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Easements

Proposed regs issued today identify certain syndicated conservation easement transactions as "listed."

Jason Bramwell • Dec. 06, 2022



Proposed regulations issued today by the IRS identify certain syndicated conservation easement transactions as "listed transactions," a move that followed a recent U.S. Tax Court ruling against the tax agency.

The IRS defines listed transactions as "a transaction that is the same as or substantially similar to one of the types of transactions that the IRS has determined

to be a tax avoidance transaction and identified by notice, regulation, or other form

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easements, landowners who give up development rights for their acreage, usually by donating those rights to a nonprofit land trust, get a charitable deduction in return. When conservation easements are used as intended, both the public and the owner of the property benefit. A piece of pristine land is preserved, sometimes as a park that the public can use, and the donor gets a tax break.

The syndicated versions are different. Instead of seeking to protect a bucolic reserve for wildlife or humans, profit-seeking intermediaries have turned the likes of abandoned golf courses or remote scrubland into high-return investment vehicles. These promoters snatch up vacant land that till then was worth little. Then they hire an appraiser willing to declare that it has huge, previously unrecognized development value — perhaps for luxury vacation homes or a solar farm — and thus is really worth many times its purchase price. The promoters sell stakes in the donation to individuals, who claim charitable deductions that are four or five times their investment. The promoters reap millions in fees.

In 2017, the IRS attempted to kill this tax avoidance scheme when it issued [Notice 2017-10](#), which classified syndicated conservation easements as listed transactions and thus must be reported to the IRS. Classifying these transactions as “listed” was meant to discourage taxpayers from participating in these schemes, identify those taxpayers who do, and penalize accordingly.

According to *Forbes*, [penalties include](#):

- By adding [Section 6662A](#) to the Internal Revenue Code in 2004, Congress imposed

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- [Section 6662A](#) and [Section 6662B](#) impose the failure to file certain reports or keep track of certain information required to be kept in connection with a listed transaction.
- [Accuracy penalties](#) and [civil fraud penalties](#) are more likely to be imposed in connection with a listed transaction.

As *Forbes* noted, these are just the civil penalties; there are potential criminal consequences, as well.

But the IRS was dealt a blow on Nov. 9 when the Tax Court called IRS Notice 2017-10 “invalid.” *Forbes* reported on Nov. 10:

In *Green Valley*, the taxpayer argued that the IRS failed to follow the Administrative Procedure Act (APA)'s requirements when it published Notice 2017-10, because it failed to follow formal rulemaking procedures the APA required. In particular, the IRS did not issue a notice of formal rulemaking, ask the public to submit comments, and then publish final guidance that addresses the comments from the public.

IRS argued that it was not required to go through formal notice and comment, but the Tax Court disagreed.

Relying heavily on recent Supreme Court of the United States case [CIC Services, LLC v. Internal Revenue Service](#) and Sixth Circuit Case *Mann Construction, Inc. v. United States*, 27 F. 4th 1138 (2022), the Tax Court held that “the act of identifying a listed transaction by the IRS, by its very nature, is the creation of a substantive (i.e., legislative) rule and not merely an interpretative rule.” Accordingly,

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comments, in 2023 and intends to issue proposed regulations identifying additional listed transactions in the near future.

IRS • Taxes

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