

Part III - Administrative, Procedural, and Miscellaneous

Listed Transactions

Notice 2004-67

SECTION 1. PURPOSE

This notice updates the list of transactions that have been determined by the Internal Revenue Service to be “listed transactions” for purposes of § 1.6011-4(b)(2) of the Income Tax Regulations and §§ 301.6111-2(b)(2) and 301.6112-1(b)(2) of the Procedure and Administration Regulations. This notice restates the list of “listed transactions” in Notice 2003-76, 2003-49 I.R.B. 1181, and updates the list by adding transactions identified as “listed transactions” in notices and other guidance released subsequent to November 7, 2003, and by eliminating transactions described in Part II of Notice 98-5, 1998-1 C.B. 334, and Notice 2002-70, 2002-2 C.B. 765.

SECTION 2. CURRENT LISTED TRANSACTIONS

Transactions that are the same as or substantially similar to transactions described in the list below have been determined by the Service to be tax avoidance transactions and are “listed transactions” for purposes of §§ 1.6011-4(b)(2), 301.6111-2(b)(2) and 301.6112-1(b)(2). As a result, taxpayers may need to disclose their participation in these listed transactions as prescribed in § 1.6011-4, and promoters (or other persons responsible for registering tax shelter transactions) may need to register these transactions under § 301.6111-2. In addition, material advisors must maintain lists of investors and other information with respect to these listed transactions pursuant to § 301.6112-1.

(1) Rev. Rul. 90-105, 1990-2 C.B. 69 (transactions in which taxpayers claim deductions for contributions to a qualified cash or deferred arrangement or matching contributions to a defined contribution plan where the contributions are attributable to compensation earned by plan participants after the end of the taxable year (identified as “listed transactions” on February 28, 2000)). See also Rev. Rul. 2002-46, 2002-2 C.B. 117 (result is the same, and transactions are substantially similar, even though the contributions are designated as satisfying a liability established before the end of the taxable year), modified by Rev. Rul. 2002-73, 2002-2 C.B. 805;

(2) Notice 95-34, 1995-1 C.B. 309 (certain trust arrangements purported to qualify as multiple employer welfare benefit funds exempt from the limits of §§ 419 and 419A of the Internal Revenue Code (identified as “listed transactions” on February 28, 2000)). See also § 1.419A(f)(6)-1 of the Income Tax Regulations (10 or more employer plans);

(3) Transactions substantially similar to those at issue in ASA Investering Partnership v. Commissioner, 201 F.3d 505 (D.C. Cir. 2000), and ACM Partnership v. Commissioner, 157 F.3d 231 (3d Cir. 1998) (transactions involving contingent installment sales of securities by partnerships in order to accelerate and allocate income to a tax-indifferent partner, such as a tax-exempt entity or foreign person, and to allocate later losses to another partner (identified as “listed transactions” on February 28, 2000));

(4) Section 1.643(a)-8 of the Income Tax Regulations (transactions involving distributions described in § 1.643(a)-8 from charitable remainder trusts (identified as “listed transactions” on February 28, 2000));

(5) Notice 99-59, 1999-2 C.B. 761 (transactions involving the distribution of encumbered property in which taxpayers claim tax losses for capital outlays that they have in fact recovered (identified as “listed transactions” on February 28, 2000)). See also § 1.301-1(g) of the Income Tax Regulations;

(6) Section 1.7701(l)-3 of the Income Tax Regulations (transactions involving fast-pay arrangements as defined in § 1.7701(l)-3(b) (identified as “listed transactions” on February 28, 2000));

(7) Rev. Rul. 2000-12, 2000-1 C.B. 744 (certain transactions involving the acquisition of two debt instruments the values of which are expected to change significantly at about the same time in opposite directions (identified as “listed transactions” on February 28, 2000));

(8) Notice 2000-44, 2000-2 C.B. 255 (transactions generating losses resulting from artificially inflating the basis of partnership interests (identified as “listed transactions” on August 11, 2000)). See also § 1.752-6T of the temporary Income Tax Regulations and §§ 1.752-1(a) and 1.752-7 of the proposed Income Tax Regulations;

(9) Notice 2000-60, 2000-2 C.B. 568 (transactions involving the purchase of a parent corporation's stock by a subsidiary, a subsequent transfer of the purchased parent stock from the subsidiary to the parent's employees, and the eventual liquidation or sale of the subsidiary (identified as “listed transactions” on November 16, 2000));

(10) Notice 2000-61, 2000-2 C.B. 569 (transactions purporting to apply § 935 to Guamanian trusts (identified as “listed transactions” on November 21, 2000));

(11) Notice 2001-16, 2001-1 C.B. 730 (transactions involving the use of an intermediary to sell the assets of a corporation (identified as “listed transactions” on January 18, 2001));

(12) Notice 2001-17, 2001-1 C.B. 730 (transactions involving a loss on the sale

of stock acquired in a purported § 351 transfer of a high basis asset to a corporation and the corporation's assumption of a liability that the transferor has not yet taken into account for federal income tax purposes (identified as "listed transactions" on January 18, 2001));

(13) Notice 2001-45, 2001-2 C.B. 129 (certain redemptions of stock in transactions not subject to U.S. tax in which the basis of the redeemed stock is purported to shift to a U.S. taxpayer (identified as "listed transactions" on July 26, 2001));

(14) Notice 2002-21, 2002-1 C.B. 730 (transactions involving the use of a loan assumption agreement to inflate basis in assets acquired from another party to claim losses (identified as "listed transactions" on March 18, 2002));

(15) Notice 2002-35, 2002-1 C.B. 992 (transactions involving the use of a notional principal contract to claim current deductions for periodic payments made by a taxpayer while disregarding the accrual of a right to receive offsetting payments in the future (identified as "listed transactions" on May 6, 2002));

(16) Notice 2002-50, 2002-2 C.B. 98 (transactions involving the use of a straddle, a tiered partnership structure, a transitory partner, and the absence of a § 754 election to claim a permanent noneconomic loss (identified as "listed transactions" on June 25, 2002)); Notice 2002-65, 2002-2 C.B. 690 (transactions involving the use of a straddle, an S corporation or a partnership, and one or more transitory shareholders or partners to claim a loss while deferring an offsetting gain are substantially similar to transactions described in Notice 2002-50); and Notice 2003-54, 2003-33 I.R.B. 363 (transactions involving the use of economically offsetting positions, one or more tax indifferent parties, and the common trust fund accounting rules of § 584 to allow a taxpayer to claim a noneconomic loss are substantially similar to transactions described in Notice 2002-50 and Notice 2002-65);

(17) Rev. Rul. 2002-69, 2002-2 C.B. 760, modifying and superseding Rev. Rul. 99-14, 1999-1 C.B. 835 (transactions in which a taxpayer purports to lease property and then purports to immediately sublease it back to the lessor (often referred to as "lease-in/lease-out" or "LILO" transactions) (identified as "listed transactions" on February 28, 2000));

(18) Rev. Rul. 2003-6, 2003-1 C.B. 286 (certain arrangements involving the transfer of employee stock ownership plans (ESOPs) that hold stock in an S corporation for the purpose of claiming eligibility for the delayed effective date of § 409(p) (identified as "listed transactions" on December 17, 2002));

(19) Notice 2003-22, 2003-1 C.B. 851 (certain arrangements involving leasing companies that have been used to avoid or evade federal income and employment taxes (identified as "listed transactions" on April 4, 2003));

(20) Notice 2003-24, 2003-1 C.B. 853 (certain arrangements that purportedly qualify as collectively-bargained welfare benefit funds excepted from the account limits of §§ 419 and 419A (identified as “listed transactions” on April 11, 2003));

(21) Notice 2003-47, 2003-30 I.R.B. 132 (transactions involving compensatory stock options and related persons to avoid or evade federal income and employment taxes (identified as “listed transactions” on July 1, 2003));

(22) Notice 2003-55, 2003-34 I.R.B. 395 (transactions in which one participant claims to realize rental or other income from property or service contracts and another participant claims the deductions related to that income (often referred to as “lease strips”)), modifying and superceding Notice 95-53, 1995-2 C.B. 334 (identified as “listed transactions” on February 28, 2000);

(23) Notice 2003-77, 2003-49 I.R.B. 1182 (certain transactions that use contested liability trusts improperly to accelerate deductions for contested liabilities under § 461(f) (identified as “listed transactions” on November 19, 2003)). See also § 1.461-2 of the Income Tax Regulations. See Rev. Proc. 2004-31, 2004-22 I.R.B. 986, for procedures which taxpayers must use to change their methods of accounting for deducting under § 461(f) amounts transferred to trusts in transactions described in Notice 2003-77.

(24) Notice 2003-81, 2003-51 I.R.B. 1223 (certain transactions in which a taxpayer claims a loss upon the assignment of a § 1256 contract to a charity but fails to report the recognition of gain when the taxpayer’s obligation under an offsetting non-section 1256 contract terminates (identified as “listed transactions” on December 4, 2003));

(25) Notice 2004-8, 2004-4 I.R.B. 333 (certain transactions designed to avoid the limitations on contributions to Roth IRAs described in § 408A (identified as “listed transactions” on December 31, 2003));

(26) Rev. Rul. 2004-4, 2004-6 I.R.B. 414 (transactions that involve segregating the business profits of an ESOP-owned S corporation in a qualified subchapter S subsidiary, so that rank-and-file employees do not benefit from participation in the ESOP (identified as “listed transactions” on January 23, 2004));

(27) Transactions that are the same as, or substantially similar to, those described in Situation 2 of Rev. Rul. 2004-20, 2004-10 I.R.B. 546, modifying and superseding Rev. Rul. 55-748, 1955-2 C.B. 234 (certain arrangements in which an employer deducts contributions to a qualified pension plan for premiums on life insurance contracts that provide for death benefits in excess of the participant’s death benefit, where under the terms of the plan, the balance of the death benefit proceeds revert to the plan as a return on investment) (identified as “listed transactions” on

February 13, 2004)). See also Rev. Rul. 2004-21, 2004-10 I.R.B. 544, §§ 1.79-1(d)(3), 1.83-3(e) and 1.402(a)-1(a)(1) and (2) of the proposed Income Tax Regulations, and Rev. Proc. 2004-16, 2004-10 I.R.B. 559;

(28) Notice 2004-20, 2004-11 I.R.B. 608 (transactions in which, pursuant to a prearranged plan, a domestic corporation purports to acquire stock in a foreign target corporation and to make an election under § 338 before selling all or substantially all of the target corporation's assets in a preplanned transaction that generates a taxable gain for foreign tax purposes (but not for U.S. tax purposes) (identified as "listed transactions" on February 17, 2004));

(29) Notice 2004-30, 2004-17 I.R.B. 828 (transactions in which S corporation shareholders attempt to transfer the incidence of taxation on S corporation income by purportedly donating S corporation nonvoting stock to an exempt organization while retaining the economic benefits associated with that stock (identified as "listed transactions" on April 1, 2004)); and

(30) Notice 2004-31, 2004-17 I.R.B. 830 (transactions in which corporations claim inappropriate deductions for payments made through a partnership (identified as "listed transactions" on April 1, 2004)).

SECTION 3. TRANSACTIONS NO LONGER CONSIDERED TO BE LISTED TRANSACTIONS

Transactions that are the same as, or substantially similar to, transactions described in the list below will no longer be considered listed transactions for purposes of §§ 1.6011-4(b)(2), 301.6111-2(b)(2) and 301.6112-1(b)(2). No inference is intended, however, as to whether such transactions are otherwise subject to the disclosure requirements of § 6011, the registration requirements of § 6111, or the list maintenance requirements of § 6112.

(1) Transactions described in Part II of Notice 98-5, 1998-1 C.B. 334 (transactions in which the reasonably expected economic profit is insubstantial in comparison to the value of the expected foreign tax credits (identified as "listed transactions" on February 28, 2000)). Notice 2004-19, 2004-11 I.R.B. 606, withdrew Notice 98-5. Effective for taxable years for which the due date of the return (including extensions, whether or not actually requested) is after February 17, 2004, transactions will not be considered listed transactions for purposes of §§ 1.6011-4(b)(2) and 301.6112-1(b)(2) solely because they are the same as or substantially similar to the transactions or arrangements described in Part II of Notice 98-5. In addition, for offers made after February 17, 2004, transactions will not be considered listed transactions for purposes of § 301.6111-2(b)(2) solely because they are the same as or substantially similar to the transactions or arrangements described in Part II of Notice 98-5.

(2) Transactions described in Notice 2002-70, 2002-2 C.B. 765 (transactions

involving reinsurance arrangements between a taxpayer and the taxpayer's own reinsurance company that is subject to little or no federal income tax (identified as "listed transactions" on October 15, 2002)). Notice 2004-65, 2004-41 I.R.B., modified Notice 2002-70 by removing the identification of transactions that are the same as, or substantially similar to, transactions described in Notice 2002-70 as listed transactions effective for taxable years for which the due date of the return (including extensions, whether or not actually requested) is after September 24, 2004.

SECTION 4. EFFECT ON OTHER NOTICES

Notice 2003-76, as modified by Notice 2004-19 and Notice 2004-65, is supplemented and superseded. For updates to this list go to the IRS web page at www.irs.gov/businesses/corporations and click on Abusive Tax Shelters and Transactions. Notices and other published guidance will still be used to identify transactions that have been determined by the Service to be "listed transactions."

DRAFTING INFORMATION

The principal authors of this notice are Michael J. Goldman and David A. Shulman of the Office of Associate Chief Counsel (Passthroughs & Special Industries). For further information regarding this notice contact the authors at (202) 622-3070 (not a toll-free call).