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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I. ACCOUNTING

II. BUSINESS INCOME AND DEDUCTIONS

III. INVESTMENT GAIN AND INCOME

A. Gains and Losses

1. You can't have your cake and eat it too, even if Bernie "Madoff" with the "ingredients" (i.e., the investments underlying your variable life insurance policy) Pascucci v. Commissioner, T.C. Memo. 2024-43 (4/15/24). This memorandum decision from the Tax Court (Judge Gustafson) illustrates one of the finer points of the theft loss deduction allowed by § 165(a) and (e). That is, to qualify for a deduction under § 165(a) and (e), the taxpayer himself, herself, or itself must be the victim of the theft, not merely suffer the collateral consequences of the crime. As Judge Gustafson recited in his opinion: "An individual claiming a theft loss deduction under § 165 must show for the taxable year in question that (1) a theft occurred, (2) there was no reasonable chance of recovery of the property, and (3) he *owned the property* at the time it was stolen." T.C. Memo. at ___ (emphasis added). Based upon stipulated facts and concessions by the IRS and the taxpayers in this case, the determinative issue was whether the taxpayers owned the investments underlying the taxpayers' private placement life insurance contracts.

Facts. The husband-and-wife taxpayers held numerous private placement variable life insurance policies. Essentially, a private placement variable life insurance policy is a portfolio of investments wrapped in a life insurance policy. Unlike a traditional life insurance policy, the premiums and the death benefit can fluctuate depending upon the "variable" performance of the investments underlying the policy. Further, the owner of the policy can, within limits set by the insurance carrier, direct the investments. Insurance carriers maintain separate accounts into which a policyholder's premiums are paid and invested. Nonetheless, the insurance contract must endow the carrier with ultimate ownership and control of the investments. In fact, the private placement memorandums in this case expressly stated that, for state law purposes, the carriers were the owners of the separately maintained accounts. Otherwise, § 72 (annuities and life insurance contracts) does not apply to protect the policyholder from being taxed on the income (the "inside buildup") generated by the investments. *See generally* Mancini & Sawyer, *Understanding Private Placement Life Insurance: Planning Opportunities and Pitfalls*, 162 Tr. & Est. 35 (2023). Here, the taxpayers' private placement variable life insurance policies became worthless in 2008 after investing with Bernie Madoff. Consequently, the taxpayers claimed an $8.2 million theft loss deduction for 2008 (under § 165(a) and (e)) and carried the loss back to 2005 and 2006. (Readers may recall that Madoff famously was convicted of theft in 2009 for running a sophisticated Ponzi scheme. Madoff was convicted and sentenced in 2009 to 150 years in prison, dying in 2021 while incarcerated.) The IRS examined the taxpayers' 2008 return and disallowed the 2008 theft loss deduction and carrybacks, issuing notices of deficiency totaling approximately $3.75 million for the taxpayers' taxable years 2005, 2006, and 2008. The taxpayers timely filed a petition in the Tax Court contesting the notices of deficiency.

The Arguments and Judge Gustafson's Opinion. The IRS's argument before Judge Gustafson was relatively simple: as required by § 72, the insurance carriers (either directly or through feeder fund partnerships in which they invested), not the taxpayer, owned the investments that were stolen by Madoff. The fact that the premiums were paid into, and the investments were segregated by, the carriers' separately maintained accounts did not make the taxpayers the owners of the investments. Thus, the insurance carriers (or the feeder fund partnerships in which they invested) were the victims of the theft, not the taxpayer. See, for example, authorities holding that the decline in value of stock, even if it is due to corporate theft, does not give rise to a theft loss deduction. Reg. § 1.165-4(a); *Marr v. Commissioner*, T.C. Memo. 1995-250; *Crowell v. Commissioner*, T.C. Memo. 1986-314; Notice 2004-27, 2004-1 C.B. 782; Rev. Rul. 2009-9, 2009-14 I.R.B. 735. The taxpayer made several counterarguments, none with success. We do not discuss here all of the taxpayer's unavailing arguments but instead focus on two that we find interesting. *One*, the taxpayers argued that, despite the fact they had never included in income the "inside buildup" of the policies (consistent with § 72), their limited ability to direct the carriers' investments among the feeder funds (including the exercise of certain voting rights and ultimately suffering the economic consequences of the funds' decisions) made them the "victims" of Madoff's theft. The taxpayers cited as support for their argument *Webber v. Commissioner*, 144 T.C. 324 (2015) (applying the "investor control doctrine" to treat the policyholder, not the carrier, of a private placement variable life insurance contract as the federal income tax owner of assets held in a segregated investment account underlying the policy). In other words, the taxpayers essentially were arguing that the variable life insurance wrappers should be disregarded notwithstanding the taxpayers' inconsistent position vis-à-vis the policies prior to 2008. Judge Gustafson's response to this argument essentially was that the taxpayers cannot have their cake and eat it too. Thus, even if the taxpayers via the carriers' separately maintained accounts may have had limited rights to pick among investment feeder funds (including concomitant voting rights), such rights were "typical rights contemplated by state law and do not qualify as an incident of ownership of the assets underlying the [p]olicies." T.C. Memo. 2024-43 at ___. *Two*, the taxpayers had qualified in 2018 for $202,766 in monetary relief from the Department of Justice's Madoff Victim Fund ("MVF"). The MVF was established by the DOJ to distribute more than $4 billion in forfeited assets to the "victims" of Bernie Madoff's Ponzi scheme. Judge Gustafson responded to this argument by clarifying that the MVF was "understood to be 'unique' (i.e., generous and broad) because of its focus on the 'ultimate investor' rather than on the feeder and mutual funds that had directly invested" with Madoff. T.C. Memo. 2024-43 at ___. Accordingly, qualifying for MVF relief was not determinative (or even particularly persuasive) that the taxpayers were "victims" of theft entitled to a deduction under § 165(a) and (e). Concluding his opinion, Judge Gustafson wrote: "The [taxpayers] are not entitled to a theft loss deduction under section 165 for the diminution in value of the assets in the separate accounts, because they did not own the assets at the time of the theft."

B. Interest, Dividends, and Other Current Income

C. Profit-Seeking Individual Deductions

D. Section 121

E. Section 1031

F. Section 1033

G. Section 1035

H. Miscellaneous

IV. COMPENSATION ISSUES

A. Fringe Benefits

B. Qualified Deferred Compensation Plans

1. Beginning in 2024, the § 72(t) 10% penalty for early withdrawal from a retirement plan will not apply to distributions of up to $1,000 for "necessary personal or family emergency expenses." Subject to certain exceptions, § 72(t)(1) provides that, if a taxpayer who has not attained age 59-1/2 receives a distribution from a retirement plan, the taxpayer's tax must be increased by 10 percent of the distribution. A provision of the SECURE 2.0 Act, Division T, Title I, § 115 of the Consolidated Appropriations Act, 2023, amended § 72(t)(2) by adding § 72(t)(2)(I), which allows an individual to treat one distribution per calendar year as an "emergency personal expense distribution" that is not subject to the 10-percent additional tax. An individual who takes an emergency personal expense distribution can repay it during the 3-year period beginning on the day after the date on which the distribution was received to any eligible retirement plan to which a rollover contribution could be made. The maximum amount that can be treated as an emergency personal expense distribution is $1,000. An individual who treats a distribution as an emergency personal expense distribution cannot treat a distribution in any of the three succeeding taxable years as such a distribution unless either (1) the previous distribution is fully repaid to the plan, or (2) the aggregate contributions by the employee to the plan after the previous distribution equal or exceed the amount of the previous distribution that has not been repaid. An emergency personal expenses distribution is defined as

> any distribution from an applicable eligible retirement plan … to an individual for purposes of meeting unforeseeable or immediate financial needs relating to necessary personal or family emergency expenses.

These rules apply to distributions made after December 31, 2023.

a. Administrative guidance on the exception to the 10% penalty on early withdrawals from a qualified retirement plan for emergency expenses. Notice 2024-55, 2024-28 I.R.B. 31 (6/21/24). This notice provides guidance in question-and-answer format on § 72(t)(2)(I), enacted as part of the SECURE 2.0 Act, which allows an individual to treat one distribution per calendar year as an "emergency personal expense distribution" that is not subject to the normal 10-percent additional tax on early withdrawals from a qualified retirement plan (including IRAs). The notice provides guidance both to individuals and to plan administrators. The notice provides that "[w]hether an individual has an unforeseeable or immediate financial need relating to necessary personal or family emergency expenses is determined by the relevant facts and circumstances for each individual." More specifically, the notice indicates that factors to be considered in determining whether this requirement is met include whether the individual or family members have expenses related to, among others, medical care, foreclosure or eviction, burial or funeral expenses, auto repairs, or "any other necessary emergency personal expenses." According to the notice, plan administrators can rely on an employee's written certification that the employee is eligible for an emergency personal expense distribution. A plan is not required to permit such emergency distributions. If a plan does not permit emergency distributions, an individual can nevertheless treat a distribution as qualifying for the penalty exception if the distribution is otherwise permissible under the plan (e.g., as a hardship distribution or a distribution after separation from service) and the individual attaches to the return for the year Form 5329, *Additional Taxes on Qualified Plans (Including IRAs) and Other Tax-Favored Accounts*, indicating that the distribution is an emergency personal expenses distribution. The notice indicates that Treasury and the IRS will issue proposed regulations addressing this and other exceptions to the 10-percent penalty on early withdrawals and invites comments.

2. Beginning in 2024, survivors of domestic abuse can withdraw up to $10,000 from a retirement plan without being subject to the § 72(t) 10% penalty for early withdrawal. Subject to certain exceptions, § 72(t)(1) provides that, if a taxpayer who has not attained age 59-1/2 receives a distribution from a retirement plan, the taxpayer's tax must be increased by 10 percent of the distribution. A provision of the SECURE 2.0 Act, Division T, Title III, § 314 of the Consolidated Appropriations Act, 2023, amended § 72(t)(2) by adding § 72(t)(2)(K), which allows an individual to treat a distribution as "an eligible distribution to a domestic abuse victim" that is not subject to the 10-percent additional tax. An individual who takes such a distribution can repay it during the 3-year period beginning on the day after the date on which the distribution was received to any eligible retirement plan to which a rollover contribution could be made. The maximum amount that can be treated as an eligible distribution to a domestic abuse victim is the lesser of $10,000 or 50 percent of the present value of the accrued benefit of the employee under the plan. The $10,000 limitation will be adjusted for inflation for taxable years beginning after 2024. An eligible distribution to a domestic abuse victim is defined as a

> distribution … from an applicable eligible retirement plan [that] is made to an individual during the 1-year period beginning on any date on which the individual is a victim of domestic abuse by a spouse or domestic partner."

For this purpose, "domestic abuse" is defined as

> physical, psychological, sexual, emotional, or economic abuse, including efforts to control, isolate, humiliate, or intimidate the victim, or to undermine the victim's ability to reason independently, including by means of abuse of the victim's child or another family member living in the household.

These rules apply to distributions made after December 31, 2023.

a. Administrative guidance on the exception to the 10% penalty on early withdrawals from a qualified retirement plan for survivors of domestic abuse. Notice 2024-55, 2024-28 I.R.B. 31 (6/21/24). This notice provides guidance in question-and-answer format on § 72(t)(2)(K), enacted as part of the SECURE 2.0 Act, which allows an individual to treat a distribution as "an eligible distribution to a domestic abuse victim" that is not subject to the normal 10-percent additional tax on early withdrawals from a qualified retirement plan (including IRAs). The notice provides guidance both to individuals and to plan administrators. The notice refers to distributions that qualify for the penalty exception as "domestic abuse victim distributions" and provides that "[a] domestic abuse victim distribution is a distribution from an eligible retirement plan to a domestic abuse victim made during the 1-year period beginning on any date on which the individual is a victim of domestic abuse by a spouse or domestic partner." For this purpose, the notice provides guidance on what constitutes domestic abuse:

> The term "domestic abuse" means physical, psychological, sexual, emotional, or economic abuse, including efforts to control, isolate, humiliate, or intimidate the victim, or to undermine the victim's ability to reason independently, including by means of abuse of the victim's child or another family member living in the household.

According to the notice, any distribution that an employee or participant certifies as a domestic abuse victim distribution will be treated as meeting the distribution restriction. Regarding the form of certification, the notice provides:

> To meet the certification requirements of section 72(t)(2)(K)(vi)(III), the employee or participant could check the box on the distribution request form to certify that (1) the employee or participant is eligible for a domestic abuse victim distribution and (2) the distribution is made during the 1-year period beginning on any date on which the individual is a victim of domestic abuse.

A plan is not required to permit domestic abuse victim distributions. If a plan does not permit domestic abuse victim distributions, an individual can nevertheless treat a distribution as qualifying for the penalty exception if the distribution is otherwise permissible under the plan (e.g., as a hardship distribution or a distribution after separation from service) and the individual attaches to the return for the year Form 5329, *Additional Taxes on Qualified Plans (Including IRAs) and Other Tax-Favored Accounts*, indicating that the distribution is a domestic abuse victim distribution. The notice indicates that Treasury and the IRS will issue proposed regulations addressing this and other exceptions to the 10-percent penalty on early withdrawals and invites comments.

3. Beginning in 2023, terminally ill individuals can withdraw funds from a retirement plan without being subject to the § 72(t) 10% penalty for early withdrawal. Subject to certain exceptions, § 72(t)(1) provides that, if a taxpayer who has not attained age 59-1/2 receives a distribution from a retirement plan, the taxpayer's tax must be increased by 10 percent of the distribution. A provision of the SECURE 2.0 Act, Division T, Title III, § 326 of the Consolidated Appropriations Act, 2023, amended § 72(t)(2) by adding § 72(t)(2)(L), which provides that distributions to a terminally ill individual on or after the date on which a physician has certified the individual as having a terminal illness are not subject to the 10-percent additional tax. An individual who takes such a distribution can repay it during the 3-year period beginning on the day after the date on which the distribution was received to any eligible retirement plan to which a rollover contribution could be made. The term "terminally ill individual" has the same meaning as it does in § 101(g)(4)(A) except that "84 months" is substituted for "24 months," which means that a "terminally ill individual" is defined as

> an individual who has been certified by a physician as having an illness or physical condition which can reasonably be expected to result in death in 84 months or less after the date of the certification.

New § 72(t)(2)(L)(iii) provides that an employee is not considered to be a terminally ill individual unless the employee provides sufficient evidence to the plan administrator in the form and manner required by the Secretary of the Treasury.

These rules apply to distributions made after the date of enactment of the SECURE 2.0 Act, which was December 29, 2022.

a. Administrative guidance on the exception to the 10% penalty on early withdrawals from a qualified retirement plan for terminally ill indviduals. Notice 2024-2, 2024-2 I.R.B. 316 (12/20/23). This notice provides guidance in question-and-answer format on § 72(t)(2)(L), enacted as part of the SECURE 2.0 Act, which creates an exception to the normal 10-percent additional tax on early withdrawals from a qualified retirement plan (including IRAs) for distributions to a terminally illindividual. The notice provides guidance (in Q&A F-1 to F-15) both to individuals and to plan administrators. The notice refers to distributions that qualify for the penalty exception as "terminally ill indiividual distributions." For this purpose, a "terminally ill individual distribution" is:

> any distribution from a qualified retirement plan to an employee (as defined in section 72(t)(5)) who is a terminally ill individual (within the meaning of Q&A F-4 of this notice) that is made on or after the date on which the employee has been certified by a physician as having a terminal illness.

The notice further provides:

> [F]or purposes of the exception to the 10 percent additional tax under section 72(t)(2)(L), a terminally ill individual means an individual who has been certified by a physician as having an illness or physical condition that can reasonably be expected to result in death in 84 months or less after the date of the certification.

The notice specifies (in Q&A 6) the information that the physician's certification must include. It also clarifies that the physician's certification must be made *before* the distribution to the individual occurs. In other words, it is not possible to retroactively treat a distribution as a terminally ill individual distribution by obtaining a physician's certification after the distribution. According to the notice, the individual must provide the certification to the plan administrator.

A plan is not required to permit terminally ill individual distributions. If a plan does not permit such distributions, an individual can nevertheless treat a distribution as qualifying for the penalty exception if the distribution is otherwise permissible under the plan (e.g., as a hardship distribution or a distribution after separation from service) and the individual attaches to the return for the year Form 5329, *Additional Taxes on Qualified Plans (Including IRAs) and Other Tax-Favored Accounts*, indicating that the distribution is a terminally ill individual distribution.

4. Some inflation-adjusted numbers for 2025. Notice 2024-80, 2024-47 I.R.B. 1120 (11/1/24).

- The limit on elective deferrals in §§ 401(k), 403(b), and 457 plans is increased to $23,500 (from $23,000) with a catch-up provision for employees aged 50 or older that is $7,500 (unchanged from 2024). For individuals who attain ages 60-63 in 2025, the limit on catch-up contributions is $11,250.

- The limit on contributions to an IRA is increased to $7,000 (unchanged from 2024) with a catch-up provision for those aged 50 or older that is $1,000 (unchanged from 2024). The AGI phase-out range for contributions to a traditional IRA by employees covered by a workplace retirement plan is increased to $79,000-$89,000 (from $77,000-$87,000) for single filers and heads of household, increased to $126,000-$146,000 (from $123,000-$143,000) for married couples filing jointly in which the spouse who makes the IRA contribution is covered by a workplace retirement plan, and increased to $236,000-$246,000 (from $230,000-$240,000) for an IRA contributor who is not covered by a workplace retirement plan and is married to someone who is covered. The phase-out range for contributions to a Roth IRA is increased to $236,000-$246,000 (from $230,000-$240,000) for married couples filing jointly, and increased to $150,000-$165,000 (from $146,000-$161,000) for singles and heads of household.

- The limit on the annual benefit from a defined benefit plan under § 415 is increased to $280,000 (from $275,000).

- The limit for annual additions to defined contribution plans is increased to $70,000 (from $69,000).

- The amount of compensation that may be taken into account for various plans is increased to $350,000 (from $345,000), and is increased to $520,000 (from $505,000) for government plans.

- The AGI limit for the retirement savings contribution credit for low- and moderate-income workers is increased to $79,000 (from $76,500) for married couples filing jointly, increased to $59,250 (from $57,375) for heads of household, and increased to $39,500 (from $38,250) for singles and married individuals filing separately.

The following table summarizes key figures from the notice:

Category	2023	2024	2025
Elective deferrals - 401(k) plans	$22,500	$23,000	$23,500
Catch-up contributions to employer-sponsored plans (age 50+)	$7,500	$7,500	$7,500[1]
IRA contribution limit	$6,500	$7,000	$7,000
Catch-up contributions to IRAs (age 50+)	$1,000	$1,000	$1,000

C. Nonqualified Deferred Compensation, Section 83, and Stock Options

D. Individual Retirement Accounts

V. PERSONAL INCOME AND DEDUCTIONS

VI. CORPORATIONS

VII. PARTNERSHIPS

VIII. TAX SHELTERS

IX. EXEMPT ORGANIZATIONS AND CHARITABLE GIVING

A. Exempt Organizations

B. Charitable Giving

1. With more than 750 conservation easement cases on the docket, the Tax Court's flip-flop on the validity of the extinguishment proceeds regulation is not going to help matters. Valley Park Ranch, LLC v. Commissioner, 162 T.C. No. 6 (3/28/24). In a reviewed opinion (7-2-4) by Judge Jones, the Tax Court refused to follow its prior decision in a conservation easement case decided just four years earlier, *Oakbrook Land Holdings, LLC v. Commissioner*, 154 T.C. 180 (2020), *aff'd,* 28 F.4th 700 (6th Cir. 2022). Instead, rejecting *Oakbrook*, a majority of the Tax Court in this case appealable to the Tenth Circuit determined that Reg. § 1.170A-14(g)(6)(ii), one of the chief weapons the IRS has used to combat conservation easements, is procedurally invalid under the Administrative Procedure Act ("APA"). It is fair to say that the Tax Court's decision in *Valley Park Ranch* will have a significant impact on current and future conservation easement litigation between the taxpayers and the IRS.

Background. Other than challenging valuations, the IRS's most successful strategy in combating syndicated conservation easements generally has centered around the "protected in perpetuity" requirement of § 170(h)(2)(C) and (h)(5)(A). The IRS has argued in the Tax Court that the "protected in perpetuity" requirement is not met where the taxpayer's easement deed fails to meet the strict requirements of the "extinguishment regulation." *See* Reg. § 1.170A-14(g)(6)(ii). The extinguishment regulation ensures that conservation easement property is protected in perpetuity because, upon destruction or condemnation of the property and collection of any proceeds therefrom, the charitable donee must proportionately benefit. According to the IRS's reading of the extinguishment regulation, the charitable donee's proportionate benefit must be determined by a fraction determined at the time of the gift as follows: the value of the conservation easement as compared to the total value of the property subject to the conservation easement (hereinafter the "proportionate benefit fraction"). *See* *Coal Property Holdings, LLC v.*

[1] $11,250 if ages 60-63.

Commissioner, 153 T.C. 126 (10/28/19). Thus, upon extinguishment of a conservation easement due to an unforeseen event such as condemnation, the charitable donee must be entitled to receive an amount equal to the product of the proportionate benefit fraction multiplied by the proceeds realized from the disposition of the property.

Facts. The taxpayer partnership in this case claimed a $14.8 million charitable contribution deduction for its 2016 tax year after granting to a charity a conservation easement over 45.76 acres of Oklahoma land it acquired in 1998 for $91,610. The easement deed recited in part that the contributed property was to be held "forever predominantly in its natural, scenic, and open space condition" and that "the duration of the Easement shall be in perpetuity." 162 T.C. at ___. The easement deed further provided in relevant part that if the land was taken by eminent domain, the taxpayer and the charity would, "after the satisfaction of prior claims," share in the condemnation proceeds "as determined by a Qualified Appraisal meeting standards established by the United States Department of Treasury." 162 T.C. at _____. Upon audit, the IRS took the position, as it has in many prior cases, that the taxpayer's deduction should be disallowed for failing to meet the proportionate benefit fraction requirement of the extinguishment proceeds regulation, Reg. § 1.170A-14(g)(6)(ii). The IRS's litigating position is that the proportionate benefit fraction must be fixed and unalterable *as of the date of the donation* according to the following ratio: the value of the conservation easement as compared to the total value of the property subject to the conservation easement. Thus, according to the IRS, leaving the proportionate benefit upon condemnation to be determined later by a qualified appraisal meeting certain standards is insufficient. (*Note:* Section 4.01 of Notice 2023-30, 2023-17 I.R.B. 766 (4/10/23), sets forth what the IRS considers acceptable language regarding the proportionate benefit fraction as it relates to extinguishment clauses in conservation easement deeds.) After petitioning the Tax Court, the taxpayer argued alternatively that either (i) the easement deed met the requirements of Reg. § 1.170A-14(g)(6)(ii) by "explicit incorporation," or (ii) the regulation is procedurally invalid under the APA, in which case the easement deed need not strictly comply with the regulation as long as it meets the more general requirements of the applicable subsections of the statute, § 170(h) (qualified conservation contribution). The case was heard by the Tax Court on cross-motions for summary judgment.

The Tax Court's Majority Opinion. In a reviewed opinion (7-2-4) by Judge Jones (joined by Judges Foley, Urda, Toro, Greaves, Marshall, and Weiler), the court began its analysis by reviewing the conflicting decisions of the Sixth and Eleventh Circuits concerning the procedural validity of Reg. § 1.170A-14(g)(6)(ii) under the APA. See *Hewitt v. Commissioner*, 21 F.4th 1336 (11th Cir. 2021) (concluding that the regulation is invalid under the APA); *Oakbrook Land Holdings, LLC v. Commissioner*, 28 F.4th 700 (6th Cir. 2022) (concluding that the regulation satisfies the APA). The majority emphasized that a divided (2-1) Sixth Circuit panel decided *Oakbrook*, whereas a unanimous (3-0) Eleventh Circuit panel decided *Hewitt*. Thus, in a footnote, Judge Jones pointed out that of the six appellate court judges who have considered the issue, four decided that Reg. § 1.170A-14(g)(6)(ii) is invalid under the APA while only two upheld the regulation. Noting that the case is appealable to the Tenth Circuit, which has not taken a position on the validity of Reg. § 1.170A-14(g)(6)(ii), Judge Jones concluded for the majority that "after careful consideration of the Eleventh Circuit's reasoning in *Hewitt*, we find it appropriate to change our position." 162 T.C. at ____. The majority gave a nod to the principle of *stare decisis*—following established precedent—but reasoned that its holding in *Oakbrook*, even though affirmed by the Sixth Circuit, is not "entrenched precedent," thereby allowing the Tax Court to strike down Reg. § 1.170A-14(g)(6)(ii) as procedurally invalid under the APA in line with *Hewitt*. 162 T.C. at ____.

Upon agreeing with the Eleventh Circuit that Reg. § 1.170A-14(g)(6)(ii) is procedurally invalid under the APA, the majority then turned to the applicable statute itself and the language of the easement deed. Specifically, the majority examined § 170(h)(2)(C), which requires a "restriction (granted in perpetuity)" on the use of the property subject to a conservation easement.

The majority also examined § 170(h)(5), which states that a contribution is not exclusively for conservation purposes unless it is "protected in perpetuity." Agreeing again with the Eleventh Circuit, but this time based upon the Eleventh Circuit's decision in *Pine Mountain Preserve, LLLP v. Commissioner*, 978 F.3d 1200 (11th Cir. 2020), *aff'g in part, rev'g in part, vacating and remanding* 151 T.C. 247 (2018), the majority concluded that the § 170(h)(2)(C) requirement of a "restriction (granted in perpetuity)" was met because the deed in this case recited that the easement property was to be held for conservation purposes "forever predominantly in its natural, scenic, and open space condition." 162 T.C. at ___. Further, as the Eleventh Circuit held in *Pine Mountain*, the majority agreed that a broad limitation on the use of the property as a whole for conservation purposes satisfies § 170(h)(2)(C) even if there are narrow exceptions to that limitation in the easement deed. Concerning the "protected in perpetuity" requirement of § 170(h)(5), the majority again followed the Eleventh Circuit's decision in *Pine Mountain*. The Eleventh Circuit reasoned in *Pine Mountain* that the "protected in perpetuity" language of § 170(h)(5) draws upon the common law usage of the term, meaning simply that the granted property will not automatically revert to the grantor or the grantor's heirs and assigns. The majority concluded that its "review of the entire deed reveals nothing in the grant that 'envisions a reversion of the easement interest to the landowner, its heirs, or assigns.'" 162 T.C. at ____ (quoting *Pine Mountain*, 978 F.3d at 1206). Lastly, the majority rejected a last-ditch argument by the IRS that the easement deed's language about sharing eminent domain proceeds "after the satisfaction of prior claims" violated the "perpetuity" requirement of either § 170(h)(2)(C) or (h)(5). The majority rejected this argument by the IRS because (i) the IRS conceded that there were no existing "prior claims" at the time the taxpayer granted the conservation easement, and (ii) the IRS could not point to any interpretation under Oklahoma law that the "after the satisfaction of prior claims" language applies to claims arising after the conservation easement deed is granted but before the condemnation or other disposition of the property.

Concurring opinion. Judge Buch, joined by Judge Copeland, concurred in the result, but wrote separately to express his opinion that the majority could have decided the case on the basis of the conservation easement deed and the relevant statutory language without invalidating the "extinguishment proceeds regulation" (Reg. § 1.170A-14(g)(6)(ii)). Judge Buch and Judge Copeland apparently would have accepted the taxpayer's first argument that the easement deed met the requirements of Reg. § 1.170A-14(g)(6)(ii) by "explicit incorporation."

Dissenting opinion. Judge Kerrigan, joined by Judges Nega, Pugh, and Ashford), dissented from the majority and concurring opinions, writing succinctly:

> I disagree with the opinion of the Court for three reasons. First, I do not think it necessary to decide the validity of Treasury Regulation § 1.170A-14(g)(6)(ii) to resolve the Cross-Motions for Partial Summary Judgment. Second, I supported the opinion of the Court in [*Oakbrook*], and I find no compelling reason to change my position. Third, the longstanding principle of stare decisis should be followed.

162 T.C. at ____.

Comment. The slim (7-2-4) Tax Court majority in this case (Jones, Foley, Urda, Toro, Greaves, Marshall, and Weiler) sustained taxpayer arguments that an overwhelming (12-1-1) majority (Lauber, Foley, Gale, Thornton, Paris, Morrison, Kerrigan, Buch, Nega, Pugh, Ashford, and Copeland) rejected only four years earlier in *Oakbrook*. Moreover, as mentioned above, *Oakbrook* was upheld by the Sixth Circuit in 2022. Consequently, the Tax Court has now aligned itself with the Eleventh Circuit, which, as mentioned above, struck down the extinguishment proceeds regulation in 2021 as procedurally invalid under the APA. Further, the Tax Court has reversed itself even though the U.S. Supreme Court declined in 2023 to resolve the split between the Sixth and Eleventh Circuits. *See Oakbrook Land Holdings, LLC v. Commissioner*, 143 S.Ct. 626 (1/9/23). On one hand, as Judge Jones wrote for the majority, perhaps the Tax Court's recent flip-flop "is the right time to 'gracefully and good naturedly surrender . . . former views to a better considered position.'" 162 T.C. at ____. On the other hand, if the Tax Court desires to resolve the hundreds of conservation easement cases on its docket, completely changing its mind from just a few years ago may not be the best course. As Judge Kerrigan wrote in dissent, "In 21 cases between 2016 and 2021, [the Tax Court] sustained the disallowance of charitable contribution deductions because the deeds of easement failed to comply with the [extinguishment] proceeds regulation." 162 T.C. at ____. *We cannot help but wonder if the taxpayers who lost in those 21 prior Tax Court cases are a bit upset and are scrambling to file claims for refund (assuming, of course, the statute of limitations has not expired).*

X. TAX PROCEDURE

A. Interest, Penalties, and Prosecutions

B. Discovery: Summonses and FOIA

C. Litigation Costs

D. Statutory Notice of Deficiency

E. Statute of Limitations

F. Liens and Collections

G. Innocent Spouse

H. Miscellaneous

1. The Sixth Circuit joins other circuits in holding that recklessness is sufficient to establish a willful FBAR violation. United States v. Kelly, 92 F.4th 598 (6th Cir. 2/8/24). The U.S. Court of Appeals for the Sixth Circuit has held that for purposes of imposing an FBAR civil penalty, a "willful violation of the FBAR reporting requirements includes both knowing and reckless violations." With this holding, the Sixth Circuit joins all the other circuits that have addressed this issue. See, e.g., *United States v. Rum*, 995 F.3d 882 (11th Cir. 2021) (per curiam); *Kimble v. United States*, 991 F.3d 1238, 1242 (Fed. Cir. 2021); *United States v. Horowitz*, 978 F.3d 80, 88 (4th Cir. 2020); *Norman v. United States*, 942 F.3d 1111 (Fed. Cir. 2019); *Bedrosian v. United States*, 912 F.3d 144, 153 (3d Cir. 2018). The Sixth Circuit here in *Kelly* adopted the same line of reasoning as the *Norman* and *Horowitz* courts, relying on the U.S. Supreme Court's decision in *Safeco Ins. Co. v. Burr*, 551 U.S. 47, 57 (2007). In *Safeco*, the Supreme Court observed that, when willfulness is a statutory condition of civil (as opposed to criminal) liability, the Court had "generally taken it to cover not only knowing violations of a standard, but reckless ones as well." For purposes of determining whether a reckless (and therefore willful) FBAR violation occurred, the Sixth Circuit also adopted the meaning of recklessness set forth in *Safeco.* Under *Safeco*, reckless conduct in the civil context is determined by application of an objective standard and is defined as an "…action entailing an unjustifiably high risk of harm that is either known or so obvious that it should be known." 551 U.S. at 685 (internal quotations and citations omitted). Based on this authority, the Sixth Circuit stated:

> …in the context of a civil FBAR penalty, the government can establish a willful violation "based on recklessness" by proving that "the defendant (1) clearly ought to have known that (2) there was a grave risk that an accurate FBAR was not being filed and [that] (3) he was in a position to find out for certain very easily."

92 F.4th at 603-04 (citing *Horowitz*, 978 F.3d at 89).

In this case, the taxpayer was a U.S. citizen who closed his U.S. domestic bank accounts and opened an interest-bearing account at Finter Bank in Switzerland, into which he deposited over $1.8 million. After an investigation, the IRS determined that the taxpayer had willfully failed to timely file FBARs for multiple years and imposed substantial penalties. When the taxpayer failed to pay the penalties, the government initiated an action against him in a U.S. District Court. The district court granted the IRS's motion for summary judgment. In affirming the district court, the Sixth Circuit concluded that the taxpayer had taken steps to intentionally evade his legal duties. The taxpayer designated his Finter account as "numbered" so that his name would not appear on the bank statements and he requested that the bank retain any account related communications. The Sixth Circuit concluded that these efforts allowed the taxpayer to shield his assets from U.S. authorities and that this evidenced more than mere negligence. Only after Finter notified the taxpayer that it would disclose his account to U.S. authorities did the taxpayer then begin complying with FBAR reporting obligations. The taxpayer did not seek professional advice about his reporting obligations or the tax implications of the assets in the Swiss bank account. Finter temporarily closed the taxpayer's account and warned him that it was required to report to U.S. authorities. Finter also recommended that the taxpayer get professional tax counsel. The taxpayer then requested to participate in the IRS's Offshore Voluntary Disclosure Program (OVPD). The government preliminarily accepted his voluntary disclosure. The taxpayer later transferred the funds in his Swiss bank account to an account with Bank Alpinum in Lichtenstein. He submitted a Form 433-A, Collection Information Statement, to the IRS that failed to disclose the Lichtenstein account. The government later removed the taxpayer from the OVDP because he had failed to provide information about his foreign assets. The court found that the taxpayer was aware of his reporting requirements and that he failed to file future FBAR reports. The taxpayer never consulted tax counsel. Because the taxpayer should have known about the risk of failing to comply and he could have found out by simply asking, the court held that his failure was, at a minimum, reckless. In summary, the court concluded that the taxpayer knew about his foreign account, took steps to keep it secret, did not consult with professionals about his tax obligations, and then, after learning that he had not met reporting requirements in the past, failed to file FBARs for the years at issue. Accordingly, the court held that the taxpayer's failure to satisfy his FBAR requirements for the years in issue was a willful violation of the Bank Secrecy Act.

2. Yet another *Green* decision under the APA regarding listed transaction notices has the IRS and Treasury seeing red, but proposed and final regulations provide a blackletter law counterpunch. We previously have written about successful taxpayer challenges to the IRS process of issuing administrative notices identifying "listed transactions" (a subset of "reportable transactions") under Reg. § 1.6011-4(b)(2), thereby potentially triggering enhanced penalties for noncompliance. Generally, taxpayers participating in such listed transactions must file special disclosures with the IRS under § 6011(a). *See Form 8886, Reportable Transaction Disclosure Statement*. Material advisors (as defined) to such participating taxpayers are also subject to special disclosure and list maintenance requirements under § 6112(a). *See Form 8918, Material Advisor Disclosure Statement*. In addition, taxpayers and their material advisors may be subject to enhanced penalties and criminal sanctions for failing to properly disclose, and for participating in, such transactions. *See* §§ 6662A; 6707; 6707A; 6708. At least three courts have held that the IRS violated the Administrative Procedures Act ("APA") by issuing certain listed transaction notices. Specifically, the Sixth Circuit, the U.S. District Court for the Eastern District of Tennessee, and the U.S. Tax Court have determined that the three distinct listed transaction notices at issue in those cases were "legislative rules" subject to the notice-and-comment procedures of the APA. Further, because the IRS did not publish an advanced notice of proposed rulemaking inviting public comment before issuing the notices, the courts invalidated them. *See Mann Construction, Inc. v. United States*, 27 F.4th 1138 (6th Cir. 2022) (invalidating Notice 2007-83, 2007-2 C.B. 960, which identified certain business trust arrangements utilizing cash value life insurance purportedly to provide welfare benefits as listed transactions); *CIC Services, LLC v. Internal Revenue Service*, 592 F. Supp. 3d 677 (E.D. Tenn. 2022), *as modified by unpublished opinion*, 2022 WL 2078036 (2022) (invalidating Notice 2016-66, 2016-47 I.R.B. 745, as modified by Notice 2017-8, 2017-3 I.R.B. 423, which identified certain micro-captive insurance arrangements as listed transactions); *Green Valley Investors, LLC v. Commissioner*, 159 T.C. 80 (2022) (invalidating Notice 2017-10, 2017-4 I.R.B. 544, which identified post-2009 syndicated conservation easements as listed transactions). After initially contesting the application of the APA to the listed transaction notices at issue in *Mann Construction*, *CIC Services*, and *Green Valley Investors*, the IRS and Treasury practically have conceded, responding in at least two instances with proposed APA-compliant listed transaction regulations in place of invalidated notices. *See* REG-109309-22, Micro-Captive Listed Transactions and Micro-Captive Transactions of Interest, 88 FR 21547 (4/11/23) and REG-106134-22, Syndicated Conservation Easements as Listed Transactions, 87 F.R. 75185 (12/8/22). The latter proposed regulations regarding syndicated conservation easements have been finalized and are discussed further below. For additional background, see Announcement 2023-11, 2023-17 I.R.B. 798. The recent developments summarized immediately below are another installment in the APA tug-of-war between taxpayers and the IRS concerning listed transaction notices under Reg. § 1.6011-4(b)(2) that may implicate enhanced penalties under §§ 6662A; 6707; 6707A; 6708.

a. IRS and Treasury see red after *Green*(s). Green Rock LLC v. Internal Revenue Service, 104 F.4th 220 (11th Cir. 6/4/24), *aff'g* 654 F. Supp. 3d 1249 (2023). The taxpayer in this case was a promoter/material advisor of syndicated conservation easements. As such, the taxpayer was subject to Notice 2017-10, 2017-4 I.R.B. 544, which identified post-2009 syndicated conservation easements as one type of listed transaction under Reg. § 1.6011-4(b)(2). Further, as a promoter/material advisor to a listed transaction, the taxpayer potentially was subject to enhanced penalties under § 6707A. The taxpayer complied with Notice 2017-10 and the reportable transaction regime throughout the relevant years, including filing *Form 8886, Reportable Transaction Disclosure Statement*, and *Form 8918, Material Advisor Disclosure Statement*. Nevertheless, the taxpayer filed suit in the U.S. District Court for the Northern District of Alabama in 2021, alleging that Notice 2017-10 was invalid under the APA. Like taxpayers in previous similar cases, the taxpayer argued that the IRS had failed to comply with the APA by issuing Notice 2017-10 without providing a formal notice of proposed rulemaking inviting public comment. The district court agreed, setting aside Notice 2017-10 as applied to the taxpayer. *See Green Rock LLC v. Internal Revenue Service*, 654 F. Supp. 3d 1249 (2023). The taxpayer undoubtedly was emboldened by the Tax Court's 2022 decision against the IRS in another "Green" case, *Green Valley Investors* (cited above). By an 11-4-2 vote, the Tax Court invalidated Notice 2017-10 under the APA in that case.

IRS's implicit APA exemption and slippery slope arguments: On appeal before the Eleventh Circuit, the IRS argued, as it had in similar cases, that Notice 2017-10 is exempt from the APA's notice-and-comment procedures because Congress was aware of the IRS's practice of identifying listed transactions by administrative notice when it enacted § 6707A (and other such enhanced penalties) *in 2004 after* the reportable transaction regime of Reg. § 1.6011-4 was finalized *in 2003*. More precisely, Reg. § 1.6011-4(b)(2) allows the IRS to identify listed transactions "by notice, regulation, or other form of published guidance." Thus, according to the IRS, Congress implicitly approved the process of identifying listed transactions by administrative notice without requiring the IRS to comply with the APA because Congress enacted § 6707A (and other such enhanced penalties) with the above-quoted language of Reg. § 1.6011-4(b)(2) in mind. Moreover, to bolster its position before the Eleventh Circuit, the IRS also made a classic "slippery slope" argument: upholding the district court's decision would "eliminate every listed transaction to date" identified by the IRS. (For a complete list, see the IRS website, "Recognized abusive and listed transactions" (last accessed 12/1/2024).)

Eleventh Circuit Opinion: A three-judge panel of the Eleventh Circuit, in an opinion by Chief Judge Pryor, rejected the IRS's arguments and affirmed the district court, invalidating Notice 2017-10 under the APA as applied to the taxpayer. *First*, the Eleventh Circuit was not persuaded by the IRS's implicit APA exemption argument because, as Chief Judge Pryor wrote, "Congress may choose to exempt an agency from notice and comment if 'it does so expressly,'" but "[n]o such express language appears in [§ 6707A]." 104 F.4th at 226-27. Further examining § 6707A, Chief Judge Pryor pointed out that the statute expressly defines the terms "reportable transaction" and "listed transaction." A reportable transaction is defined in § 6707A(c)(1) as "any transaction with respect to which information is required to be included with a return or statement because, *as determined under regulations prescribed under section 6011*, such transaction is of a type which the Secretary determines as having a potential for tax avoidance or evasion." (Emphasis added.) A listed transaction is defined in § 6707A(c)(2) as "a reportable transaction which is the same as, or substantially similar to, a transaction specifically identified by the Secretary as a tax avoidance transaction for purposes of section 6011." The Eleventh Circuit was unwilling to accept the IRS's argument that the phrase "as determined under regulations prescribed under section 6011" in the § 6707A(c)(1) definition of reportable transaction incorporated by reference the above-quoted language in Reg. § 1.6011-4(b)(2) authorizing the IRS to identify listed transactions (a subset of reportable transactions) by administrative notice. Instead, relying in part upon the Sixth Circuit's decision in *Mann Construction* (cited above) and the Tax Court's decision in *Green Valley Investors* (cited above), the Eleventh Circuit determined that "an indirect series of cross-references hardly suffices as the 'express' indication [by Congress] necessary to supplant the baseline *procedures* of the [APA]." 104 F.4th at 228.

Second, concerning the IRS's slippery slope argument, the Eleventh Circuit reasoned that pre-2004 listed transactions—28 out of 34 according to the court based upon the IRS's website—were not backed by enhanced statutory penalties and criminal sanctions at the time of their issuance; however, the 2004 enactment of § 6707A (and other related provisions) authorized higher penalties and criminal sanctions. The Eleventh Circuit determined that the IRS's power beginning in 2004 to impose enhanced penalties and criminal sanctions for noncompliance by agency pronouncement implicated the APA notice-and-comment requirements, notwithstanding the pre-existing administrative notice process contemplated by Reg. § 1.6011-4(b)(2). According to the Eleventh Circuit, the APA notice-and-comment requirements applied because the listed transaction notices issued by the IRS during or after 2004 were "legislative" (not "procedural") rules due to the potentially applicable enhanced penalties and criminal sanctions that did not exist before 2004. 104 F.4th at 228. Arguably, then, pre-2004 listed transaction notices issued by the IRS need not comply with the APA, whereas IRS listed transaction notices issued in 2004 and thereafter must abide by the APA, presumably not by administrative notice but by the issuance of Treasury regulations subject to the notice-and-comment process. In fact, Chief Judge Pryor read the Tax Court's opinion in *Green Valley Investors* (cited above), especially Judge Pugh's concurrence, to suggest as much because Judge Pugh wrote in a footnote:

> Our holding does not invalidate notices that had been issued before Congress enacted penalties. Those notices are not before us today and the circumstances surrounding their issuance are distinguishable. And Congress would be presumed to know about and adopt pre-existing notices when it adopted pre-existing procedures for identifying listed transactions.

159 T.C. at 111 n. 5. Nevertheless, Chief Judge Pryor concluded by clarifying and narrowing the scope of the Eleventh Circuit's opinion, writing:

> [W]e do not purport to rule on the validity of any listed transaction not before us. Our decision is specific to Notice 2017-10. Because the notice was a legislative rule and Congress did not expressly exempt the Service from notice-and-comment rulemaking, Notice 2017-10 is not binding on [the taxpayer].

104 F.4th at 229.

Concurring Opinion: Judge Jordan concurred in the court's opinion and judgment affirming the district court, but wrote separately to explain that he would have held for the taxpayer on slightly different grounds. Judge Jordan reasoned that by enacting § 170(h)(7) in 2022 restricting charitable deductions via syndicated conservation easements,[2] Congress "effectively eliminated, on a going-forward basis, the deductions that Notice 2017-10 would have made subject to disclosure." 104 F.4th at 229. Accordingly, Jordan agreed with Judge Toro's concurring Tax Court opinion in *Green Valley Investors* (cited above) that, as the IRS argued, there is little doubt Congress enacted § 6707A in 2004 with the 2003 pre-existing Reg. § 1.6011-4(b)(2) listed transaction notice process in mind. (Chief Judge Pryor's opinion on behalf of the Eleventh Circuit did not concede this aspect of the IRS's implicit APA exemption argument.) Nonetheless, Judge Jordan agreed that Congress must have intended the APA to apply to Notice 2017-10 because of the way § 6707A(c)(1)-(2) are written. The phrase "as determined under regulations prescribed under section 6011" used in § 6707A(c)(1)'s definition of a reportable transaction is omitted from § 6707A(c)(2)'s definition of a listed transaction. Thus, Judge Jordan surmised that Congress must have envisioned the IRS complying with both the APA and Reg. § 1.6011-4 when issuing listed transaction notices. Judge Jordan's concurring opinion does not elaborate, but presumably he would not confine the listed transaction notice process of Reg. § 1.6011-4(b)(2) to pre-2004 IRS sub-regulatory guidance. Instead, Judge Jordan apparently believes that a future listed transaction notice or other sub-regulatory guidance issued by the IRS (instead of Treasury regulations) is permissible provided the publication of the notice follows the notice-and-comment process mandated by the APA.

Comment: Although not expressly stated in Chief Judge Pryor's opinion—especially considering his concluding language quoted above—the practical implication of the Eleventh Circuit's reasoning in *Green Rock* (along with the Sixth Circuit's decision in *Mann Construction*, the U.S. District Court's decision in *CIC Services*, and the Tax Court's decision in *Green Valley Investors*) appears to be that the IRS's identification of listed transactions in 2004 and thereafter (i.e., after § 6707A and similar penalties were enacted) must proceed by regulations issued in full compliance with the APA, not merely IRS pronouncements or other sub-regulatory guidance. It is thus understandable, at least in the authors' view, that the additional burden imposed upon the IRS and Treasury has those agencies seeing red after the decisions in *Mann Construction*, *CIC Services*, and *Green Valley Investors*. *See* Announcement 2023-11, 2023-17 I.R.B. 798 (cited above and stating, "The Department of the Treasury (Treasury Department) and the IRS disagree with the recent court decisions holding that listed transactions cannot be identified by notice or other subregulatory guidance. However, the Treasury Department and IRS will no longer take the position that transactions of interest can be identified without complying with APA notice-and-comment procedures.")

b. IRS and Treasury's blackletter law counterpunch for syndicated conservation easement transactions. T.D. 10007, Syndicated Conservation Easement Transactions as Listed Transactions, 89 F.R. 81341 (10/8/2024). As mentioned above, before the Eleventh Circuit's decision in *Green Rock* (cited above), but after the Tax Court's decision in *Green Valley Investors* (cited above), Treasury and the IRS issued proposed regulations identifying syndicated conservation easements as a listed transaction for purposes of §§ 6111(a); 6012(a); 6662A; 6707; 6707A; and 6708. *See* REG-106134-22, Syndicated Conservation Easements as Listed Transactions, 87 F.R. 75185 (12/8/22). The required APA notice-and-comment period

[2] New § 170(h)(7)(A) generally provides that a contribution by a partnership is not treated as a qualified conservation contribution (and therefore no deduction is allowed)—whether via a direct contribution or as an allocable share from a lower-tier partnership—if the amount of the contribution exceeds "2.5 times the sum of each 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, 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.

ensued and passed, resulting in the above-cited final regulations becoming effective as of October 8, 2024, the date of publication in the Federal Register. T.D. 10007 adds new Reg. § 1.6011-9, identifying certain syndicated conservation easements or substantially similar arrangements as listed transactions, a type of reportable transaction subject to enhanced disclosure rules and penalties for noncompliance. Reg. § 1.6011-9(b) defines syndicated conservation easement transactions subject to the new rules, while Reg. § 1.6011-9(c) provides related definitions, including the definition of "substantially similar" transactions. Reg. § 1.6011-9(d)(1) carves out from listed transaction treatment those syndicated conservation easements "for which the promotional materials offer the taxpayer the possibility of being allocated a charitable contribution deduction of only an amount less than 2.5 times the taxpayer's investment and for which the taxpayer is actually allocated a charitable contribution deduction of an amount less than 2.5 times the taxpayer's investment." In other words, syndicated conservation easement transactions that are constrained by new (as of 2022) § 170(h)(7) ordinarily are not a listed transaction. Reg. §1.6011-9(d)(5) provides two examples of listed transactions subject to the new rules: one that is a syndicated conservation easement as defined in Reg. § 1.60119(b) and another that is a "substantially similar" transaction as defined in Reg. § 1.6011-9(c). Finally, the new regulations obsolete Notice 2017-10 for transactions occurring after October 8, 2024.

Comment: An unaddressed question under new Reg. § 1.6011-9 is the extent to which syndicated conservation easements or substantially similar arrangements can be retroactively identified as listed transactions via the regulations (even though Notice 2017-10 has been held invalid under the APA). Commenters to the proposed regulations raised this issue, opining that the new regulations cannot or should not retroactively designate syndicated conservation easements as listed transactions. In this regard, the preamble to the final regulations states that the Tax Court has not resolved whether a listed transaction designation can be applied retroactively. Accordingly, at least as far as the IRS is concerned, any commenter's theory that the regulations cannot be applied retroactively has not been judicially resolved. The preamble states in relevant part:

> The reporting rules for listed transactions are outside the scope of these final regulations, which merely identify a listed transaction. The reporting rules for listed transactions are found in § 1.6011-4, which was issued pursuant to notice and comment and finalized most recently in TD 9350 (72 FR 43146), published in 2007 and which is not amended by these final regulations. Section 1.6011-4(e)(2)(i) requires reporting of transactions entered into prior to the publication of guidance identifying a transaction as a listed transaction if the statute of limitations for assessment of tax is still open when the transaction becomes a listed transaction. While the reporting mandated by § 1.6011-4 may be with respect to prior periods, the disclosure obligation is itself not retroactive—it is a current reporting obligation. Thus, the comments regarding an impermissible retroactive burden required by § 1.6011-4 are without merit.

Furthermore, the preamble continues at length regarding this retroactivity issue and "open" tax years but also provides no crystal clear answers:

> Several commenters requested additional guidance on what constitutes an "open year" for purposes of reporting the listed transaction. These commenters opined that the final regulations should not be able to hold open (or re-open) a statute of limitations for a return that was filed before the relevant transaction became a listed transaction. One commenter stated that such a rule would result in taxpayers currently under audit and disputing penalties based on an expired statute of limitations finding one legal basis of their case evaporated, undoing months or years of analysis and evaluation.
>
> Guidance on open years for purposes of applying § 1.6011-4 is outside the scope of these final regulations, which merely identify a listed transaction.

> However, if a taxpayer who is required to disclose a listed transaction for a taxable year for which the statute of limitations has not expired prior to the identification of the listed transaction fails to do so, then the taxpayer's statute of limitations will continue to stay open for that taxable year as provided in section 6501(c)(10) of the Code. Section 6501(c)(10) provides that, if a taxpayer fails to include on any return or statement for any taxable year any information with respect to a listed transaction (as defined in section 6707A(c)(2) of the Code) which is required under section 6011 to be included with such return or statement, the time for assessment of any tax imposed by the Code with respect to such transaction does not expire before the date that is one year after the earlier of (1) the date the taxpayer provides the required information or (2) the date that a material advisor meets the requirements of section 6112 with respect to a request by the Secretary under section 6112(b) relating to such transaction with respect to such taxpayer. Section 301.6501(c)-1(g)(3)(iii) of the Procedure and Administration Regulations (26 CFR part 301), which was issued pursuant to notice and comment and finalized most recently in TD 9718 (80 FR 16973), published in 2015, and which is not amended by these final regulations, provides (1) that the taxable years to which the failure to disclose relates include each taxable year that the taxpayer participated (as defined under section 6011 and the regulations thereunder) in a transaction that was identified as a listed transaction and for which the taxpayer failed to disclose the listed transaction as required under section 6011, and (2) if the taxable year in which the taxpayer participated in the listed transaction is different from the taxable year in which the taxpayer is required to disclose the listed transaction under section 6011, the taxable years to which the failure to disclose relates include each taxable year for which the taxpayer participated in the transaction.
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> Several commenters asked for guidance as to what constitutes an "open" tax year for taxpayers that took the position they were not required to file a Form 8886, Reportable Transaction Disclosure Statement, because Notice 2017-10 was invalidated. This requested guidance is also outside the scope of these final regulations for the reasons discussed in the prior paragraph.

- *IRS and Treasury's pending blackletter law counterpunch for micro-captive insurance arrangements.* REG-109309-22, Micro-Captive Listed Transactions and Micro-Captive Transactions of Interest, 88 F.R. 21547 (4/11/23). As noted above, in response to the district court's decision in *CIC Services, LLC*, the IRS and Treasury also proposed regulations in 2023 identifying certain micro-captive insurance arrangements as listed transactions and transactions of interest. These proposed regulations are expected to be finalized in 2025. *See* Department of Treasury, 2024-2025 Priority Guidance Plan (10/3/24) at 13 (last accessed 12/1/2024).

3. The IRS has delayed full implementation of Form 1099-K reporting requirements until 2026 and has declared 2024 and 2025 a "further transition period" with a reporting threshold of $5,000 for 2024 and $2,500 for 2025. Notice 2024-85, 2024-51 I.R.B. ___ (11/27/24). This notice announces that calendar years 2024 and 2025 will be the "final transition period" for reporting on Form 1099-K.

Background. In 2008, Congress added § 6050W to the Code. Section 6050W became effective for the 2011 tax year. Generally, § 6050W requires payment card companies and online marketplaces (aka third-party settlement organizations or TPSOs) to report on Form 1099-K payments processed for goods and services. Third-party settlement organizations include eBay, gig-worker platforms like Uber and Lyft, and payment apps such as Venmo and Cash App (but not Zelle). There has never been a de minimis exception for payment card transactions, i.e., a payment card company must report all transactions processed for a participating payee. As enacted, § 6050W(e) set forth a de minimis exception under which third-party settlement organizations were required to issue Forms 1099-K only when gross payments to a participating payee for goods and services during the calendar year exceeded $20,000 *and* there were more than 200 transactions with that payee. The American Rescue Plan (March 2021) lowered the de minimis exception for third-party settlement organizations to $600 with no minimum number of transactions, effective in 2022. In Notice 2023-10, 2023-3 I.R.B. 403 (12/23/22), the IRS announced that 2022 would be a transition period for implementation of the reduced reporting threshold, i.e., the reduced threshold did not apply for 2022. Similarly, in Notice 2023-74, 2023-51 I.R.B. 1484 (11/21/23), the IRS announced that the reduced reporting thresholds for Form 1099-K enacted by the American Rescue Plan (March 2021) would not apply for 2023. This meant that, *for 2022 and 2023*:

- Payment card companies still had to report all transactions processed for a participating payee, regardless of the amount processed or number of transactions, and
- A third-party settlement organization was not required to report payments in settlement of third-party network transactions with respect to a participating payee unless:
    - The gross amount of aggregate payments to be reported exceeded $20,000, and
    - The number of such transactions with that participating payee exceeded 200.

Notice 2024-85 and Form 1099-K reporting. The notice announces that calendar years 2024 and 2025 will be a "further transition period" for enforcement and administration of the reporting requirements of § 6050W. Specifically, *for calendar year 2024*:

- Payment card companies must report all transactions processed for a participating payee, regardless of the amount processed or number of transactions, and
- A third-party settlement organization is not required to report payments in settlement of third-party network transactions with respect to a participating payee unless the gross amount of aggregate payments to be reported exceeds $5,000, regardless of the number of such transactions.

For *calendar year 2025*:

- Payment card companies must report all transactions processed for a participating payee, regardless of the amount processed or number of transactions, and
- A third-party settlement organization is not required to report payments in settlement of third-party network transactions with respect to a participating payee unless the gross amount of aggregate payments to be reported exceeds $2,500, regardless of the number of such transactions.

For *calendar year 2026 and future years*:

- Payment card companies must report all transactions processed for a participating payee, regardless of the amount processed or number of transactions, and
- A third-party settlement organization is not required to report payments in settlement of third-party network transactions with respect to a participating payee unless the gross amount of aggregate payments to be reported exceeds $600, regardless of the number of such transactions.

Notice 2024-85 and Back-Up Withholding. The notice also addresses the back-up withholding obligations of third-party settlement organizations. Section 3406(a) requires certain payors to perform backup withholding by deducting and withholding income tax from a reportable payment when, among other circumstances, the payee fails to furnish the payee's Taxpayer Identification Number (TIN) to the payor or the IRS has notified the payor that the TIN furnished by the payee is incorrect. Pursuant to § 3406(b)(3)(F), a reportable payment includes payments made by a third-party settlement organization that are required by § 6050W to be shown on a Form 1099-K. Section 3406(b)(4) provides that whether payments made in settlement of payment card transactions or third party network transactions are subject to withholding under section 3406 is determined without regard to the monetary thresholds found in § 6050W. *See also* Reg. § 31.3406(b)(3)-5(b).

In other words, the monetary threshold is considered solely for determining whether a TPSO has an information reporting obligation under § 6050W for payments made to a payee. However, in Notice 2011-42, 2011-23 I.R.B. 866, the IRS announced that no back-up withholding is required by a third-party settlement organization unless the aggregate number of transactions between the TPSO and a payee exceed 200 within a calendar year. (According to Notice 2011-42, the monetary threshold for information reporting, which originally was $20,000, is not relevant in determining whether backup withholding is required.) In Notice 2024-85, the IRS has announced that:

- *For calendar year 2024*, the IRS will *not* assert penalties under §§ 6651 or 6656 for a TPSO's failure to withhold and pay backup withholding tax during the calendar year. The notice reminds TPSOs that have performed backup withholding during 2024 to file Form 945, *Annual Return of Withheld Federal Income Tax*, and issue Form 1099-K with the amount withheld in box 4.
- *For calendar years 2025 and after,* P the IRS *will* assert penalties under §§ 6651 or 6656 for a TPSO's failure to withhold and pay backup withholding tax during the calendar year. Presumably, this means that a TPSO is required to perform backup withholding when required even if the TPSO has no reporting obligation to issue Form 1099-K.

The notice obsoletes Notice 2011-42, which announced that no back-up withholding is required by a third-party settlement organization unless the aggregate number of transactions between the TPSO and a payee exceed 200 within a calendar year.

XI. WITHHOLDING AND EXCISE TAXES

XII. TAX LEGISLATION

XIII. TRUSTS, ESTATES & GIFTS