

# **Recent Developments in Federal Income Taxation**

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**Pascucci v. Commissioner**  
**T.C. Memo. 2024-43 (4/15/24)**

***Outline: item A.1, page 2***

- The taxpayers, a married couple, held numerous private placement variable life insurance policies.
  - Such a policy is a portfolio of investments wrapped in a life insurance policy.
  - Within limits, the owner of the policy can direct the investments.
  - The insurance company has ultimate ownership and control of the investments.
- The taxpayers' private placement variable life insurance policies became worthless in 2008 after investing with Bernie Madoff.
  - Madoff was convicted of theft in 2009 for running a sophisticated Ponzi scheme.
- The taxpayers claimed an \$8.2 million theft loss deduction for 2008 (under § 165(a) and (e)) and carried the loss back to 2005 and 2006.
- Issue: Were the taxpayers entitled to a theft loss deduction?
- Held: No. To claim a theft loss deduction, a taxpayer must show that (1) a theft occurred, (2) there was no reasonable chance of recovery of the property, and (3) the taxpayer owned the property at the time it was stolen.
  - Here, the insurance company, not the taxpayers, owned the assets in question.<sup>3</sup>

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**Expanded Penalty-Free Retirement Withdrawals**

***Outline: item B.1, page 4***

- SECURE 2.0 Act:
  - Expanded penalty-free withdrawals. SECURE 2.0 modifies certain existing exceptions and adds additional exceptions to the normal 10% penalty on early withdrawals from qualified retirement plans, including exceptions for:
    - Emergency withdrawals: beginning in 2024, individuals can withdraw up to \$1,000 without a penalty for "unforeseeable or immediate financial needs relating to necessary personal or family emergency expenses." [Code § 72(t)(2)(I)]
      - See Notice 2024-55 (6/21/24) (Q&A A1-A15) [item B.1.a, page 4]
        - Whether a distribution qualifies is determined by the relevant facts and circumstances for each individual.
        - Factors to be considered include whether the individual or family members have expenses related to, among others, medical care, foreclosure or eviction, burial or funeral expenses, auto repairs, or any other necessary emergency personal expenses.
      - Plans need not permit emergency distributions, but if plan does not, an individual can still treat as such by completing Form 5329.<sup>4</sup>

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## Expanded Penalty-Free Retirement Withdrawals

### *Outline: items B.2, page 5*

- SECURE 2.0 Act:
  - Expanded penalty-free withdrawals. SECURE 2.0 modifies certain existing exceptions and adds additional exceptions to the normal 10% penalty on early withdrawals from qualified retirement plans, including exceptions for:
    - Survivors of domestic abuse: beginning in 2024, no penalty applies to distributions up to \$10,000 (or 50% of the account value, if less) that are “made to an individual during the 1-year period beginning on any date on which the individual is a victim of domestic abuse [as defined] by a spouse or domestic partner.” [Code § 72(t)(2)(K)]
      - See Notice 2024-55 (6/21/24) (Q&A B1-B14) [item B.2.a, page 5]
        - “Domestic abuse” means physical, psychological, sexual, emotional, or economic abuse, including efforts to control, isolate, humiliate, or intimidate the victim, or to undermine the victim’s ability to reason independently, including by means of abuse of the victim’s child or another family member living in the household
      - Plans need not permit DAVDs, but if plan does not, an individual can still treat as such by completing Form 5329.

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## Expanded Penalty-Free Retirement Withdrawals

### *Outline: items B.3, page 6*

- SECURE 2.0 Act:
  - Expanded penalty-free withdrawals. SECURE 2.0 modifies certain existing exceptions and adds additional exceptions to the normal 10% penalty on early withdrawals from qualified retirement plans, including exceptions for:
    - Those with a terminal illness: beginning in 2023, distributions are penalty-free if made to “an individual who has been certified by a physician as having an illness or physical condition which can reasonably be expected to result in death in 84 months or less after the date of the certification.” [Code § 72(t)(2)(L)]
    - See Notice 2024-2 (12/20/23) (Q&A F1-F15) [item B.3.a, page 6]
      - Requirements for physician’s certification
      - Employee must provide certification to plan administrator
      - Physician’s certification must be obtained before distribution
      - Plans need not permit terminally ill individual distributions, but if plan does not, an individual can still treat as such by completing Form 5329

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**Notice 2024-80**  
**2024-47 I.R.B. 1120 (11/1/24)**  
***Outline: item B.4, page 7***

- Sets forth inflation-adjusted figures for benefits and contributions under qualified retirement plans for 2025.
- Among other figures:

Category	2023	2024	2025
Elective deferrals- 401(k) plans	22,500	23,000	23,500
Catch-up contributions to employer-sponsored plans (age 50+)	7,500	7,500	7,500*
IRA contribution limit	6,500	7,000	7,000
Catch-up contributions to IRAs (age 50+)	1,000	1,000	1,000

\* \$11,250 if ages 60-63.

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**Valley Park Ranch, LLC v. Commissioner**  
**162 T.C. No. 6 (3/28/24)**  
***Outline: item B.1, page 8***

- IRS has made a series of attacks on charitable contribution deductions for conservation easements
- Most successful IRS strategy: easement does not protect the property in perpetuity, as required by § 170(h)(2)(C) and (h)(5)(A).
  - IRS has argued that conservation easements failed to protect the property in perpetuity because extinguishment language in the easement deed dictating what would happen if the easement were extinguished:
    - Failed to preserve donee's proportionate benefit, as required by Reg. § 1.170A-14(g)(6)(ii).
    - Required that charitable-donee's benefit upon destruction or condemnation of the property be reduced by value of improvements to the property made by the taxpayer-donor after the contribution, contrary to Reg. § 1.170A-14(g)(6)(ii).

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## **Valley Park Ranch, LLC v. Commissioner**

**162 T.C. No. 6 (3/28/24)**

***Outline: item B.1, page 8***

- **Issue:** did Treasury comply with the Administrative Procedure Act (APA) in issuing Reg. § 1.170A-14(g)(6)(ii)?
  - IRS interprets the regulation as requiring that, if the easement is extinguished, charitable-donee share in post-donation increases in value of the property attributable to improvements made by taxpayer-donor after the contribution.
- **Prior Decisions:**
  - Hewitt v. Commissioner, 21 F.4th 1336 (11th Cir. 2021) (*rev'g* T.C. Memo. 2020-89)) (holding that Reg. § 1.170A-14(g)(6)(ii) is arbitrary and capricious under the APA for failing to comply with procedural requirements and therefore is invalid).
  - Oakbrook Land Holdings, LLC v. Commissioner, 28 F.4th 700 (6th Cir. 2022) (*aff'g* 154 T.C. 180 (2020)) (holding that Treasury complied with the APA in issuing Reg. § 1.170A-14(g)(6)(ii) and that the regulation is valid).
- **Valley Park Ranch, LLC v. Commissioner, 162 T.C. No. 6 (3/28/24):**
  - Tax Court reverses position it took in *Oakbrook Land Holdings*
  - Holds that IRS failed to comply with APA and Reg. § 1.170A-14(g)(6)(ii) is invalid<sup>9</sup>

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## **United States v. Kelly**

**92 F.4th 598 (6th Cir. 2/8/24)**

***Outline: item H.1, page 11***

- The taxpayer, a U.S. citizen, closed his U.S. bank accounts and opened an account at Finter Bank in Switzerland.
  - Finter temporarily closed the taxpayer's account and warned him that it was required to report to U.S. authorities.
  - Finter also recommended that the taxpayer get professional tax counsel.
- The taxpayer requested to participate in the government's Offshore Voluntary Disclosure Program (OVDP).
  - The government preliminarily accepted his voluntary disclosure.
  - The government later removed the taxpayer from the OVDP because he had failed to provide information about his foreign assets.
- **Issue:** Can recklessness be sufficient to establish a willful violation of FBAR reporting requirements?
- **Held:** Yes. Joins all other Circuits that have considered the issue.
  - The government can establish a willful FBAR violation by proving that the defendant (1) clearly ought to have known that (2) there was a grave risk that an accurate FBAR was not being filed and that (3) he was in a position to find out for certain very easily.<sup>10</sup>

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## **IRS Notices Violate the Administrative Procedure Act**

### ***Outline: item H.2, page 12***

- Under the Administrative Procedure Act (APA), when a federal agency issues a “legislative rule” (one that binds the public and has the force of law), the rule must go through a notice-and-comment process.
- In at least three prior decisions, courts have held that Notices issued by the IRS were invalid because they were legislative rules that the IRS issued without a notice-and-comment process:
  - *Mann Construction, Inc. v. United States*, 27 F.4th 1138 (6th Cir. 2022) (invalidating 2007-83, which identified certain trust arrangements involving cash value life insurance policies as listed transactions)
  - *CIC Services, LLC v. Internal Revenue Service*, 592 F. Supp. 3d 677 (E.D. Tenn. 2022) (invalidating Notice 2016-66, which identified certain micro-captive insurance arrangements as listed transactions)
  - *Green Valley Investors, LLC v. Commissioner*, 159 T.C. 80 (2022) (invalidating Notice 2017-10, which identified syndicated conservation easement arrangements as listed transactions).
- Effect: IRS cannot impose penalties pursuant to these Notices for a taxpayer’s failure to disclose these listed transactions.

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## **IRS Notices Violate the Administrative Procedure Act**

### ***Outline: item H.2, page 12***

- IRS response:
  - The IRS disagrees with the judicial decisions invalidating the Notices
    - But IRS announced that it will no longer take the position that transactions of interest /listed transactions can be identified without going through a notice-and-comment process. Announcement 2023-11, 2023-17 I.R.B. 798.
  - Issued two sets of proposed regulations identifying transactions as listed transactions:
    - REG-106134-22, Syndicated Conservation Easements as Listed Transactions, 87 F.R. 75185 (12/8/22)
    - REG-109309-22, Micro-Captive Listed Transactions and Micro-Captive Transactions of Interest, 88 F.R. 21547 (4/11/23)
  - Final regulations issued on syndicated conservation easements:
    - T.D. 10007, Syndicated Conservation Easement Transactions as Listed Transactions, 89 F.R. 81341 (10/8/2024) [item H.2.b, page 15]

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**IRS Notices Violate the Administrative Procedure Act**  
***Outline: item H.2, page 12***

- Recent decision:
  - *Green Rock LLC v. Internal Revenue Service*, 104 F.4th 220 (11th Cir. 6/4/24) [item H.2.a, page 13]
  - Holds that Notice 2017-10, which identifies syndicated conservation easements as listed transactions, is a legislative rule, improperly issued by the IRS without notice and comment as required under the APA.

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**Notice 2024-85 (11/27/24)**  
**Form 1099-K Delay**  
***Outline: item H.3, page 17***

- Background:
  - In 2008, Congress added § 6050W to the Code.
  - Section 6050W became effective for the 2011 tax year.
  - Requires payment card companies and online marketplaces (aka third-party settlement organizations) to report on Form 1099-K payments processed for goods and services.
    - Payment cards include credit, debit, and stored value cards
    - Third-party settlement organizations include eBay, gig-worker platforms like Uber and Lyft, and payment apps such as Venmo and Cash App (but not Zelle).

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**Notice 2024-85 (11/27/24)**  
**Form 1099-K Delay**  
***Outline: item H.3, page 17***

- De minimis exceptions:
  - Payment cards. There has never been a de minimis exception for payment card transactions, i.e., a payment card company must report all transactions processed for a participating payee
  - Third-party settlement organizations. As enacted, § 6050W(e) required third-party settlement organizations (TPSOs) to issue Forms 1099-K only when gross payments to a participating payee for goods and services during the calendar year exceeded \$20,000 and there were more than 200 transactions
    - The American Rescue Plan (March 2021) lowered the de minimis exception for third-party settlement organizations to \$600 with no minimum number of transactions, effective in 2022.

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**Notice 2024-85 (11/27/24)**  
**Form 1099-K Delay**  
***Outline: item H.3, page 17***

- De minimis exceptions:
  - The American Rescue Plan (March 2021) lowered the de minimis exception for third-party settlement organizations to \$600 with no minimum number of transactions, effective in 2022
  - In Notice 2023-10, the IRS announced that 2022 would be a transition period for implementation of the reduced reporting threshold, i.e., the reduced threshold did not apply for 2022.
  - In Notice 2023-74, the IRS announced that 2023 would be a transition period for implementation of the reduced reporting threshold, i.e., the reduced threshold did not apply for 2023.

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**Notice 2024-85 (11/27/24)**

**Form 1099-K Delay**

***Outline: item H.3, page 17***

- Notice 2024-85: calendar years 2024 and 2025 will be a “further transition period” for implementing the reporting requirements of § 6050W.
- For calendar year 2024:
  - Payment card companies must report all transactions processed for a participating payee, regardless of the amount or number of transactions
  - A TPSO is not required to report payments in settlement of third-party network transactions with a participating payee unless the gross amount of aggregate payments to be reported exceeds \$5,000, regardless of the number of such transactions.
- For calendar year 2025:
  - Payment card companies must report all transactions processed for a participating payee, regardless of the amount or number of transactions
  - A TPSO is not required to report payments in settlement of third-party network transactions with a participating payee unless the gross amount of aggregate payments to be reported exceeds \$2,500, regardless of the number of such transactions.

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**Notice 2024-85 (11/27/24)**

**Form 1099-K Delay**

***Outline: item H.3, page 17***

- Notice 2024-85: calendar years 2024 and 2025 will be a “further transition period” for implementing the reporting requirements of § 6050W.
- For calendar year 2026:
  - Payment card companies must report all transactions processed for a participating payee, regardless of the amount or number of transactions
  - A TPSO is not required to report payments in settlement of third-party network transactions with a participating payee unless the gross amount of aggregate payments to be reported exceeds \$600, regardless of the number of such transactions.

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## Notice 2024-85 (11/27/24)

### Form 1099-K Delay

#### *Outline: item H.3, page 17*

- Common problems with 1099-K:
  - Incorrect 1099-K received (e.g., reporting wrong amounts)
    - Solution: obtain a corrected 1099-K if possible
  - Form 1099-K received for payments that are not taxable:
    - Example 1: you took a trip with a friend and you paid for the airline tickets. Your friend reimburses you \$2,500 for their airline tickets and you received a Form 1099-K reporting the \$2,500 as gross proceeds
      - Solution:
        - Report as other income on Form 1040, Schedule 1 (Additional Income and Adjustments to Income), line 8z (e.g., "Form 1099-K Received in Error .... \$2,500")
        - Report as a negative adjustment on Form 1040, Schedule 1, line 24z, e.g., "Form 1099-K Received in Error.... \$2,500")

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## Notice 2024-85 (11/27/24)

### Form 1099-K Delay

#### *Outline: item H.3, page 17*

- Common problems with 1099-K (cont'd):
  - Form 1099-K received for payments that are not taxable:
    - Example 2: you sell your couch on eBay for \$800. You purchased the couch years ago for \$2,000 (nondeductible personal loss of \$1,200). You received a Form 1099-K reporting the \$800 as gross proceeds.
      - Solution:
        - Report as other income on Form 1040, Schedule 1 (Additional Income and Adjustments to Income), line 8z (e.g., "Form 1099-K Personal Item Sold at a Loss.... \$800")
        - Report as a negative adjustment on Form 1040, Schedule 1, line 24z, (e.g., "Form 1099-K Personal Item Sold at a Loss.... \$800")

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