A Look at Listed Transactions and the Assessment Statute of Limitations.

Section 6501(a) of the Internal Revenue Code generally provides the IRS with three years to issue an assessment to a taxpayer for additional taxes or for penalties after a return is filed. Congress created an exception, however, for "listed transactions," providing that if a taxpayer does not disclose a listed transaction on its return, the IRS has one year to issue an assessment of additional tax or penalties beginning either when the IRS is furnished with the required disclosure or when a material advisor provides sufficient information concerning a listed transaction in response to a request by the Secretary of the Treasury. I.R.C. § 6501(c)(10).

A listed transactions is a "reportable transaction which is the same as, or substantially similar to, a transaction specifically identified by the Secretary as a tax avoidance transaction for purposes of section 6011." I.R.C. § 6707A(c)(2). In English, this means that a listed transaction is a tax shelter that has either been identified as an abusive shelter previously, or bears a sufficient family resemblance to one.

What sort of disclosure will start the one year clock running when a taxpayer fails to identify a listed transaction on its tax return? The Fifth Circuit looked at that issue in *Bemont Investments L.L.C. v. United States*, 2012 U.S. App. LEXIS 8505 (Fifth Cir. Apr. 26, 2012).

Bemont involved a Son of BOSS transaction, in which inflated basis is used to create deductible losses. *Id.* slip op. at *4. The transaction in *Bemont* involved long and short currency swap positions that provided offsetting payments; the transaction was structured so that the holder of the swap positions reported a tax basis that included its contribution of the long swaps and other securities to the partnership, while ignoring the offsetting short swaps. *Id.* at *6-*7. The long swaps cost $202.5 million, but the offsetting short position meant their net cost was $2.5 million. When the partnership was unwound, it reported a $151 million dollar foreign currency loss.

Andrew Beale, a participant in the arrangement, filed a return for 2002 that claimed losses associated with the transaction but did not identify it as a listed transaction. When the IRS initially audited the return of one of the participants in the transaction, Beale's accountant furnished the IRS with complete information about the long currency swaps, including an agreement that also listed the offsetting short positions, but did not furnish any additional information about the short positions. *Id.* at *8. The audit concluded with no adjustments to Beale's return.

In October 2006, outside the normal three year limitation period, the IRS issued final partnership administrative adjustments to the relevant partnerships for the 2002 tax year, which disallowed the losses from the swaps. *Id.* at *8.

In terms of the assessment statute of limitations, the district court concluded that the taxpayer had never made the required disclosure concerning the listed transaction, as there was no disclosure on the return, and the limited disclosure provided by the accountant in Mr. Beale's audit was not sufficient under Section 6501(c)(10)(A) to start the one year clock.

Instead, the district court concluded that prior disclosures made by Deutsche Bank, a material advisor to the relevant partnerships, under an administrative summons satisfied the requirements of Section 6501(c)(10)(B) by identifying the relevant partnerships as participants

in a “Son of BOSS” transaction by July 2005, and concluded that additional taxes or penalties could not be assessed for the 2002 tax year. 2012 U.S. App. LEXIS 8505 at *13-14.

The United States appealed after trial, and the Fifth Circuit reversed, ruling that the disclosure made pursuant to the summons was insufficient to satisfy Section 6501(c)(10)(B). The parties debated whether two requirements of the relevant regulation were satisfied; one focused on the specifics of the disclosures, such as identification of participants and the like. Treas. Reg. § 301.6112T, Q&A 17 (2002). The second provision required that the information had to be furnished in a way that “enables the Internal Revenue Service to determine, without undue delay, or difficulty” the relevant information about the listed transaction. Treas. Reg. § 301.6112T, Q&A 16 (2002).

The Fifth Circuit concluded that the latter standard was not met because the information was not provided in a form in which the IRS could readily identify the relevant transactional information “without undue delay or difficulty.” 2012 U.S. App. LEXIS 8505 at 17. The basic circumstances that lead to this conclusion were straightforward: the information necessary to flag the relevant partnerships as participants in a listed transaction was contained “on three pages buried in over 2 million pages of documents.” *Id*. The information came in the form of attachments to internal emails and neither the title of the emails nor the title of the attachments indicated that if furnished a list of advisees who had participate in listed transactions. *Id*.

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