



TaxNewsFlash

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U.S. Tax Court: Listing notice is legislative rule improperly issued under the Administrative Procedure Act

The U.S. Tax Court today held that Notice 2017-10—which provides that syndicated conservation easement transactions described in section 2 of the notice (and substantially similar transactions) are listed transactions for purposes of sections 6111 and 6112 and Treas. Reg. § 1.6011-4(b)(2)—is a legislative rule, improperly issued by the IRS without notice and comment as required under the Administrative Procedure Act (APA). The Tax Court thus set aside Notice 2017-10 and held that penalties under section 6662A could not be imposed on the taxpayer.

Today's opinion was joined by 11 of the 17 judges of the Tax Court. Four judges concurred in the result, with two of those judges writing separate opinions, and two judges dissented, with each writing a separate opinion.

The case is: *Green Valley Investors, LLC v. Commissioner*, 159 T.C. No. 5 (November 9, 2022). Read the Tax Court's [opinion](#) [PDF 388 KB]

Summary

The Tax Court found that the act of identifying a transaction as a listed transaction by the IRS is the creation of a substantive (i.e., legislative) rule and not merely an interpretative rule because it imposes new duties in the form of reporting obligations and recordkeeping requirements on both taxpayers and their advisors.

The Tax Court further determined that the language provided in section 6707A or in section 6011 did not rise to the level required to avoid or modify the requirements of the APA, rejecting the IRS's contention that Congress clearly exempted the IRS from following the APA's normal procedures when it enacted section 6707A.

As a result, the Tax Court held Notice 2017-10 was subject to the notice-and-comment rulemaking requirement under the APA regime.

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