income taxes. Finally, we suggested that to the extent that taxpayers were not required to include the value of municipal services in income, a valid argument could be made for nondeductibility of a portion of State and local taxes and that, as a matter of administrative convenience, the nondeductible amount could be determined as a percentage of income. We are gratified that H.R. 3838 retains the deduction for State and local taxes.

With the passage of H.R. 3838, the Tax Section will be intensifying its work on tax reform. We have already prepared reports on the income shifting and foreign tax credit proposals. At the Executive Committee's December and January meetings we addressed the difficult question of postponing effective dates. In the forthcoming months, the

Section's committees will be identifying technical errors in H.R. 3838 and will be preparing more detailed comments on selected aspects of the tax reform legislation.

### **New York State and New York City Tax Matters**

During the past eleven months, we have made a major effort to focus increased attention on New York State and New York City tax matters. A number of important State tax laws were enacted in 1985 and others, including franchise tax legislation and legislation restructuring the system for adjudicating tax disputes, appear ripe for enactment in 1986. This legislation was the subject of panel discussions at both the summer and annual meetings of the Section; and we were fortunate to have as guest speakers on these occasions John P. Duggan, Deputy Commissioner and Counsel of the State Department of Taxation and Finance, Frank J. Mauro, Secretary to the Assembly Ways and Means Committee, and Philip C. Pinsky, First Assistant Counsel to the Majority of the State Senate. We were particularly pleased to have as our luncheon speaker at the summer meeting, the Honorable Roderick G. W. Chu, Commissioner of Taxation and Finance for New York State.

While the Section's efforts with respect to State and City tax matters have not resulted in the publication of a large number of reports, they have nevertheless been extensive and important. In large part the Section's work on State and City tax matters during the past year has been carried out in direct meetings and communications with State and City officials.

Thus, Paul Comeau and Arthur Rosen, the co-chairs of the Section's Committee on New York State Tax Matters, have participated in numerous drafting and working sessions on the tax disputes legislation; and David Sachs, a former Chair of the Tax Section, and Dale Collinson, the current Chair, also met with officials in Albany to discuss that legislation. During the Section's summer meeting, the Committee on New York State Tax Matters and the Committee on Sales, Property and Miscellaneous, chaired by Edward

Hein and Robert Brown, held separate committee meetings attended by State tax officials. The Committee on Criminal and Civil Penalties, under the leadership of Sherry Krause, has provided technical assistance to the State and to New York City in the implementation of the tax amnesty program.

### Corporate Tax Revision

The Tax Section continued its participation, previously described by Willard Taylor and Richard Hiegel in their annual reports, in the development of legislative proposals for revision of the net operating loss and reorganization provisions of Subchapter C of the Internal Revenue Code. In March we called for publication of the draft legislation developed by the staff of the Senate Finance Committee, after extensive consultation with academic experts and tax practitioners including several members of the Tax Section. Richard O. Loengard, Jr. and Robert A. Jacobs, co-chairs of the Committee on Reorganizations, presented the Section's position on net operating loss proposals at a May hearing of the Subcommittee on Select Revenue Measures of the Committee on Ways and Means. And the Section's position on the Finance Committee staff's draft legislation was presented in September at a hearing before the Subcommittee on Taxation and Debt Management of the Senate Finance Committee.

As in prior years, the Tax Section supported the proposals to unify the definitional provisions governing corporate acquisitions and to provide elective recognition or carryover basis treatment at the corporate level and, with respect to qualifying consideration, at the shareholder level. We also supported repeal of the *General Utilities* doctrine as part of such a general revision of the corporate acquisition rules, with relief in the form of a shareholder basis step up for the corporate tax paid on long-held capital assets. However, we opposed limitation of such relief to "small businesses" and we also suggested that consideration be given to alternative relief for in-kind liquidations through an



expanded section 333 approach. Finally, we supported the staff's net operating loss recommendations, which adopted the ALI's neutrality approach but with a single rule for purchases and mergers under which post-acquisition use of tax losses and other attributes would be limited, in each year, to an assumed earn out rate times the acquisition purchase price. However, we suggested that the proposed rate based on the "applicable long-term federal rate" was too low. With the inclusion of the net operating loss proposals and *General Utilities* repeal in H.R. 3838, we can anticipate further activity on these subjects in the forthcoming year.

In December, we submitted the longest report of the year, the 138 page report of the Committee on Corporations, chaired by James Peaslee and Michael Schler, on temporary and proposed regulations under section 338. The issues discussed in the report would have continuing relevance under H.R. 3838, which retains the *General Utilities* doctrine, and section 338, for certain closely-held corporations.

#### **Other Federal Tax Matters**

In addition to stating its position on selected tax reform proposals and Subchapter C revision, the Tax Section commented or prepared reports on a wide variety of other topics, including the withholding tax consequences of interest rate swap agreements, the application of short sale and wash sale principles and rules dealing with mixed straddles under section 1092, and recommendations for paring the Tax Court's case backlog. Under the leadership of last year's chairs, Arthur Feder and Sherwin Kamin, the Committee on Partnerships prepared an extensive report on regulations under sections 704(c), 707(a) and 752; and the Committee on Bankruptcy, chaired by Kenneth Heitner and Morris Kramer, completed a similarly thorough report on "G" reorganizations. Lorraine Rothenberg led the Committee on Employee Benefits to a particularly active year, with the filing of reports on Technical Corrections to the Retirement Equity Act of 1984 ("REA") and the Tax Reform Act of 1984 and on regulations to implement REA.

We also urged the chairmen and ranking minority members of the tax, budget and appropriation committees to support an increase in the IRS budget. We noted that "the tax system is the main linkage between our government and our people, and expenditures to make collection of taxes less burdensome to taxpayers should be regarded not as 'costs' but as an improvement in the quality of life of our citizenry. Improved service, not cost cutting, should be the touchstone for IRS budget analysis."

### **Mid-Year and Annual Meetings**

Our mid-year meeting was held at The Gideon Putnam Hotel in Saratoga Springs Spa, New York, on July 19-21. Government panelists included David H. Brockway, Chief of Staff, Joint Committee on Taxation; J. Roger Mentz, Deputy Assistant Secretary for Tax Policy, United States Treasury; Howard Nester, Deputy Director of Tax Analysis, United States Treasury; John Mobyed, Regional Problem Resolution Officer, North American Region, Internal Revenue Service; Charles M. Morgan, III, Associate Chief Counsel (Technical), Internal Revenue Service; Jerome D. Sebastian, Deputy Associate Chief Counsel (Technical), Internal Revenue Service; John P. Dugan, Deputy Commissioner and Counsel, NYS Department of Taxation and Finance; Frank J. Mauro, Secretary to New York State Assembly Ways and Means Committee; Philip C. Pinsky, First Assistant Counsel to the Majority of the State Senate; David Blaustein, Principal Attorney, Legal Policy Analysis, New York Department of Taxation and Finance; Marilyn Kaltenborn, Chief of Tax Regulations, New York Department of Taxation and Finance; and Donald Boyd, New York Assembly Ways and Means Committee Staff. Roderick G.W. Chu, Commissioner of the New York Department of Taxation and Finance, was our luncheon speaker.

At the Annual Meeting, held on January 16 in New York City, guest speakers included Stephen E. Shay, Deputy International Tax Counsel, United States Treasury, Charles M. Morgan III, Associate Chief Counsel (Technical), Internal

Revenue Service; Mark A. Kuller, Special Assistant to the Chief Counsel, Internal Revenue Service; Donald E. Osteen, Chief, Reorganization Branch, Internal Revenue Service; Michael S. Novey, Principal Technical Advisor to the Associate Chief Counsel (Technical), Internal Revenue Service; John P. Dugan, Deputy Commissioner and Counsel, New York State Department of Taxation and Finance; Frank J. Mauro, Secretary of New York State Assembly Ways and Means Committee; Paul B. Coburn, Secretary to the New York State Tax Commission; H. Patrick Oglesby, Foreign Tax Counsel, Joint Committee on Taxation; LaBrenda G. Stodghill, Legislation Attorney, Joint Committee on Taxation; and Richard D'Avino, Attorney Advisor, United States Treasury. J. Roger Mentz, Acting Assistant Secretary of the Treasury for Tax Policy, was our luncheon speaker.

### Conclusion

As in past years, the achievements of the Tax Section have been obtained through the efforts of its members and their willingness to devote both time and energy to Tax Section activities. While the efforts of the officers and the members of the Executive Committee, many of whom are mentioned in this report, are most visible and are especially instrumental in the success of the Tax Section, the Section's strength ultimately rests on the breadth of participation of its members. That participation is illustrated by the report of the Committee on Corporation on Section 338 Regulations, which lists twenty-seven members who participated in the preparation of the report and an additional six members who made helpful comments. I sincerely thank them and all the members of the section who helped prepare our reports this year.

I am particularly indebted to Sydney Rubin, the chair of our Committee on Continuing Legal Education, for assistance in the organization of the summer meeting, to James Halpern, Mark McConaghy, Paul Comeau, and Arthur Rosen, who chaired the panel discussions at the summer

meeting, and to Herbert Camp, William Burke, Paul Comeau, Richard Cohen and James Halpern, who chaired the panel discussions at the annual meeting.

This year was again a short year for the Executive Committee because of the change in the Annual Meeting from April back to January in 1985. Even so, much has been accomplished although more remains to be done. I look forward to observing another extraordinary year of the Tax Section under the leadership of its new chairman, Richard G. Cohen, and his fellow officers, Donald Schapiro, Herbert L. Camp, and William L. Burke.

Thank you,

DALE S. COLLINSON,  
*Chairman*

January 16, 1986

**NEW YORK STATE BAR ASSOCIATION  
TAX SECTION**

**Reports and Other Submissions during the  
1985-1986 Year**

**I. Federal**

**A. Legislation**

1. Letters to John Colvin, Chief Counsel, Senate Finance Committee, Ronald A. Pearlman, Assistant Secretary of the Treasury for Tax Policy, David H. Brockway, Chief of Staff, Joint Committee on Taxation, and George Yin, Tax Counsel, Senate Finance Committee, supporting publication of draft legislation on Subchapter C revision (March 15, 1985).
2. Letters to numerous government officials regarding the Administration's proposal to put large service businesses on the accrual method (April 26, 1985 and September 4, 1985).
3. Letters to the chairman and ranking minority members of the House and Senate Tax, Budget, and Appropriation Committees, and other government officials, with copies to Assistant Secretary Ronald A. Pearlman and Commissioner Roscoe L. Egger, Jr., urging that the IRS budget be increased (May 21, 1985 and July 5, 1985).
4. Testimony of Richard O. Loengard, Jr. and Robert A. Jacobs, co-chairs of the Committee on Reorganizations, regarding the position of the Tax Section on proposals regarding carryover of tax attributes before the Subcommittee on Select Revenue Measures of the Committee on Ways and Means (May 22, 1985).

5. Report of the Committee on Employee Benefits on Technical Corrections to the Retirement Equity Act of 1984 and the Tax Reform Act of 1984 (filed July 15, 1985).
6. Comments of the Committee on Interstate Commerce regarding Draft Unitary Tax Legislation (filed August 15, 1985).
7. Letters to numerous public officials regarding the Administration's proposal to repeal the deduction for State and local taxes (September 4 and 9, 1985).
8. Report of the Committee on Income of Estates and Trusts regarding the Administration's proposals to limit income shifting by revising Subchapter J and the provisions respecting taxation of unearned income of minors under the age 14 (filed September 28, 1985).
9. Testimony of Dale S. Collinson regarding Subchapter C revisions before the Subcommittee on Taxation and Debt Management of the Senate Finance Committee (September 30, 1985).
10. Report of the Committee on Foreign Activities of U.S. Taxpayers regarding foreign tax credit reforms in the Administration's proposals and H.R. 3838 (filed January 13, 1986).

#### **B. Regulations**

1. Report of the Committee on U.S. Activities of Foreign Taxpayers regarding proposed and temporary FIRPTA withholding regulations under Section 1445 (filed May 7, 1985).
2. Report of the Committee on Partnerships regarding Proposed regulations pursuant to Sections 704(c), 707(a)(2) and 752 (filed May 7, 1985).

3. Report of the Committee on Partnerships on a suggested Revenue Procedure providing advance approval for a partnership with no principal partner to elect a calendar taxable year (filed September 17, 1985).
4. Letter to S. Allen Winbourne, Assistant Commissioner, Employee Plans and Exempt Organizations, requesting that Post-March 19, 1984 Master or Prototype Plan adoptions be treated the same as Pre-March 19, 1984 adoptions (October 21, 1985).
5. Report of the Committee on Bankruptcy on Regulations regarding "G" Reorganizations (filed October 30, 1985).
6. Report of The Committee on Employee Benefits regarding proposed and temporary regulations implementing the Retirement Equity Act of 1984 (filed November 19, 1985).
7. Report of the Committee on Corporations on Temporary Section 338 Regulations (filed December 2, 1985).
8. Report of the Committee on Commodities and Financial Futures regarding proposed and temporary regulations under Section 1092 (filed January 6, 1986).

#### C. Other

1. Report of the Ad Hoc Committee on the Withholding Tax Consequences of Interest Rate Swap Agreements under the Internal Revenue Code (filed June 5, 1985).
2. Report of the Committee on Practice and Procedure on "Managing the Tax Court Docket" (filed July 15, 1985).

#### II. New York State

1. Report and draft bill on the adoption of an amendment to Section 612(b)(7) of the New York tax law (filed March 18, 1985).

2. Letter to Governor Cuomo from Henry A. Miller, President of the New York State Bar Association, regarding proposed creation of a tax tribunal to resolve controversies between taxpayers and the New York State Department of Taxation and Finance (April 11, 1985).
3. Report of Committee on Financial Institutions Regarding Proposed New York State and New York City Banking Corporation Tax Regulations (filed November 14, 1985).