

of managers included in conference committee reports, and floor statements made prior to enactment by one of a bill's managers. Conclusions reached in treatises, legal periodicals, legal opinions or opinions rendered by other tax professionals, descriptions of statutes prepared after enactment (such as "General Explanations" prepared by the Staff of the joint Committee on Taxation), general counsel memoranda (other than those published in pre-1955 volumes of the Cumulative Bulletin), actions on decisions, technical memoranda, written determinations (except as provided in paragraph (b)(4)(i) of this section), and proposed regulations are not authority. The authorities underlying such expressions of opinion where applicable to the facts of a particular case, however, may give rise to substantial authority for the tax treatment of an item. (See § 1.6661-6(b), however, regarding waiver of the penalty when the taxpayer relies on proposed regulations.)

(3) *Nature of analysis.* Except as otherwise provided in this section, the weight of the authorities for the tax treatment of an item is determined by the same analysis that a court would be expected to follow in evaluating the tax treatment of the item. Thus, the weight of authorities depends on their persuasiveness and relevance as well as their source. For example, a case or revenue ruling having some facts in common with the tax treatment at issue would not be considered particularly relevant if the authority is materially distinguishable on its facts, or is otherwise inapplicable to the tax treatment at issue. Similarly, an authority that merely states a conclusion ordinarily would be given less weight than an authority that reaches its conclusion by cogently relating the applicable law to pertinent facts. There may be substantial authority for the tax treatment of an item despite the absence of certain types of authority. Thus, a taxpayer may have substantial authority for a position that is supported only by a well-reasoned construction of the applicable statutory provision.

(4) *Special rules*—(i) *Written determinations.* There is substantial authority for

the tax treatment of an item if the treatment is supported by the holding of a ruling or a determination letter (as defined in § 301.6110-2 (d) and (e)) issued to the taxpayer, by the holding of a technical advice memorandum in which the taxpayer is named, or by an affirmative statement in a revenue agent's report with respect to a prior taxable year of the taxpayer ("written determinations"). The preceding sentence shall not apply, however, if there has been a misstatement or omission of a material fact, the facts that subsequently develop are materially different from the facts on which the written determination was based, or authority supporting a contrary position has arisen since the date of the written determination.

(ii) *Taxpayer's jurisdiction.* The applicability of court cases to the taxpayer by reason of the taxpayer's residence in a particular jurisdiction is not taken into account in determining whether there is substantial authority for the tax treatment of an item. Notwithstanding the preceding sentence, however there is substantial authority for the tax treatment of an item if the treatment is supported by controlling precedent of a United States Court of Appeals to which the taxpayer has a right of appeal with respect to the item.

(iii) *When substantial authority determined.* For purposes of section 6661, there is substantial authority for the tax treatment of an item if there is substantial authority at the time the return containing the item is filed or there was substantial authority on the last day of the taxable year to which the return relates.

[T.D. 8017, 50 FR 12016, Mar. 27, 1985]

§ 1.6661-4 Disclosure of certain information.

(a) *In general.* Items (other than tax shelter items as defined in § 1.6661-5(c)) for which there is adequate disclosure are treated as if such items were shown properly on the return for the taxable year in computing the amount of tax shown on the return. Thus, for purposes of section 6661, the tax attributable to such items is not included in the understatement for the year. (See

paragraph (d)(2) of §1.6661-2.) Disclosure is adequate with respect to the tax treatment of an item on a return only if it is made on such return or in a statement attached thereto. Thus, disclosure with respect to a recurring item, such as the basis of recovery property, made on a return or statement attached thereto for one taxable year is not adequate disclosure with respect to the item for any other taxable year. (See paragraph (d) of this section for special rules relating to disclosure with respect to carrybacks and carryovers.)

(b) *Disclosure in attached statement—*

(1) *In general.* Disclosure will be adequate with respect to an item (or group of similar items, such as the specific deduction of business bad debts or the deduction of amounts paid or incurred for supplies by a taxpayer engaged in business), if it is made on a properly completed Form 8275 or if it takes the form of a statement attached to the return that includes the following:

(i) A caption identifying the statement as disclosure under section 6661.

(ii) An identification of the item (or group of similar items) with respect to which disclosure is made.

(iii) The amount of the item (or group of similar items).

(iv) The facts affecting the tax treatment of the item (or group of similar items) that reasonably may be expected to apprise the Internal Revenue Service of the nature of the potential controversy concerning the tax treatment of the item (or items).

(2) *Disclosure of legal issue.* In lieu of setting forth the facts affecting the tax treatment of an item (or group of similar items) in accordance with paragraph (b)(1)(iv) of this section, the taxpayer may set forth a concise description of the legal issue presented by such facts.

(3) A concise description of the taxpayer's legal position with respect to the items.

(4) *Requirement of particularity.* Disclosure is not adequate with respect to an item (or group of similar items) if it consists of undifferentiated information that is not arranged in a manner that reasonably may be expected to apprise the Internal Revenue Service of the identity of the item, its amount,

and the nature of the potential controversy concerning the item (or items). For example, attachment to the return of an acquisition agreement generally will not constitute adequate disclosure of the issues involved in determining the basis of certain acquired assets.

(c) *Disclosure on return.* The Commissioner may by revenue procedure prescribe the circumstances in which information provided on the return in accordance with the applicable forms and instructions will be adequate disclosure for purposes of section 6661.

(d) *Carryovers and carrybacks.* In the case of a carryover or carryback attributable to the tax treatment of an item on a return to which section 6661 applies (see paragraph (b) of §1.6661-1 and paragraph (d)(2)(iv) of §1.6661-2), disclosure is adequate with respect to the item only if it is made on the return for the taxable year in which the item arises or in a statement attached thereto. In such a case, disclosure with respect to the item is not required on the return for the taxable year in which the carryover or carryback attributable to the item is taken into account.

(e) *Pass-through entities.* In the case of items attributable to a pass-through entity ("pass-through items"), disclosure regarding the tax treatment of such items should be made on the return of the entity or on an attachment thereto. For this purpose, a pass-through entity is a partnership, an S corporation (as defined in section 1361(a)(1)), an estate, a trust, a regulated investment company (as defined in section 851(a)), or a real estate investment trust (as defined in section 856(a)). A taxpayer (partner, shareholder, or beneficiary) also may make adequate disclosure with respect to a pass-through item, however, if the taxpayer files a separate statement in duplicate, one copy attached to and filed with the taxpayer's return and the other copy filed with the Internal Revenue Service Center with which the return of the entity is required to be filed. Each statement filed shall relate to the pass-through items of only one entity and shall include the following:

(1) An identification of the taxpayer and the entity by name, address, and taxpayer identification number.

(2) The taxable year of the entity to which the disclosure relates.

(3) An identification of the items with respect to which the taxpayer has made disclosure under this paragraph.

(4) Such additional information as would be required for adequate disclosure with respect to the items under paragraphs (a), (b), and (d) of this section.

(5) A notation to the effect that the statement is to be associated with the return of the entity.

[T.D. 8017, 50 FR 12017, Mar. 27, 1985]

§ 1.6661-5 Items relating to tax shelters.

(a) *In general.* (1) Tax shelter items (as defined in paragraph (c) of this section) are treated as if such items were shown properly on the return for the taxable year in computing the amount of tax shown on the return if—

(i) There is or was substantial authority for the tax treatment of the items (as provided in § 1.6661-3); and

(ii) The taxpayer reasonably believes at the time the return is filed that the tax treatment claimed is more likely than not the proper tax treatment of the items (see paragraph (d) of this section).

Thus, for purposes of section 6661, the tax attributable to such items is not included in the understatement for the year. (See paragraph (d)(2) of § 1.6661-2.)

(2) Disclosure (whether or not adequate under § 1.6661-4) with respect to tax shelter items (as defined in paragraph (c) of this section) does not affect the amount of the understatement.

(b) *Tax shelter*—(1) *In general.* For purposes of section 6661, the term “tax shelter” means—

(i) A partnership or other entity (such as a corporation or trust),

(ii) An investment plan or arrangement, or

(iii) Any other plan or arrangement, if the principal purpose of the entity, plan, or arrangement, based on objective evidence, is the avoidance or evasion of Federal income tax. The principal purpose of an entity, plan or arrangement is the avoidance or evasion of Federal income tax if that purpose

exceeds any other purpose. See § 1.269-3(a). Typical of tax shelters are transactions structured with little or no motive for the realization of economic gain, and transactions that utilize the mismatching of income and deductions, overvalued assets or assets with values subject to substantial uncertainty, nonrecourse financing, financing techniques which do not conform to standard commercial business practices, or the mischaracterization of the substance of the transaction. The existence of economic substance does not of itself establish that a transaction is not a tax shelter if the transaction includes other characteristics that indicate it is a tax shelter.

(2) *Principal purpose.* The principal purpose of an entity, plan or arrangement is not the avoidance or evasion of Federal income tax if the entity, plan or arrangement has as its purpose the claiming of exclusions from income, accelerated deductions or other tax benefits in a manner consistent with the statute and Congressional purpose. For example, an entity, plan or arrangement will not be considered to have as its principal purpose the avoidance or evasion of Federal income tax merely as a result of the following uses of tax benefits provided by the Internal Revenue Code: The claiming of the investment credit under section 38; the purchase or holding of an obligation bearing interest which is excluded from gross income under section 103; entering into a safe-harbor lease transaction under section 168(f)(8); taking an accelerated cost recovery system (ACRS) allowance under section 168; taking the percentage depletion allowance under section 613 or section 613A; deducting intangible drilling and development costs as expenses under section 263(c); establishing a qualified retirement plan under the provisions of sections 401-409A, claiming the possession tax credit under section 936; or claiming tax benefits available by reason of an election under section 992 to be taxed as a domestic international sales corporation (DISC), under section 927(f)(1) to be taxed as a foreign sales corporation (FSC), or under section 1362 to be taxed as an S corporation.

(c) *Tax shelter item.* An item of income, gain, loss, deduction or credit