



Current Federal Tax Developments

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Kaplan Financial Education



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This Week We Look At:

Tax Court finds that adding to listed transactions requires IRS to comply with Administrative Procedures Act

Election results and likely tax actions in lame duck session

What about next year?



IRS Cannot Add to Listed Transactions Without Following Administrative Procedures Act



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- *Green Valley Investors LLC et al. v. Commissioner*, 159 TC No. 5, 11/9/22
 - Issue involved Notice 2017-10 and IRC §6707A - must such added listed transactions undergo notice and comment per APA
 - *Mann Construction Inc. v. United States*, 27 F.4th 1138 (6th Cir. 2022) had held APA applied to these items
 - Tax Court now agrees

IRS Cannot Add to Listed Transactions Without Following Administrative Procedures Act



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- *Green Valley Investors LLC et al. v. Commissioner*, 159 TC No. 5, 11/9/22
 - APA requires notice and comment for legislative rules
 - Not required for “interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice.”
 - Identifying a listed transaction found to be, by its nature, a substantive (legislative) rule

IRS Cannot Add to Listed Transactions Without Following Administrative Procedures Act



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- *Green Valley Investors LLC et al. v. Commissioner*, 159 TC No. 5, 11/9/22
 - Rejected IRS argument that Congress provided for an exception here
 - IRS could go through the formal notice and comment process to restore this (and other) listed transactions, so this is likely only a temporary reprieve

The Election: What Does It Mean for Taxes



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- Lame Duck Session and the Election
 - At the time this was written, the AP had the following based on called races:
 - US Senate: 50 Democrats, 49 Republicans, 1 runoff (Majority 50 for Democrats, 51 for Republicans) *Tentative Democratic control*
 - US House: 211 Republicans, 201 Democrats, 23 left to be called (Majority 418 for either)

The Election: What Does It Mean for Taxes



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- **Lame Duck Session and the Election**
 - House is very likely to have a small Republican majority once all races are settled
 - Senate will be under Democratic control if all called races come out as projected. If both parties end up at 49 seats (likely either Arizona or Nevada fails to turn out as projected) then the Georgia runoff would determine control.

The Election: What Does It Mean for Taxes



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- Lame Duck Session and the Election
 - Given the lack of much direction clearly favoring one party, things are in a bit of flux
 - If Democrats aren't sure they will control the Senate, may spend most time in the session on confirming appointments
 - Otherwise, they may want to get things through while still have control of House

The Election: What Does It Mean for Taxes



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- Lame Duck Session and the Election
 - Republicans could be motivated to get some deals done to get things out of the way for their (likely) transition in the House
 - Extender package
 - Child tax credit extension
 - §174 expensing restoration

The Election: What Does It Mean for Taxes



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- Lame Duck Session and the Election
 - Less likely extenders:
 - Push §163(j) calculation back to last year's ATI calculation
 - Restore bonus depreciation to 100% for 2023
 - Retirement plan changes have a reasonable chance to get attached if something passes per Rep. Brady
 - May come very late in the session

The Election: What Does It Mean for Taxes



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- Next Session
 - House (assuming Republican House control):
 - Ranking Republican member Kevin Brady is retiring, three members reported pushing for chair of Ways & Means
 - Chair generally has major influence in what is heard in the committee, so likely who gets this will have influence

The Election: What Does It Mean for Taxes



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- Next Session
 - Senate:
 - If Democrats control Senate, Senator Wyden will almost certainly continue as Chairman
 - If Republicans get control of the Senate, then Senator Crapo of Idaho would likely take the Chairmanship

The Election: What Does It Mean for Taxes



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- Next Session
 - Since will no longer have one party controlling House, Senate and White House, tax bills will need significant bipartisan support to get enacted
 - Expect bills to be proposed that have no hope of being enacted just to “score points” against the other party
 - If extenders aren’t dealt with in the lame duck session, may get pressure to pass in the new Congress

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