

Part III – Administrative, Procedural, and Miscellaneous

Qualified Amended Returns

Notice 2004-38

PURPOSE

The purpose of this notice is to announce that the Internal Revenue Service and the Treasury Department will issue temporary and proposed regulations that will modify the definition of “qualified amended return” in Treasury Regulations § 1.6664-2(c)(3). The temporary regulations will provide that the period for filing a qualified amended return is terminated when the Service serves a John Doe summons under section 7609(f) of the Internal Revenue Code with respect to the taxpayer’s tax liability. The temporary regulations also will provide that the period for filing a qualified amended return is terminated when the Service contacts a promoter, organizer or material advisor concerning a listed transaction for which the taxpayer has claimed a tax benefit.

The temporary regulations will be effective for amended returns or requests for administrative adjustment filed on or after April 30, 2004.

BACKGROUND

Section 1.6664-2(c)(3) of the Treasury Regulations requires a taxpayer to file a qualified amended return before the earliest of: (1) the date on which the taxpayer is first contacted by the Service concerning an examination of the return; (2) the date on

which a person described in section 6700(a) is first contacted by the Service concerning the examination of an activity described in section 6700(a) with respect to which the taxpayer claimed any tax benefit on the return directly or indirectly through the entity, plan or arrangement described in section 6700(a)(1)(A); or (3) for certain pass-through items, the date on which the pass-through entity is first contacted by the Service in connection with an examination to which the pass-through item relates.

The Service may serve a John Doe summons pursuant to section 7609(f) after a court proceeding in which the Service establishes that: (1) the summons relates to the investigation of a particular person or ascertainable group or class of persons; (2) there is a reasonable basis for believing that the person, group, or class may fail or may have failed to comply with any internal revenue provision; and (3) the information sought from the examination of records and testimony (and the identity of the person or persons with respect to whose liability the summons is issued) is not readily available from other sources.

In February 2000, the Treasury Department and the Service issued temporary and proposed regulations requiring certain corporations to disclose “reportable transactions” that were reflected on their federal income tax returns. A reportable transaction included a transaction that is the same as or substantially similar to one of the types of transactions that the Service determined to be a tax avoidance transaction and identified by published guidance as a “listed transaction,” if the transaction also gave rise to federal income tax savings above a certain dollar threshold. In June 2002, the Treasury Department and the Service extended the disclosure requirement for listed

transactions to individuals, partnerships, S corporations, and other noncorporate persons. This change was effective for transactions entered into on or after January 1, 2001, that had not been reported on a return filed on or before June 14, 2002. (T.D. 9000, 6/14/2002). The June 2002 modifications also removed the dollar thresholds related to tax savings for all taxpayers engaging in listed transactions. The regulations under section 6011 requiring disclosure of reportable transactions were modified substantially in October 2002 (T.D. 9017, 10/17/2002) and finalized in February 2003 (T.D. 9046, 2/27/2003). The February 2003 final regulations also amended the regulations under sections 6111 and 6112 relating to the registration of and list maintenance for certain transactions.

In early 2002, the Treasury Department and the Service gave taxpayers the opportunity to avoid the imposition of certain penalties by disclosing their participation in any transaction for which the imposition of the accuracy-related penalty under section 6662 may be appropriate. In Announcement 2002-2, 2002-1 C.B. 304, the Service agreed to waive certain components of the accuracy-related penalty under section 6662 for taxpayers who disclosed any item in accordance with the terms of Announcement 2002-2 by April 23, 2002.

DISCUSSION

I. Revised Definition of Qualified Amended Returns

The Treasury Department and the Service have identified additional periods of time after which a taxpayer is no longer permitted to file a qualified amended return. In

addition to the current requirements, the temporary regulations will require that a taxpayer file a qualified amended return before the earliest of:

(1) The date on which a third party is served a John Doe summons described in section 7609(f) relating to the tax liability of a person, group, or class that includes the taxpayer, with respect to the return reflecting the transactions or tax items that are the subject of the summons, or

(2) The "date of contact" or "date of request," described below, in the case of a transaction with respect to which the taxpayer claimed any direct or indirect tax benefits on its return and that is the same or substantially similar to a transaction that has been designated as a "listed transaction" (regardless of whether the taxpayer's transaction is required to be disclosed as a listed transaction under Treasury Regulation § 1.6011-4), unless the taxpayer disclosed the transaction under Treasury Regulation § 1.6011-4 or pursuant to Announcement 2002-2 before the date of contact or date of request.

(a) Date of contact. The date of contact is the date on which any person required to register a tax shelter under section 6111(a) is first contacted by the Service concerning an examination of an activity described in section 6707(a) (relating to the failure to register a tax shelter as defined in section 6111 or the filing of false or incomplete information with respect to that registration) relating to a type of listed transaction with respect to which the taxpayer claimed any direct or indirect tax benefits on its return. The rules in the temporary regulations will

apply even if the taxpayer's transaction is not required to be disclosed as a listed transaction under Treasury Regulation § 1.6011-4.

(b) Date of request. The date of request is the date on which any person described in section 6112(a) (organizer or seller, including a material advisor as defined in the Treasury Regulations under section 6112) receives a request from the Service for information required to be included on a list under section 6112 relating to a type of listed transaction with respect to which the taxpayer claimed any direct or indirect tax benefits on its return. The rules in the temporary regulations will apply even if the taxpayer's information is not required to be included on the list requested by the Service.

The regulations also will provide similar rules in the case of pass-through items. In addition, where appropriate, the regulations will reference the October 2002 temporary regulations under sections 6011 and 6112 and other temporary regulations under sections 6011, 6111, and 6112.

II. Effective Date of Regulations Issued Pursuant to This Notice

The regulations to be issued will be effective for amended returns and requests for administrative adjustment filed on or after April 30, 2004, the date this notice is issued.

DRAFTING INFORMATION

The principal author of this notice is Nancy M. Galib of the Office of Associate Chief Counsel (Procedure and Administration), Administrative Provisions and Judicial Practice Division. For further information regarding this notice, contact Ms. Galib at (202) 622-4940 (not a toll-free call).