

Part III – Administrative, Procedural, and Miscellaneous

Listed Transactions

Announcement 2022-28

INTRODUCTION

Since 2000, the Internal Revenue Service (IRS) has identified over 30 “listed transactions”— transactions that the IRS has determined to be abusive tax avoidance transactions within the meaning of § 1.6011-4(b)(2) of the Income Tax Regulations—by publishing a notice or other subregulatory guidance as provided in § 1.6011-4. One of these notices, Notice 2017-10, 2017-4 I.R.B. 544, identified certain syndicated conservation easements as listed transactions. On November 9, 2022, the U.S. Tax Court, in a reviewed decision with two judges dissenting, held that Notice 2017-10 was invalid because it was issued without following the notice-and-comment rulemaking procedure set forth in section 553 of the Administrative Procedure Act (APA), 5 U.S.C. 551 - 559. See *Green Valley Investors, LLC v. Commissioner*, 159 T.C. No. 5 (2022). Earlier this year, the U.S. Court of Appeals for the Sixth Circuit reached a similar conclusion with respect to Notice 2007-83, 2007-2 C.B. 960, which identified certain trust arrangements claiming to be welfare benefit funds and involving cash value life insurance policies as listed transactions. See *Mann Construction, Inc. v. United States*, 27 F.4th 1138 (6th Cir. 2022).

The Department of the Treasury (Treasury Department) and the IRS disagree with the Tax Court’s decision in *Green Valley* and the Sixth Circuit’s decision in *Mann Construction*, and are continuing to defend the validity of existing listing notices in circuits other than the Sixth Circuit. At the same time, however, to eliminate any confusion and to ensure that these decisions do not disrupt the IRS’s ongoing efforts to combat abusive tax shelters throughout the nation, the Treasury Department and the IRS are today issuing proposed regulations to identify certain syndicated conservation easement transactions as listed transactions. The Treasury Department and the IRS intend to finalize these regulations, after due consideration of public comments, in 2023 and intend to issue proposed regulations identifying additional listed transactions in the near future.

BACKGROUND

Section 6011 of the Internal Revenue Code (Code) requires persons to file such returns or statements prescribed by the Secretary of the Treasury or her delegate (Secretary), as required by regulation. Pursuant to that section, the Treasury Department and the IRS promulgated § 1.6011-4, which defines five types of “reportable transactions” and requires any participant in a reportable transaction to file a disclosure statement (Form 8886, *Reportable Transaction Disclosure Statement*) with the Office of Tax Shelter Analysis (OTSA) and with certain tax returns. That regulation defines a “listed transaction,” a type of reportable transaction, as a transaction that is the same as or substantially similar to one that the IRS has determined to be a tax avoidance transaction and has identified by notice, regulation, or other form of published guidance.

Following the promulgation of §1.6011-4, Congress passed the American Jobs Creation Act (AJCA), which included section 6707A of the Code. Section 6707A imposes penalties on any person who fails to disclose participation in a reportable transaction, including a listed transaction. Consistent with the regulation, that statute defines a “reportable transaction” as “any transaction with respect to which information is required to be included with a return or statement because, as determined under regulations prescribed under section 6011, such transaction is of a type which the Secretary determines as having a potential for tax avoidance or evasion;” and a “listed transaction” as “a reportable transaction which is the same as, or substantially similar to, a transaction specifically identified by the Secretary as a tax avoidance transaction for purposes of section 6011.”

Section 6111 of the Code and the related regulations require material advisors with respect to reportable transactions to disclose such transactions on Form 8918, *Material Advisor Disclosure Statement*. Section 6112 of the Code and the related regulations require material advisors to maintain lists of persons advised with respect to reportable transactions. Sections 6707 and 6708 were also amended as part of the AJCA and impose penalties for failure to meet those disclosure and list maintenance obligations.

TREASURY AND IRS ACTIONS TO COMBAT ABUSIVE TRANSACTIONS

The Treasury Department and the IRS continue to take the position that listed transactions can be identified by notice or other subregulatory guidance and that the APA’s notice-and-comment procedure does not apply to identification of such transactions. The Treasury Department and the IRS disagree with the Tax Court’s

decision in *Green Valley* and the Sixth Circuit's decision in *Mann Construction* and continue to defend the validity of existing listing notices in litigation. The Treasury Department and the IRS recognize, however, that *Mann Construction* is controlling law in the Sixth Circuit, and the IRS has ceased enforcing disclosure and list maintenance requirements with respect to Notice 2017-10 in the Sixth Circuit. Accordingly, to avoid confusion and to prevent disruption of the IRS's ongoing efforts to identify and examine abusive tax shelters throughout the nation, the Treasury Department and the IRS are issuing proposed regulations to identify certain syndicated conservation easement transactions as listed transactions. The Treasury Department and the IRS intend to finalize these regulations, after due consideration of public comments, in 2023 and intend to issue proposed regulations identifying additional listed transactions in the near future.

Taxpayers should take note that, if a transaction becomes a listed transaction after a taxpayer files a return reflecting the tax effects of the transaction, § 1.6011-4(e)(2)(i) requires the participant to file a disclosure statement with OTSA within 90 days of the transaction becoming a listed transaction if the assessment limitations period remains open for any taxable year in which the taxpayer participated in the listed transaction. Accordingly, any taxpayer, including taxpayers who reside in the Sixth Circuit, who has participated in a transaction in any year for which the assessment limitation period remains open when the regulation identifying the transaction as a listed transaction is finalized will have an obligation to disclose the transaction. Failure to disclose will subject the taxpayer to the penalty under section 6707A. Participants required to disclose listed transactions who fail to do so are also subject to an extended

period of limitations under section 6501(c)(10). That section provides that the time for assessment of any tax with respect to the transaction will not expire before the date that is one year after the earlier of the date the participant discloses the transaction or the date a material advisor discloses the participation pursuant to a written request under section 6112(b)(1)(A).

Likewise, if a regulation identifying a transaction as a listed transaction is finalized after the occurrence of the events described in § 301.6111-3(b)(4)(i) of the Procedure and Administration Regulations, a material advisor will be treated as becoming a material advisor on the date the regulation is finalized pursuant to § 301.6111-3(b)(4)(iii) (if not deemed a material advisor earlier pursuant to a valid listing notice). A material advisor is required to file a Form 8918 by the last day of the month following the quarter in which the advisor became a material advisor with respect to the listed transaction. See § 301.6111-3(d) and (e).

In addition, a material advisor must maintain a list identifying each person with respect to whom the advisor acted as a material advisor with respect to a listed transaction, if the person advised by the material advisor entered into the listed transaction within six years before the transaction was identified as a listed transaction. See § 301.6112-1(b)(2).

DRAFTING INFORMATION

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