

Alert | Tax Audits, Litigation & Criminal Tax Defense



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Responding to Recent Taxpayer Victories, IRS Issues Proposed Regulations Identifying Syndicated Conservation Easement Transactions as Listed Transactions

Go-To Guide:

- Following defeat in Tax Court, IRS issues proposed regulations identifying syndicated conservation easement transactions as listed transactions.
- Expanded rules for identifying syndicated conservation easement transactions.
- Potential implications for qualified organizations receiving syndicated conservation easement donations.
- Effect of proposed regulations, if adopted, on current disclosure and list maintenance requirements.

On Dec. 6, 2022, the IRS issued **proposed regulations** identifying syndicated conservation easement transactions as listed transactions for purposes of I.R.C. § 6011. The proposed regulations are in response to a series of taxpayer victories in cases involving application of the Administrative Procedure Act (APA) to the IRS's identification of listed transactions. In *Mann Construction, Inc. v. United States*,¹ the Sixth Circuit invalidated Notice 2007-83 for failure to comply with the APA's notice-and-comment procedures.

¹ 27 F. 4th 1138 (6th Cir. 2022).

(For a more detailed explanation of the *Mann Construction* ruling, see [GT Alert, 6th Circuit Rules IRS Must Follow Administrative Procedure Act in ‘Listing’ Transactions, Raising Questions on Extent of Case’s Application](#).) Citing *Mann Construction*, the U.S. Tax Court on Nov. 9 invalidated the syndicated conservation easement transaction listing notice (i.e., Notice 2017-10) in *Green Valley Investors, LLC, Et Al., Bobby A. Branch, Tax Matters Partner, v. Commissioner*.² (For a detailed discussion of the *Green Valley Investors* decision, see [GT Alert, U.S. Tax Court Invalidates Conservation Easement Notice, Abates Reportable Transaction Penalty for Failure to Comply with the Administrative Procedure Act](#).) In Announcement 2022-28, 2022-52 IRB 1, also released on Dec. 6, 2022, the Treasury Department and the IRS state that they disagree with the rulings in *Mann Construction* and *Green Valley Investors*; however, they issued the proposed regulations to ensure consistent application of the tax laws. The Treasury Department is requesting comments on the proposed regulations by Feb. 6, 2023.

Summary of the Proposed Regulations

- **Syndicated Conservation Easement Transaction Identified as Listed Transactions-** Prop. Reg. § 1.6011-9(a) provides that transactions that are the same as or substantially similar to a syndicated conservation easement transaction are listed transactions for purposes of the disclosure and list maintenance requirements and related penalties. The proposed regulations adopt Notice 2017-10’s four-part definition of syndicated conservation easement transactions: (i) the taxpayer receives promotional materials promising a charitable contribution deduction equal to or exceeding 2.5 times the taxpayer’s investment in the passthrough entity (the “2.5 times rule”); (ii) the taxpayer invests directly or indirectly through a passthrough entity; (iii) the passthrough entity contributes the conservation easement to a qualified organization and allocates the charitable contribution deduction to its partners; and (iv) the taxpayer reports the charitable contribution deduction on the taxpayer’s federal tax return.
- **Promotional Materials Defined Broadly-** The content of the promotional materials is critical to the determination of whether a transaction meets the definition of a syndicated conservation easement transaction. Prop. Reg. § 1.6011-9(c)(4) defines “promotional materials” broadly to include any written or oral communication provided to investors, such as tax analyses or opinions concerning the expected tax treatment of the transaction, appraisals, marketing materials, websites, transactional documents, private placement memoranda, operating agreements, subscription agreements, and statements of the expected charitable contribution deduction.
- **Guidance on the Application of the 2.5 Times Rule-** The proposed regulations include three new rules to prevent taxpayers and promoters from avoiding the 2.5 times rule:
 - **Use of the Highest Stated Charitable Deduction in the Promotional Materials-** The IRS recognizes that promoters attempt to avoid the 2.5 times rule by issuing promotional materials that are vague about the amount of the potential charitable deduction. To prevent this, the proposed regulations provide that the highest stated charitable deduction in the promotional materials will be used for purposes of applying the 2.5 times rule. For example, where the promotional materials provide for a range of potential charitable deductions, the 2.5 times rule will be applied using the highest amount.
 - **Rebuttable Presumption-** The IRS notes that taxpayers and promoters may not be forthcoming about the content of the promotional materials. Under the proposed regulations, there will be a rebuttable presumption that the 2.5 times rule is satisfied where: (i) the passthrough entity donates the conservation easement within three years of the taxpayer’s investment; (ii) the

² 159 T.C. No. 5 (2022).

passthrough entity allocates a charitable contribution deduction to the taxpayer that equals or exceeds 2.5 times the amount of the taxpayer's investment; and (iii) the taxpayer claims a charitable contribution deduction that equals or exceeds 2.5 times the amount of the taxpayer's investment. The presumption can be rebutted where the taxpayer establishes that none of the promotional materials imply that investors may receive a charitable contribution deduction exceeding 2.5 times the amount of their investment in the passthrough entity. The IRS is requesting comments on the rebuttable presumption.

- **Anti-Stuffing Rule-** The IRS recognizes that some taxpayers may invest excess amounts in the passthrough entity to avoid application of the 2.5 times rule. As a result, the proposed regulations will only include the amount of the taxpayer's investment attributable to the real property subject to the conservation easement. For example, if the passthrough entity holds other assets such as marketable securities, cash, or other real property that are not subject to the conservation easement, the taxpayer's share of those assets will not be included in the taxpayer's investment for purposes of applying the 2.5 times rule.
- **Potential Changes for Qualified Organizations Receiving Donations of Syndicated Conservation Easements-** The proposed regulations may have significant implications for qualified organizations that receive donations of syndicated conservation easements:
 - **Qualified Organizations Not Treated as “Participants”-** The proposed regulations confirm that qualified organizations are not treated as participants for purposes of the disclosure requirements under I.R.C. § 6011.
 - **Qualified Organizations No Longer Excluded from the Definition of “Material Advisors”-** Notice 2017-10 provided that qualified organizations were excluded from the definition of “material advisor” for purposes of the disclosure and list maintenance requirements. The proposed regulations remove this exclusion and seek comments on whether qualified organizations are receiving fees for providing material aid, assistance, or advice in connection with syndicated conservation easement transactions.
 - **Excise Tax under I.R.C. § 4965-** I.R.C. § 4965 imposes an excise tax on tax-exempt entities that become a party to prohibited tax shelter transactions. The amount of the excise tax depends on whether the qualified organization had knowledge of or reason to know it was a party to a prohibited tax shelter transaction. Under the proposed regulations, qualified organizations receiving donations of syndicated conservation easements are not treated as parties to the transaction for purposes of applying I.R.C. § 4965. Based on thousands of disclosures, the IRS has determined that only a small group of qualified organizations have facilitated abusive syndicated conservation easement transactions. But the IRS is seeking comments on whether it should eliminate or limit the I.R.C. § 4965 carveout.

Effect on Current Disclosure and List Maintenance Requirements

The IRS's position is that the disclosure and list maintenance requirements for syndicated conservation easement transactions in Notice 2017-10 remain in effect for participants and material advisors outside the Sixth Circuit. When the proposed regulations become final, participants and material advisors in the Sixth Circuit will be required to file disclosures within 90 days after the effective date for any tax year that is open under the statute of limitations.

Conclusion

The proposed regulations demonstrate that the IRS is taking a proactive approach in addressing the APA challenges to its method for identifying listed transactions. The IRS makes clear that it will continue to aggressively pursue syndicated conservation easement transactions. It remains to be seen whether the proposed regulations will be adopted in their current form. But taxpayers, material advisors, and qualified organizations that receive syndicated conservation easement donations may wish to consult with their tax advisors to understand how the proposed regulations, if adopted, may affect them.

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