

new york state society of

NYSSCPA

certified public accountants

530 fifth avenue, new york, ny 10036-5101
www.nysscpa.org

September 15, 2003

Mr. Horace Howells
Internal Revenue Service
CC:PA:RU (REG-106736-00)
Room 5226
PO Box 7604
Ben Franklin Station
Washington, DC 20044

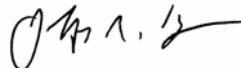
By e-mail to: via IRS Online Comment on Proposed Regulation Page
<http://www.irs.gov/app/scripts/ct.jsp?regTitle=Assumption%20of%20Partner%20Liabilities>

Dear Mr. Howells:

The New York State Society of Certified Public Accountants, the oldest state accounting association, representing approximately 30,000 CPAs, welcomes the opportunity to comment on proposed regulations relating to the definition of liabilities under section 752 of the Internal Revenue Code.

The NYSSCPA Taxation of Financial Institutions and Products Committee has prepared the attached comments. If you would like additional discussion with the committee, please contact the committee's chair, Leon M. Metzger, at 203-861-3232, or Ernest J. Markezin, NYSSCPA staff, at (212) 719-8303.

Sincerely,



Jeffrey R. Hoops
President

Attachment

cc: Mr. Horace Howells
Internal Revenue Service
Room 5007
1111 Constitution Ave. NW
Washington, D.C. 20224

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**NEW YORK STATE SOCIETY OF CERTIFIED PUBLIC
ACCOUNTANTS**

**COMMENTS ON INTERNAL REVENUE SERVICE AND
TREASURY PROPOSED AND TEMPORARY REGULATIONS
UNDER SECTION 752**

SEPTEMBER 15, 2003

Principal Drafters

**Israel A. Press, CPA
Leon M. Metzger, CPA**

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NEW YORK STATE SOCIETY OF CERTIFIED PUBLIC ACCOUNTANTS

COMMENTS ON INTERNAL REVENUE SERVICE AND TREASURY PROPOSED AND TEMPORARY REGULATIONS UNDER SECTION 752

SEPTEMBER 15, 2003

General Comments

Different tax treatments for the same transaction based on an entity's status with the SEC does not represent sound tax policy. Nor does retroactive application of provisions that are at odds with Tax Court interpretations inspire great confidence in the fairness of the regulatory process. The specific comments below detail our concerns about the regulations proposed for the assumption of liabilities under Section 752.

Specific Comments

1. Prop. Reg. 1.752-7. Congress authorized Treasury to prescribe rules that provide appropriate adjustments under partnership rules to prevent acceleration or duplication of losses through the assumption of liabilities pertaining to section 358(h). Under this section, if property is transferred to a corporation where the basis exceeds its fair market value, then such basis is to be reduced (not below fair market value) by the amount of liability which is assumed in exchange for such property. However, there is an exception under section 358(h)(2) for any liability if the trade or business with which the liability is associated is transferred to the person assuming the liability as part of the exchange. Under Prop. Reg. 1.752-7, the activity of acquiring, holding, or disposing of financial instruments constitutes a trade or business for this purpose if the activity is conducted by an entity registered as a management company with the Securities and Exchange Commission (SEC), under the Investment Company Act of 1940, as amended. An exception is given for contributions by mutual funds to a master partnership.

Comments: There are countless investment partnerships such as hedge funds and venture capital funds that conduct a trade or business but are not registered with the SEC. There is no reason to exclude such legitimate entities from Prop. Reg. 1.752-7. Good tax policy weighs substance over form. In this case, transactions should be treated similarly without regard to whether an entity is regulated by the SEC.

2. Temp Reg. 1.752-6T. The Internal Revenue Service (IRS) issued Notice 2000-44 describes two arrangements that "have been designed to produce non economic

tax losses on the disposition of partnership interests. These arrangements purport to give taxpayers artificially high bases in partnership interests and thereby give rise to deductible losses on disposition of those partnership interests.” The Notice concluded that the “purported losses resulting from the transaction described herein do not represent bona fide losses reflecting actual economic consequences as required for purposes of sec. 165.”

The new temporary regulation states that the above position is to apply retroactively to liabilities assumed by a partnership after October 18, 1999 and before June 24, 2003, when the regulations were issued. The definition of a liability in this regulation does not follow the Tax Court interpretation of an option in *Helmer TCM 1975-160*.

Comments: We are troubled by the issuance of regulations as temporary with a retroactive date of almost three years because taxpayers should be able to take tax positions as currently interpreted by the Courts and not be second guessed a few years later. Furthermore, the *Helmer* case was reinforced in a recent Tax Court decision in *Salina Partnership LP TCM 2000-352* wherein the Court stated that the writing of an option and a short sale transaction are “materially different” because the option in *Helmer*, as is the case with short options, created no claim for repayment or demand for further services. Thus, the Court implicitly approved its decision in *Helmer* that an option, which may expire unexercised, is not a liability for purposes of section 752.

The above cases have not been challenged by the IRS. In fact, the IRS won the *Helmer* case, denying basis to the partners who claimed they had an obligation under the option sold to perform. The proposed regulation does not reconcile with the above cases.