

**Office of Chief Counsel
Internal Revenue Service
Memorandum**

Number: **200917030**

Release Date: 4/24/2009

CC:PA:02:SBrown

POSTF-128329-08

UILC: 6501.00-00

date: December 2, 2008

to: Associate Area Counsel (Kansas City)
(Small Business/Self-Employed) CC:SB:9:KCY
Attention: Robert M. Fowler, Senior Counsel

from: Ashton P. Trice
Branch Chief, Branch 2
(Procedure & Administration) CC:PA:02

subject: Application of I.R.C. § 6501(c)(10)

This Chief Counsel Advice responds to your request for assistance. This advice may not be used or cited as precedent.

Legend

Taxpayer A =

Taxpayer B =

Roth IRA Corporation =

\$A =

\$B =

\$C =

Date A =

ISSUES

Was the transaction at issue the same as or substantially similar to the transaction described in Notice 2004-8 requiring the taxpayers to disclose the transaction pursuant to I.R.C. § 6011? If yes, did the taxpayers at issue make an adequate disclosure of their participation in the transaction to prevent the period of limitations for assessment from being extended pursuant to section 6501(c)(10)?

CONCLUSION

Based on the facts submitted, representations made, and considering all the facts and circumstances of these transactions, under § 1.6011-4T(b)(2), as in effect when the taxpayers entered into the transactions, the transactions at issue are the same as, or substantially similar to, the listed transactions described in Notice 2004-8, making the transactions listed transactions. Participation in a listed transaction creates a duty for a taxpayer to disclose the transaction. I.R.C. § 6011. This duty of disclosure was satisfied by the Roth IRA Corporation through its filing of Form 8886. Unlike the Roth IRA Corporation, Taxpayers A and B (collectively, "Taxpayers") failed to disclose their involvement in the transaction as required by I.R.C. § 6011. For these reasons, section 6501(c)(10) applies to the assessment of tax with regard to the Taxpayers but is not extended for the Roth IRA Corporation.

FACTS

In December , Taxpayers A and B, husband and wife (collectively, "Taxpayers") set up a corporation, ("Roth IRA Corporation"), into which they would direct payments for consulting, accounting, and bookkeeping services they provided to other individuals and businesses. Also in December , the Taxpayers each opened a Roth IRA account at Bank C. After contributing \$A to their respective Roth IRA accounts, Taxpayer A and Taxpayer B each directed their Roth IRA account to purchase 50% of the stock of the Roth IRA Corporation for \$A. Consequently, following the transactions, the couple's two Roth IRA accounts were the sole shareholders of the Roth IRA Corporation.

Before the formation of the Roth IRA Corporation, Taxpayer A worked as general manager for and received consulting fees from Company X and possibly other clients and Taxpayer B received income for bookkeeping services she provided to unrelated clients. After the formation of the Roth IRA Corporation, the Taxpayers provided services to various clients, including Company X, through the Roth IRA Corporation as employees of the Roth IRA Corporation.

In each of its first two fiscal years, the Roth IRA Corporation made dividend distributions of \$B to each of the Roth IRA accounts. As a result, the total amount of dividend distributions from the Roth IRA Corporation to Taxpayers' Roth IRA accounts was \$C.

When the Roth IRA Corporation filed its corporate income tax return for the taxable year ending Date A, it attached Form 8886, which disclosed the corporation's involvement in a transaction substantially similar to the transaction described in Notice 2004-8.

Taxpayers A and B did not attach a Form 8886 to their joint return. Instead, taxpayers A and B each attached a completed Form 5329 to their joint return. Although unsigned, each Form 5329 disclosed that the respective taxpayer had made an excess contribution in the amount of \$A to their Roth IRA, but that they had also received a corresponding \$A distribution, resulting in no excise tax imposed.

LAW AND ANALYSIS

In general, the limitations period for the assessment of tax is three years after the later of the due date for filing a tax return or the date on which the taxpayer files a return. I.R.C. § 6501(a). Section 6501(c) provides several exceptions to the general three-year period of limitations. Specifically, section 6501(c)(10) states that if a taxpayer engages in a listed transaction and fails to disclose that transaction, as required by section 6011, the limitations period for assessment shall not expire before one year after the earlier of: (a) the date on which the Secretary is furnished the information required under section 6011, or (b) the date that a material advisor meets the requirements of section 6112.

The term "listed transaction" is defined in section 6707A(c)(2) 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." The term "transaction" includes all of the factual elements necessary to support the tax benefits that are expected to be claimed with respect to any entity, plan, or arrangement, and includes any series of related steps carried out as part of a prearranged plan and any series of substantially similar transactions entered into in the same taxable year. Treas. Reg. § 1.6011-4T(b)(1). The regulations also provide that while a listed transaction is a transaction that is the same as or substantially similar to one of the types of transactions that the Service has determined to be a tax avoidance transaction, it must also be identified by notice, regulation, or other form of published guidance as a listed transaction. Treas. Reg. § 1.6011-4(b)(2).

Treas. Reg. § 1.6011-4T(b)(1)(i), as in effect on the relevant dates, provided for purposes of § 1.6011-4T, the term "substantially similar" includes any transaction that is expected to obtain the same or similar types of tax benefits and that is either factually similar or based on the same or similar tax strategy. Receipt of an opinion concluding that the tax benefits from the taxpayer's transaction are allowable is not relevant to the determination of whether the taxpayer's transaction is the same as or substantially similar to a listed transaction. Further, the term substantially similar must be broadly construed in favor of disclosure.

In Notice 2004-8, the Service identified transactions that are the same as, or substantially similar to, transactions described in the Notice as "listed transactions" effective December 31, 2003, the date the notice was released to the public.

Transactions identified as “listed transactions” in Notice 2004-8 include arrangements in which an individual, related persons, or a business controlled by such individual or related persons, engage in one or more transactions with a corporation, including contributions of property to such corporation, substantially all the shares of which are owned by one or more Roth IRAs maintained for the benefit of the individual, related persons, or both. The transactions are listed transactions with respect to the individuals for whom the Roth IRAs are maintained, the business (if not a sole proprietorship) that is a party to the transaction, and the corporation substantially all the shares of which are owned by the Roth IRAs.

Transactions described in Notice 2004-8 are designed to avoid the statutory limits on contributions to a Roth IRA contained in § 408A and, in general, these transactions involve the following parties: (1) an individual who owns a pre-existing business such as a corporation or a sole proprietorship (the Business), (2) a Roth IRA within the meaning of § 408A that is maintained for such individual, and (3) a corporation, substantially all the shares of which are owned by the Roth IRA (the Roth IRA Corporation). At the direction of the individual, the Business and the Roth IRA Corporation enter into transactions designed to shift value into the Roth IRA Corporation. Because the individual owns the Business and is the beneficial owner of substantially all of the Roth IRA Corporation, such individual controls both entities and bears little or no economic disadvantage if transactions shift value between the two entities. Other examples include arrangements between the Roth IRA Corporation and the individual that have the effect of transferring value to the Roth IRA Corporation comparable to a contribution to the Roth IRA.

Section 1.6011-4(a) of the Income Tax Regulations provides that, in general, every taxpayer that has participated in a reportable transaction and who is required to file a tax return must attach a disclosure statement to its return for the taxable year. To satisfy this disclosure obligation the taxpayer is required to attach to its tax return Form 8886 as prescribed by Treas. Reg. § 1.6011-4(d) (2003) (see T.D. 9000).

Discussion

Congress enacted the IRA provisions (including the Roth IRA provisions) to provide an individual with retirement plan options that provide income tax deferral (income tax exemption in the case of a Roth IRA) to enable the individual to maintain his/her accustomed standard of living during retirement. However, Congress also placed limits on the amount that an individual is permitted to contribute to these tax-favored retirement accounts.

Generally, a Roth IRA is permitted to invest in stock of a corporation, and the Roth IRA will not be subject to tax on any appreciation in value of that stock. However, pursuant to Notice 2004-8, certain value-shifting transactions that are designed to avoid the statutory limits on contributions to a Roth IRA have been identified as listed

transactions, and the purported tax benefits from such transactions will be challenged.¹ As set forth in Notice 2004-8, arrangements in which an individual or a business controlled by the individual engage in one or more transactions with a corporation, substantially all the shares of which are owned by one or more Roth IRAs maintained for the benefit of the individual are identified as listed transactions. The effect of arrangements described in Notice 2004-8 is to transfer value to the Roth IRA Corporation comparable to a contribution to the Roth IRA.

In determining whether a transaction is the same as or substantially similar to the transaction described in Notice 2004-8, we consider whether a transaction is expected to obtain the same or similar types of tax benefits and is either factually similar or based on the same or similar tax strategy as the Notice 2004-8 transaction. We construe the term substantially similar broadly in favor of disclosure.

In this case, like the transaction described in Notice 2004-8, the structure of the transaction at issue purportedly allows a taxpayer or multiple related taxpayers to create a Roth IRA investment that avoids the contribution limits by transferring value to the Roth IRA Corporation comparable to a contribution to the Roth IRA, thereby yielding tax benefits that are not contemplated by a reasonable interpretation of the language and purpose of § 408A. In this case, the value of the services provided was shifted from the Taxpayers or their business to the Roth IRA Corporation when the Taxpayers provided services through the Roth IRA Corporation as employees of the Roth IRA Corporation. Furthermore, the total value of services provided by the Taxpayers to clients of the Roth IRA Corporation was not received by the Taxpayers in the form of salary or other compensation from the Roth IRA Corporation. As in the Notice 2004-8 transaction, the Taxpayers shifted the value of income or property from the Taxpayers or a business of the Taxpayers to the Roth IRA Corporation, thereby purportedly avoiding the contribution limitations applicable to Roth IRAs. The Taxpayers or their business engaged in transactions with the Roth IRA Corporation by providing services to clients through the Roth IRA Corporation. Value was transferred from the Taxpayers or the Taxpayers' business to the Roth IRA Corporation comparable to a contribution to the Roth IRA whenever the Roth IRA Corporation received payment from clients as a result of the services provided by the Taxpayers.

Because the transaction is expected to obtain the same or similar types of tax benefits as the Notice 2004-8 transaction and is, in fact, both factually similar and based on the same or similar tax strategy as the Notice 2004-8 transaction, the transaction at issue is the same as or substantially similar to the Notice 2004-8 transaction and therefore a listed transaction.

The Taxpayers will argue that Company X corresponds to the pre-existing business (the Business) described in Notice 2004-8 and that, because they do not have an ownership

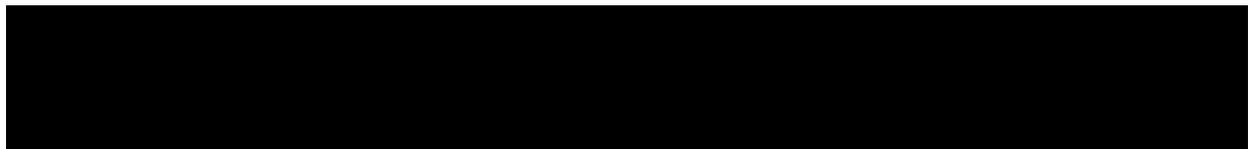
¹ For purposes of this memorandum, the issue of whether a prohibited transaction under section 4975 of the Internal Revenue Code has occurred in this case is not addressed.

interest in Company X, their transaction is not substantially similar to the transaction described in Notice 2004-8. Whether the Taxpayers control Company X is not dispositive in this case. As an initial matter, Company X is not the Business described in the general fact pattern in the Notice. Instead the Taxpayers' business whereby the Taxpayers provided services to other businesses and individuals is the Business described. As set forth in Notice 2004-8, the Business can be a sole proprietorship or other type of business and need not be a corporation. Notwithstanding this determination of what may constitute the Business described in the general fact pattern in the Notice, the Taxpayers' attempt to rely upon the general fact pattern in the Notice ignores the broader, express language in the Notice that identifies as listed transactions arrangements in which an individual or a business controlled by such individual engages in one or more transactions with a corporation, substantially all the shares of which are owned by one or more Roth IRAs maintained for the benefit of the individual. The fact that Taxpayers do not have an ownership interest in Company X is therefore irrelevant and the transaction is a listed transaction.

A taxpayer is required to disclose its participation in a listed transaction pursuant to section 1.6011-4(a) of the income tax regulations. For the year in question the regulations provided that the disclosure of the taxpayer was to be made on Form 8886 and include all the information required by the form. Treas. Reg. § 1.6011-4(d) (2003). In conjunction with its tax return for its tax year ending Date A, the Roth IRA Corporation filed Form 8886. In this form the Roth IRA Corporation disclosed its participation in the listed transaction. This disclosure met the requirement section 1.6011-4(a) of the income tax regulations and thus limited the time in which the corporation could be assessed deficiencies related to the return to the general period of three years provided in section 6501(a).

Unlike the Roth IRA Corporation, Taxpayers A and B did not include Form 8886 with their tax return. The Taxpayers did file Forms 5329 disclosing their excess contributions into their Roth IRAs of \$A each along with their subsequent withdrawal of the same. The form did not identify a listed transaction in any manner nor did it provide the pertinent facts of the transactions or the tax benefits derived from engaging in the transactions as would be found on a properly completed Form 8886. The regulations provide that adequate disclosure can only be made on Form 8886. Treas. Reg. § 1.6011-4(d) (2003). The taxpayers did not file this form and thus did not adequately disclose their participation in a listed transaction leaving the statute of limitations open until one year from the date they provided the information required under section 6011. I.R.C. § 6501(c)(10)

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS



[REDACTED]

[REDACTED]

[REDACTED]

This writing may contain privileged information. Any unauthorized disclosure of this writing may undermine our ability to protect the privileged information. If disclosure is determined to be necessary, please contact this office for our views.

Please call (202) 622-4940 if you have any further questions.