



Section of Taxation

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June 10, 2008

Hon. Douglas Shulman
Commissioner
Internal Revenue Service
1111 Constitution Avenue, N.W.
Washington, DC 20224

Re: Recommendations for 2008-2009 Guidance Priority List

Dear Commissioner Shulman:

The American Bar Association Section of Taxation welcomes the opportunity to provide recommendations of guidance for inclusion in the 2008-2009 Treasury-IRS Guidance Priority List. These recommendations represent the views of the American Bar Association Section of Taxation. They have not been approved by the Board of Governors or the House of Delegates of the American Bar Association and should not be construed as representing the policy of the American Bar Association.

The enclosed list contains recommendations made by the members of various committees within the Section of Taxation. I hope you find the suggestions helpful as you formulate the new Priority Guidance List. The recommendations include items in the following areas of practice:

Capital Recovery and Leasing
Corporate Tax
Employee Benefits
Energy and Environmental Taxes

Exempt Organizations
Low Income Taxpayers
Partnerships and LLCs
Tax Accounting

Enclosure

Sincerely,

Stanley L. Blend
Chair, Section of Taxation

Enclosures

cc: Hon. Donald L. Korb, Chief Counsel, Internal Revenue Service
Hon. Eric Solomon, Assistant Secretary (Tax Policy), Department of the Treasury

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RECOMMENDATIONS FOR THE 2008-2009 TREASURY-IRS GUIDANCE PRIORITY LIST

As requested in Notice 2008-47, the Section of Taxation of the American Bar Association has identified the following tax issues that should be addressed through regulations, rulings or other published guidance in 2008-2009. In each case, the contact person's name and contact information are provided. We would be happy to discuss the issues with you, if you would find that helpful.

Capital Recovery & Leasing

Kevin D. Anderson, Capital Recovery & Leasing Committee, (301) 634-0222, kdanderson@bdo.com

1. Guidance under section 48 on the energy credit for qualified fuel cell and microturbine property (currently number 14 under General Tax Issues in the IRS Business Plan).
2. Guidance under section 179C on the election to expense certain refineries (currently number 28 under General Tax Issues in the IRS Business Plan).
3. Temporary regulations under section 179B regarding the deduction for capital cost incurred by a refinery in complying with EPA regulations (currently number 27 under General Tax Issues in the IRS Business Plan).
4. Guidance under section 45, clarifying Notice 2006-88, section 3.03, to provide that the section 45 credit for open-loop biomass is available for electricity sold to an unrelated party regardless of the amount of electricity purchased from the buyer.
5. Guidance under section 168 regarding the treatment of property depreciated under the modified accelerated cost recovery system.
6. Guidance on bonus depreciation allowance under section 168(k) as provided pursuant to the Economic Stimulus Act of 2008.
7. Proposed regulations under section 263(a) regarding the treatment of capitalized transaction costs. (Carried over from 2007-2008 Priority Guidance Plan, but not expected to be completed prior to the end of the current plan year.)
8. Final regulations under section 263(a) regarding the treatment of expenditure with respect to tangible property.

Corporate Tax

Julie Divola, Corporate Tax Committee, (415) 983-7446, julie.divola@pillsburylaw.com

1. Guidance regarding the recovery of basis in redemptions of corporate stock governed by section 301. A notice was published in the Federal Register on April 19, 2006.
2. Regulations regarding basis tracing under section 358 and allocation of boot under section 356.
3. Regulations enabling elections for certain transactions under section 336(e).
4. Revise Regulation section 1.355-3 regarding the active trade or business requirement. Proposed Regulations were published on May 8, 2007. Also see Rev. Rul. 2007-42 issued in July 2007.
5. Regulations regarding predecessors and successors under section 355(e). Proposed Regulations were published on November 22, 2004.
6. Regulations regarding the applicability of section 358(h)(2)(B) to the assumption of certain liabilities. Temporary Regulations were published on May 23, 2005.
7. Guidance under section 362(e) regarding the importation or duplication of losses. Notice 2005-70 was published on October 11, 2005. Proposed Regulations were published on October 23, 2006 and January 23, 2007.
8. Regulations regarding continuity of interest. Temporary Regulations were published on March 20, 2007.
9. Regulations regarding transactions involving the transfer or receipt of no net equity value. Proposed Regulations were published on March 10, 2005.
10. Guidance regarding the scope of section 368(a)(1)(D). Temporary Regulations were published on December 18, 2006 and revised on February 28, 2007.
11. Regulations under section 368(a)(1)(F). Proposed Regulations were published on August 12, 2004.
12. Guidance under sections 382 and 384, including Regulations regarding built-in items under section 382(h)(6). Built-in items under section 382(h)(6) were previously addressed in Notice 2003-65. Temporary Regulations regarding the treatment of prepaid income were published on June 13, 2007.
13. Guidance regarding the transfer of treasury stock to a corporation controlled by the transferor. See Rev. Rul. 2006-2, revoking Rev. Rul. 74-503.
14. Guidance under section 355(a)(3)(B) regarding the definition of “hot stock.”
15. Guidance regarding Notice 2008-20 and the definition of Intermediary Transaction Tax Shelter.
16. Guidance regarding the treatment of restricted stock in reorganizations.
17. Guidance regarding the treatment of escrowed or contingent share arrangements in reorganizations.

18. Guidance under section 382(l)(3)(C) regarding the extent to which fluctuations in the relative fair market values of different classes of stock are not taken into account in determining whether there is an ownership change of a loss corporation for purposes of section 382.
19. Guidance under section 382(l)(1)(B) concerning circumstances in which a taxpayer may establish that capital contributions made during the 2-year period ending on the change date should not be treated as part of a plan a principal purpose of which is to avoid or increase a section 382 limitation.

Employee Benefits

Dave Mustone, Employee Benefits Committee, (703) 714-7509, dmustone@hunton.com

1. Nonqualified programs/executive compensation
 - a. Guidance on section 409A(b) funding rules.
 - b. Correction programs under section 409A.
 - c. Proposed Regulations on the application of a substantial risk of forfeiture under section 457(f).
 - d. Proposed Regulations implementing the changes to section 6039 reporting requirements made by section 403 of the Tax Relief And Health Care Act of 2006.
2. Tax-qualified plans
 - a. Proposed Regulations on the backloading issues addressed in Rev. Rul. 2008-7.
 - b. Guidance on permissible benefits under a qualified defined benefit pension plan (in follow-up to Notice 2007-14).
 - c. Guidance on permissible mid-year changes to a section 401(k) plan with “safe harbor” contributions.
 - d. Updated safe harbor explanation under section 402(f).
3. Health and other employee welfare benefit plans
 - a. Update section 105(h) Regulations.
 - b. Guidance on (i) calculating COBRA premiums for defined contribution (DC) health plans and (ii) application of COBRA generally to non-FSA DC health plans.

Energy & Environmental Taxes

Stephen Lee, Energy & Environmental Taxes Committee, (713) 739-7007, slee@cjmlaw.com

1. Update and coordinate the oil and gas Regulations under sections 613A(c)(7)(D) and 704(b) and(c) and selected TEFRA provisions. This area needs clarification and consistency. See, for example *Bakersfield Energy Partners, LP et al v. Commissioner*, 128 TC 207 (2007), which is now on appeal to the Ninth Circuit. Neither the parties nor the Tax Court acknowledged that, on the sale of an oil and gas property by a partnership, gain or loss calculations are determined at the partner level, not the partnership level, pursuant to section 613A(c)(7)(D).
2. Publish guidance that geological expense incurred solely to site a well remains deductible under Regulation section 1.612-4 and is not amortized pursuant to section 167(h).
3. Provide guidance on how to make an election under section 179C.

Exempt Organizations

Michael Clark, Exempt Organizations Committee, (312) 853-2173, mclark@sidley.com

- 1 Guidance relating to the Pension Protection Act of 2006
 - a. Guidance regarding section 4966, including guidance as to the definition of a “donor advised fund” under section 4966(d)(2)(A), the exceptions to donor advised fund status under section 4966(d)(2)(B) and (C), and the scope of “taxable distributions” under section 4966(c).
 - b. Guidance regarding the requirements for qualification as a “functionally integrated type III supporting organization” under section 4943(f)(5) for purposes of the qualifying distribution rules under section 4942 and the excess business holding rules of section 4943.
 - c. Guidance regarding section 4958(c)(2) to (3) and (f) and its application to supporting organizations and donor advised funds, including defining “substantial contributors” and “disqualified persons” with respect to supporting organizations which support the charitable and educational programs of section 501(c)(4), (5), or (6) organizations.
 - d. Guidance regarding section 509(f), including guidance as to the requirements which charitable trusts must meet in order to satisfy the “responsiveness” requirement of Regulation section 1.509(a)-4(i)(2).
 - e. Guidance regarding the application of section 4967, including defining the “incidental benefits” which provide the occasion for and measure of the tax.

2. Other Needed Guidance

- a. Modify the Regulations under sections 509(a)(1), 170(b)(1)(A)(vi), and 509(a)(2) to simplify, clarify, and achieve greater consistency in application of the alternative public support tests for organizations seeking classification as public charities, consistent with the revised form 990.
- b. Guidance regarding acceptable methods for determining whether an organization is conducting political activities (including both candidate campaign intervention and improper private benefit to partisan interests) as its primary activity (consistent with section 527 exemption), or as a less-than-primary activity (consistent with non-charitable section 501(c) exemption).
- c. Update the revenue procedures regarding foundation status determinations (Rev. Proc. 76-34), and group exemptions (Rev. Proc. 80-27).
- d. Guidance regarding the computation and reporting of “qualified donee income” from “qualified intellectual property” contributions described in section 170(m), as added by the American Jobs Creation Act of 2004..
- e. Seek public comment on the Memorandum for Manager, EO Determinations, dated April 25, 2006, dealing with criteria for processing exemption applications by section 501(c)(3) organizations participating in low-income housing tax credit partnerships, and convert it into a revenue ruling.
- f. Guidance regarding when a member of a tax-exempt organization’s board of directors can be considered independent for purposes of the rebuttable presumption of Regulation section 53.4958-6 notwithstanding a financial relationship between the organization and the director or the director’s employer, under a *de minimis* standard or otherwise.
- g. Guidance regarding the definition and scope of program-related investments of private foundations.
- h. Guidance regarding the application of section 501(m) and commercial-type insurance. Following the Supreme Court’s decision in *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355 (2002), the Service’s withdrawal of its HMO audit guidelines in this area, and the expiration of the 18-month directive suspending the application of section 501(m) to HMOs, there is no guidance concerning the Service’s interpretation of section 501(m).

Low Income Taxpayers

Joseph Barry Schimmel, Low Income Taxpayers Committee, (305) 670-0201, jschimmel.aba@comcast.net

1. Revise Regulation section 1.6015-7 and, if necessary, Regulation section 1.6015-4, to reflect amendments to section 6015(e) permitting Tax Court consideration of stand-alone equitable relief.
2. Revise Regulation sections 1.152-1 and 1.152-2 to implement the recommendations contained in the Section of Taxation's Report on the Uniform Definition of a Child, specifically by providing or modifying the definitions of "foster child," "eligible foster child," relationships of affinity (e.g., step-child) upon divorce or death of a spouse, "niece," "nephew," "in-law," and "in violation of local law."
3. Proposed Regulations under the partial payment requirements for offers-in-compromise discussed in Notice 2006-68.

Partnerships

Eric Sloan, Partnerships & LLCs Committee, (212) 492-4159, esloan@deloitte.com

1. Guidance regarding the circumstances under which it is proper to classify a separate series of a business entity, such as a limited liability company (an "LLC") organized under a statute such as the Delaware LLC Act, as a separate "business entity" for purposes of Regulation section 301.7701-3(a). In this regard, it should be noted that the Service recently published Rev. Rul. 2008-8, 2008-5 I.R.B. 340 (Jan. 15, 2008), which addressed the treatment of insurance arrangements involving "cell" companies, and, in connection with that ruling, issued Notice 2008-19, 2008-5 I.R.B. 366 (Jan. 15, 2008), in which comments were requested regarding the proper treatment of series (or "cell") entities. Additionally, the Service recently issued a private letter ruling in which it ruled that each series of an LLC was properly classified as a separate business entity. PLR 200803004 (Oct. 15, 2007). Also, the Service has issued numerous private letter rulings holding that each series of a Delaware business trust is a separate entity. *See, e.g.*, PLR 200809012 (Nov. 28, 2007); PLR 9703002 (Sep. 5, 1996); and PLR 9703016 (Oct. 11, 1996). Because those letter rulings contain little legal analysis of the issue, however, it is difficult to apply them to another set of facts.

Real Estate

Kevin Thomason, Real Estate Committee, (214) 969-2561, kevin.thomason@tklaw.com

1. Guidance on REITs under section 897 and Notice 2007-55.
2. Update to Regulations under section 337(d) for REITs and RICs regarding issues relating to (1) tax-exempt corporations as C corporations and (2) exchanged-basis transactions.
3. Update to fractions rule Regulations for issues including (a) multiple or staged closings and (b) impact of targeted capital account agreements.

Tax Accounting

Jody Brewster, Tax Accounting Committee, (202) 371-7280, jody.brewster@skadden.com

1. Guidance under section 118 regarding contributions to capital.
2. Guidance under section 174 regarding changes in method of accounting from an impermissible method.
3. Guidance under section 174 regarding whether certain costs associated with producing inventory may be characterized as research and experimental expenses.
4. Regulations under sections 195, 248 and 709, as amended by the American Jobs Creation Act of 2004, regarding the elections to amortize start-up and organizational expenditures.
5. Proposed regulations under section 263(a) regarding the treatment of capitalized transaction costs.
6. Final regulations under section 263(a) regarding the treatment of expenditures with respect to tangible property.
7. Guidance under section 263(a) regarding the deduction and capitalization of costs for maintenance of network assets.
8. Guidance regarding supporting documentation required under Regulation section 1.263(a)-5(f) to allocate success-based fees between activities that facilitate a transaction and activities that do not facilitate a transaction.
9. Guidance regarding the treatment of post-production costs, including sales based royalties, under section 263A.
10. Guidance under section 263A regarding whether “negative” additional section 263A costs are taken into account under Regulation section 1.263A-1(d)(4).
11. Final Regulations under sections 381(c)(4) and (5) regarding changes in method of accounting that conform the terms and conditions to those applicable to non-automatic accounting method changes.
12. Revenue procedure under section 446 regarding changes in method of accounting for rotatable spare parts.
13. Update of Rev. Proc. 2002-9 regarding automatic changes in methods of accounting.
14. Guidance implementing a pilot program as announced in Notice 2007-88 to revise the general procedures for obtaining consent to change a method of accounting.

15. Guidance under section 446 regarding whether a change between (1) separately reporting income and deducting a related expense (either in the same or a different tax year) and (2) either excluding the item from income and not deducting the expense, or (b) netting the item of income with the related expense, is a change in method of accounting.
16. Guidance regarding the nonaccrual experience method under section 448.
17. Guidance under section 453A regarding the application of the interest charge rules to contingent payment sales.
18. Guidance under section 460 on contracts that qualify for the rules for home construction contracts.
19. Guidance under section 460 regarding look-back interest for tax-exempt pass through entities.
20. Guidance under section 468B regarding the tax treatment of a single-claimant qualified settlement fund.
21. Final Regulations under section 468B regarding escrow accounts and other funds used in like-kind exchanges. Proposed regulations were published on February 7, 2006.
22. Guidance regarding the permissibility of a moving average cost method for valuing inventory.
23. Guidance under Regulation section 1.472-8 regarding the inventory price index computation (IPIC) method.