



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. Slomka

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 Pisem

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. Rosow
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

Alysee 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

January 23, 2004

The Honorable Pamela F. Olson
Assistant Secretary (Tax Policy)
Department of the Treasury
Room 3120 MT
1500 Pennsylvania Avenue, N.W.
Washington, DC 20220

The Honorable Mark W. Everson
Commissioner
Internal Revenue Service
Room 3000 IR
1111 Constitution Avenue, N.W.
Washington, DC 20224

Dear Secretary Olson and Commissioner Everson:

I am pleased to submit the New York State Bar Association Tax Section's Report No. 1050 on Continuity of Interest and Pre-Closing Stock Value Fluctuation.

This report addresses the question whether the continuity of proprietary interest requirement applicable to reorganizations under Section 368 of the Internal Revenue Code should be determined based on stock values as of the date of the signing of a merger agreement or, as is the customary understanding, as of the date the merger closes.

The current practice for determining whether a merger satisfies the continuity of proprietary interest requirement turns on the value of the acquiring corporation's stock on the date that the merger closes, rather than on the date that the merger agreement is signed. Consequently, in a merger where shareholders of the target corporation receive consideration consisting

FORMER CHAIRS OF SECTION:

Samuel Brodsky

Edwin M. Jones

Peter Miller

John E. Morrissey, Jr.

Charles E. Hering

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

Dale 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

of part-cash, part-stock in the acquiring corporation, the transaction could fail to satisfy the continuity of proprietary interest requirement if the acquiring corporation's stock drops in value between the date that the merger agreement is signed and the date that the merger closes.

As a result of the current practice, considerable taxpayer uncertainty regarding whether a merger that is the subject of a binding written agreement (but that has not yet closed) will qualify as a reorganization. We believe this uncertainty is not necessary in order to achieve the objective of the policies of the continuity of interest doctrine. This doctrine is a judicial rule designed to disqualify transactions that meet the literal requirements of the Code where the underlying objectives of business reorganization are not served. As such, we believe this doctrine can be applied with some flexibility with a view to preserving the underlying objectives of the reorganization provisions, while not impacting other areas of tax law.

The principal recommendation of this report is that continuity of proprietary interest be measured using signing date values (determined immediately prior to the public announcement of the merger agreement) provided that (a) the acquiring corporation and the target corporation have entered into a binding written contract subject to customary closing conditions and (b) the closing of the merger occurs within a commercially reasonable amount of time. Our recommendation relating to the timing of this determination relates solely to the continuity of interest doctrine. It does not extend to other areas of taxation. For example, we are not suggesting any change to the general rule for determining amount realized based upon closing date values.

If you have any questions or comments regarding this report, please feel free to contact us and we will be glad to discuss or assist in any way.

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 "B" at the end.

Andrew N. Berg
Chair

cc: Eric Solomon, Deputy Assistant Secretary, Regulatory Affairs,
Department of Treasury

Helen M. Hubbard, Tax Legislative Counsel, Department of Treasury

William F. Sweetnam, Jr., Benefits Tax Counsel, Department of
Treasury

Emily A. Parker, Acting Chief Counsel, Internal Revenue Service

Gary Wilcox, Deputy Chief Counsel (Technical), Internal Revenue
Service

William D. Alexander, Associate Chief Counsel (Corporate),
Internal Revenue Service