Part III – Administrative, Procedural, and Miscellaneous

Listed Transactions and Transactions of Interest

Announcement 2023-11

The identification of "listed transactions"—transactions that the Internal Revenue Service (IRS) has determined to be abusive tax avoidance transactions within the meaning of § 1.6011-4(b)(2) of the Income Tax Regulations—and "transactions of interest"—transactions that the IRS has determined have the potential for tax avoidance or evasion within the meaning of § 1.6011-4(b)(6)—is an important tool in combatting the use of abusive tax avoidance transactions. Since 2000, the IRS has identified more than 30 of these transactions by publishing a notice or other subregulatory guidance as provided in § 1.6011-4. One of these notices, Notice 2016-66, 2016-47 I.R.B. 745 (as modified by Notice 2017-8, 2017-3 I.R.B. 423), identified certain micro-captive transactions as transactions of interest.

Recent court decisions have held that the IRS's longstanding practice of issuing notices to identify listed transactions and transactions of interest does not comply with the Administrative Procedure Act (APA), 5 U.S.C. 551-559. On March 3, 2022, the U.S. Court of Appeals for the Sixth Circuit issued an order holding that Notice 2007-83, 2007-2 C.B. 960, which identified certain trust arrangements as listed transactions, violated the APA because the notice was issued without following the notice-and-comment procedures required by section 553 of the APA. Mann Construction v. United States, 27

F.4th 1138, 1147 (6th Cir. 2022). Subsequently, the U.S. District Court for the Eastern District of Tennessee, which is located in the Sixth Circuit, vacated Notice 2016-66 on the ground that the IRS failed to comply with the APA's notice-and-comment procedures, viewing the analysis in Mann Construction as controlling. CIC Services, LLC v. IRS, 2022 WL 985619 (E.D. Tenn. March 21, 2022), as modified by 2022 WL 2078036 (E.D. Tenn. June 2, 2022). The Court also held that the IRS acted arbitrarily and capriciously, based on the administrative record. On November 9, 2022, the U.S. Tax Court, in a reviewed decision with two judges dissenting, relied on Mann Construction in holding that Notice 2017-10, 2017-4 I.R.B. 544, which identifies certain syndicated conservation easements as listed transactions, is invalid because it was issued without following notice-and-comment rulemaking procedures. See Green Valley Investors, LLC v. Commissioner, 159 T.C. No. 5 (2022). See also Green Rock, LLC v. IRS, 2023 WL 1478444 (N.D. AL., February 2, 2023).

The Department of the Treasury (Treasury Department) and the IRS disagree with the recent court decisions holding that listed transactions cannot be identified by notice or other subregulatory guidance. However, the Treasury Department and IRS will no longer take the position that transactions of interest can be identified without complying with APA notice-and-comment procedures. Accordingly, the IRS is obsoleting Notice 2016-66 (as modified by Notice 2017-8), and will not enforce the disclosure requirements or penalties that are dependent upon the procedural validity of Notice 2016-66. Consistent with this determination, the Treasury Department and the IRS are today issuing proposed regulations that identify certain micro-captive transactions as transactions of interest. The proposed regulations also identify certain

other micro-captive transactions as listed transactions.

The Treasury Department and the IRS continue to take the position that listed transactions can be identified by notice or other subregulatory guidance because Congress, in enacting the American Jobs Creation Act of 2004, exempted the identification of such transactions from the APA's notice-and-comment procedure. As stated in Announcement 2022-28, 2022-52 I.R.B. 659 (Dec. 27, 2022), the Treasury Department and IRS will continue to defend existing listing notices in cases in which Mann Construction is not controlling precedent. Consistent with the aim expressed in Announcement 2022-28 of avoiding confusion and preventing disruption of the IRS's ongoing efforts to identify and examine abusive tax shelters, the Treasury Department and the IRS are following notice and comment procedures in identifying certain micro-captive transactions as listed transactions in order to eliminate any confusion and ensure that the IRS's efforts to combat abusive tax shelters throughout the nation continue undisrupted.

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 or a transaction of interest after a taxpayer files a tax return (including an amended return) reflecting the taxpayer's participation in the transaction, § 1.6011-4(e)(2)(i) generally requires the participant to file a disclosure statement (Form 8886, *Reportable Transaction Disclosure Statement*) with the Office of Tax Shelter Analysis (OTSA) within 90 days of the transaction becoming a listed transaction or a transaction of interest if the

assessment limitations period remains open for any taxable year in which the taxpayer participated in the transaction. Accordingly, any taxpayer 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 or a transaction of interest is finalized will have an obligation to disclose the transaction, unless otherwise provided in the final regulations. Failure to disclose will subject the taxpayer to the penalty under section 6707A of the Internal Revenue Code (Code). 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) of the Code. 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) of the Code.

Likewise, if a regulation identifying a transaction as a listed transaction or a transaction of interest 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, *Material Advisor Disclosure Statement*, with OTSA by the last day of the month that follows the end of the calendar quarter in which the advisor became a material advisor with respect to the 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 or transaction of interest, if the person advised by the material advisor entered into the transaction within six years before the date the transaction was identified as a listed transaction or transaction of interest in published guidance. See § 301.6112-1(b)(2).

DRAFTING INFORMATION

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