Current Federal Tax Developments

Week of April 1, 2019

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CURRENT FEDERAL TAX DEVELOPMENTS
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Section: 30D
Credit for GM Electric Vehicles Will Begin to Phase-Out

Citation: Notice 2019-22, 3/26/19

Another manufacturer has sold enough qualified electric vehicles[1] to begin phasing out the tax credit for purchasing the manufacturer's vehicles. In Notice 2019-22 the IRS announced that the credit for qualified plug-in electric vehicles sold by General Motors would be phased down beginning April 1, 2019.

Before April 1, 2019, the credit for the affected vehicles was $7,500. From April 1, 2019 through September 30, 2019, buyers of the qualifying General Motors vehicles will receive 50% of the otherwise allowable credit ($3,750). For the period from October 1, 2019 through March 31, 2020, buyer will receive 25% of the otherwise allowable credit ($1,875). No credit will be allowed for purchases of vehicles after April 1, 2020.

The qualifying vehicles affected by this notice are:

- 2011-2019 Chevrolet Volt
- 2014-2016 Chevrolet Spark EV
- 2017-2019 Chevrolet Bolt
- 2014, 2016 Cadillac ELR
- 2017-2018 Cadillac CT6 Plug-In

Section: 111
IRS Confirms Treatment of State Tax Refunds on 2019 Tax Returns

Citation: Revenue Ruling 2019-11, 3/29/19

The IRS has issued Revenue Ruling 2019-11 which outlines how state and local tax refunds will be treated when they arise from years subject to the $10,000 cap on deducting personal state and local income and property taxes imposed by IRC §164(b)(6) added by the Tax Cuts and Jobs Act (TCJA). The treatment agrees with the treatment outlined in our March 1, 2019 article on the matter ("Tax Benefit Rule of §111 Should Shield State Tax Refunds For Taxpayers Over the SALT Limit", *Current Federal Tax Developments website*, March 1, 2019).

As was noted in the referenced article, the tax benefit rule of §111(a) requires determining the amount of such deduction that was later refunded could have been removed from the prior year's return with no tax effect. That could be true to the extent:

- The tax deduction for the prior year was capped at $10,000 by IRC §164(b)(6). In that case, any refund up to the amount of the disallowed tax deduction on the original return would not generate a tax benefit and, under IRC §111(a), would not be subject to inclusion in income in the received; or
- Had the refunded amount not been deducted on the original return, the standard deduction would have exceeded the itemized deduction. In that case, no tax benefit is

[1] Over 200,000 vehicles sold in the quarter ended December 31, 2018.

> generated by the refund that is in excess of the amount of the total allowed itemized deductions on the original return in excess of the standard deduction.

The ruling provides three fact patterns and the tax results. The first one deals with a taxpayer whose deductions on the original return for state and local taxes were below the cap, but otherwise the total itemized deductions were well in excess of the standard deduction.

> *Facts for the first situation:* *Taxpayer A paid local real property taxes of $4,000 and state income taxes of $5,000 in 2018. A's state and local tax deduction was not limited by section 164(b)(6) because it was below $10,000. Including other allowable itemized deductions, A claimed a total of $14,000 in itemized deductions on A's 2018 federal income tax return. In 2019, A received a $1,500 state income tax refund due to A's overpayment of state income taxes in 2018.*
>
> *Results in the first situation:* *In 2019, A received a $1,500 refund of state income taxes paid in 2018. Had A paid only the proper amount of state income tax in 2018, A's state and local tax deduction would have been reduced from $9,000 to $7,500 and as a result, A's itemized deductions would have been reduced from $14,000 to $12,500, a difference of $1,500. A received a tax benefit from the overpayment of $1,500 in state income tax in 2018. Thus, A is required to include the entire $1,500 state income tax refund in A's gross income in 2019.*

In the second case the taxpayer's deduction was capped, and he/she receives a refund that is less that the amount his state and local taxes exceeded $10,000 for the year in question.

> *Facts for the second situation:* *Taxpayer B paid local real property taxes of $5,000 and state income taxes of $7,000 in 2018. Section 164(b)(6) limited B's state and local tax deduction on B's 2018 federal income tax return to $10,000, so B could not deduct $2,000 of the $12,000 state and local taxes paid. Including other allowable itemized deductions, B claimed a total of $15,000 in itemized deductions on B's 2018 federal income tax return. In 2019, B received a $750 state income tax refund due to B's overpayment of state income taxes in 2018.*
>
> *Results for second situation:* *In 2019, B received a $750 refund of state income taxes paid in 2018. Had B paid only the proper amount of state income tax in 2018, B's state and local tax deduction would have remained the same ($10,000) and B's itemized deductions would have remained the same ($15,000). B received no tax benefit from the overpayment of $750 in state income tax in 2018. Thus, B is not required to include the $750 state income tax refund in B's gross income in 2019.*

In the third situation, the taxpayer was subject to the cap, but the state income tax refund is more than the amount that total state and local taxes paid in the year were in excess of the $10,000 cap.

> *Facts in the third situation:* *Taxpayer C paid local real property taxes of $5,000 and state income taxes of $6,000 in 2018. Section 164(b)(6) limited C's state and local tax deduction on C's 2018 federal income tax return to $10,000, so C could not deduct $1,000 of the $11,000 state and local taxes paid. Including other allowable itemized deductions, C claimed a total of $15,000 in itemized deductions on C's 2018 federal income tax return. In 2019, C received a $1,500 state income tax refund due to C's overpayment of state income taxes in 2018.*
>
> *Results in the third situation:* *In 2019, C received a $1,500 refund of state income taxes paid in 2018. Had C paid only the proper amount of state income tax in 2018, C's state and local tax deduction would have been reduced from $10,000 to $9,500 and as a result, C's itemized deductions would have been reduced from $15,000 to $14,500, a difference of $500. C received a tax benefit from*

> *$500 of the overpayment of state income tax in 2018. Thus, C is required to include $500 of C's state income tax refund in C's gross income in 2019.*

In the final situation, we see a combination of the interaction of the cap and the standard deduction, which ends up with two different issues that deny a tax benefit to different portions of the refund.

> *Facts in the fourth situation:* *Taxpayer D paid local real property taxes of $4,250 and state income taxes of $6,000 in 2018. Section 164(b)(6) limited D's state and local tax deduction on D's 2018 federal income tax return to $10,000, so D could not deduct $250 of the $10,250 state and local taxes paid. Including other allowable itemized deductions, D claimed a total of $12,500 in itemized deductions on D's 2018 federal income tax return. In 2019, D received a $1,000 state income tax refund due to D's overpayment of state income taxes in 2018.*
>
> *Results in fourth situation:* *In 2019, D received a $1,000 refund of state income taxes paid in 2018. Had D paid only the proper amount of state income tax in 2018, D's state and local tax deduction would have been reduced from $10,000 to $9,250, and, as a result, D's itemized deductions would have been reduced from $12,500 to $11,750, which is less than the standard deduction of $12,000 that D would have taken in 2018. The difference between D's claimed itemized deductions ($12,500) and the standard deduction D could have taken ($12,000) is $500. D received a tax benefit from $500 of the overpayment of state income tax in 2018. Thus, D is required to include $500 of D's state income tax refund in D's gross income in 2019.*

Section: 170
OIRA In the Process of Reviewing Final SALT Workaround Regulations and Related Notice

Citation: OIRA Website, 3/25/19

The Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget (OMB) announced that they are in the process of reviewing final regulations for the state and local tax workarounds and a separate notice related to §§170(c) and 164.

OIRA has been reviewing all IRS regulations, both proposed and final, since last year. However, this is the first time that OIRA has announced a review of a notice. This is also interesting since the IRS also recently issued a policy statement indicating a reduced use of subregulatory guidance, which has some questioning what this particular review might mean, if anything, about the new IRS policy.

These regulations would be the final version of those released in proposed form in August of 2018 that dealt with state tax credits given for contributions (REG-112176-18; 83 F.R. 43563-43571). Those regulations took the position that if there is a tax credit offered in excess of 15% of the donation, the federal income tax deduction has to be reduced by the amount of this *quid pro quo* benefit being granted. The proposed regulations had asked for specific comments in three areas:

- How to compute a reduction in the charitable contribution deduction on the federal return when a taxpayer is granted a state income tax deduction in excess of the fair value of what is contributed;
- The proposed *de minmis* rule that ignores state tax credit benefits when the amount of the credit is no more than 15% of the contribution; and

- A possible rule that would allow taxpayers to forego a state tax credit in exchange for retaining a full federal tax deduction.

OIRA has taken varying amounts of time to complete their review of tax regulations over the past year. Since these regulations and the notice do not appear to be "fast tracked" for the special 10 day review, it is likely they will not be issued before the April 15 due date. Whether changes in the final regulations could impact (or electively impact) 2018 returns will likely be an unknown as we approach the date to extend such returns.

Section: 6212
EINs Will No Longer Be Allowed for Responsible Party in Applying for Identification Numbers Beginning May 13

Citation: "IRS revises EIN application process; seeks to enhance security", IR 2019-58, 3/27/19

The IRS has announced there will be changes to the process to issue employer identification numbers beginning on May 13 in New Release IR 2019-58. The IRS indicated these change are meant to enhance security.

Entities will no longer be able to use their own EIN as the identification number for the responsible party and the change will apply to both EINs obtained online and via filing a paper Form SS-4. The release describes the responsible person as follows:

> *Generally, the responsible party is the person who ultimately owns or controls the entity or who exercises ultimate effective control over the entity. In cases where more than one person meets that definition, the entity may decide which individual should be the responsible party.*

The release explains the new system as follows:

> *Individuals named as responsible party must have either a Social Security number (SSN) or an individual taxpayer identification number (ITIN). By making the announcement weeks in advance, entities and their representatives will have time to identify the proper responsible official and comply with the new policy.*
>
> *The Form SS-4 Instructions provide a detailed explanation of who should be the responsible party for various types of entities. Generally, the responsible party is the person who ultimately owns or controls the entity or who exercises ultimate effective control over the entity. In cases where more than one person meets that definition, the entity may decide which individual should be the responsible party.*

The news release notes that the only exemptions from the responsible party requirements are governmental entities, including the military and state national guards.

The news release provides that there is "no change" for tax professionals who act as third-party designees for entities and complete the application process. Or, to put it more directly, tax professionals will not have to provide their own social security numbers in this process.

The news release justifies the change as follows:

> *The new requirement will provide greater security to the EIN process by requiring an individual to be the responsible party and improve transparency. If there are changes to the responsible party, the entity*

can change the responsible official designation by completing Form 8822-B, Change of Address or Responsible Party. A Form 8822-B must be filed within 60 days of a change.

Section: 6707A
Final Regulations Implementing 2010 Changes in Reportable Transaction Disclosure Rules Issued

Citation: TD 9853, 3/26/19

Final regulations have been issued by the IRS on the penalty found at IRC §6707A for failure to disclose a reportable transaction (TD 9853). These regulations clarify the application of these rules due to changes made in the Small Business Jobs Act of 2010. That Act modified the calculation of the penalty, making it somewhat less draconian than the fixed dollar penalties found in the original provision.

IRC §6707A imposes penalties for failing to report certain transactions that are either treated as reportable transactions[2] as defined by Reg. §1.6011-4 or are treated as listed transactions due to being identified by IRS as a tax avoidance transaction for purposes of IRC §6011.[3]

Such transactions are reported on Form 8886, *Reportable Transaction Disclosure Statement* which must be completed for each year that the affected transaction has an impact on the return.[4]

The penalty for failing to disclose participation in a listed transaction, regardless of whether any tax deficiency is eventually found to result from the transaction, is "75 percent of the decrease in tax shown on the return as a result of such transaction (or which would have resulted from such transaction if such transaction were respected for Federal tax purposes)."[5] A minimum penalty of $5,000 for individuals and $10,000 for any other type of taxpayer shall be imposed even if 75% of the reduction in tax is less than that amount.[6]

There is also a maximum penalty, but the amount differs depending on whether the item in question has been identified by the IRS as a listed transaction. The maximum penalty is:

- $100,000 for an individual and $200,000 for other entities for a listed transaction and
- $10,000 for an individual and $50,000 for other entities for any other reportable transaction.[7]

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[2] IRC §6707A(c)(1)

[3] IRC §6707A(c)(2)

[4] Reg. §1.6011-4(d)

[5] IRC §6707A(b)(1)

[6] IRC §6707A(b)(3)

[7] IRC §6707A(b)(2)

The minimum and maximum penalties apply separately for each year for which there is failure to report.[8] Examples found in the final regulations at Reg. §301. 6707A-1(d)(3) outline how the limits apply:

> *(vi) Example 6. Taxpayer X, a natural person, files X's 2019 return reflecting participation in a reportable transaction that is not a listed transaction, but fails to disclose the transaction as required by the regulations under section 6011. The decrease in tax with respect to X's 2019 return as a result of participation in the reportable transaction is $20,000. X files an amended 2019 return to include a net operating loss carried forward from a prior year, which X inadvertently failed to include when filing the original 2019 return. The amended return reflects participation in the same reportable transaction, but X again fails to disclose the transaction as required by the regulations under section 6011. The decrease in tax with respect to the amended 2019 return as a result of participation in the transaction is also $20,000. X is subject to two separate 6707A penalties: one for the failure to disclose the reportable transaction with respect to the tax benefits from the reportable transaction reflected on the original 2019 return and one for the failure to disclose the reportable transaction with respect to the tax benefits from the reportable transaction reflected on the amended 2019 return. Seventy-five percent of the $20,000 decrease in tax shown on the original 2019 return is $15,000 and on the amended 2019 return is another $15,000. However, because X is a natural person, the amount of the penalty for failure to disclose is limited to the maximum amount of $10,000 under §301.6707A-1(a) and section 6707A(b)(2)(B). Accordingly, the amount of the section 6707A penalty for the 2019 original return is $10,000 and the amount of the section 6707A penalty for the 2019 amended return is also $10,000, for a total penalty of $20,000.*
>
> *(vii) Example 7. Taxpayer X, a natural person, timely files X's 2019 return on April 15, 2020, reflecting participation in a transaction that was not identified as a reportable transaction when X filed the return, the only year X participated in the transaction. In early 2021, the IRS identifies the transaction as a listed transaction. X fails to disclose the listed transaction as required by the regulations under section 6011. In late 2021, X files an amended 2019 income tax return to claim deductions that had been omitted from the originally filed 2019 return. The amended 2019 return reflects X's participation in the listed transaction. X does not disclose the listed transaction when filing the amended 2019 return. The decrease in tax resulting from X's participation in the transaction is $100,000 with respect to the original 2019 return and $80,000 with respect to the 2019 amended return. Pursuant to §1.6011-4(e)(2)(i) of this chapter, X was required to file a disclosure statement reflecting X's participation in the listed transaction if the period of limitations on assessment of tax remained open for any taxable year in which the taxpayer participated in the listed transaction. When the transaction at issue became listed, the period of limitations on assessment on X's 2019 tax year was open. Pursuant to §1.6011- 4(e)(1) of this chapter, X was also required to disclose participation in the transaction when the 2019 amended return was filed because the transaction was a listed transaction at that time. X is subject to two penalties under section 6707A: one for the failure to disclose participation in a listed transaction reflected on X's original 2019 return within 90 calendar days of the date the transaction became a listed transaction as required by §1.6011-4(e)(2)(i) of this chapter and another for the failure to disclose participation in the same listed transaction reflected on the 2019 amended return. Seventy-five percent of this decrease in tax with respect to the original 2019 return is $75,000 (75 percent of $100,000) and with respect to the 2019 amended return is $60,000 (75 percent of $80,000). Pursuant to paragraph (d)(1)(iv) of this section, because X is subject to two separate penalties, the maximum penalty amount of $100,000 under §301.6707A-1(a) and section*

[8] Reg. §301.6707A-1(d)(1)(iv)

6707A(b)(2)(A) applies separately to each penalty and does not operate to reduce the amount of the X's 6707A penalties.

(x) Example 10. In tax year 2020, Taxpayer X, a natural person, participated in a listed transaction that resulted in a $50,000 deduction. X also has a net operating loss carryover of $150,000 from 2019. X uses the deduction of $50,000 and a portion of the net operating loss carryover resulting in zero tax liability for 2020. X carries over the remaining net operating loss to tax year 2021. X's gross income for 2021 is $250,000, but as a result of the net operating loss carryover, X reports reduced adjusted gross income of $150,000. Pursuant to §1.6011-4 of this chapter, X is required to disclose participation in the listed transaction for both 2020 and 2021, but X fails to make the required disclosures and is subject to the section 6707A penalty for each failure. The decrease in tax on the 2020 return that results from the reportable transaction is zero. Because X has $150,000 of a net operating loss carryover not attributable to the reportable transaction, X's tax without the benefits of the reportable transaction is the same as the tax shown on the 2020 return as filed. Because X is a natural person, the minimum penalty of $5,000 under §301.6707A-1(a) and section 6707A(b)(3) will apply for the failure to disclose the listed transaction with the 2020 return. The decrease in tax on the 2021 return is the difference between the tax shown on the return as filed and the tax that would be shown if X had only $50,000 of net operating loss to carry over to 2021 (i.e., if X had not offset $50,000 of its 2020 gross income with the deduction resulting from the reportable transaction and thus had used $100,000 of its net operating loss carryover in 2020), including any changes to the amount of tax that are only indirectly connected with the listed transaction. The amount of the penalty with respect to the disclosure relating to 2021 will be 75 percent of this decrease in tax, subject to the minimum and maximum penalty amount limitations.

The final regulations define a return for purposes of §6707A as "an original return, amended return, or application for tentative refund" except in cases where the regulation otherwise provides.[9]

The final regulations provide for a two-part calculation of the reduction in tax which is subjected to the 75% penalty. The decrease in tax is treated as the sum of:

(1) The excess of the amount of the tax that would have been shown on the return if the return did not reflect the taxpayer's participation in the reportable transaction over the tax actually reported on the return reflecting participation in the reportable transaction; and

(2) Any other tax that results from participation in the reportable transaction but was not reported on the taxpayer's return.[10]

The method of computing the tax adjustment is described as follows:

The amount of tax that would have been shown on the return if it did not reflect the taxpayer's participation in the reportable transaction includes adjustments that result mechanically from backing out the reportable transaction, such as tax items affected by an increase in adjusted gross income resulting from not participating in the transaction. The calculation of the penalty is unaffected by whether a taxpayer's tax liability is ultimately settled with the IRS for a different amount or whether the taxpayer subsequently reports a different amount of tax on an amended return, because these

[9] Reg. §301.6707A-1(b)(3)

[10] Reg. §301.6707A-1(d)(1)(i)(A)

> *amounts do not enter into the calculation of the decrease in tax shown on the return (or returns) to which the penalty relates.*[11]

Examples of computing the penalty are found at Reg. §301.6707A-1(d)(3):

> *(i) Example 1. Taxpayer X, a natural person, participated in a listed transaction involving a Roth IRA and filed a return reflecting participation in the transaction. X failed to disclose participation in the listed transaction as required by the regulations under section 6011. As a result of the transaction, X was liable under section 4973 for a $10,000 excise tax for excess contributions to X's Roth IRA. On X's return reflecting participation in the listed transaction, X correctly reported $25,000 of income tax, none of which was attributable to the listed transaction, but failed to report the excise tax. If X had not participated in the listed transaction, the excise tax under section 4973 would not have applied and X's income tax would have remained $25,000. There would, therefore, be no difference between the tax on the return as filed and the tax on the return if it did not reflect participation in the transaction. The excise tax, however, is another tax that resulted from participation in the transaction but was not reported on X's return, as described in paragraph (d)(1)(i)(B) of this section. Therefore, under paragraph (d)(1) of this section, the decrease in tax resulting from the listed transaction is $10,000. This amount is determined by adding zero (the excess of the amount of tax that would have been shown on X's return if the return did not reflect X's participation in the transaction over the tax X actually reported on the return reflecting X's participation in the transaction) and $10,000 (the amount of excise tax that resulted from participation in the transaction but was not reported on the return). The amount of the penalty under section 6707A is $7,500, which amount is 75 percent of the $10,000 decrease in tax.*
>
> *(ii) Example 2. Taxpayer X participated in a listed transaction that resulted in a $40,000 decrease in the tax shown on the return reflecting participation in the transaction. X failed to disclose its participation in the transaction as required by the regulations under section 6011 and is, therefore, subject to a penalty under section 6707A. After weighing litigating hazards and other costs of litigation, the IRS Office of Appeals agreed to settle X's deficiency for $20,000. For purposes of calculating the amount of the penalty under paragraph (d)(1) of this section, the settlement does not affect the decrease in tax shown on X's return as a result of the listed transaction which remains $40,000. The amount of X's penalty under section 6707A is $30,000, which amount is 75 percent of the $40,000 decrease in tax*
>
> *(iii) Example 3. For the 2018 tax year, Taxpayer X, a natural person, failed to disclose participation in a reportable transaction that is not a listed transaction and, therefore, is subject to a penalty under section 6707A. After offsetting gross income with the losses generated in the reportable transaction, X's return reported adjusted gross income of $100,000. The return also reported $12,000 of medical expenses, $4,500 of which were deductible after applying the 7.5 percent floor in section 213(a) and (f). If X's return had not reflected participation in the reportable transaction, X's adjusted gross income would have been $140,000 and the deductible medical expenses would be limited to $1,500 ($3,000 less than the deductible amount claimed). Under paragraph (d)(1) of this section, the decrease in tax shown on X's return as a result of X's participation in the reportable transaction takes into account both the tax on the additional $40,000 in adjusted gross income had X not participated in the reportable transaction and the tax on the $3,000 adjustment to X's deductible medical expenses caused by the increase in adjusted gross income.*

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[11] Reg. §301.6707A-1(d)(1)(i)(B)

(iv) Example 4. Taxpayer X, a natural person, timely filed X's 2019 return and reported income tax of $40,000. X did not participate in a reportable transaction in 2019. X participated in a listed transaction in 2020, but failed to file a complete and proper disclosure statement with X's 2020 return as required by the regulations under section 6011. As filed, the 2020 return reports that X owes no tax and has a loss of $10,000. If the tax consequences of the listed transaction were not reflected on the 2020 return, the return would show income tax of $15,000 and no loss. X files an amended return for the 2019 tax year on which the only amendment is to carry back the $10,000 loss reported on the 2020 tax return to the 2019 tax year. The loss carryback reduces X's tax liability for 2019 by $3,000 to $37,000. X fails to file a complete and proper disclosure statement with the 2019 amended return as required by the regulations under section 6011. Two penalties under section 6707A apply: one for X's failure to disclose participation in a listed transaction reflected on the 2020 return and another for the failure to disclose participation in the same listed transaction reflected on the 2019 amended return. Under paragraph (d)(1) of this section, the decrease in tax on the 2020 return resulting from the listed transaction is $15,000, which is the excess of the amount of tax that would have been shown on X's 2020 return if that return did not reflect X's participation in the listed transaction over the tax X actually reported on the 2020 return. The amount of the section 6707A penalty with respect to the 2020 return is $11,250, which amount is 75 percent of the decrease in tax. Under paragraph (d)(1) of this section, the decrease in tax on the 2019 amended return that results from the listed transaction is $3,000. This amount is computed by determining the excess of the amount of tax that would have been shown on X's 2019 amended return if that return did not reflect X's participation in the listed transaction over the tax X actually reported on the 2019 amended return reflecting the loss carryback resulting from X's participation in the listed transaction in 2020. See paragraph (c) of this section. However, because X is a natural person, and because 75 percent of the $3,000 decrease in tax is less than $5,000, which is the minimum penalty under paragraph (a) of this section and section 6707A(b)(3), the section 6707A penalty with respect to the failure to disclose the listed transaction with respect to the 2019 amended return is $5,000. Accordingly, X is subject to a $11,250 section 6707A penalty for failure to disclose participation in a listed transaction reflected on the 2020 return and a $5,000 section 6707A penalty for failure to disclose participation in a listed transaction reflected on the 2019 amended return.

(ix) Example 9. In tax year 2019, Taxpayer X participated in a listed transaction that resulted in a $150,000 deduction. X's gross income for 2019 before the listed transaction deduction is $100,000. X uses $100,000 of the deduction resulting in zero tax liability for 2019. X carried over to tax year 2020 the remaining $50,000 net operating loss that was not used in 2019. X's gross income for tax year 2020 is $200,000 but as a result of the $50,000 net operating loss carryover, X reports $150,000 adjusted gross income. Pursuant to §1.6011- 4 of this chapter, X is required to disclose participation in the listed transaction for both 2019 and 2020, but X fails to make the required disclosures and is therefore subject to the section 6707A penalty for each failure. The decrease in tax on the 2019 return is the amount of tax on $100,000 because that is the difference between the amount of tax that would have been shown on the return if it did not reflect participation in the listed transaction and the tax actually reported. No other tax resulted from X's participation in the listed transaction. The amount of the penalty with respect to X's failure to disclose with respect to 2019 will be 75 percent of the decrease in tax. The decrease in tax on the 2020 return is the difference between the tax shown on the return as filed and the tax that would be shown if the $50,000 net operating loss was not used, including any changes to the amount of tax that are only indirectly connected with the listed transaction. The amount of the penalty with respect to X's failure to disclose with respect to 2020 will be 75 percent of the decrease in tax, subject to the minimum and maximum penalty amount limitations.

The IRS did grant some relief from filing statements for prior returns when a transaction is subsequently identified as a transaction of interest (a listed transaction) after returns affected by the transaction have been filed. Reg. §1.6011-4(a) generally requires taxpayer to file a report within 90 days of the IRS identification of a transaction as a listed transaction for any previously filed return impacted by that transaction.

In the preamble the IRS noted that while the law does not impose a requirement that affected returns must be open for assessment for this rule to apply, the IRS in these regulations have limited the need to search for potentially impacted returns only to those whose statute for assessing tax remained open (apparently tested at the date the IRS announces that the transaction is a listed transaction, though the regulation could be read instead to have the test apply at the 90th day following the publication of that notice).[12]

The application of this rule is outlined in an example found in Reg. §301.6707A-1(d)(3):

> *(v) Example 5. Taxpayer X, a corporation, timely files its 2019, 2020, and 2021 returns, each of which reflects participation in the same transaction. In 2023, the transaction becomes a listed transaction. When the transaction at issue became listed, the periods of limitations on assessment on X's 2020 and 2021 tax year were open, but the period of limitations on assessment on X's 2019 tax year was closed. Pursuant to §1.6011-4(a) and (e)(2)(i) of this chapter, X is required to file a single disclosure statement reflecting its participation in the listed transaction 90 calendar days after the date on which the transaction becomes a listed transaction. X failed to file a disclosure statement as required. Pursuant to paragraph (d)(1)(ii) of this section, the section 6707A penalty is computed by aggregating the decrease in tax shown on the 2020 return and the decrease in tax shown on the 2021 return. Because the period of limitations on assessment for X's 2019 tax year was closed at the time the transaction became listed, the decrease in tax shown on the 2019 return as a result of X's participation in the listed transaction is not taken into account in computing the amount of the penalty. The decreases in tax shown on the returns as a result of X's participation in the transaction are $265,000 in tax year 2020 and $7,000 in tax year 2021. Under paragraph (d)(1) of this section, the total decrease in tax shown is computed by adding the decrease in tax for 2020 and the decrease in tax for 2021, which is $272,000. Seventy-five percent of that amount is $204,000. Because X is a corporation, the maximum penalty amount is $200,000 under paragraph (a) of this section and section 6707A(b)(2)(A). Accordingly, X is subject to a section 6707A penalty of $200,000, rather than $204,000.*

IRC §6707A(c) contains a special rule that applies to those that must file reports under section 13 or 15(d) of the Securities Exchange Act of 1934, requiring disclosure in those reports filed with the SEC if the entity:

> *(A) is required to pay a penalty under this section with respect to a listed transaction,*
>
> *(B) is required to pay a penalty under section 6662A with respect to any reportable transaction at a rate prescribed under section 6662A(c), or*

[12] Reg. §301.6707A-1(d)(1)(ii)

> *(C) is required to pay a penalty under section 6662(h) with respect to any reportable transaction and would (but for section 6662A(e)(2)(B)) have been subject to penalty under section 6662A at a rate prescribed under section 6662A(c)*[13]

A failure to provide such a disclosure is treated as a separate failure to report a transaction under §6707A. Reg. §301.6707A-1(d)(1)(iii) provides:

> *In the case of a penalty imposed under section 6707A(e) for failure to disclose liability for certain penalties in reports to the Securities and Exchange Commission (SEC), the amount of the penalty will be determined under section 6707A(b) and this paragraph (d), regardless of whether the penalty that the taxpayer failed to disclose is imposed under section 6707A, 6662A, or 6662(h).*

An example applying this rule is found at Reg. §301.6707A-1(d)(3):

> *(xi) Example 11. Taxpayer X, a public corporation required to file periodic reports under section 13 or 15(d) of the Securities Exchange Act of 1934, timely filed its 2019 return reflecting tax benefits from a reportable transaction that is not a listed transaction and properly disclosed the transaction in accordance with the regulations under section 6011. In 2023, as a result of an examination of X's 2019 return, the IRS imposes a penalty under section 6662A with respect to the reportable transaction. The decrease in tax for purposes of paragraph (d)(1) of this section is $190,000. As a person who is required to file periodic reports under section 13 or 15(d) of the Securities Exchange Act of 1934, X is required, pursuant to section 6707A(e), to disclose the penalty imposed under section 6662A to the Securities and Exchange Commission in 2023, which X failed to do. X's failure to disclose the section 6662A penalty is treated as a failure to disclose to which section 6707A(b) applies. Thus, X is subject to a penalty under section 6707A(e), which equals 75 percent of the decrease in tax resulting from the transaction. The decrease in tax resulting from the reportable transaction was $190,000, 75 percent of which is $142,500. Because X is a corporation and the transaction is not a listed transaction, the amount of the penalty is limited to $50,000 under paragraph (a) of this section and section 6707A(b)(2)(B). Therefore, rather than $142,500, X is subject to a $50,000 section 6707A penalty for failure to disclose the section 6662A penalty to the SEC.*

In the case of an entity for which no tax is required to be shown on the return (such as a passthrough entity), the minimum penalty is imposed on the failure to disclose the transaction.[14] An example applying this rule is found at Reg. §301.6707A-1(d)(3):

> *(viii) Example 8. Under §1.6011-4 of this chapter, Partnership M is required to attach a disclosure statement to its Form 1065, U.S. Return of Partnership Income, for the 2020 taxable year. M fails to do so and is, therefore, subject to a penalty under section 6707A. No tax is required to be shown on M's Form 1065. Pursuant to §301.6707A-1(d)(2), M is subject to the minimum section 6707A penalty of $10,000. The partners of Partnership M may have separate disclosure obligations as required by the regulations under section 6011 and would be subject to separate section 6707A penalties if they fail to comply with the disclosure requirements.*

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[13] IRC §6707A(c)(2)

[14] Reg. §301.6707A-1(d)(2)