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Revenue Procedure 2005-26

Rev. Proc. 2005-26; 2005-1 C.B. 965; 2005 IRB LEXIS 148; 2005-17 I.R.B. 965

April 25, 2005

[*1]

APPLICABLE SECTIONS:

26 CFR 601.105: Examination of returns and claims for refund, credit or abatement; determination of correct tax liability.

REFERENCE: Also: Part I, §§ *6011, 6501, 6707A, 6111, 6112; 1.6011-4*

TEXT:

SECTION 1. PURPOSE

The purpose of this revenue procedure is to alert taxpayers to the enactment of *section 6501(c)(10) of the Internal Revenue Code*, and to provide guidance for taxpayers subject to the extended period of limitations on assessment under *section 6501(c)(10)*.

SECTION 2. BACKGROUND

.01 In general, the limitations period on assessment of tax is three years after the later of the due date for filing a tax return or the date on which the taxpayer files its return. *I.R.C. § 6501(a)*. *Section 6501(c)* provides several exceptions to the general three-year period of limitations.

.02 Section 814 of the American Jobs Creation Act of 2004, Pub. L. No. 108-357, 118 Stat. 1418 (2004) (the Act), amended *section 6501(c)* by adding a new *paragraph (10)*. *Section 6501(c)(10)* provides that the limitations period on assessment with respect to a listed transaction that the taxpayer fails to disclose, as required under *section 6011* (an "undisclosed listed transaction"), shall not expire before one year after the earlier [*2] of (A) the date on which the Secretary is furnished the information required under *section 6011*, or (B) the date that a material advisor meets the requirements of *section 6112* with respect to a request by the Secretary under *section 6112* relating to the undisclosed listed transaction. *Section 6501(c)(10)* is effective for taxable years with respect to which the limitations period on assessment did not expire prior to October 22, 2004, the date of enactment of the Act. *Section 6501(c)(10)* does not revive an assessment limitations period that expired prior to October 22, 2004.

.03 *Section 6707A(c)(2)* (added by section 811 of the Act) defines a "listed transaction" as a reportable transaction that is the same as, or substantially similar to, a transaction identified by the Secretary as a tax avoidance transaction for purposes of *section 6011*. See also *Treas. Reg. § 1.6011-4(b)(2)*. For a list of transactions identified by the Secretary as listed transactions, go to the IRS web page at www.irs.gov/businesses/corporations and click on Abusive Tax Shelters and Transactions. See also *Notice 2004-67, 2004-41 I.R.B. 600 (October 12, 2004)*, and subsequent published guidance.

.04 Taxpayers are [*3] required under *section 6011*, and the regulations thereunder, to disclose certain information regarding each listed transaction in which the taxpayer has participated, as defined in *section 1.6011-4(c)(3)*. Generally, if a taxpayer is required to disclose information regarding the transaction, the taxpayer must complete Form 8886, Reportable Transaction Disclosure Statement, for each listed transaction and attach the Form 8886 to the tax-

payer's return for each year in which the taxpayer participated in the listed transaction. See *Treas. Reg. § 1.6011-4(e)*. A copy of the disclosure statement must also be sent to the Office of Tax Shelter Analysis (OTSA) at the same time that any disclosure statement is first filed by the taxpayer. See *Treas. Reg. §§ 1.6011-4(d)* and *-4(e)*. The Form 8886 must provide the information requested and be completed in accordance with the instructions to the form. See *Treas. Reg. § 1.6011-4(d)*.

.05 *Section 6112* requires material advisors to maintain lists of investors and other information with respect to reportable transactions, including listed transactions, and to furnish that information to the Secretary upon request. The term "material advisor" is defined [*4] in *section 301.6112-1(c)(2)*. See *Notice 2004-80, 2004-50 I.R.B. 963 (December 13, 2004)*, amplified by *Notice 2005-17, 2005-8 I.R.B. 606 (February 22, 2005)*, clarified and modified by *Notice 2005-22, 2005-12 I.R.B. 756 (March 21, 2005)*, and *section 301.6112-1* for guidance relating to the preparation, content, maintenance, retention, and furnishing of lists by material advisors.

SECTION 3. SCOPE

This revenue procedure applies to taxpayers that fail to disclose information regarding listed transactions, as required under *section 6011* and the regulations thereunder, for taxable years with respect to which the period for assessing a deficiency did not expire before October 22, 2004. This revenue procedure provides procedures that taxpayers and material advisors may follow to disclose undisclosed listed transactions.

SECTION 4. APPLICATION TO TAXPAYERS

.01 Disclosure of an undisclosed listed transaction by a taxpayer that has filed a tax return. Until further guidance is issued, if a taxpayer filed a tax return with respect to a taxable year for which the taxpayer participated in an undisclosed listed transaction and the IRS has not previously received from the material advisor the information [*5] described in *section 301.6112-1(e)(3)* in accordance with Section 5 of this revenue procedure, the limitations period on assessment with respect to that undisclosed listed transaction will not expire earlier than one year after the taxpayer discloses the transaction in accordance with the procedures in this Section 4.

(1) Disclosure on a Form 8886. A taxpayer must disclose an undisclosed listed transaction by submitting a Form 8886, with appropriate cover letter, as described below, with the Internal Revenue Service Center at which the taxpayer filed its original return. A taxpayer is permitted, but not required, to file an amended return with the Form 8886 and cover letter. A copy of the Form 8886 and cover letter also must be sent simultaneously to OTSA. The taxpayer must include on the top of Page 1 of the Form 8886, and each copy of the form, the following statement: "*Section 6501(c)(10) Disclosure*" followed by the taxable year and tax return to which the disclosure statement relates. For example, if the Form 8886 relates to the taxpayer's Form 1040 for the 2002 taxable year, the taxpayer must include the following statement: "*Section 6501(c)(10) Disclosure; 2002 Form 1040*" on [*6] the form. Separate Forms 8886 and separate cover letters must be submitted for each taxable year for which the taxpayer participated in the undisclosed listed transaction. A cover letter to which a Form 8886 is to be attached must identify the return to which the disclosure statement relates and include the following statement signed under penalties of perjury by the taxpayer and, if applicable, by the paid preparer preparing the Form 8886 or amended return:

Under penalties of perjury, I declare that I have examined this reportable transaction disclosure statement and, to the best of my knowledge and belief, this reportable transaction disclosure statement is true, correct, and complete. Declaration of preparer (other than taxpayer) is based on all information of which the preparer has any knowledge.

(2) Taxpayers under an examination by the IRS or under Appeals consideration. A taxpayer under examination by the IRS or under Appeals consideration for any taxable year for which the taxpayer participated in an undisclosed listed transaction also must submit a copy of the Form 8886, prepared in accordance with the requirements of subsection (1) above, to the IRS examiner or Appeals officer [*7] in addition to the other disclosure requirements of this section.

.02 Disclosure of an undisclosed listed transaction that is designated as a listed transaction subsequent to the filing of a tax return. If the Secretary identifies a transaction as a listed transaction after the date on which the taxpayer files a tax return for a taxable year during which the taxpayer participated in the listed transaction (a "post-filing listed transaction"), the taxpayer must disclose the transaction under *section 6011* in accordance with the regulations thereunder. See *Treas. Reg. § 1.6011-4(e)(2)(i)*. The exception under *section 6501(c)(10)* to the general period of limitations on assessment is applicable to a post-filing listed transaction unless the taxpayer discloses the listed transaction in accordance with the regulations under *section 6011*, which currently require that the taxpayer attach the Form 8886 to its next filed

return. If the obligation to disclose a post-filing listed transaction, as prescribed by the regulations under *section 6011*, arises after the expiration of the period of limitations on assessment for a taxable year in which the taxpayer participated in the post-filing listed transaction, [*8] *section 6501(c)(10)* will not operate to reopen or extend the limitations period. Conversely, if the limitations period on assessment has not expired, and the taxpayer fails to disclose the post-filing listed transaction as required by the regulations under *section 6011*, the limitations period on assessment with respect to the undisclosed listed transaction will not expire earlier than one year after the taxpayer discloses the transaction in accordance with the procedures described in *section 4.01*.

.03 Date of disclosure by taxpayers for purposes of *section 6501(c)(10)(A)*. For purposes of *section 6501(c)(10)(A)*, the limitations period on assessment with respect to an undisclosed listed transaction will not expire earlier than one year after the date on which the IRS receives the information described in this section 4. A taxpayer will not be treated as disclosing an undisclosed listed transaction until the date on which the original Form 8886 is received by the appropriate Internal Revenue Service Center and a copy of the disclosure statement is received by OTSA and, if applicable, by the IRS examiner or Appeals officer. If the required disclosures are not made on the same date, the [*9] taxpayer will be deemed to have disclosed the transaction on the date that the IRS receives the disclosure that, together with prior disclosures, satisfies the requirements of this section 4. For example, if a taxpayer discloses the information only by submitting the original Form 8886 with the appropriate Internal Revenue Service Center or by sending a copy of the Form 8886 to OTSA, but not both, the one-year limitations period on assessment under *section 6501(c)(10)(A)* will not begin until both events have occurred.

SECTION 5. APPLICATION TO MATERIAL ADVISORS

.01 Disclosure of an undisclosed listed transaction by material advisors. In general, a material advisor must furnish the Secretary with the information described in *section 6112* if a material advisor receives a request by the Secretary under *section 6112* relating to a listed transaction. See *Treas. Reg. § 301.6112-1(g)* and *Notice 2004-80 (December 13, 2004)*, amplified by *Notice 2005-17, 2005-8 I.R.B. 606 (February 22, 2005)*, clarified and modified by *Notice 2005-22, 2005-12 I.R.B. 756 (March 21, 2005)*, or subsequent published guidance, for instructions on how to comply with these requirements. Until further guidance is [*10] issued, the limitations period on assessment with respect to an undisclosed listed transaction that is not otherwise disclosed by a taxpayer in accordance with Section 4 of this revenue procedure will not expire earlier than one year after the date on which the IRS receives from the material advisor the information described in *section 301.6112-1(e)(3)* with respect to that taxpayer.

.02 Date of disclosure by material advisors for purposes of *section 6501(c)(10)(B)*. For purposes of *section 6501(c)(10)(B)* and this section 5, the limitations period on assessment for a taxpayer with respect to an undisclosed listed transaction will not expire earlier than one year after the date on which the material advisor makes available for inspection by the IRS the information described in section 5.01, regardless of whether the material advisor provides the information within 20 days of the IRS's request as required by *section 301.6112-1(g)(1)*. Alternatively, if the material advisor sends the required information to the IRS, then for purposes of *section 6501(c)(10)(B)*, [*11] the limitations period on assessment will not expire earlier than one year after the date on which the IRS receives the information.

SECTION 6. OTHER PERIODS OF LIMITATIONS FOR ASSESSING ANY TAX

The exception under *section 6501(c)(10)* to the period of limitations on assessment does not supplant or shorten any other applicable period of limitations on assessment, including a limitations period that has been extended by agreement under *section 6501(c)(4)*, or a limitations period described in *section 6501(c)(1)* relating to a false or fraudulent return.

SECTION 7. REQUEST FOR COMMENTS

The IRS and the Department of Treasury intend to issue regulations implementing the requirements of *section 6501(c)(10)*. The IRS and the Department of Treasury continue to consider how to balance the burden imposed on taxpayers and their representatives with the benefits to the government of early and complete disclosure. The IRS and the Department of Treasury invite interested persons to submit comments regarding these procedures, including the application of these procedures to partners and partnerships. Comments are encouraged to be submitted by June 7, 2005, to: Internal Revenue Service, CC:PA:LPD:PR (RP [*12] 2005-26), Room 5203, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions also may be hand delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to: CC:PA:LPD:PR (RP 2005-26), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue N.W., Washington, DC 20224. Alternatively, taxpayers may submit electronic comments directly to the IRS e-mail ad-

dress: notice.comments@irs.counsel.treas.gov. Commentators who provide electronic comments should include the identification number of this revenue procedure in the body of the comment and in the subject line of the e-mail.

SECTION 8. EFFECTIVE DATE

This revenue procedure is effective on April 8, 2005.

SECTION 9. PAPERWORK REDUCTION ACT

The collection of information contained in this revenue procedure has been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act of 1995 (*44 U.S.C. § 3507*) under the control number 1545 -- 1940.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid OMB control number. The collection of information in this revenue procedure is in section 4. [*13] This information is required to provide the Service with the information necessary to properly determine the taxpayer's applicable period of limitations and to provide the information under penalties of perjury. The collection of information is required to obtain a benefit. The likely respondents are individuals and businesses or other for-profit institutions.

The estimated total annual reporting and/or record-keeping burden is 429.50 hours.

The estimated annual burden per respondent/recordkeeper varies from 0.25 hour to 0.75 hour, depending on individual circumstances, with an estimated average of 0.5 hour. The estimated number of respondents and/or recordkeepers is 859.

The estimated annual frequency of responses (used for reporting requirements only) is 859.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by *26 U.S.C. § 6103*.

SECTION 10. DRAFTING INFORMATION

The principal author of this revenue procedure is Audra M. Dineen of the Office of Associate Chief Counsel (Procedure & Administration), [*14] Administrative Provisions and Judicial Practice Division. For further information regarding this revenue procedure, contact Audra M. Dineen at (202) 622-4940 (not a toll-free call).