

Business owners who set up captives in the past thinking they were getting a nice tax advantage may come to regret that decision if they want to sell their business in the future, Slenn said.

In a merger or acquisition, business owners have to disclose reportable transactions in the purchase agreement, he said. "The buyer's going to see, 'Oh, they have one of these captives. That's a reportable transaction.' Then they're going to have to spend time investigating as part of their due diligence."

Why Now?

When the guidance was issued, Steven Miller, a former acting IRS commissioner who now works as the national director of tax at Alliantgroup LP, questioned why the agency didn't wait for the final ruling in an ongoing U.S. Tax Court case, *Avrahami v. Commissioner*.

Typically, when someone establishes a captive they set it up during the year in which they want to receive the tax deduction, Adkisson said. "Then, they get the captive formed and some time in December they pay the premium for the whole 12 months" ahead, he said.

The IRS likely issued the guidance now because many taxpayers wrap up their tax planning around this time of year, Adkisson said. Taxpayers who created captives for 2015 are "locked in" because they've already had to file their 2015 tax returns, he said. However, it's still early enough to "kill off" the marketing and stop the formation of captives that were intended to come on line in 2016, he said.

"There are a lot of people out there who had paid advisers for captives to be formed in 2016 thinking they're getting a tax deduction in 2016 and they're now going back to their advisers demanding their money back," he said.

Settlement, Criminal Litigation

Rachel L. Partain, a member of Caplin & Drysdale, said the IRS should expect a flood of captives coming under these new reporting requirements, especially since the notice is retroactive to Nov. 2, 2006. This date is consistent with Treasury Regulations Section 1.6011-4(h)(1), which provides the effective and applicability dates for "transactions of interest."

"There's a large, large percentage of the captive industry that's going to have to report," she said. Even now there are "large numbers of captives and managers under examination," in appeals or in Tax Court, she said.

Partain said her gut reaction is that the IRS will pursue a settlement initiative, because there are "just too many cases for them to work." She pointed to the Son of Boss Settlement Initiative in the early 2000s as an example. "Boss" stands for bond and option sales strategy. "Son of Boss" was a type of tax shelter promoted as a way to reduce federal income tax on capital gains.

In 2004 the IRS issued Announcement 2004-46 that offered Son of Boss investors an opportunity to "quickly close out of their tax disputes," according to the agency's website.

Beckett Cantley, a legal consultant and associate professor at Atlanta's John Marshall Law School, said some of the most egregious actors may be looking at civil and potentially criminal litigation.

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