

Part III

Administrative, Procedural, and Miscellaneous

26 CFR 601.105: Examination of returns and claims for refund, credit or abatement; determination of correct tax liability.
(Also: Part I, §§ 6011, 6112; 1.6011-4, 301.6112-1.)

Rev. Proc. 2004-66

SECTION 1. PURPOSE

This revenue procedure provides that certain losses are not taken into account in determining whether a transaction is a reportable transaction for purposes of the disclosure rules under § 1.6011-4(b)(5) of the Income Tax Regulations. However, these transactions may be reportable transactions for purposes of the disclosure rules under § 1.6011-4(b)(2), (b)(3), (b)(4), (b)(6), or (b)(7).

SECTION 2. BACKGROUND

.01 Section 1.6011-4 requires a taxpayer that participates in a reportable transaction to disclose the transaction in accordance with the procedures provided in § 1.6011-4. Under § 1.6011-4(b), there are six categories of reportable transactions. One category of reportable transaction is a loss transaction. A loss transaction is defined in § 1.6011-4(b)(5). Generally, a loss transaction is any transaction resulting in the taxpayer claiming a loss under § 165 of the Internal Revenue Code of (i) at least \$10 million in a single taxable year or \$20 million in any combination of taxable years for corporations or partnerships with only corporations as partners, (ii) at least \$2 million in any single taxable year or \$4 million in any combination of taxable years for other partnerships, individuals, S corporations, and trusts, or (iii) at least \$50,000 in any single taxable year for individuals or trusts if the loss is attributable to a § 988 transaction.

.02 Section 1.6011-4(b)(8)(i) provides that a transaction will not be considered a reportable transaction, or will be excluded from any individual category of reportable transaction, if the Commissioner makes a determination by published guidance that the transaction is not subject to the reporting requirements of § 1.6011-4.

SECTION 3. SCOPE

This revenue procedure applies to taxpayers that may be required to disclose reportable transactions under § 1.6011-4, material advisors that may be required to disclose reportable transactions under § 6111, as amended by § 815 of the American Jobs Creation Act of 2004, P.L. 108-357, 118 Stat. 1418 (October 22, 2004), and material advisors that may be required to maintain lists under former and new § 6112.

SECTION 4. APPLICATION

.01 In general. Losses from the sale or exchange of an asset with a qualifying basis under section 4.02 of this revenue procedure or losses described in section 4.03 of this revenue procedure are not taken into account in determining whether a transaction is a reportable transaction under § 1.6011-4(b)(5).

.02 Sale or exchange of an asset with a qualifying basis.

(1) General rule. A loss under § 165 from the sale or exchange of an asset is not taken into account in determining whether a transaction is a loss transaction under § 1.6011-4(b)(5) if—

(a) the basis of the asset (for purposes of determining the loss) is a qualifying basis;

(b) the asset is not an interest in a passthrough entity (within the meaning of § 1260(c)(2), other than regular interests in a REMIC as defined in § 860G(a)(1));

(c) the loss from the sale or exchange of the asset is not treated as ordinary under § 988;

(d) the asset has not been separated from any portion of the income it generates; and

(e) the asset is not, and has never been, part of a straddle within the meaning of § 1092(c), excluding a mixed straddle under § 1.1092(b)-4T.

(2) Qualifying basis. For purposes of section 4 of this revenue procedure, a taxpayer's basis in an asset (less adjustments for any allowable depreciation, amortization, or casualty loss) is a qualifying basis if—

(a) the basis of the asset is equal to, and is determined solely by reference to, the amount (including any option premium) paid in cash by the taxpayer for the asset and for any improvements to the asset;

(b) the basis of the asset is determined under § 358 by reason of it being received in an exchange to which § 354, 355, or 361 applies, and the taxpayer's basis

in the property exchanged in the transaction was described in this section 4.02(2);

(c) the basis of the asset is determined under § 1014;

(d) the basis of the asset is determined under § 1015, and the donor's basis in the asset was described in this section 4.02(2);

(e) the basis of the asset is determined under § 1031(d), the taxpayer's basis in the property that was exchanged for the asset in the § 1031 transaction was described in this section 4.02(2), and any debt instrument issued or assumed by the taxpayer in connection with the § 1031 transaction is treated as a payment in cash under section 4.02(4) of this revenue procedure;

(f) the basis of the asset is adjusted under § 961 or § 1.1502-32, and the taxpayer's basis in the asset immediately prior to the adjustment was described in this section 4.02(2); or

(g) the basis of the asset is adjusted under § 1272(d)(2) or § 1278(b)(4), and the taxpayer's basis in the asset immediately prior to the adjustment was described in this section 4.02(2).

(3) Section 83 income. For purposes of section 4.02(2)(a) of this revenue procedure, an amount included as compensation income under § 83 by the taxpayer will be treated as an amount paid in cash by the taxpayer for an asset if the amount is included in the taxpayer's basis in the asset.

(4) Debt instruments. Except as provided below, an amount paid in cash will not be disregarded for purposes of section 4.02(2) of this revenue procedure merely because the taxpayer issued a debt instrument to obtain the cash. However, if the taxpayer has issued a debt instrument to the person (or a related party as described in § 267(b) or § 707(b)) who sold or transferred the asset to the taxpayer, assumed a debt instrument (or took an asset subject to a debt instrument) issued by the person (or a related party as described in § 267(b) or § 707(b)) who sold or transferred the asset to the taxpayer, or issued a debt instrument in exchange for improvements to an asset, the taxpayer will be treated as having paid cash for the asset or the improvement only if the debt instrument is secured by the asset and all amounts due under the debt instrument have been paid in cash no later than the time of the sale or exchange of the asset (except in the case of stock or securities traded on an established securities market, the settlement date) for which the loss is claimed.

.03 Other losses. The following losses under § 165 are not taken into account in determining whether a transaction is a loss transaction under § 1.6011-4(b)(5):

(1) A loss from fire, storm, shipwreck, or other casualty, or from theft, as those terms are defined for purposes of § 165(c)(3);

(2) A loss from a compulsory or involuntary conversion as described in § 1231(a)(3)(A)(ii) and 1231(a)(4)(B);

(3) A loss to which § 475(a) or § 1256(a) applies;

(4) A loss arising from any mark-to-market treatment of an item under §§ 475(f), 1296(a), 1.446-4(e), 1.988-5(a)(6), or 1.1275-6(d)(2), and any loss from a sale or disposition of an item to which one of the foregoing provisions applied, provided that the taxpayer computes its loss by using a qualifying basis (as defined in section 4.02(2) of this revenue procedure) or a basis resulting from previously marking the item to market, or computes its loss by making appropriate adjustments for previously determined mark-to-market gain or loss;

(5) A loss arising from a hedging transaction described in § 1221(b), if the taxpayer properly identifies the transaction as a hedging transaction, or from a mixed straddle account under § 1.1092(b)-4T;

(6) A loss attributable to basis increases under § 860C(d)(1) during the period of the taxpayer's ownership;

(7) A loss attributable to the abandonment of depreciable tangible property that was used by the taxpayer in a trade or business and that has a qualifying basis under section 4.02(2) of this revenue procedure;

(8) A loss arising from the bulk sale of inventory if the basis of the inventory is determined under § 263A; or

(9) A loss that is equal to, and is determined solely by reference to, a payment of cash by the taxpayer (for example, a cash payment by a guarantor that results in a loss or a cash payment that is treated as a loss from the sale of a capital asset under § 1234A or § 1234B).

(10) A loss from the sale to a person other than a related party (within the meaning of § 267(b) or § 707(b)) of property described in § 1221(a)(4) in a factoring transaction in the ordinary course of business.

(11) A loss arising from the disposition of an asset to the extent that the taxpayer's basis in the asset is determined under § 338(b).

SECTION 5. EFFECT ON OTHER DOCUMENTS

This document modifies and supersedes Rev. Proc. 2003-24, 2003-11 I.R.B. 599.

SECTION 6. EFFECTIVE DATE

This revenue procedure is effective November 16, 2004, the date this revenue procedure was released to the public. This revenue procedure applies to transactions that are entered into on or after January 1, 2003.

SECTION 7. DRAFTING INFORMATION

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