



Federal Tax ADVISORY ■

APRIL 1, 2019

The Treasury's New Guidance Policy

Reg. §1.6011-4(b)(6) requires taxpayers to report "A transaction of interest [that] is a transaction that is the same as or substantially similar to one of the types of transactions that the IRS has identified by notice, regulation, or other form of published guidance as a transaction of interest." The regulation states that reporting will not affect the taxpayer's tax liability. Notice 2016-66 announced a new transaction of interest involving certain captive insurance companies, called micro-captive transactions.

One sponsor of this type of transaction of interest sued to have the Notice declared invalid. *CIC Services LLC v. IRS*, No. 3:17-cv-00110 (E.D. Tenn. 2017). It claimed that the Notice was a legislative rule issued without notice and comment as required by the Administrative Procedure Act.

The IRS moved to dismiss, claiming that the suit was barred by the Anti-Injunction Act and the Declaratory Judgment Act, both of which preclude suits to prevent the assessment of tax. Failure to comply with the Notice could subject the plaintiff to a penalty, which the Code defines as a tax. Although the plaintiff complied with the Notice and could not be subject to the penalty, the court ruled that the suit still sought to prevent the assessment of tax from someone, and dismissed the action.

The plaintiffs appealed. Before the appeal was decided, on March 12, 2019, the plaintiffs wrote to the appellate court to make an additional argument based on a [Policy Statement on the Tax Regulatory Process](#), which the Treasury issued on March 5. It states that subregulatory guidance does not have the "force and effect of law."

The letter asserts that means that the Notice, which is subregulatory guidance by definition since it was not issued as a regulation, does not have any effect and cannot be enforced by a penalty/tax and should be enjoined as a mandatory directive. The letter states: "This eviscerates the premise of Appellees' argument that the Anti-Injunction Act prevents this Court from enjoining Notice 2016-66. If Notice 2016-66 is not a *law*, enjoining it cannot restrain the assessment and collection of *lawful* taxes."

Whether the letter succeeds or not, it nicely illustrates the predicament the Treasury has gotten into by using the term "force and effect of law," which has no clear meaning, and admitting that subregulatory guidance does not have it. Expect to see many, many more litigations like this one..

For more information, please contact [Jack Cummings](#) at 919.862.2302.

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If you have any questions or would like additional information, please contact your Alston & Bird attorney or any of the following:

Federal Tax Group

John F. Baron
Chair
704.444.1434
john.baron@alston.com

George B. Abney
404.881.7980
george.abney@alston.com

Jasper L. Cummings, Jr.
919.862.2302
jack.cummings@alston.com

Sam K. Kaywood, Jr.
404.881.7481
sam.kaywood@alston.com

Daniel M. Reach
704.444.1272
danny.reach@alston.com

John F. Baron
704.444.1434
john.baron@alston.com

Scott Harty
404.881.7867
scott.harty@alston.com

Ryan J. Kelly
202.239.3306
ryan.kelly@alston.com

Heather Ripley
212.210.9549
heather.ripley@alston.com

Henry J. Birnkrant
202.239.3319
henry.birnkrant@alston.com

Brian D. Harvel
404.881.4491
brian.harvel@alston.com

Brian E. Lebowitz
202.239.3394
brian.lebowitz@alston.com

Michael Senger
404.881.4988
michael.senger@alston.com

Seth M. Buchwald
404.881.7836
seth.buchwald@alston.com

L. Andrew Immerman
404.881.7532
andy.immerman@alston.com

Clay A. Littlefield
704.444.1440
clay.littlefield@alston.com

Edward Tanenbaum
212.210.9425
edward.tanenbaum@alston.com

James E. Croker, Jr.
202.239.3309
jim.croker@alston.com

Stefanie Kavanagh
202.239.3914
stefanie.kavanagh@alston.com

Ashley B. Menser
919.862.2209
ashley.menser@alston.com

ALSTON & BIRD

WWW.ALSTON.COM

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ATLANTA: One Atlantic Center ■ 1201 West Peachtree Street ■ Atlanta, Georgia, USA, 30309-3424 ■ 404.881.7000 ■ Fax: 404.881.7777
BEIJING: Hanwei Plaza West Wing ■ Suite 21B2 ■ No. 7 Guanghai Road ■ Chaoyang District ■ Beijing, 100004 CN ■ +86 10 8592 7500
BRUSSELS: Level 20 Bastion Tower ■ Place du Champ de Mars ■ B-1050 Brussels, BE ■ +32 2 550 3700 ■ Fax: +32 2 550 3719
CHARLOTTE: Bank of America Plaza ■ 101 South Tryon Street ■ Suite 4000 ■ Charlotte, North Carolina, USA, 28280-4000 ■ 704.444.1000 ■ Fax: 704.444.1111
DALLAS: Chase Tower ■ 2200 Ross Avenue ■ Suite 2300 ■ Dallas, Texas, USA, 75201 ■ 214.922.3400 ■ Fax: 214.922.3899
LOS ANGELES: 333 South Hope Street ■ 16th Floor ■ Los Angeles, California, USA, 90071-3004 ■ 213.576.1000 ■ Fax: 213.576.1100
NEW YORK: 90 Park Avenue ■ 15th Floor ■ New York, New York, USA, 10016-1387 ■ 212.210.9400 ■ Fax: 212.210.9444
RALEIGH: 555 Fayetteville Street ■ Suite 600 ■ Raleigh, North Carolina, USA, 27601-3034 ■ 919.862.2200 ■ Fax: 919.862.2260
SAN FRANCISCO: 560 Mission Street ■ Suite 2100 ■ San Francisco, California, USA, 94105-0912 ■ 415.243.1000 ■ Fax: 415.243.1001
SILICON VALLEY: 1950 University Avenue ■ 5th Floor ■ East Palo Alto, California, USA, 94303-2282 ■ 650-838-2000 ■ Fax: 650.838.2001
WASHINGTON, DC: The Atlantic Building ■ 950 F Street, NW ■ Washington, DC, USA, 20004-1404 ■ 202.239.3300 ■ Fax: 202.239.3333