

Office of Chief Counsel
Internal Revenue Service
Memorandum

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to: James D. Hill
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from: Meghan M. Howard
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CC:PA:01

subject: False Statements Under Section 6700, Promoting Abusive Tax Shelters

This Chief Counsel Advice responds to your email dated November 23, 2020. In accordance with I.R.C. 6110(k)(3), Chief Counsel Advice may not be used or cited as precedent.

LEGEND

X =

ISSUE

What constitutes a false or fraudulent for purposes of assessing a section 6700 penalty against a promoter?

CONCLUSION

There are two types of statements that fall within the statutory bar of section 6700(a)(2)(A): statements directly addressing the availability of tax benefits and those concerning factual matters that are relevant to the availability of the tax benefits. See United States v. Campbell, 897 F2d 1317, 1320 (5th Cir. 1990).

FACTS

X is an LLC that engaged in the promotion of micro-captive insurance transactions. In a typical micro-captive insurance transaction, a taxpayer attempts to reduce the aggregate taxable income of the taxpayer, related persons, or both, using contracts that the parties treat as insurance contracts and a related company that the parties treat as a captive insurance company. Each entity that the parties treat as an insured entity under the contracts claims deductions for premiums for insurance coverage. The related company that the parties treat as a captive insurance company elects pursuant to section 831(b) to be taxed only on investment income and therefore excludes the payments directly or indirectly received under the contracts from its taxable income.

Many of the documents X distributed to investors and potential investors in the micro-captive insurance transaction contain statements with respect to the allowability of deductions for purported "insurance premiums" under section 162, the excludability of such premium income under section 831(b), or other federal tax benefits such as eligibility of the captives to elect treatment under section 953(d).

LAW AND ANALYSIS

For activities after December 31, 1989, section 6700 of the Code imposes a penalty upon persons who promote abusive tax shelters. In pertinent part, the penalty applies to any person who

- (1)(A) organizes (or assists in the organization of) –
 - (i) a partnership or other entity,
 - (ii) any investment plan or arrangement, or
 - (iii) any other plan or arrangement, or

(B) participates (directly or indirectly) in the sale of any interest in, an entity plan or arrangement . . . ,and

- (2) makes or furnishes or causes another person to make or furnish (in connection with such organization or sale)-

(A) a statement with respect to the allowability of any deduction or credit, the excludability of any income, or the securing of any other tax benefit by reason of holding an interest in the entity or participating in the plan or arrangement which the person knows or has reason to know is false or fraudulent as to any material matter. . . .

A statement can be either written or oral. United States v. Music Masters, Ltd., 621 F.Supp 1046, 1058 (W.D. NC 1985). There are two types of statements that fall within the statutory bar of section 6700(a)(2)(A): statements directly addressing the availability of tax benefits and those concerning factual matters that are relevant to the availability of the tax benefits. See United States v. Campbell, 897 F2d 1317, 1320 (5th Cir. 1990). Advice and recommendations are considered statements for purposes of section 6700. United States v. Stover, 650 F.3d 1099, 1108 (8th Cir. 2011). False statements under

section 6700 include representations that a plan qualifies for special tax treatment when the plan does not comply with the law. See Koresko v. United States, 123 F. Supp. 3d 654, 682-689 (E.D. Pa. 2015).

Further, statements are false when assertions are not qualified and customers are not notified that following the advice could subject them to IRS scrutiny. Stover, 650 F.3d at 1109-1110. Where a promoter has knowledge of the risks incident to a tax shelter, the promoter must clearly and unambiguously inform its agents, prospective clients, and current clients of that risk. See Davison v. Commissioner, T.C. Memo. 2020-58, appeal dismissed, No. 20-9002, 2020 WL 7033850 (10th Cir. Aug. 18, 2020)

Statements in the context of micro-captive insurance transactions include opinions, promotional materials, reports, tax savings projections, or other statements (or materials relied upon in making such statements) that are false or fraudulent as to any matter material to exclusion of income under section 831(b) or tax deductions under section 162 for premiums paid by the insured.

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Please contact Branch 2 of Procedure and Administration if you have any further questions.