

Taxpayers Required to Disclose Certain Transactions

July 2004

Disclosures are an important part of the IRS's efforts to combat abusive tax avoidance transactions. Taxpayers are required to disclose reportable transactions, as defined in Regulation §1.6011-4, effective for transactions entered into on or after February 28, 2003.

Disclosures are reported to IRS on Form 8886. A copy of Form 8886 must be attached to each year's tax return that includes the transaction, and a copy must be filed with the Office of Tax Shelter Analysis in the first year of the transaction.

There are six major categories of reportable transactions:

1. Listed transactions. These are tax avoidance transactions the IRS has identified by notice, regulation, or other forms of published guidance, or transactions that are expected to obtain the same or substantially similar types of tax consequences.
2. Confidential transactions. These are transactions offered under conditions of confidentiality, such as where the disclosure of a transaction is limited in any manner by express or implied understanding or agreement whether or not such understanding or agreement is legally binding. Modified regulations issued in December 2003 now include a minimum fee requirement of \$250,000 for corporations and \$50,000 for most other transactions.
3. Transactions with contractual protection. These are transactions when the taxpayer has the right to a full or partial refund of fees paid to any person who makes or provides an oral or written statement about the potential tax consequences of a transaction if it is not sustained, or if fees are contingent on the taxpayer's realization of tax benefits from the transaction.
4. Loss transactions. These are transactions when taxpayers claim losses under Section 165 exceeding certain thresholds.
 - For corporations and partnerships having only corporations as partners; \$10 million in a single year or \$20 million in any combination of taxable years.
 - For all other partnerships, individuals, S corporations or trusts; \$2 million in any single year or \$4 million in any combination of taxable years.
 - For individuals or trusts involved in certain foreign currency transactions, \$50,000 in any single taxable year.

Revenue Procedure 2003-24, known as the "Angel List", provides that certain losses are exceptions to the reporting requirements. Exceptions include, but are not limited to, an asset sold or exchanged with a qualifying basis, fire storm or ship wreck, mark-to market treatment, hedging transactions, basis treatment under Section 860C (d)(1), abandonment of property, and the bulk sale of inventory.

5. Transactions with a significant book-tax difference. These are transactions with differences of income, gain, expense, or loss of more than \$10 million on a gross basis between book and tax and apply only to taxpayers governed by the SEC or whose assets equal or exceed \$250 million.

Revenue Procedure 2003-25, also known as the “Angel List”, provides that certain book-tax differences are exceptions to the reporting requirements. Exceptions include, but are not limited to, book losses or expenses reported before or without a loss or deduction for federal taxes; items of income or gain reported for federal tax before or without book income or gain; depreciation, depletion, and amortization relating solely to differences in methods, lives, or conventions; capitalization and amortization under Code Sections 195, 248, and 709; the dividends paid deduction by a publicly traded REIT; and patronage refunds or dividends.

Revenue Procedure 2004-45 provides that certain taxpayers may satisfy the requirement to disclose transactions with significant book-tax difference by filing Schedule M-3.

6. Transactions involving a brief asset holding period. These are transactions when a taxpayer claims a tax credit exceeding \$250,000 and the asset generating the credit is held less than 45 days.

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