



# New York State Bar Association

One Elk Street, Albany, New York 12207 • 518/463-3200 • <http://www.nysba.org>

## TAX SECTION

### 2003-2004 Executive Committee

#### ANDREW N. BERG

Chair  
Debevoise & Plimpton  
919 Third Avenue  
New York, NY 10022  
212/909-6288

#### LEWIS R. STEINBERG

First Vice-Chair  
212/474-1856

#### DAVID P. HARITON

Second Vice-Chair  
212/558-4248

#### KIMBERLY S. BLANCHARD

Secretary  
212/310-8799

#### COMMITTEE CHAIRS:

##### Bankruptcy and Operating Losses

Lawrence M. Garrett  
Stuart J. Goldring

##### Compliance, Practice & Procedure

Ellis W. Reemer  
Bryan G. Skarlatos

##### Consolidated Returns

Karen Gilbreath  
Jonathan Kushner

##### Corporations

Kathleen L. Farrel  
Jodi J. Schwartz

##### Employee Benefits

Karen G. Krueger  
Max J. Schwartz

##### Estates and Trusts

T. Randolph Harris  
Jeffrey N. Schwartz

##### Financial Instruments

Michael S. Farber  
Erika W. Nijenhuis

##### Financial Intermediaries

David M. Schizer  
Andrew P. Solomon

##### Foreign Activities of U.S.

##### Taxpayers

Peter H. Blessing  
David R. Sicular

##### Multistate Tax Issues

Robert E. Brown  
Paul R. Comeau

##### New York City Taxes

Robert J. Levinschn  
Irwin M. Slonka

##### New York State Franchise and

##### Income Taxes

Maria T. Jones  
Arthur R. Rosen

##### Partnerships

William B. Brannan  
David H. Schnabel

##### Pass-Through Entities

Patrick C. Gallagher  
Gary B. Mandel

##### Real Property

David E. Kahan  
Elliot Piser

##### Reorganizations

Andrew R. Walker  
Diana L. Wollman

##### Securitized and Structured

##### Finance

David S. Miller  
Paul R. Wysocki

##### Tax Accounting

David W. Mayo  
Marc L. Siberberg

##### Tax Exempt Bonds

Stuart L. Frosow  
John T. Lutz

##### Tax Exempt Entities

Dickson G. Brown  
Michelle P. Scott

##### U.S. Activities of Foreign

##### Taxpayers

Gary M. Friedman  
Yaron Z. Reich

## MEMBERS-AT-LARGE OF EXECUTIVE COMMITTEE

Edward E. Gonzalez

Alyse Grossman  
Sherwin Kamin

Arnold Y. Kapiloff

Barbara T. Kaplan

Charles I. Kingson  
Janet B. Korins

Sherry S. Kraus

Jlyeon Lee-Lim

Charles Morgan  
Andrew W. Needham

Deborah L. Paul

Matthew A. Rosen

Seth L. Rosen  
Joel Scharfstein

Linda Z. Swartz

Gordon Wamka

David E. Watts  
Victor Zonana

September 12, 2003

George K. Yin  
Chief of Staff  
U.S. House of Representatives  
Joint Committee on Taxation  
1015 Longworth  
Washington, DC 20515

Dear Chairman Yin:

I am pleased to enclose New York State Bar Association Tax Section Report No. 1037 commenting on two recent proposals that would modify the “earnings stripping rules” contained in section 163(j) of the Internal Revenue Code of 1986, as amended. The principal drafter of the report was Peter Blessing.

The report discusses certain provisions of the Bush Administration’s Fiscal Year 2004 Revenue Proposals (the “Bush Proposal”), as well as section 2001 of H.R. 2896, the “American Jobs Creation Act of 2003”, introduced by Ways and Means Committee Chairman Thomas on July 25, 2003 (the “Thomas Bill,” and, together with the Bush Proposal, the “Proposals”). The report also addresses a proposal to liberalize the guarantee provisions of section 163(j) contained in section 255 of the Promote Growth and Jobs in the USA (PRO GROW USA) Act of 2003 introduced by Senator Orrin Hatch on July 28, 2003 (the “Hatch Bill”).

The Proposals reflect, in part, a policy response to the perceived abuses of inversion transactions. The Tax Section has recently indicated its support for legislation to address inversion transactions and suggested

## FORMER CHAIRS OF SECTION:

Samuel Brodsky

Edwin M. Jones

Peter Miller

John E. Morrissey, Jr.

Charles E. Heming

Ralph O. Winger

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

Daie S. Collinson

Richard G. Cohen

Donald Schapiro

Herbert L. Camp

William L. Burke

Arthur A. Feder

James M. Peaslee

John A. Corry

Peter C. Canellos

Michael L. Schier

Carolyn Joy Lee

Richard L. Reinhold

Richard O. Loengard

Steven C. Todrys

Harold R. Handler

Robert H. Scarborough

Robert A. Jacobs

Samuel J. Dilon

tightening the rules on earnings stripping as one possible way of doing that.<sup>1</sup> We note that the modifications to the earnings stripping rules contained in the Proposals would have a far greater impact on foreign investment in the United States than targeted anti-inversion legislation.

The Tax Section generally supports tightening the earnings stripping rules as an appropriate response to transactions that erode the United States tax base. We are concerned, however, that certain aspects of the Proposals could adversely impact cross-border investments in ways that may not be appropriate and go beyond what is necessary to accomplish the main purpose of the legislation. Our specific comments can be summarized as follows:

1. We recommend retention of a safe harbor. We generally would favor the debt-to-assets safe harbor set forth in the Bush Proposal (as the asset categories may be further refined) but using, at the taxpayer's election, U.S. tax basis, U.S. GAAP book value, or fair market value.

2. We recommend against adoption of a worldwide leverage test as was proposed in the Bush Proposal (and in an earlier proposal introduced by Chairman Thomas as section 201 of H.R. 5095, the "American Competitiveness and Corporate Accountability Act of 2002"). In our view, such a test would be extremely difficult for taxpayers to apply and for the Internal Revenue Service to audit.

3. We recommend that proposed reductions in the percent limit for purposes of the adjusted taxable income test take into account, among other factors, that the resulting amount allowed should be consistent with arm's length principles.

---

<sup>1</sup> Tax Section Report No. 1014, at 60 (May 24, 2002).

September 12, 2003

4. We recommend that if the carryforward of disallowed interest is limited, that the limit be the same length of time as for net operating losses, i.e., 20 years.

5. We recommend that, especially in connection with the proposed tightening of the earnings stripping rules, it would be appropriate to reconsider to what extent section 163(j) should continue to apply to loans guaranteed by affiliates. In this regard, we believe in particular that a tailored approach such as the Hatch proposal deserves serious consideration.

Please feel free to contact the undersigned if you wish to discuss any of our suggestions or any other issues relating to the Report.

Respectfully submitted,

A handwritten signature in black ink that reads "Andrew N. Berg". The signature is written in a cursive style with a large, stylized 'A' and 'B'.

Andrew N. Berg  
Chair

cc: Mary A. Schmitt