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September 21, 2010

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Re: Employment Tax Proposal for S Corporations and Partnerships

Gentlemen:

We are pleased to submit New York State Bar Association Tax Section Report No. 1218, concerning the proposal contained in Section 413 of the original version of H.R. 4213, The American Jobs and Closing Tax Loopholes Act to improve Social Security and Medicare taxes on certain

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earnings of S Corporations and partnerships engaged in the provision of professional services (the "Proposal").

The subject of these "payroll" taxes in relation to S corporation shareholders and partners in partnerships (including limited liability companies) has been the focus of a number of proposals and legal commentary over the past two decades. While the Proposal was not included in the final version of H.R. 4213 (and was dropped from the so-called "Extenders" legislation shortly after this report was prepared), we anticipate that this issue will remain one that draws your attention in the future. The treatment of members of pass-through entities for employment tax purposes is a question that deserves to be addressed given the disparities in existing treatment, the uncertainties in this area, and the administrative challenges under current law, in order that income from personal services does not inappropriately escape payroll taxes simply because of the form through which a business activity is conducted.

As the report reflects, we endorse the Proposal's approach in terms of addressing this matter in relation to a specified universe of service businesses. We believe such a targeted approach has merit in addressing the most obvious and easily addressed disparities, and postponing for another day the issues of disparity in the application of payroll taxes in more complicated contexts.

The report comments on certain technical aspects of the Proposal as it originally appeared in H.R. 4213. For example, we include comments on the manner in which relevant terms (such as "disqualified S corporation" and "professional service business") are defined. We also provide comments on aspects of the technical language that could reach unintended results and on the family attribution rule contained in the proposal. We hope our comments serve to further the Proposal's intent, which we understand to be one that aims to equalize the payroll tax treatment of S corporation shareholders, members of partnerships, and sole proprietors who derive income from personal services.

We hope the enclosed report may be of assistance in your future consideration of these issues. Please let us know if you would like to discuss these matters or if we can assist you in any other way.

Respectfully yours,



Peter H. Blessing  
Chair

Enclosure

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cc: Thomas Barthold  
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