

Green Rock Rolls Over Notice 2017-10

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In a recently issued memorandum opinion, U.S. District Judge Annemarie Carney Axon dealt the IRS another blow in its ongoing battle over the validity of its syndicated conservation easement listing notice, Notice 2017–10. The Northern District of Alabama judge sided with Green Rock, LLC in its suit against the IRS asking the court to set aside Notice 2017–10 as an invalid agency action under the Administrative Procedure Act ("APA").

In December 2016, the IRS issued Notice 2017-10, requiring taxpayers and advisors who participated in certain syndicated conservation easements to report their role in the transaction or face substantial civil, and potentially criminal, penalties. As was its practice at the time, the IRS issued the listing notice without seeking comment from the general public based on its view that the relevant law allowed the IRS to operate outside the requirements of the APA.

Green Rock, LLC challenged this action, arguing it was improper for the IRS to impose onerous reporting requirements on taxpayers and their advisors without first seeking comments from the general public as required by the APA. Not only was the cost of compliance with the listing notice hefty, but the penalties for non-compliance were steep. Green Rock's position was supported by a recent Sixth Circuit decision in *Mann Construction*, setting aside a different listing notice, and the Tax Court's November 9, 2022, decision in *Green Valley Investors*, which also set aside Notice 2017-10 for failing to comply with the APA.

The district court in *Green Rock LLC v. IRS* agreed with the Sixth Circuit and Tax Court, holding that language in the Treasury Regulation that allows the IRS to identify listed transactions through "listing notices" "does not irreconcilably conflict with the Administrative Procedure Act's notice-and-comment requirement." *Green Valley Invs., LLC*, 159 T.C. at 26, 32 (Pugh, J., concurring); *id.* at 34 (Toro, J.,

concurring). Because the statute did not expressly exempt the listing notice process from the APA's requirements, the court held that listing notices, like other IRS rules, are subject to the APA. And because the IRS failed to comply with the APA, Notice 2017-10 was invalid.

The district court then grappled with the implications of its decision that Notice 2017-10 was set aside. The Tax Court had already held that its decision to set aside Notice 2017-10 applied to "all similarly situated taxpayers who come before us" *Green Valley* at 23 n.22. Conversely, a U.S. District Court in Ohio held that its decision setting aside Notice 2017-10 applied only to the plaintiff in that case. *GBX Associates LLC v. United States*, No. 1:22-cv-00401 (N.D. Ohio 2022). Judge Axon concluded that her decision setting aside Notice 2017-10 was not a nationwide injunction based on Supreme Court precedent holding "that an order vacating an agency action is not the same as an injunction." So, while the *Green Rock* decision does not enjoin the IRS from a particular course of conduct, it is still an open question whether the IRS is permitted to take action (such as imposing penalties) for failing to comply with Notice 2017-10, which has been "set aside." We expect to see further developments on this question in the coming weeks and months.



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