

CB-NOTICE, 2008FED ¶46,273, **Listed transactions: Intermediary transaction tax shelter: Components and participants.** —, Notice 2008-20 (January 17, 2008)

Notice 2008-20, I.R.B. 2008-6, January 17, 2008.

[Code Secs. [6011](#), [6111](#), [6112](#), [6662](#), [6662A](#), [6700](#) and [6701](#)]

**Listed transactions: Intermediary transaction tax shelter: Components and participants.** —The IRS has identified the four components identifying an intermediary transaction tax shelter (ITTS), which is a listed transaction under [Reg. §1.6011-4\(b\)\(2\)](#), and has modified [Notice 2001-16](#), 2001-1 C.B. 730, with respect to the types of persons considered to be participants in such transaction. A transaction is characterized as an ITTS if it has four components: 1) a corporation (T) or its successor owns appreciated assets and has insufficient tax benefits to eliminate or offset the gain if such assets were sold (the “built-in tax”); 2) at least 50 percent of T’s stock is sold by it shareholder(s) (X) in a non-liquidation transaction within a 12 month period; 3) at the time X sells at least 50 percent of T’s stock, or within the twelve months before or thereafter, T’s assets are sold to one or more buyers (Y); and 4) T’s built-in tax is purportedly offset, avoided or not paid. In addition, X will not be considered a participant in an ITTS transaction if the T stock X disposes of is traded on an established securities market (“Securities”). The buyer, Y, will not be treated as a participant if the only assets of T which Y acquires are either Securities or do not include a trade or business. Participants in ITTS transactions have disclosure and registration requirements, and may be subject to penalties for failing to satisfy them. Back references: [¶35,141.78](#), [¶37,002.156](#), [¶37,022.156](#), [¶39,651G.825](#), [¶39,654E.01](#), [¶39,960.40](#), [¶40,030.14](#) and [¶40,035.80](#).

## SECTION 1. PURPOSE

[Notice 2001-16](#), 2001-1 C.B. 730, identified the Intermediary Transaction Tax Shelter as a listed transaction under [§1.6011-4\(b\)\(2\)](#) of the Income Tax Regulations. Since that notice was published, the Internal Revenue Service (Service) has received disclosure statements with respect to [Notice 2001-16](#) transactions pursuant to [§1.6011-4](#) and other information pursuant to [§§6111](#) and [6112](#) of the Internal Revenue Code and through promoter audits. After reviewing the disclosure statements and other information, the Service and Treasury Department have decided to identify the components of an Intermediary Transaction Tax Shelter. A transaction that does not have all of the components identified herein is not the same as or substantially similar to the listed transaction described in [Notice 2001-16](#). The Service and Treasury Department also are identifying the persons who are treated as participants in an Intermediary Transaction Tax Shelter under [§1.6011-4\(c\)\(3\)\(i\)\(A\)](#). This notice should not otherwise be construed as limiting the scope or application of [Notice 2001-16](#) and should not otherwise create any inference as to whether or not a transaction was required to be disclosed or registered under [§6011](#) or [§6111](#) prior to January 17, 2008.

## SECTION 2. BACKGROUND

An Intermediary Transaction Tax Shelter attempts to avoid the corporate income tax from a sale of assets. Generally it involves transactions in which shareholders of a corporation dispose of their shares of stock of the corporation, one or more persons purchase the corporation's assets in one or more taxable transactions, and all or a portion of the gain or tax that would otherwise result to the corporation from a sale of the assets is avoided.

## SECTION 3. DISCUSSION

### .01 Components of an Intermediary Transaction Tax Shelter

An Intermediary Transaction Tax Shelter involves the use of an intermediary (M) (which can be one or more persons) in facilitating the transaction. However, the Service has received information and comments from taxpayers suggesting that identifying the transaction based on the role of an entity that appears to be an intermediary may result in over-disclosure or under-disclosure of the transaction depending on the circumstances of the transaction. To address these concerns, this notice identifies the four necessary components in an Intermediary Transaction Tax Shelter from the perspective of the target corporation, its shareholders, and the purchasers of the target corporation's assets.

1. A corporation (T) directly or indirectly (e.g., through a pass-through entity or a member of a consolidated group of which T is a member) owns assets the sale of which would result in taxable gain and, as of the time of the stock disposition described in component two, T (or the consolidated group of which T is a member) has insufficient tax benefits to eliminate or offset such taxable gain (or the tax) in whole or in part. The tax that would result from such sale is hereinafter referred to as T's Built-in Tax. In determining whether T's (or the consolidated group's) tax benefits are insufficient for purposes of the first sentence, the following tax benefits shall be excluded: (i) any tax benefits attributable to a listed transaction under [§1.6011-4\(b\)\(2\)](#), and (ii) any tax benefits attributable to built-in loss property acquired within 12 months before the stock disposition described in component two, to the extent such built-in losses exceed built-in gains in property acquired in the same transaction(s). All references to T in this notice include successors to T.
2. At least 50 percent of the T stock (by vote or value) is disposed of by T's shareholder(s) (X), other than in liquidation of T, in one or more related transactions within a 12 month period.
3. Either within 12 months before, simultaneously, or within 12 months after the date on which X has disposed of at least 50 percent of the T stock (by vote or value) (excluding any time T is protected or hedged against price fluctuations), all or most of T's assets are disposed of (Sold T Assets) to one or more buyers (Y) in one or more transactions in which gain is recognized with respect to the Sold T Assets. Where a disposition of Sold T Assets is an intercompany transaction between members of a consolidated group, the disposition will not be a "transaction in which gain is recognized with respect to the Sold T Assets" for purposes of the preceding sentence until such gain must be taken into account under the rules of [§1.1502-13](#).
4. All or most of T's Built-in Tax described in component one that would otherwise result from the disposition of the Sold T Assets described in component three is purportedly offset or avoided or not paid.

### .02 Participation in the Listed Transaction

A transaction must have all four of the components identified herein to be the same as or substantially similar to the listed transaction identified in [Notice 2001-16](#) as the Intermediary Transaction Tax Shelter. In determining whether a person is a participant in a transaction identified in [Notice 2001-16](#), the general rule in [§1.6011-4\(c\)\(3\)\(i\)\(A\)](#) applies, except the following rules apply with respect to persons in the position of X or Y as described below:

- In no event will any X be treated as a participant under [§1.6011-4\(c\)\(3\)\(i\)\(A\)](#) if the only T stock X disposes of is traded on an established securities market (within the meaning of [§1.453-3\(d\)\(4\)](#)) and prior to the disposition (including related persons described in [section 267\(b\)](#) or [707\(b\)](#)) did not hold five percent (or more) by vote or value of any class of T stock disposed of by

X.

- In no event will any Y be treated as a participant under [§1.6011-4\(c\)\(3\)\(i\)\(A\)](#) if the only Sold T Assets acquired by Y are either (i) securities (as defined in [section 475\(c\)\(2\)](#)) that are traded on an established securities market (within the meaning of [§1.453-3\(d\)\(4\)](#)) and represent a less-than-five-percent interest in that class of security, or (ii) assets that are not securities and do not include a trade or business as described in [§1.1060-1\(b\)\(2\)](#).

#### .03 Disclosure, List Maintenance, and Registration Requirements; Penalties; Other Considerations

Independent of their classification as “listed transactions,” transactions that are the same as, or substantially similar to, the transaction described in [Notice 2001-16](#) may already be subject to the requirements of [§6011](#), [§6111](#), or [§6112](#), or the regulations thereunder.

Persons involved with these transactions are alerted to certain responsibilities that may arise from their involvement with these transactions. Persons required to disclose these transactions under [§1.6011-4](#) and who fail to do so may be subject to the penalty under [§6707A](#). Persons required to disclose or register these transactions under [§6111](#) who have failed to do so may be subject to the penalty under [§6707\(a\)](#). Persons required to maintain lists of investors under [§6112](#) who fail to provide such lists when requested by the Service may be subject to the penalty under [§6708\(a\)](#). A person that is a tax-exempt entity within the meaning of [§4965\(c\)](#), or an entity manager within the meaning of [§4965\(d\)](#), may be subject to excise tax, disclosure, filing or payment obligations under [§4965](#), [§6033\(a\)\(2\)](#), [§6011](#), and [§6071](#). Some taxable entities may be subject to disclosure obligations under [§6011\(g\)](#) that apply to “prohibited tax shelter transactions” as defined by [§4965\(e\)](#) (including listed transactions).

In addition, the Service may impose other penalties on persons involved in this transaction or substantially similar transactions (including an accuracy-related penalty under [§6662](#) or 6662A) and, as applicable, on persons who participate in the promotion or reporting of this transaction or substantially similar transactions (including the return preparer penalty under [§6694](#), the promoter penalty under [§6700](#), and the aiding and abetting penalty under [§6701](#)).

Further, under [§6501\(c\)\(10\)](#), the period of limitations on assessment may be extended beyond the general three-year period of limitations for persons required to disclose transactions under [§1.6011-4](#) who fail to do so. See [Rev. Proc. 2005-26](#), 2005-1 C.B. 965.

The Service and the Treasury Department recognize that some taxpayers may have filed tax returns taking the position that they were entitled to the purported tax benefits of the types of transactions described in [Notice 2001-16](#). These taxpayers should consult with a tax advisor to ensure that their transactions are disclosed properly and to take appropriate corrective action.

#### **SECTION 4. EFFECTIVE DATE**

This notice is effective as of January 17, 2008. This notice is applicable to returns and statements due under [§6011](#) or [§6111](#) after January 17, 2008.

#### **SECTION 5. EFFECT ON OTHER DOCUMENTS**

[Notice 2001-16](#) is modified with respect to the types of persons who may be treated as participants in an Intermediary Transaction Tax Shelter under [§1.6011-4\(c\)\(3\)\(i\)\(A\)](#).

**DRAFTING INFORMATION**

The principal author of this notice is T. Ian Russell of the Office of Associate Chief Counsel (Corporate). For further information regarding this notice contact Mr. Russell at (202) 622-7550 (not a toll-free call).