

# IRS Listing Notices in Trouble in the Sixth Circuit

## Dentons Federal Tax Controversy Insights

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The IRS violated the Administrative Procedure Act in creating reporting requirements for two transactions on the agency’s “Dirty Dozen List”—at least according to the Sixth Circuit and the Eastern District of Tennessee. Now a third case pending in the Northern District of Ohio could strike yet another blow to the IRS.

In *Mann Constr., Inc. v. United States*<sup>1</sup> and *CIC Servs., LLC v. Internal Revenue Service*<sup>2</sup>, both plaintiffs successfully argued the IRS failed to follow the APA’s notice and comment procedures prior to issuing the listing notices.

Mann Construction, Inc. failed to report cash value life insurance policies as required under Listing Notice 2007-83. The corporation was subsequently fined for failure to include a reportable transaction with its return. Mann Construction paid the penalties and sued for a refund in the Eastern District of Michigan, which dismissed the plaintiff’s claims on the IRS’s motion for summary judgment. On appeal, the Sixth Circuit held that 2007-83 was a legislative rule that should have gone through the APA’s notice and comment procedures<sup>3</sup>.

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1 27 F.4th 1138 (6th Cir. 2022).

2 No. 3:17-CV-110, 2022 WL 985619 (E.D. Tenn. Mar. 21, 2022), on reconsideration, No. 3:17-CV-110, 2022 WL 2078036 (E.D. Tenn. June 2, 2022)(IRS motion granted on other grounds not pertinent to this article).

3 5 U.S.C. §§ 551, 553–59, 701–06.

As the agency had not offered a notice and comment period prior to issuing 2007-83, and Congress had not otherwise exempted the agency from the APA's requirements, 2007-83 was set aside.

CIC Services, LLC set up captive insurance plans. As "material advisors" to these transactions under Listing Notice 2016-66, the company was required to report the transactions with its tax returns. After the Supreme Court found that CIC Services was not barred from bringing its case under the Anti-Injunction Act, the Eastern District of Tennessee found that the IRS had failed to follow notice and comment requirements prior to issuing 2016-66, largely for the same reasons the Sixth Circuit gave in *Mann*. The court went a step further than *Mann* and found 2016-66 to be arbitrary and capricious as the record did not show the potential for abuse of the insurance plans described in the notice.

The IRS filed its notice of appeal to the Sixth Circuit on July 29th, and CIC Services cross-appealed. CIC Services' notice of cross-appeal challenges the district court's determination that the IRS does not have to return all documents to non-party taxpayers and material advisors which were produced pursuant to Notice 2016-66.

On March 11th of this year, GBX Associates LLC filed a complaint arguing Listing Notice 2017-010—which mandates reporting of certain syndicated conservation easements—violated the APA for the same reasons as in *Mann*<sup>4</sup>. The case is currently pending before the Northern District of Ohio. GBX may prove pivotal to conservation easement transactions as the Department of Justice has admitted in its July 1st answer that *Mann* controls and that "the analysis in that decision ... appears to apply with equal force to IRS Notice 2017-10."<sup>5</sup> The DOJ has requested that 2017-10 be declared unlawful as to GBX only<sup>6</sup>, whereas GBX wants the notice vacated for taxpayers nationwide<sup>7</sup>.

Should Listing Notice 2017-010 be vacated at the national level or the IRS enjoined only as to GBX, taxpayers stand to gain a leg up with refund claims and penalty abatement related to these three listing notices.

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4 *GBX ASSOCIATES LLC, Plaintiff, v. UNITED STATES OF AMERICA*, Also Serve: United States of America, c/o Office of the United States Attorney United States Court House and Department of the Treasury, and Internal Revenue Service, Defendants., 2022 WL 1684796 (N.D. Ohio).

5 Defendants Answer 3.

6 *Id.* at 16.

7 Plaintiff's Reply in Support of Motion for Summary Judgment.



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