RECENT DEVELOPMENTS IN FEDERAL INCOME TAXATION

We apologize to our readers. If we had more time, this outline would be much shorter.

By

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1. Beginning in 2024, beneficiaries of § 529 college savings plans that have been open for more than 15 years will be able to roll over up to $35,000 during their lifetime from the 529 plan to a Roth IRA (subject to annual Roth IRA contribution limits). A provision of the SECURE 2.0 Act, Division T, Title I, § 126 of the Consolidated Appropriations Act, 2023, amended Code § 529(c)(3) by adding § 529(c)(3)(E), which permits distributions from a § 529 college savings account to be tax-free if they are rolled over to a Roth IRA maintained for the benefit of the designated beneficiary of the § 529 account provided that certain requirements are met. The requirements are that (1) the § 529 account must have been maintained for the 15-year period ending on the date of the distribution, (2) the distribution does not exceed the amount contributed to the § 529 plan (plus earnings) during the 5-year period ending on the date of the distribution, and (3) the distribution is paid in a direct trustee-to-trustee transfer to a Roth IRA maintained for the benefit of the designated beneficiary of the § 529 account. The amount rolled over each year is subject to two limitations. *First*, the amount rolled over cannot exceed the annual limit on Roth IRA contributions for the designated beneficiary reduced by the aggregate contributions made during the year to all IRAs maintained for the benefit of the designated beneficiary. For example, the limit on Roth IRA contributions for 2023 is $6,500. If the designated beneficiary of a § 529 account contributes $1,000 to a traditional IRA for the year, then the maximum amount that the individual could roll over from the § 529 account to the Roth IRA would be $5,500. *Second*, the amount rolled over in the current year and in all prior years cannot exceed $35,000, i.e., the lifetime limit on rollovers from the § 529 account to a Roth IRA is $35,000. This change applies to distributions from § 529 accounts made after December 31, 2023.

G. Alternative Minimum Tax

VI. CORPORATIONS

A. Entity and Formation

B. Distributions and Redemptions

1. A new excise tax of 1% on redemptions of stock by publicly traded corporations. The Inflation Reduction Act, § 138102, adds new Code § 4501, which imposes on a publicly traded U.S. corporation a 1 percent excise tax on the value of any of its stock that is repurchased by the corporation during the taxable year. The term "repurchase" means a redemption within the meaning of Code § 317(b) with regard to the stock of the corporation and any other economically similar transaction as determined by the Secretary of Treasury. The amount of repurchases subject to the tax is reduced by the value of any new issuance to the public and stock issued to the employees of the corporation. A subsidiary of a publicly traded U.S. corporation that performs the buyback for its parent or a U.S. subsidiary of a foreign corporation that buys back its parent's stock is subject to the excise tax. The provision excludes certain repurchases from the excise tax. The provision applies to repurchases of stock after December 31, 2022.

a. Yay! We get to teach corporate redemptions again. Notice 2023-2, 2023-2 I.R.B. 374 (12/27/22). The Treasury Department and the IRS have announced interim guidance under § 4501 in the form of Notice 2023-2. The notice is extensive and foreshadows the inevitably complicated regulations that ultimately will be promulgated under § 4501. Section 2 of Notice 2023-2 summarizes relevant law and provides introductory guidance, including the meaning of a "covered corporation" and "covered repurchases." Section 2 further identifies certain transactions that trigger the tax even if § 317(b) technically may not apply, such as stock purchases by a "specified affiliate" and "transactions economically similar to a § 317(b) redemption." Section 2 of Notice 2023-2 also clarifies that, pursuant to § 275(a)(6), any tax paid under § 4501 is not deductible by the covered corporation. Section 3 of Notice 2023-2 comprises the bulk of the new guidance. Section 3 provides rules concerning amounts includable in the excise tax base, amounts excludable from the excise tax base, and other aspects of the application of § 4501. Section 3 also includes twenty-six helpful examples, a few of which are reproduced here regarding preferred stock redemptions, stock dividends, boot in acquisitive reorganization transactions, cash paid for fractional shares in an acquisitive reorganization, corporate liquidations, and purchases by a disregarded entity.

Example 1: Redemption of preferred stock-

a) Facts. Corporation X has outstanding common stock that is traded on an established securities market, as well as mandatorily redeemable preferred stock that is not traded on an established securities market. The preferred stock is stock for Federal tax purposes. On January 1, 2023, Corporation X redeems the preferred stock pursuant to its terms.

b) Analysis. The redemption by Corporation X of its mandatorily redeemable preferred stock is a repurchase because (i) Corporation X redeemed an instrument that is stock for Federal tax purposes (that is, mandatorily redeemable preferred stock issued by Corporation X), and (ii) the redemption by Corporation X is a § 317(b) redemption.

Example 5: Pro rata stock split -

a) Facts. On October 1, 2023, Corporation X distributes three shares of Corporation X common stock with respect to each existing share of its outstanding common stock (Corporation X Stock Split).

b) Analysis. The common stock distributed by Corporation X to its shareholders through the Corporation X Stock Split is not an issuance because Corporation X distributed the stock to its shareholders with respect to its outstanding common stock. See section 3.08(4)(b) of this notice. Therefore, the stock distributed by Corporation X is not taken into account for purposes of the netting rule. See section 3.08(4)(a) of this notice (disregarding such types of issuances). Accordingly, Corporation X's stock repurchase excise tax base for its 2023 taxable year is not reduced by the Corporation X Stock Split.

Example 6: Acquisition of a target corporation in an acquisitive reorganization -

a) Facts. On October 1, 2023, Target merges into Corporation X (Target Merger). The Target Merger qualifies as an A reorganization. On the date of the Target Merger, the fair market value of Target's outstanding stock is $100x. In the Target Merger, Target's shareholders exchange $60x of their Target stock for Corporation X common stock, and $40x of their Target stock for $40x of cash.

b) Analysis regarding repurchase treatment, timing, and amount. The exchange by the Target shareholders of their Target stock for the consideration received in the Target Merger is a repurchase by Target because that exchange is an economically similar transaction. See section 3.04(4)(a)(i) of this notice. This repurchase occurs on October 1, 2023 (that is, the date on which the Target shareholders exchange their Target shares as part of the Target Merger). See section 3.06(1)(b) of this notice. The amount of this repurchase by Target is $100x, which equals the aggregate fair market value of the Target stock at the time that stock is exchanged by the Target shareholders as part of the Target Merger (that is, October 1, 2023). See section 3.06(2)(a) of this notice.

c) Analysis regarding impact of Target Merger on Target's stock repurchase excise tax base. Target's stock repurchase excise tax base for its 2023 taxable year is initially increased by $100x on account of the Target Merger. Under the qualifying property exception, the fair market value of the Target stock exchanged by the Target shareholders for Corporation X stock in the Target Merger (that is, $60x of Target stock) is a qualifying property repurchase that reduces Target's stock repurchase excise tax base. See sections 3.03(3)(a) and 3.07(2)(a) of this notice (regarding acquisitive reorganizations). However, the fair market value of the Target stock exchanged by the Target shareholders for the $40x of cash in the Target Merger does not qualify for the qualifying property exception. See sections 3.03(3)(a) and 3.07(2)(a) of this notice. Therefore, Target's stock repurchase excise tax base for its 2023 taxable year is increased by $40x ($100x repurchase - $60x exception = $40x).

d) Analysis regarding Corporation X's stock repurchase excise tax base. Corporation X's transfer of Corporation X stock to Target in the Target Merger is not an issuance for purposes of the netting rule because Corporation X's issuance of that stock is part of a transaction to which the qualifying property exception applies. See generally section 3.08(4)(d) of this notice. Specifically, Corporation X's transfer of Corporation X stock to Target is not an issuance for purposes of the netting rule because (i) the Corporation X stock constitutes property permitted to be received under § 354 without the recognition of gain, (ii) the Corporation X stock is used by a covered corporation (that is, Target) to repurchase its stock in a transaction that is a repurchase under section 3.04(4)(a)(i) of this notice, and (iii) the repurchase by Target is not included in Target's stock repurchase excise tax base because it is a qualifying property repurchase. See section 3.08(4)(d) of this notice. Therefore, Corporation X does not take into account any of the $60x of its stock transferred to Target in the Target Merger to reduce its stock repurchase excise tax base for Corporation X's 2023 taxable year. See section 3.08(4)(a) of this notice (disregarding such types of issuances).

Example 7: Cash paid in lieu of fractional shares -

a) Facts. The facts are the same as in section 3.09(6)(a) of this notice (Example 6). Additionally, the exchange ratio in the Target Merger is 1.25 shares of Corporation X stock for each share of Target stock. As part of the Target Merger, Shareholder A, who owns two shares of Target stock, receives two shares of Corporation X stock as well as additional cash in lieu of a 0.5 fractional share in Corporation X. The payment by Corporation X to Shareholder A of cash in lieu of a fractional share of Corporation X stock (i) was not separately bargained-for consideration (that is, the cash paid by Corporation X in lieu of a fractional Corporation X share represented a mere rounding off of the two Corporation X shares issued in the exchange), (ii) was carried out solely due to administrative necessity (and therefore, solely for non-tax reasons), and (iii) was for an amount of cash with regard to a fractional share of Corporation X stock that did not exceed the value of one share.

b) Analysis. The payment by Corporation X of cash to Shareholder A in lieu of a fractional share of Corporation X stock is treated for Federal income tax purposes as though the 0.5 fractional share were (i) distributed by Corporation X to Shareholder A as part of the Target Merger, and then (ii) redeemed by Corporation X for cash. Corporation X's deemed redemption of the fractional share treated as received by Shareholder A in the Target Merger is not a repurchase because, in addition to the facts described in section 3.09(7)(a) of this notice (this Example 7), the payment of cash by Corporation X is carried out as part of a transaction that qualifies as an acquisitive reorganization (that is, the Target Merger). See section 3.04(3)(b) of this notice. In addition, Corporation X's deemed issuance of the fractional share to Shareholder A is not taken into account for purposes of the netting rule. See section 3.08(4)(f) of this notice.

Example 16: Distribution in complete liquidation of a covered corporation -

a) Facts. Corporation X adopts a plan of complete liquidation that becomes effective on March 1, 2023 (Corporation X Liquidation). Corporation X has 100x shares of common stock outstanding. On April 1, 2023, all shareholders of Corporation X receive a liquidating distribution by Corporation X in full payment for their Corporation X common stock. At the time at which Corporation X distributes all of its corporate assets to its shareholders in complete liquidation (that is, April 1, 2023), Corporation X stock trades at $1x per share. Each distribution in complete liquidation is subject to § 331.

b) Analysis. A distribution in complete liquidation of a covered corporation (that is, Corporation X) to which § 331 (but not § 332(a)) applies is not a repurchase by the covered corporation. See section 3.04(4)(b)(i) of this notice. Therefore, none of the distributions by Corporation X in complete liquidation is a repurchase by Corporation X, and Corporation X's stock repurchase excise tax for its 2023 taxable year is not increased as a result of the Corporation X Liquidation.

Example 17: Complete liquidation of a covered corporation to which both §§ 331 and 332(a) apply -

a) Facts. The facts are the same as in section 3.09(16)(a) of this notice (Example 16), except that one of Corporation X's shareholders is a corporation (Corporation Z). As of the date of adoption of the plan of liquidation of Corporation X (that is March 1, 2023), Corporation Z has continued to be at all times until the receipt of the Corporation X liquidating distribution the owner of 80x shares of Corporation X common stock. In other words, Corporation Z has continued to be at all times until the receipt of the Corporation X liquidating distribution the owner of stock in Corporation X meeting the requirements of § 1504(a)(2) (that is, Corporation Z is an 80-percent distributee within the meaning of § 337(c)). Therefore, the liquidating distribution by Corporation X to Corporation Z as part of the Corporation X Liquidation qualifies as a liquidation under § 332(a). The liquidating distributions by Corporation X to the other shareholders described in section 3.09(16)(a) of this notice (Example 16) are distributions in liquidation subject to § 331.

b) Analysis. In the case of a complete liquidation of a covered corporation, if §§ 331 and 332(a), respectively, apply to component distributions of the complete liquidation, (i) a distribution to which § 331 applies is a repurchase by the covered corporation, and (ii) the distribution to which § 332(a) applies is not a repurchase by the covered corporation. See section 3.04(4)(a)(v) of this notice. Therefore, as a result of the component liquidating distributions of the Corporation X Liquidation to which § 331 applies, Corporation X repurchased 20x shares of its stock on April 1, 2023. Accordingly, the Corporation X Liquidation results in a $20x increase in Corporation X's stock repurchase excise tax base for its 2023 taxable year because the fair market value of Corporation X's stock at the time of repurchase (that is, April 1, 2023) was $1x per share (20x shares x $1x = $20x). See section 3.06(2)(a) of this notice.

Example 18: Acquisition by disregarded entity -

a) Facts. Corporation X owns all the interests in LLC, a domestic limited liability company that is disregarded as an entity separate from its owner for Federal tax purposes (disregarded entity) under § 301.7701-3 of the Procedure and Administration Regulations (26 CFR part 301). On May 31, 2023, LLC purchases shares of Corporation X's stock for cash from an unrelated shareholder.

b) Analysis. Because LLC is a disregarded entity, the May 31, 2023, acquisition of Corporation X stock is treated as an acquisition by Corporation X. Accordingly, the acquisition is a § 317(b) redemption and is therefore a repurchase. See section 3.04(2) of this notice. Section 301.7701-2(c)(2)(v) (treating disregarded entities as corporations for purposes of certain excise taxes) does not apply to treat LLC as a corporation because § 4501 is not described in § 301.7701-2(c)(2)(v)(A).

Affected taxpayers may rely upon Notice 2023-2 until proposed regulations are issued.

C. Liquidations

D. S Corporations

E. Mergers, Acquisitions and Reorganizations

F. Corporate Divisions

G. Affiliated Corporations and Consolidated Returns

H. Miscellaneous Corporate Issues

1. Congress has revived the corporate AMT for corporations with "applicable financial statement income" over $1 billion. The corporate alternative minimum tax (AMT) was repealed by the 2017 Tax Cuts and Jobs Act. The Inflation Reduction Act, § 10101, amends Code § 55(b) to reinstate a corporate AMT. Specifically, the legislation imposes a 15 percent minimum tax on corporations (other than S corporations, regulated investment companies, and real estate investment trusts) with average "adjusted financial statement income" measured over three years of over $1 billion. Adjusted financial statement income (AFSI) is the net income or loss stated on the taxpayer's "applicable financial statement" with certain modifications. One modification is that AFSI is adjusted to allow depreciation deductions calculated for tax purposes rather than book purposes. An "applicable financial statement" is defined as (1) a financial statement that is certified as being prepared in accordance with generally accepted accounting principles that is (a) a 10-K or annual statement to shareholders required to be filed with the Securities and Exchange Commission, (b) an audited financial statement used for credit purposes, reporting to shareholders, partners, other proprietors, or beneficiaries, or for any other substantial nontax purpose, or (c) filed with any other federal agency for purposes other than federal tax purposes; (2) certain financial statements made on the basis of international financial reporting standards and filed with certain agencies of a foreign government; or (3) a financial statement filed with any other regulatory or governmental body specified by IRS. The corporate AMT applies for tax years beginning after December 31, 2022.

a. Guidance on the revived corporate AMT. Notice 2023-7, 2023-3 IRB 390 (12/27/22). Pending forthcoming proposed regulations, the Treasury Department and the IRS have announced interim guidance on "time-sensitive" issues under newly amended § 55(b). Notice 2023-7 also provides that Treasury and the IRS intend to issue additional interim guidance to address other corporate AMT issues, particularly concerning unintended adverse consequences to the insurance industry and certain other industries. Taxpayers may rely upon this interim guidance until proposed regulations are issued.

VII. PARTNERSHIPS

VIII. TAX SHELTERS

IX. EXEMPT ORGANIZATIONS AND CHARITABLE GIVING

A. Exempt Organizations

B. Charitable Giving

1. The Tax Court reminds us yet again that no CWA, no charitable deduction, regardless of how obvious it is that the donation was without return consideration. Albrecht v.

Commissioner, T.C. Memo. 2022-53 (5/25/22). Section 170(f)(8) requires a contemporaneous written acknowledgment ("CWA") from the donee organization as a condition for a taxpayer's deduction of charitable contributions of $250 or more. The CWA must include (i) the amount of cash and a description (but not value) of any property other than cash contributed; (ii) whether the donee organization provided any goods or services in consideration, in whole or in part, for any such property; and (iii) a description and good faith estimate of the value of any such goods or services. *See* 15 W. 17th St. LLC v. Commissioner, 147 T.C. 557, 563 (2016); Treas. Reg. § 1.170A-13(f)(2). The taxpayer in this case went to great lengths to document her "unconditional and irrevocable" donation of Native American jewelry and artifacts to an exempt museum; however, the documents executed by the taxpayer and the museum in connection with the donation did not contain language stating that the taxpayer received "no goods or services" in return for her gift. Hence, the Tax Court (Judge Greaves) disallowed the taxpayer's claimed charitable contribution deduction citing § 170(f)(8).

2. For contributions of property to donor advised funds, to CYA you better get the CWA to state that the DAF has "exclusive legal control." Keefer v. United States, 130 A.F.T.R.2d 2022-5002 (N.D. Texas 7/6/22). Section 170(f)(8) requires a contemporaneous written acknowledgment ("CWA") from the donee organization as a condition for a taxpayer's deduction of charitable contributions of $250 or more. The CWA must include (i) the amount of cash and a description (but not value) of any property other than cash contributed; (ii) whether the donee organization provided any goods or services in consideration, in whole or in part, for any such property; and (iii) a description and good faith estimate of the value of any such goods or services. In addition to satisfying the CWA requirements of § 170(f)(8), contributions to a "donor advised fund" or "DAF" (as defined in § 4966(d)(2)) must comply with § 170(f)(18) as a condition to the donor's charitable contribution deduction. Specifically, § 170(f)(18)(B) requires the CWA issued by the DAF in connection with a donation of $250 or more to state that the DAF has "exclusive legal control over the assets contributed." The taxpayer in this refund case assigned a 4 percent interest in a hotel partnership to a DAF shortly before the hotel's sale, claiming a charitable contribution deduction of approximately $1.25 million generating tax savings of roughly $508,000. Upon audit, the IRS denied the taxpayer's claimed charitable contribution deduction because the CWA issued by the DAF (along with other documents executed in connection with the donation) did not expressly state that the DAF had "exclusive legal control" over the contributed partnership interest. The taxpayer paid the tax and filed a claim for refund, which the IRS also denied. The taxpayer then filed a suit for refund in the United States District Court for the Northern District of Texas, Dallas Division. Ruling on cross-motions for summary judgement, Judge Boyle agreed with the IRS and denied the taxpayer's refund claim. Judge Boyle determined, as the IRS had argued, that neither the CWA nor the other documents relating to the taxpayer's donation to the DAF contained the "exclusive legal control" language. Without this language, Judge Boyle held, the taxpayer's charitable contribution deduction and refund claim could not be sustained.

3. After 2022, syndicated conservation easements are on life support if not DOA. A well-hidden provision of the SECURE 2.0 Act, Division T, Title VI, § 605 of the Consolidated Appropriations Act, 2023, amended Code § 170(h) to add a new subsection (7) severely restricting charitable deductions for "qualified conservation contributions" by partnerships, S corporations, and other pass-through entities. "Qualified conservation contributions" are defined by § 170(h)(1) to include (but are not limited to) conservation easements granted to charitable organizations in connection with syndicated conservation easements. As described in Notice 2017-10, 2017-4 I.R.B. 544, a typical syndicated conservation easement involves a promoter offering prospective investors the possibility of a charitable contribution deduction in exchange for investing in a partnership. The partnership subsequently grants a conservation easement to a qualified charity, allowing the investing partners to claim a charitable contribution deduction under § 170.

New "2.5 times" proportionate outside basis rule will limit the charitable deduction for conservation contributions by pass-through entities. New § 170(h)(7)(A) generally provides that a partner's charitable contribution deduction for a qualified conservation contribution by a partnership (whether via a direct contribution or as an allocable share from lower-tier partnership) cannot exceed "2.5 times the sum of [such] partner's relevant basis" in the partnership. The term "relevant basis" is defined by new § 170(h)(7)(B)(i) to mean that portion of a partner's "modified basis" which is allocable (under rules similar to those used under § 755) to the real property comprising the qualified conservation contribution. "Modified basis" (defined in § 170(h)(7)(B)(ii)) essentially refers to a partner's outside basis exclusive of the partner's share of partnership liabilities under § 752. Thus, reading between the lines and subject to further guidance, relevant basis appears to equate to an investor's cash investment (a/k/a initial tax and book capital account) in a syndicated conservation easement partnership. Many syndicated conservation easement partnerships claim that investors may secure a charitable deduction that is five times their cash investment. New § 170(h)(7)(A) thus limits the charitable deduction to "2.5 times" an investor's cash contribution, making a syndicated conservation easement much less attractive. New § 170(h)(7) also contains three exceptions: (i) partnerships making conservation easement contributions after a three-year holding period applicable at the partnership- and partner-level, including through tiered partnerships; (ii) "family partnerships" (as defined) making conservation easement contributions; and (iii) partnerships making conservation easement contributions relating to historic structures. *See* IRC §§ 170(f)(19), 170(h)(7)(C)-(E). Moreover, new § 170(h)(7)(F) authorizes Treasury to issue regulations applying similar rules to S corporations and other pass-through entities. Related provisions of the legislation make dovetailing amendments to (i) § 170(f) (charitable contribution substantiation and reporting requirements); (ii) §§ 6662 and 6664 (underpayment penalties attributable to valuation misstatements); (iii) § 6011 (reportable transactions); and (vi) §§ 6235 and 6501 (statute of limitations). New § 170(h)(7) applies to qualified conservation contributions made by partnerships and other pass-through entities after December 29, 2022.

Some welcome news for non-syndicated conservation easement donors? In an uncodified provision (*see* § 605(d)), the legislation directs Treasury to publish "safe harbor deed language for extinguishment clauses and boundary line adjustments" relating to qualified conservation contributions (whether via partnerships or otherwise). Treasury is directed to publish such safe harbor deed language within 120 days of the date of enactment of new § 170(h)(7) (i.e., by April 28, 2023), and donors have 90 days after publication of the safe harbor language to execute and file corrective deeds. This special, uncodified relief provision seems to be targeted toward donors like those who lost battles with the IRS over highly-technical language in their conservation easement deeds. *See Oakbrook Land Holdings LLC v. Commissioner*, 154 T.C. 180 (5/12/20) (deed's extinguishment clause violated the proportionate benefit rule), *aff'd*, 28 F.4th 700 (6th Cir. 3/14/22), and *Pine Mountain Preserve, LLLP v. Commissioner*, T.C. Memo. 2018-214 (12/27/18) (deed improperly allowed substituted property), *rev'd in part, aff'd in part, and vacated and remanded*, 978 F.3d 1200 (5th Cir. 10/22/20). Importantly, however, the foregoing uncodified relief provision does <u>not</u> apply to syndicated conservation easements as described in Notice 2017-10 or to conservation easement cases (and related penalty disputes) docketed in the federal courts before the date a corrective deed is filed.

X. TAX PROCEDURE

A. <u>Interest, Penalties, and Prosecutions</u>

B. <u>Discovery: Summonses and FOIA</u>

C. <u>Litigation Costs</u>

D. <u>Statutory Notice of Deficiency</u>

E. <u>Statute of Limitations</u>

F. <u>Liens and Collections</u>

G. <u>Innocent Spouse</u>

H. <u>Miscellaneous</u>

1. In Notice 2007-83, the IRS concluded that certain trust arrangements involving cash value life insurance policies are listed transactions. According to the Sixth Circuit, the IRS failed to comply with the Administrative Procedure Act in issuing Notice 2007-83 and the notice therefore is invalid. Mann Construction, Inc. v. United States, 27 F.4th 1138 (6th Cir. 3/3/22). In an opinion by Chief Judge Sutton, the U.S. Court of Appeals for the Sixth Circuit has held that the IRS failed to comply with the Administrative Procedure Act (APA) in issuing Notice 2007-83, 2007-2 C.B. 960, and that the notice therefore is invalid.

Notice 2007-83. In Notice 2007-83, the IRS examined certain trust arrangements being promoted to business owners. In these arrangements, a taxable or tax-exempt trust is established to provide certain benefits, such as death benefits, to owners of the business and to employees. The business makes contributions to the trust, which the trustees use to purchase cash value life insurance policies on the lives of the owners and term insurance on the lives of non-owner employees. The arrangements are structured so that, upon termination of the plan, the owners of the business receive all or a substantial portion of the assets of the trust. According to the notice, those promoting the arrangements take the position that the business can deduct contributions to the trust and that the owners have no income as a result of the contributions or the benefits provided by the trust. The notice identifies these transactions as listed transactions that must be disclosed to the IRS. Accordingly, those who fail to disclose these transactions are subject to significant penalties pursuant to § 6707A.

Facts of this case. In this case, from 2013 to 2017, a corporation, Mann Construction, Inc., established an employee-benefit trust that paid the premiums on a cash-value life insurance policy benefitting the corporation's two shareholders. The corporation deducted these payments and the shareholders reported as income part of the insurance policy's value. Neither the individuals nor the company reported this arrangement to the IRS as a listed transaction. In 2019, the IRS concluded that this transaction fell within Notice 2007-83 and imposed a $10,000 penalty on the corporation and on both of its shareholders ($8,642 and $7,794) for failing to disclose their participation in the transaction. The corporation and the shareholders paid the penalties for the 2013 tax year, sought administrative refunds on the ground that the IRS lacked authority to penalize them, and ultimately brought legal action seeking a refund in a U.S. District Court. The District Court upheld the validity of Notice 2007-83 and held in favor of the government.

Sixth Circuit's analysis. The U.S. Court of Appeals for the Sixth Circuit reversed the District Court's holding and concluded that the IRS had failed to comply with the APA in issuing Notice 2007-83. The APA generally prescribes a three-step process for notice-and-comment rulemaking. First, the agency must issue a general notice of proposed rulemaking. Second, assuming notice is required, the agency must consider and respond to significant comments received during the period for public comment. Third, in issuing final rules, the agency must include a concise general statement of the rule's basis and purpose. *See, e.g.*, *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 96 (2015). The IRS did not comply with the first requirement in issuing Notice 2007-83 because it did not issue a notice of proposed rulemaking. The government made two principal arguments as to why it was not required to comply with the APA's notice-and-comment requirements. *First*, the government argued that Notice 2007-83 is an interpretive rule that is not subject to the APA's notice-and-comment procedures rather than a legislative rule that is subject to such procedures. The Sixth Circuit rejected this argument and concluded that Notice 2007-83 is a legislative rule. According to the court, the notice imposes new duties on taxpayers by requiring them to report certain transactions and imposes penalties for failure to do so. The notice also carries out an express delegation of authority from Congress, the court reasoned, because § 6011(a) provides that the Secretary of the Treasury is to determine by regulations when and how taxpayers must file returns and statements and § 6707A(c) delegates to the Secretary of the Treasury the authority to identify which transactions have the potential for tax avoidance or evasion and which transactions are substantially similar to such transactions. Because Notice 2007-83 imposes new duties and penalties on taxpayers and carries out an express delegation of congressional authority, the court concluded, the notice is a legislative rule that is subject to the APA's notice-and-comment procedures. *Second*, the government argued that, even if Notice 2007-83 is a legislative rule, Congress had exempted it from the APA's notice-and-comment procedures. The Sixth Circuit rejected this argument as well. According to the court, nothing in the language of the relevant statutory provisions or their legislative history indicated a congressional intent to exempt the IRS from the APA's notice-and-comment procedures when the IRS identifies transactions that have the potential for tax avoidance or evasion and substantially similar transactions. Because the IRS was required to comply with the APA's notice-and-comment procedures in issuing Notice 2007-83 and failed to do so, the court concluded, the notice is invalid. Accordingly, the taxpayers are entitled to a refund of the penalties they paid for failing to disclose the transaction.

Broader implications. The effect of the Sixth Circuit's decision is to preclude the IRS from imposing penalties under § 6707A for failing to disclose a transaction that the IRS identifies in a notice issued without complying with the APA's notice-and-comment requirements. Because the IRS normally does not comply with the APA's requirements in issuing notices, the broader implication of the court's decision is that taxpayers, at least those whose appeals will be heard by the Sixth Circuit, can challenge penalties imposed pursuant to similar notices that identify transactions as listed or reportable transactions. These include Notice 2016-66, 2016-47 I.R.B. 745, which identifies certain captive insurance arrangements, referred to as "micro-captive transactions," as transactions of interest for purposes of Reg. § 1.6011-4(b)(6) and §§ 6111 and 6112 of the Code, and Notice 2017-10, 2017-4 I.R.B. 544, which identifies certain syndicated conservation easement transactions entered into after 2009 as listed transactions.

a. ♪♫"Hey, I'm gonna get you too. Another one bites the dust."♫♪ Notice 2017-10 held invalid for violating the APA. Green Valley Investors, LLC v. Commissioner, 159 T.C. No. 5 (11/9/22). Aligning with the Sixth Circuit's reasoning in *Mann Construction, Inc. v. United States*, 27 F.4th 1138 (6th Cir. 3/3/22), the Tax Court, in a reviewed opinion (11-4-2) by Judge Weiler, has held that another IRS notice identifying a transaction as a listed transaction violated the APA and therefore is invalid.

Notice 2017-10. As mentioned immediately above, the IRS announced in Notice 2017-10, 2017-4 I.R.B. 544, that 2010 and later syndicated conservation easements are another type of § 6707A listed transaction. A typical syndicated conservation easement involves a promoter offering prospective investors the possibility of a charitable contribution deduction in exchange for investing in a partnership. The partnership subsequently grants a conservation easement to a qualified charity, allowing the investing partners to claim a charitable contribution deduction under § 170. See Part IX item B.1. of the outline for a discussion of recent syndicated contribution easement cases.

Intended Effect of Notice 2017-10. The intended effect of Notice 2017-10 was to make syndicated conservation easements subject to special disclosure and list-maintenance obligations under §§ 6111 and 6112, as well as associated penalties for failure to comply. Section 6111 requires each "material advisor" (as defined) with respect to a § 6707A listed transaction to file an IRS Form 8918 (Material Advisor Disclosure Statement). Failure to file Form 8918 may result in penalties under § 6707. In addition, § 6112 requires material advisors to maintain lists of persons who were provided advice concerning a § 6707A listed transaction. Section 6662A, which is central to the *Green Valley Investors* case, imposes an accuracy-related penalty on an understatement of taxable income by a taxpayer participating in a § 6707A listed transaction. Furthermore, a taxpayer-participant in a listed transaction must file IRS Form 8886 (Reportable Transaction Disclosure Statement) with the taxpayer's return and also may be subject to penalties under § 6707A for failure to disclose required information. Willful failures to file Form 8886 or Form 8918 can result in criminal sanctions under § 7203 (fines and up to one year in prison).

Green Valley Investors. This consolidated case involves IRS examinations of four different syndicated conservation easement partnerships claiming approximately $90 million in combined charitable contribution deductions for tax years 2014 and 2015. In each of the four cases, the IRS filed motions for summary judgment claiming that certain penalties, including the accuracy-related penalty under § 6662A, were properly assessed. The IRS argued that § 6662A applies because the syndicated conservation easements at issue are § 6707A listed transactions as described in Notice 2017-10. The taxpayers objected to the IRS's motions for summary judgment and filed cross-motions for summary judgment that § 6662A should not apply based upon two grounds: (i) because Notice 2017-10 was not issued until after the tax years at issue, the IRS cannot impose the § 6662A penalty retroactively, and

(ii) the IRS failed to comply with the notice-and-comment rulemaking procedures of the APA when issuing Notice 2017-10. With respect to the taxpayers' argument that Notice 2017-10 and any corresponding penalties could not be assessed retroactively, the Tax Court declined to rule; however, Judge Weiler's opinion was skeptical of the taxpayers' argument, noting that (i) retroactive penalties have been upheld by the Tax Court in prior cases and (ii) Reg. § 1.6011-4(e)(2) imposes a duty on taxpayers to disclose any transaction that subsequently becomes a listed transaction as long as the period of limitations for assessment remains open. With respect to the taxpayers' second argument that the IRS failed to comply with the notice-and-comment rulemaking procedures of the APA when issuing Notice 2017-10, the Tax Court held for the taxpayers, thereby invalidating the notice. The Tax Court rejected the same arguments that the IRS made in *Mann Construction* and largely followed the reasoning of the Sixth Circuit. The court concluded that Notice 2017-10 is a legislative rule because it "creates new substantive reporting obligations for taxpayers and material advisors, including petitioner and the LLCs, the violation of which prompts exposure to financial penalties and sanctions." Because Notice 2017-10 is a legislative rule, the court concluded, it was subject to the APA's notice-and-comment procedures. The IRS had not complied with those procedures in issuing Notice 2017-10, and the notice therefore was invalid.

Concurring opinion of Judge Pugh. Judge Pugh wrote a lengthy concurring opinion joined by Judges Ashford, Copeland, Kerrigan, and Paris—essentially that the notice-and-comment procedures of the APA should not apply because Congress explicitly authorized Treasury and the IRS to identify listed transactions when Congress enacted the statutory scheme surrounding § 6707A—but ultimately agreed with the majority. Judge Pugh believed that the IRS could and should have invoked the "good cause exception" to the notice-and-comment procedures of the APA to issue temporary regulations (instead of merely a notice). Judge Pugh pointed out that the IRS previously had used the "good cause exception" when it issued Notice 2000-44 (Son-of-Boss transactions) followed by temporary regulations. *See* T.D. 9062, 2003-2 C.B. 46.

Dissenting opinions of Judges Gale and Nega. Judges Gale and Nega dissented from the majority's opinion, piggybacking on Judge Pugh's concurring opinion, but concluded that use of the "good cause exception" was unnecessary and that the APA's notice-and-comment procedures should not apply given the clear statutory scheme surrounding § 6707A.

b. ♪♫"I get knocked down, but I get up again. You're never gonna keep me down."♫♪ IRS issues proposed regulations identifying syndicated conservation easements as listed transactions. REG-106134-22, Syndicated Conservation Easements as Listed Transactions, 87 F.R. 75185 (12/8/2022). Perhaps following Judge Pugh's cue in *Green Valley Investors*, Treasury and the IRS have issued proposed regulations identifying syndicated conservation easements as listed transactions for purposes of § 6707A. The proposed regulations will be effective on the date they are published as final regulations in the Federal Register.

XI. WITHHOLDING AND EXCISE TAXES

A. Employment Taxes

B. Self-employment Taxes

C. Excise Taxes

XII. TAX LEGISLATION

A. Enacted

XIII. TRUSTS, ESTATES & GIFTS

A. Gross Estate

B. Deductions

C. Gifts

D. Trusts

1. No, you IDGT! You don't get a basis step-up at the grantor's death. Rev. Rul. 2023-2, ___ I.R.B. ___ (3/29/23). A relatively common estate-planning strategy involves the use of a so-called "intentionally defective grantor trust" ("IDGT"). An IDGT exploits the mismatch between subchapter J (income taxation of trusts and estates) of chapter 1 of the IRC and subtitle B (estate and gift taxes) of chapter 11 of the IRC. Through an IDGT, a grantor can make a completed gift of property for estate and gift tax purposes under subtitle B chapter 11 of the IRC but still be taxed on the income from the property under subchapter J chapter 1 of the IRC. More specifically, Rev. Rul. 2023-2 postulates the following facts:

> In Year 1, A, an individual, established irrevocable trust, T, and funded T with Asset in a transfer that was a completed gift for gift tax purposes. A retained a power over T that causes A to be treated as the owner of T for income tax purposes under subpart E of part I of subchapter J of chapter 1 (subpart E). A did not hold a power over T that would result in the inclusion of T's assets in A's gross estate under the provisions of chapter 11. By the time of A's death in Year 7, the fair market value (FMV) of Asset had appreciated. At A's death, the liabilities of T did not exceed the basis of the assets in T, and neither T nor A held a note on which the other was the obligor.

Normally, of course, when property is acquired from a decedent via a bequest or devise, § 1014(a) allows a step-up in basis equal to the value of the property includable in the decedent's gross estate under chapter 11 of the IRC. *See also* Reg. § 1.1014-1(a). Apparently, some taxpayers have taken the position that property acquired from an IDGT after the grantor's death is entitled to a basis step-up under § 1014(a). Rev. Rul. 2023-2 asserts the contrary, reasoning that the "Asset" (see above) was not acquired or passed from A (the decedent) within the meaning of IRC § 1014(a) as elaborated in subsections (b)(1)-(10). Instead, Rev. Rul. 2023-2 holds that the "Asset" was acquired from the IDGT, which was not includable in A's estate under § 2031 or otherwise under chapter 11. Notably, Rev. Rul. 2023-2 distinguishes an older ruling, Rev. Rul. 84-139, 1984-2 C.B. 168, where a non-citizen, non-resident person devised non-U.S. real property to a U.S. citizen. The non-U.S. real property was not subject to chapter 11 (estate and gift taxation) because it was owned by a non-US person. Nevertheless, Rev. Rul. 84-139 held that the non-U.S. property was "acquired from a decedent" under § 1014(b)(1) and thereby entitled to a basis step-up under § 1014(a).