TAX SHELTERS: THE IRS ISSUES A LISTING NOTICE FOR SYNDICATED CONSERVATION EASEMENTS

Posted on **February 2, 2017** by **Jim Malone**

The Internal Revenue Code provides a deduction for a qualified conservation contribution, such as an easement or an outright donation of property for conservation purposes. *See* I.R.C. § 170(f)(3)(B)(iii) (providing deduction for a qualified conservation contribution). There are a variety of technical requirements in place that determine whether a particular contribution of property falls within section 170(f)(3)(B)(iii). *See* I.R.C. § 170(h) (describing requirements for deductible donation). The government has been fairly aggressive in pursuing litigation over the requirements for a deduction. *See, e.g., Mitchell v. Comm'r*, 775 F.3d 1243 (10th Cir. 2015); *Carroll v. Comm'r*, 146 T.C. 196 (2016).

In December, the IRS adopted a different approach, labeling a category of abusive conservation transactions as listed transactions. Notice 2017-10, 2017-4 I.R.B. 544, 2016 I.R.B. LEXIS 789 (Dec. 23, 2016). A transaction that is a listed transactions has been determined to be "a tax avoidance transaction" by the IRS. Treas. Reg. § 1.6011-4(b)(2). The issuance of Notice 2017-10 makes these transactions "reportable transactions." Treas. Reg. § 1.6011-4(b)(1). This means taxpayers who engaged in one of these transactions must make disclosures to the IRS. *See* Treas. Reg. § 1.6011-4(a). Material advisers involved in the transactions are required to make disclosures and to maintain lists of participants for production to the IRS upon request. I.R.C. §§ 6111(a) (imposing reporting requirement); 6112(a) (imposing record-keeping requirement), (b) (production requirement).

Notice 2017-10 reaches a specific genre of conservation deals that have apparently been marketed on the premise that the transaction will generate a charitable deduction in excess of the amount that the taxpayers invest. Specifically, the promoters syndicate ownership interests in a pass-through entity "using promotional materials suggesting to prospective investors that an investor may be entitled to a share of a charitable contribution deduction that equals or exceeds an amount that is two and one-half times the amount of the investor's investment." Notice 2017-10, 2016 I.R.B. LEXIS 789 at *2-*3. This was accomplished through the use an appraisal "that greatly inflates the value of the conservation easement based on unreasonable conclusions about the development potential of the real property." *Id.* at *3.

Any transaction entered into after January 1, 2010 that falls within those parameters is covered. Taxpayers who engaged in a transaction that is covered by Notice 2017-10 should understand several

things:

- Their disclosure obligations apply to any return previously filed for which the assessment limitations period remains open. Treas. Reg. § 1.6011-4(e)(2).
- There are significant penalties applicable for failure to make the required disclosures. Section 6707A of the Code provides for a penalty of 75% of the tax decrease derived from the transaction, subject to a maximum of $100,000 for individuals who engage in listed transactions and a minimum penalty of $10,000. I.R.C. § 6707A.
- The failure to comply with the disclosure requirement also extends the assessment limitations period. I.R.C. § 6501(c)(10).

Individuals who were involved in promoting these transactions are also subject to the same penalty regimen.

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