NEW YORK STATE BAR ASSOCIATION
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November 14, 2014

The Honorable Mark Mazur
Assistant Secretary (Tax Policy)
Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

The Honorable John Koskinen
Commissioner
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

The Honorable William J. Wilkins
Chief Counsel
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

Re: Report on the Proposed Regulations Regarding the Allocation of Recourse Partnership Liabilities

Dear Messrs. Mazur, Koskinen and Wilkins:

I am pleased to submit the attached report of the Tax Section of the New York State Bar Association. The report provides comments on regulations proposed on December 16, 2013 (the "Proposed Regulations") concerning the allocation of recourse partnership liabilities under section 752.

Section 752 and the regulations thereunder generally provide rules for determining a partner's share of partnership liabilities. The Proposed Regulations provide guidance regarding the allocation of a recourse liability with respect to which multiple partners bear the economic risk of loss ("EROL") and special rules for related persons and tiered partnerships.

We commend the Internal Revenue Service (the "IRS") and the Treasury Department ("Treasury") for proposing a comprehensive, thoughtful, and well-drafted set of Proposed Regulations. This Report makes the following recommendations:

1. Future guidance should require partnerships to allocate a liability among partners otherwise subject to the overlapping risk of loss rule ("OROL Rule") or the Per Capita Rule (defined in the report) in a manner analogous to how nonrecourse debt is allocated under Treas. Reg. § 1.752-3.

2. The final regulations should clarify by rule (and not merely by example)−

    a. The extent to which relationships between a partner and a person who is not a partner but has a payment obligation should be disregarded, and how the OROL Rule applies in such cases.

    b. The circumstances under which a payment obligation with respect to only part of a liability effectively bifurcates the liability into two liabilities and when it merely impacts the sharing of the liability.

3. Treas. Reg. § 1.1563-1(a)(2)(i)(A) should be modified so that it does not conflict with the language of section 1563.

4. Prop. Treas. Reg. § 1.752-4(b)(1)(iv) should be modified (i) to provide that attribution under section 1563(e)(2) also must be disregarded and (ii) to apply similar principles where a partner would otherwise be treated as "related" to a subsidiary of a partnership (*e.g.*, where the partner or the subsidiary is itself a partnership).

5. The final regulations should permit partnership liabilities that are modified and/or refinanced and payment obligations that are modified to continue to be subject to the provisions of the current regulations but only to the extent of the amount and duration of the pre-modification (or refinancing) liability or payment obligation.

6. Partnerships should be permitted to elect to apply the Proposed Regulations to all of the partnerships' liabilities to which the regulations otherwise would not apply (*i.e.*, grandfathered liabilities).

We appreciate your consideration of our recommendations.

Respectfully submitted,

David H. Schnabel
Chair

Enclosure

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