

Listing Notice--Syndicated Conservation Easement Transactions

Notice 2017-10

The Department of the Treasury (Treasury Department) and the Internal Revenue Service (IRS) are aware that some promoters are syndicating conservation easement transactions that purport to give investors the opportunity to obtain charitable contribution deductions in amounts that significantly exceed the amount invested. This notice alerts taxpayers and their representatives that the transaction described in section 2 of this notice is a tax avoidance transaction and identifies this transaction, and substantially similar transactions, as listed transactions for purposes of § 1.6011-4(b)(2) of the Income Tax Regulations (Regulations) and §§ 6111 and 6112 of the Internal Revenue Code (Code). This notice also alerts persons involved with these transactions that certain responsibilities may arise from their involvement.

SECTION 1. BACKGROUND

Section 170(f)(3)(B)(iii) of the Code allows a deduction for a qualified conservation contribution. A qualified conservation contribution is a contribution of a qualified real property interest to a qualified organization exclusively for conservation purposes. Section 170(h)(1) through (5); § 1.170A-14. A qualified real property interest includes a restriction, granted in perpetuity, on the use that may be made of real property. Section 170(h)(2)(C). For purposes of this notice, a qualified real property interest is referred to as a conservation easement.

The Treasury Department and the IRS have become aware that some promoters are syndicating conservation easement transactions that purport to give investors the

opportunity to claim charitable contribution deductions in amounts that significantly exceed the amount invested. In such a syndicated conservation easement transaction, a promoter offers prospective investors in a partnership or other pass-through entity (“pass-through entity”) the possibility of a charitable contribution deduction for donation of a conservation easement.

The promoters (i) identify a pass-through entity that owns real property, or (ii) form a pass-through entity to acquire real property. Additional tiers of pass-through entities may be formed. The promoters then syndicate ownership interests in the pass-through entity that owns the real property, or in one or more of the tiers of pass-through entities, 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. The promoters obtain an appraisal that purports to be a qualified appraisal as defined in § 170(f)(11)(E)(i) but that greatly inflates the value of the conservation easement based on unreasonable conclusions about the development potential of the real property. After an investor invests in the pass-through entity, either directly or through one or more tiers of pass-through entities, the pass-through entity donates a conservation easement encumbering the property to a tax-exempt entity. Investors who held their direct or indirect interests in the pass-through entity for one year or less may rely on the pass-through entity’s holding period in the underlying real property to treat the donated conservation easement as long-term capital gain property under § 170(e)(1). The

promoter receives a fee or other consideration with respect to the promotion, which may be in the form of an interest in the pass-through entity. The IRS intends to challenge the purported tax benefits from this transaction based on the overvaluation of the conservation easement. The IRS may also challenge the purported tax benefits from this transaction based on the partnership anti-abuse rule, economic substance, or other rules or doctrines.

SECTION 2. FACTS

A transaction described in this section is a listed transaction. An investor receives promotional materials that offer prospective investors in a pass-through entity the possibility 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. The promotional materials may be oral or written. For purposes of this notice, promotional materials include, but are not limited to, documents described in § 301.6112-1(b)(3)(iii)(B) of the Regulations. The investor purchases an interest, directly or indirectly (through one or more tiers of pass-through entities), in the pass-through entity that holds real property. The pass-through entity that holds the real property contributes a conservation easement encumbering the property to a tax-exempt entity and allocates, directly or through one or more tiers of pass-through entities, a charitable contribution deduction to the investor. Following that contribution, the investor reports on his or her federal income tax return a charitable contribution deduction with respect to the conservation easement.

SECTION 3. LISTED TRANSACTIONS

Transactions entered into on or after January 1, 2010, that are the same as, or substantially similar to, the transaction described in section 2 of this notice are identified as “listed transactions” for purposes of § 1.6011-4(b)(2) and §§ 6111 and 6112 effective December 23, 2016. Persons entering into these transactions on or after January 1, 2010, must disclose the transactions as described in § 1.6011-4 for each taxable year in which the taxpayer participated in the transactions, provided that the period of limitations for assessment of tax has not ended on or before December 23, 2016. Material advisors, including appraisers, who make a tax statement on or after January 1, 2010, with respect to transactions entered into on or after January 1, 2010, have disclosure and list maintenance obligations under §§ 6111 and 6112. See §§ 301.6111-3, 301.6112-1.

For rules regarding the time for providing disclosure of a transaction described in this notice, see §§ 1.6011-4(e) and 301.6111-3(e). However, if, under § 1.6011-4(e)(1), a taxpayer is required to file a disclosure statement with respect to a transaction described in this notice after December 23, 2016, and prior to May 1, 2017, that disclosure statement will be considered to be timely filed if the taxpayer alternatively files the disclosure with the Office of Tax Shelter Analysis by May 1 (because April 30 is a Sunday). In addition, for purposes of disclosure of transactions described in this notice, the 90-day period provided in § 1.6011-4(e)(2)(i) is extended to 180 days. Further, if under § 301.6111-3(e), a material advisor is required to file a disclosure

statement with respect to the listed transaction described in this notice by January 31, 2017, that disclosure statement will be considered to be timely filed if the taxpayer files the disclosure with the Office of Tax Shelter Analysis by May 1, 2017 (because April 30 is a Sunday).

Independent of their classification as listed transactions, transactions that are the same as, or substantially similar to, the syndicated conservation easement transaction described in section 2 may already be subject to the requirements of §§ 6011, 6111, 6112, or the regulations thereunder. The transaction described in section 2 is identified as a listed transaction regardless of whether the transaction has the characteristics described in section 1 of this notice.

Whether a taxpayer has participated in the listed transaction described in section 2 of this notice will be determined under § 1.6011-4(c)(3)(i)(A). Participants include, but are not limited to, investors, the pass-through entity (any tier, if multiple tiers are involved in the transaction), or any other person whose tax return reflects tax consequences or a tax strategy described in section 2.

For purposes of this notice, a donee described in § 170(c) shall not be treated as a party to the transaction under § 4965 or a participant under § 1.6011-4.

Participants required to disclose these transactions under § 1.6011-4 who fail to do so will be subject to penalties under § 6707A. Participants required to disclose these transactions under § 1.6011-4 who fail to do so may also be subject to an extended period of limitations under § 6501(c)(10). Material advisors required to disclose these

transactions under § 6111 who fail to do so may be subject to the penalty under § 6707. Material advisors required to maintain lists of investors under § 6112 who fail to do so (or who fail to provide such lists when requested by the IRS) may be subject to the penalty under § 6708(a). In addition, the IRS may impose other penalties on persons involved in these transactions or substantially similar transactions, including the accuracy-related penalty under § 6662 or § 6662A, the § 6694 penalty for understatements of a taxpayer's liability by a tax return preparer, and the § 6695A penalty for certain valuation misstatements attributable to incorrect appraisals.

The Treasury Department and the IRS recognize that some taxpayers may have filed tax returns taking the position that they were entitled to the purported tax benefits of the type of transaction described in this notice. These taxpayers should take appropriate corrective action and ensure that their transactions are disclosed properly.

DRAFTING INFORMATION

The principal authors of this notice are Angella L. Warren and Maxine M. Woo-Garcia of the Office of Associate Chief Counsel (Income Tax & Accounting). For further information regarding this notice contact Ms. Warren at (202) 317-7003 (not a toll-free call) or Ms. Woo-Garcia at (202) 317-7011 (not a toll-free call).