

Part III - Administrative, Procedural, and Miscellaneous

Intermediary Transaction Tax Shelters

Notice 2008-111

SECTION 1. PURPOSE AND BACKGROUND

This Notice clarifies Notice 2001-16, 2001-1 C.B. 730, and supersedes Notice 2008-20, 2008-6 I.R.B. 406, regarding Intermediary Transaction Tax Shelters. Notice 2001-16 identified the Intermediary Transaction Tax Shelter (hereafter, an “Intermediary Transaction”) as a listed transaction under § 1.6011-4(b)(2) of the Income Tax Regulations. For purposes of this Notice, an Intermediary Transaction is defined in terms of its plan and in terms of more objective components. Under this Notice, a transaction is treated as an Intermediary Transaction with respect to a particular person only if that person engages in the transaction pursuant to the Plan (as defined in sections 2 and 4), the transaction contains the four objective components indicative of an Intermediary Transaction set forth in section 3, and no safe harbor exception in section 5 applies to that person. A transaction may be an Intermediary Transaction with respect to one person and not be an Intermediary Transaction with respect to another person. This Notice does not affect the legal determination of whether a person's treatment of the transaction is proper or whether such person is liable, at law or in equity, as a transferee of property in respect of the unpaid tax obligation described in section 3.

SECTION 2. DEFINITION OF THE PLAN

An Intermediary Transaction involves a corporation (T) that would have a Federal

income tax obligation with respect to the disposition of assets the sale of which would result in taxable gain (Built-in Gain Assets) in a transaction that would afford the acquiror or acquirors (Y) a cost or fair market value basis in the assets. An Intermediary Transaction is structured to cause the tax obligation for the taxable disposition of the Built-in Gain Assets to arise, in connection with the disposition by shareholders of T (X) of all or a controlling interest in T's stock, under circumstances where the person or persons primarily liable for any Federal income tax obligation with respect to the disposition of the Built-in Gain Assets will not pay that tax (hereafter, the Plan). This plan can be effectuated regardless of the order in which T's stock or assets are disposed. A transaction is not an Intermediary Transaction for purposes of this Notice if there is neither any X nor any Y engaging in the transaction pursuant to the Plan (as defined in section 4).

SECTION 3. COMPONENTS OF AN INTERMEDIARY TRANSACTION

There are four components of an Intermediary Transaction, and a transaction must have all four components to be the same as or substantially similar to the listed transaction described in Notice 2001-16, even if the transaction is engaged in pursuant to the Plan. The four components are:

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 (T's Built-in Gain Assets) and, as of the Stock Disposition Date (as defined 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. The tax that would result from such sale is hereinafter referred to as T's Built-

in Tax. However, for purposes of this component, T will not be considered to have any Built-in Tax if, on the Stock Disposition Date, such amount is less than five percent of the value of the T stock disposed of in the Stock Disposition (as defined in component two). 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 any 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 80 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 (Stock Disposition). The first date on which at least 80 percent of the T stock (by vote or value) has been disposed of by X in a Stock Disposition is the Stock Disposition Date.

3. Either within 12 months before, simultaneously, or within 12 months after the Stock Disposition Date, at least 65 percent (by value) of T's Built-in Gain 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. For purposes of this component, transactions in which T disposes of all or part of its assets to either another member of the controlled group of corporations (as defined in § 1563) of which T is a member, or a partnership in which members of such controlled group satisfy the requirements of §1.368-1(d)(4)(iii)(B), will be disregarded provided there is no plan to

dispose of at least 65 percent (by value) of T's Built-in Gain Assets to one or more persons that are not members of such controlled group, or to partnerships not described herein.

4. At least half of T's Built-in Tax that would otherwise result from the disposition of the Sold T Assets is purportedly offset or avoided or not paid.

SECTION 4. ENGAGING IN THE TRANSACTION PURSUANT TO THE PLAN

A transaction that has all four components described in section 3 is only an Intermediary Transaction with respect to a person that engages in the transaction pursuant to the Plan. A person engages in the transaction pursuant to the Plan if the person knows or has reason to know the transaction is structured to effectuate the Plan. Additionally, any X that is at least a 5% shareholder of T (by vote or value), or any X that is an officer or director of T, engages in the transaction pursuant to the Plan if any of the following knows or has reason to know the transaction is structured to effectuate the Plan: (i) any officer or director of T; (ii) any of T's advisors engaged by T to advise T or X with respect to the transaction; or (iii) any advisor of that X engaged by that X to advise it with respect to the transaction. For purposes of this section, if T has more than five officers then the term "officer" shall be limited to the chief executive officer of T (or an individual acting in such capacity) and the four highest compensated officers for the taxable year (other than the chief executive officer or an individual acting in such capacity). A person can engage in the transaction pursuant to the Plan even if it does not understand the mechanics of how the tax liability purportedly might be offset or avoided, or the specific financial arrangements, or relationships of other parties or of T after the Stock Disposition.

A person will not be treated as engaging in the transaction pursuant to the Plan merely because it has been offered attractive pricing terms by the opposite party to a transaction.

Thus, a transaction may be an Intermediary Transaction with respect to X but not Y, or with respect to Y but not X, in situations where one party engages in the transaction pursuant to the Plan and the other does not. A transaction may also be an Intermediary Transaction with respect to some but not all Xs and/or some but not all Ys, depending on whether they engage in the transaction pursuant to the Plan. A transaction will not be an Intermediary Transaction with respect to any person that does not engage in the transaction pursuant to the Plan regardless of the amounts reported on any return.

SECTION 5. SAFE HARBOR EXCEPTIONS FOR CERTAIN PERSONS;

PARTICIPATION GENERALLY

01. Safe Harbor Exceptions for Certain Persons

A transaction is not an Intermediary Transaction with respect to the following persons under the following circumstances:

- Any X, if the only T stock it disposes of is traded on an established securities market (within the meaning of § 1.453-3(d)(4)) and prior to the disposition X (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.
- Any X, T, or M, if, after the acquisition of the T stock, the acquiror of the T stock is the issuer of stock or securities that are publicly traded on an established securities market in the United States, or is consolidated for financial reporting

purposes with such an issuer.

- Any Y, if the only Sold T Assets it acquires 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).

02. Participation

If one of the foregoing safe harbor exceptions does not apply to a person, that person engaged in a transaction pursuant to the Plan, and the transaction has all four components described in section 3, the determination of whether the person participated in an Intermediary Transaction for purposes of § 1.6011-4 in any given taxable year is made under the general rule in § 1.6011-4(c)(3)(i)(A).

SECTION 6. EFFECTIVE DATE; DISCLOSURE, LIST MAINTENANCE, AND REGISTRATION REQUIREMENTS; PENALTIES; OTHER CONSIDERATIONS

Transactions that are the same as, or substantially similar to, the transaction described in Notice 2001-16 were identified as “listed transactions” under § 1.6011-4(b)(2) effective January 19, 2001. Accordingly, this Notice is generally effective January 19, 2001. However, this Notice imposes no requirements with respect to any obligation under § 6011, § 6111, or § 6112 due before December 1, 2008, not otherwise imposed by Notice 2001-16. Because this Notice supersedes Notice 2008-20, any disclosure filed pursuant to Notice 2008-20 will be treated as made pursuant to Notice 2001-16. 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 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 parties 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 7. EFFECT ON OTHER DOCUMENTS

Notice 2001-16 is clarified. Notice 2008-20 is superseded.

SECTION 8. REQUEST FOR COMMENTS

The Service and the Treasury Department seek comments regarding the above definitions, components, and safe harbors for the purpose of reflecting more accurately which transactions are the same as or substantially similar to an Intermediary Transaction and which parties are engaging in a transaction pursuant to the Plan.

Comments should be submitted to: Internal Revenue Service, CC:PA:LPD:PR (Notice 2008-111), Room 5203, PO Box 7604, Ben Franklin Station, Washington, DC 20044. Alternatively, comments may be hand delivered Monday through Friday between the hours of 8:00 a.m. and 4:00 p.m. to: CC:PA:LPD:PR (Notice 2008-XX), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC. Comments may also be submitted electronically, via the following email address: Notice.Comments@irsounsel.treas.gov. Please include "Notice 2008-111" in the subject line of any electronic submissions. All comments received will be open to public inspection and copying.

DRAFTING INFORMATION

The principal author of this notice is Douglas C. Bates of the Office of Associate

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