

Office of Chief Counsel  
Internal Revenue Service  
**memorandum**

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subject: Tax Shelter Registration Program

This memorandum is in response to your request for assistance dated March 27, 2003. You have asked that the Office of Chief Counsel assist you in providing advice to an Internal Revenue Service employee working for Large and Midsize Business (LMSB) at the Ogden Campus regarding disclosure issues involving tax shelter registrations.

**Issues**

1. Do tax shelter registration applications (Forms 8264), the fact of registration, the registration letters the Service sends to the registrants, and the tax shelter's registration number constitute return information under section 6103(b)(2)(A) of the Internal Revenue Code?
2. What facts regarding registration may the Service disclose to the tax shelter organizer, any other person participating in the organization of the tax shelter, any person participating in the sale of the tax shelter, any person participating in the management of the tax shelter, or any person investing in the tax shelter?
3. Where the tax shelter is organized as a partnership, may return information pertaining to the shelter's registration be disclosed to members of the partnership *other* than the registrant?

4. Who may authorize disclosure of information related to registration of a particular tax shelter?

### **Conclusions**

1. Tax shelter registration applications (Forms 8264), the fact of registration, the registration letters the Service sends to the registrants, and the tax shelter's registration number constitute return information under section 6103(b)(2)(A) of the Internal Revenue Code.
2. The Service may disclose all facts relating to the tax shelter registration only to the registrant of the tax shelter, i.e., the person who submitted the registration application.
3. The fact that a *tax shelter* itself is organized as a partnership has no bearing upon the determination to whom the Service may disclose information regarding the tax shelter registration. If the *registrant* of the tax shelter is a partnership, however, the Service may disclose the return information to any of the partners in accordance with section 6103(e)(1)(C).
4. The registrant of the tax shelter may authorize the disclosure of information related to registration of a particular tax shelter under section 6103(a).

### **Background**

Certain persons must register tax shelters with the by filing a properly completed Form 8264, "Application for Registration of a Tax Shelter" with the Service. I.R.C. § 6111(a). Upon the filing of the properly completed Form 8264, the Service will assign a registration number to the tax shelter. A person who sells an interest in the tax shelter must then furnish, on a written statement, to each investor who purchases an interest in the tax shelter from him the identification number the Secretary assigned to such tax shelter. See I.R.C. § 6111(b). Any person who has an obligation to register a tax shelter and fails to do so without reasonable cause is subject to a penalty. I.R.C. § 6707(a). In addition, section 6707(b) imposes a penalty upon sellers who do not provide the registration number to investors who purchase tax shelter interests and upon investors who claim the tax benefits of a shelter but do not report the registration number on their returns.

Tax shelter registrants submit registration applications to the Service's Ogden Campus. There are circumstances, such as the receipt of an incomplete application, in which it would be advantageous for the Service to contact a person or persons with regard to a tax shelter registration. Similarly, various individuals contact the Service to obtain information relating to tax shelter registrations, such as to check on the status of their registration application.

## Discussion

**1. Do tax shelter registration applications (Forms 8264), the fact of registration, the registration letters the Service sends to the registrants, and the tax shelter's registration number constitute return information under section 6103(b)(2)(A) of the Internal Revenue Code?**

Section 6103(b)(2)(A) defines return information as, *inter alia*, any information “received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return or with respect to the determination of the existence, or possible existence, of liability (or the amount thereof) of any person under this title for any tax, penalty, interest . . . .” The information at issue here is information that section 6111 requires the principal organizer of a tax shelter, or participants in the organization of a tax shelter, to provide prior to offering interests in a tax shelter for sale. If no one submits a registration application prior to the first offering of interests in a tax shelter for sale, the regulations under section 6111 require managers and sellers of the tax shelter to register the shelter. *See* Treas. Reg. § 301.6111-1T, Q&A-25 and 26. If a person required to register a tax shelter does not do so, section 6707(a) subjects that person to penalties. Accordingly, information pertaining to a shelter's registration, including the registration number and fact of filing, constitutes return information under section 6103(b)(2)(A).

**2. What facts regarding registration may the Service disclose to the tax shelter organizer, any other person participating in the organization of the tax shelter, any person participating in the sale of the tax shelter, any person participating in the management of the tax shelter, or any person investing in the tax shelter?**

If a person has a duty to register and does so, the registration information relating to that applicant is return information of the registrant because information the Service receives and communicates with respect to the application will help determine whether the registrant is liable for a section 6707(a) penalty based on a failure to timely and properly register. The section 6111 regulations confirm this conclusion because they contemplate that the Service will provide information pertaining to the issuance of a registration number to the person who registers the tax shelter.<sup>1</sup>

In fact, a careful review of the relevant statutes, the legislative history, and regulations reveals no indication that the Service may disseminate a shelter's registration number to anyone other than the registrant. Section 301.6111-1T, Q&A51, of the regulations provides that the seller of any interest in a tax shelter must furnish the registration number assigned to that shelter to each person who purchases, or otherwise acquires an interest in that shelter from the seller or transferor. Section 301.6111-1T, Q&A54, of the regulations provides that the seller of an interest in the shelter should receive the shelter's registration number from the organizer, not

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<sup>1</sup> Sections 301.6111-1T, Q&A-1, 26, 34, and 35, of the regulations, provide that one files a properly completed Form 8264 with the Service to register a tax shelter. Upon the filing of the properly completed Form 8264, the Service will assign a registration number. As such, the regulations contemplate that the Service will provide information pertaining to the issuance of a registration number to the person who registers the tax shelter.

from the Service. That same provision also delineates procedures the seller of an interest in the shelter should follow when the shelter's registrant has not provided the registration number. Notably absent is any instruction to contact the Service to obtain the registration number.

Nothing in the regulations under sections 6111 and 6707 suggest that persons other than registrants are entitled to obtain registration information from the Service. When persons enter into a designation agreement to have someone else register a tax shelter, section 1.6111-1T, Q&A-39, of the regulations imposes a duty upon the parties to the agreement to obtain a copy of the Service's registration notice containing the registration number from the person designated to register. Section 1.6111-1T, Q&A-39, of the regulations states that "a tax shelter organizer who has signed a designation agreement is deemed to have reason to know that the designated organizer has failed to register the tax shelter if the tax shelter organizer does not receive a copy of the Internal Revenue Service registration notice containing the registration number from the designated organizer" within a specified period. The regulations thus contemplate that the registrant will share information about the registration with other organizers, rather than an organizer contacting the Service to learn whether registration has occurred.

Section 6707 reflects a similar scheme in which persons other than the registrant of a tax shelter are to obtain information about the registration from the registrant, not the Service. If a person obligated to register has reasonable cause for the failure to register, that person is not subject to the section 6707 penalty. One ground for reasonable cause could be the reasonable belief that someone else registered the tax shelter, so long as the person has made reasonable inquiry to determine whether the shelter was registered. Treas. Reg. § 1.6707-1T, Q&A-6. The regulations, however, neither require nor suggest that persons contact the Service to carry out their duty of reasonable inquiry.

The fact that a person is a seller, manager, or other organizer of a tax shelter who has a potential duty to register a tax shelter does not convert registration information regarding that shelter into return information belonging to that seller, manager, or other organizer. In many situations, the fact that another person has registered a tax shelter does not relieve one from liability for failure to register. See Treas. Reg. § 1.6707-1T, Q&A-3 and 4. In those cases, information relating to another's registration application would be entirely irrelevant to determining one's liability under section 6707(a) for failure to file and could not provide a basis for concluding that the registration information is the non-registrant's return information. Even when facts relating to another's registration of a shelter might bear upon determining the liability of a seller, manager, or other organizer, those facts do not become the non-registrant's return information. If an examination into the liability of the non-registrant is instituted, the registrant's return information may be utilized in accordance with section 6103(h)(4).

In the event that a non-registrant contacts the Service to determine whether another person has applied for registration, this fact-of-filing information may not be disclosed to the non-registrant barring the applicability of sections 6103(e)(1)(C) or (D) or pursuant to a valid section 6103(c) disclosure consent. As stated above, the information pertaining to the tax shelter is the return information of the registrant, and fact-of-filing information (whether affirmative or negative) constitutes return information under section 6103(b)(2). The Service should advise the

contacting person to solicit the desired information from the registrant directly, or, in the alternative, submit a Form 8264 to register the tax shelter.

Finally, investors are not responsible for registering a tax shelter solely based on being an investor and the regulations impose no obligation on investors to seek registration information from the Service. See Treas. Reg. §1.6111-1T, Q&A-55 to 57. Rather, the investor should seek the registration number from the seller. Thus, registration information has no bearing upon the determination of the existence, or potential existence, of the investor's liability for the section 6707(a) penalty and cannot be the investor's return information on that basis. The return information of the registrant is not converted or transformed into the return information of subsequent investors as a result of the sale of an interest in the shelter.<sup>2</sup>

Investors who contact the Service seeking a particular tax shelter's registration number should be advised to contact that shelter's organizer or the individual who transferred the interest in the shelter, as those individuals are obligated to provide the information sought. Any disclosure of this information to investors by the Service would violate section 6103.

**3. Where the tax shelter is organized as a partnership, may the Service disclose return information pertaining to the shelter's registration to members of the partnership other than the registration?**

In addition to the person to whom the return belongs, an officer or employee of the Service may disclose a return to specific persons having a material interest in the return. See I.R.C. § 6103(e). Similarly, the Service may disclose return information to any person authorized to inspect a return of the taxpayer if such disclosure would not seriously impair Federal tax administration. See I.R.C. § 6103(e)(7). Section 6103(e)(1)(C) provides that the Service may disclose the return, or return information under section 6103(e)(7), of a partnership to any person who was a member of the partnership during any part of the period covered by the return. Thus, if the person who registers the tax shelter is a partnership, the Service may disclose the tax shelter information to any one of the partners.

It is important to note, however, that section 6103(e)(1)(C) applies only in situations where the partnership is the registering entity. If the tax shelter itself is a partnership, the Service cannot disclose information relating to the tax shelter registration to the partners. Disclosure by the Service is limited to disclosure to the registrant.

**4. Who may authorize the disclosure of return information pertaining to a shelter's registration?**

Section 6103(c) provides that the Service may disclose a taxpayer's return or return information to such person or persons as the taxpayer may designate in a request for or consent to such

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<sup>2</sup> Note that once the investor obtains the registration number from the organizer or other registrant and notes that number on their personal income tax return, the registration number *as submitted by the taxpayer*, upon receipt by the Secretary, becomes that taxpayer's return information.

disclosure unless such disclosure would seriously impair Federal tax administration. Thus, only the taxpayer may consent to the disclosure of the taxpayer's own returns and return information under section 6103(c). Having determined that information pertaining to a shelter's registration is the return information of the registrant, it follows that only the registrant may authorize the Service to disclose such information.

If you have any questions, please contact