Current Events Roundup: Stock Buyback Excise Tax, Corporate AMT, and Digital Asset Guidance

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In this article, we provide a brief overview of recent events pertinent to the taxation of financial products. Our discussion is organized as follows: First, we consider recent guidance on the stock buyback excise tax and corporate alternative minimum tax ("CAMT").[1] Second, we evaluate Chief Counsel Advice ("CCA") 202302011,[2] in which the Office of Chief Counsel concluded that significant declines in the value of a digital asset did not render the digital asset worthless or abandoned for purposes of Code Sec. 165. Third, we evaluate CCA 202302012,[3] in which the Office of Chief Counsel concluded that a qualified appraisal was required for donations of more than $5,000 of digital assets. Fourth, we provide an update on the status of the long-awaited digital asset broker reporting regulations under Code Secs. 6045 and 6045A. Fifth, we discuss the recently released changes to the digital asset question included on Internal Revenue Service ("IRS") Form 1040.

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Stock Buyback Excise Tax

Background

H.R. 5376 (commonly called the "Inflation Reduction Act" ("IRA")) introduced a one-percent excise tax on repurchases of stock by certain publicly traded companies defined as "covered corporations" (*i.e.*, domestic corporations with stock traded on an established securities market) occurring after December 31, 2022. "Repurchase" for these purposes is defined as a redemption within the meaning of Code Sec. 317(b), which generally includes any acquisition by a corporation of its stock from a shareholder in exchange for property, except for its stock or rights to acquire its stock. The statute also provides that a repurchase includes any transaction determined by Treasury to be economically similar to a repurchase. The excise tax is imposed on the fair market value ("FMV") of stock repurchased (or treated as repurchased). There is a "Netting Rule" which states

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that the value of stock treated as repurchased during the taxable year for purposes of computing the excise tax is reduced by the value of any new issuances of stock by the corporation during the same taxable year. There are six exceptions to the excise tax under the statute: (i) to the extent a repurchase is part of a reorganization under Code Sec. 368(a) and no gain or loss is recognized by the shareholder; (ii) if the stock repurchased or an amount of stock equal to the value of such stock is contributed to an employer-sponsored retirement plan, an employee stock ownership plan, or similar plan; (iii) if the total value of the stock repurchased during the tax year does not exceed $1 million; (iv) under regulations prescribed by Treasury, repurchases by dealers in securities in the ordinary course of business (the "Dealer Exception"); (v) repurchases by regulated investment companies ("RICs") or real estate investment trusts ("REITs"); and (vi) repurchases treated as dividends. A detailed discussion of the excise tax is outside the scope of this article.

Notice 2023-2

Notice 2023-2[4] (the "ET Notice") was recently released and sets forth a number of rules for the computation of the excise tax liability, including (i) certain general ordering and operating rules; (ii) rules for determining the FMV of stock repurchased and issued during the tax year; (iii) an exclusive list of certain Code Sec. 317(b) redemptions that are not treated as repurchases subject to the excise tax, an exclusive list of transactions that are treated as economically similar to repurchases subject to the excise tax, and a non-exclusive list of transactions that are treated as not economically similar to repurchases; (iv) certain rules pertaining to the application of the statutory exceptions to the excise tax (*e.g.*, the Dealer Exception); (v) an exclusive list of issuances that are disregarded for purposes of the Netting Rule; (vi) certain transition rules for fiscal year taxpayers; and (vii) a filing requirement. With respect to the applicability date of these provisions, the ET Notice generally indicates that it is anticipated that forthcoming proposed regulations will provide consistent rules that apply to repurchases after December 31, 2022, and to issuances made during a taxable year ending after December 31, 2022. Prior to the issuance of such proposed regulations, taxpayers may rely on the rules in the ET Notice. A discussion of certain provisions in the ET notice as it relates to financial products is included below.

The Dealer Exception

The ET Notice states that "dealer in securities" is defined by reference to Code Sec. 475(c)(1). Additionally, the ET Notice indicates that the Dealer Exception applies solely to the extent that (i) the dealer accounts for the stock as securities held primarily for sale to customers in the dealer's ordinary course of business, (ii) the dealer disposes of the stock within a time period consistent with the holding of the stock for sale to customers in the ordinary course of business (taking into account the prevailing market), and (iii) the dealer does not sell or otherwise transfer the stock to certain related parties. Further, any stock issued by a covered corporation that is a dealer in securities is not treated as issued to the extent the stock is issued, or otherwise is used to satisfy obligations to customers arising, in the ordinary course of the dealer's (or certain related dealer's) business of dealing in securities.

The guidance on the Dealer Exception is not surprising. As expected, it appears that the repurchase activity must be connected with the dealer's security business to qualify for the Dealer Exception. The exception is likely aimed at broker dealers that purchase and sell various stocks to fulfill customer obligations. While many taxpayers may meet the definition of a dealer in securities under Code Sec. 475(c)(1), typical stock buy-back transactions likely will not be within the scope of the Dealer Exception unless the repurchase is made in connection with the taxpayer's dealer business.

FMV

The ET Notice provides that the FMV of repurchased stock is its market price (regardless of whether the market price is the price at which the stock was repurchased). The ET Notice also provides that FMV is determined at the time in which ownership of the stock is transferred for tax purposes. The ET Notice prescribes four methods for determining the market price of repurchased stock that is traded on an established securities market: (i) the daily volume-weighted average price on the repurchase date, (ii) the price at the close of day on the repurchase date, (iii) the average of the high and low prices on the repurchase date, and (iv) the trading price at the time of the repurchase. In the case of stock not traded on an established securities market, the trading price is determined under the principles of Reg. §1.409A-1(b)(5)(iv)(B)(1). The FMV of issuances for purposes of the Netting Rule is determined in a similar manner. The method chosen for determining FMV must be applied consistently in a given year.

These rules clarify a number of uncertainties that existed. For example, certain derivative products such as accelerated share repurchase transactions ("ASRs") or

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capped calls may result in the receipt of shares of a taxpayer's stock in exchange for consideration that may not equal the FMV of the stock at the time of the transaction and may result in the receipt of shares at various dates. Prior to this guidance, it was unclear what the FMV was for purposes of the excise tax and when to treat the stock as repurchased.[5] Notice 2023-2 clarifies that the excise tax is levied on the FMV of the stock at the time that tax ownership of the stock is transferred (rather than being based on the amount or timing of a payment under the arrangement).

The ET Notice includes an example of the application of the excise tax to an ASR. In the example, Corporation X entered into an ASR on October 10, 2022, with an investment bank ("Bank"). Under the ASR, Bank agrees to deliver a number of shares of Corporation X stock to Corporation X during the term of the ASR, in an amount determined by reference to the price of Corporation X's stock on specified days during the term of the ASR. Pursuant to the ASR agreement, Corporation X paid Bank a prepayment amount and Bank delivered 80x shares of Corporation X stock on October 12, 2022, that it had borrowed in the open market. On final settlement of the ASR, on February 1, 2023, Bank delivers an additional 20x shares to Corporation X. The example indicates that for federal income tax purposes, ownership of those 20x shares is treated as transferring from Bank to Corporation X at the time of delivery (that is, February 1, 2023). The ET Notice's analysis of the example concludes that Corporation X is treated as repurchasing 80x shares of stock on October 12, 2022 (that is, the date on which ownership of the 80x shares delivered by Bank transferred from Bank to Corporation X).[6] Thus, the 80x share repurchase is not subject to the excise tax since it occurred prior to December 31, 2022. The 20x share repurchase, however, increases Corporation X's stock repurchase excise tax base for its 2023 taxable year because tax ownership was transferred on February 1, 2023.

Economically Similar Transactions

The ET notice provides an *exclusive* list of transactions that are treated as economically similar to repurchases. The list includes a number of corporate actions, such as certain reorganizations, split-offs, and complete liquidations. Because this list is exclusive, and because the statute specifically requires Treasury to determine which transactions are economically similar, it appears that transactions not on the exclusive list would not be considered economically similar to a repurchase. For example, the cash settlement of an equity derivative contract on a taxpayer's stock does not appear to be within the scope of the excise tax.

Per Se Funding Rule

In general, if a U.S. "specified affiliate" of an "applicable foreign corporation" (generally speaking, a U.S corporation or partnership that is more than 50-percent owned by a publicly traded foreign corporation, a "U.S. Applicable Specified Affiliate") acquires stock of the applicable foreign corporation from a third party, the U.S. Applicable Specified Affiliate is treated as a covered corporation with regard to the acquisition, and the acquisition is treated as a repurchase of stock of a covered corporation by the covered corporation (a "Foreign Stock Repurchase").

The ET Notice indicates that a Foreign Stock Repurchase is treated as occurring if the U.S. Applicable Specified Affiliate funds by any means (including through distributions, debt, or capital contributions) the acquisition or repurchase of stock of the applicable foreign corporation (the "Funding Requirement"), and such funding is undertaken for a principal purpose of avoiding the stock repurchase excise tax (the "Principal Purpose Requirement"). The FMV of stock treated as acquired by the applicable specified affiliate is limited to the amount funded. The ET Notice also includes a "*per se* rule," which indicates that the Principal Purpose Requirement is deemed to exist if the U.S. Applicable Specified Affiliate funds by any means, other than through distributions, the applicable foreign corporation (or another specified affiliate), and such funded entity acquires or repurchases stock of the applicable foreign corporation within two years of the funding (the "*Per Se* Funding Rule").

The *Per Se* Funding Rule appears to have a broad reach. For example, the excise tax would be levied when an applicable foreign corporation repurchases its stock if there are intercompany funding or cash-pooling arrangements with U.S. subsidiaries in place within two years of the repurchase. This would appear to apply under the ET Notice even if such arrangements may have been put in place years ago for valid routine business reasons.

Notably, the *Per Se* Funding rule is subject to a special applicability date. The ET Notice states that it is anticipated that forthcoming proposed regulations will provide consistent rules that will apply to repurchases and acquisition of stock made after December 31, 2022, that are funded on or after a date to be determined under public release.

CAMT

Background

In addition to the excise tax, the IRA introduced a 15-percent CAMT on the "adjusted financial statement income" ("AFSI") of certain large corporations defined as "applicable corporations" (very generally, corporations reporting at least a $1 billion three-year average of adjusted pre-tax net income on their consolidated financial statements), including certain related entities.[7] AFSI generally starts with net income or loss reported on an applicable financial statement ("AFS") (defined by reference to Code Sec. 451(b)(3)), which could then be adjusted by an array of adjustments. Such adjustments include, but are not limited to, an add-back for federal income and foreign taxes; special rules for related entities (such as consolidated and non-consolidated corporations, controlled foreign corporations ("CFCs"), and partnerships); determining non-effectively connected income-related AFSI for foreign corporations using principles of Code Sec. 882; and tax conformity for depreciation, any item of income in connection with mortgage servicing contracts, and defined benefit pensions.[8] An applicable corporation is liable for the CAMT to the extent its "tentative minimum tax" exceeds its regular U.S. federal income tax liability (including the "BEAT" under Code Sec. 59A), prior to taking into account general business credits under Code Sec. 38. Applicable corporations subject to the CAMT are allowed to claim a credit for CAMT paid against regular tax in future years, but the credit cannot reduce that future year's tax liability below the computed CAMT for that year. There are many additional rules to consider for the CAMT; a detailed discussion of the CAMT is outside the scope of this article.

Notice 2023-7

Notice 2023-7[9] (the "CAMT Notice") was recently released and addresses certain "time-sensitive issues" created by the CAMT. Specifically, the CAMT Notice describes rules that address certain issues under the CAMT regarding subchapters C and K of chapter 1 of the Code, troubled corporations, and affiliated groups of corporations that join in filing a consolidated return. The CAMT Notice also addresses certain CAMT issues with respect to the depreciation of property, a safe harbor method for determining whether a corporation is an applicable corporation subject to the CAMT, treatment of certain federal income tax credits under the CAMT, and rules that address the determination of applicable corporation status in circumstances involving certain partnerships. With respect to the applicability date of these provisions, the CAMT Notice generally indicates that it is anticipated that forthcoming proposed regulations will provide consistent rules that apply for taxable years beginning after December 31, 2022. Prior to the issuance of such proposed regulations, taxpayers may rely on the rules in the CAMT Notice. A discussion of certain provisions in the CAMT Notice as it relates to financial products is included below.

Depreciation

In determining AFSI, in general, the applicable corporation's book depreciation expense is replaced by tax depreciation (the "AFSI depreciation adjustment"). The CAMT Notice provides a number of rules regarding the AFSI depreciation adjustment, including the application of certain adjustments upon disposition of a depreciable asset and depreciation embedded in the cost of goods sold. The CAMT Notice also indicates that AFSI must be adjusted for "Covered Book Expense," which includes amounts that are recognized as a non-depreciation expense in the financial statements (*e.g.*, interest expense, rental expense) but are reflected in the unadjusted depreciable basis of the tax depreciable property.

The additional rules around AFSI depreciation adjustments are helpful; however, there still appears to be open issues. For example, consider a taxpayer that leases property to a lessee where the lease is depreciable to the lessor for tax purposes but non-depreciable for financial statement purposes (*e.g.*, the lease is characterized as a "true lease" for tax but characterized as a "financing lease" for financial accounting purposes). The AFS would presumably have interest income (and no depreciation expense) from the lease for financial accounting purposes. For tax purposes, there would be rental income and depreciation expense. The rules in Notice 2023-7 require taxpayers to adjust expense items (*i.e.*, Covered Book Expense) in situations where an asset is depreciable for tax purposes but not for financial accounting; however, the CAMT Notice does not require items of income to be adjusted. This creates an odd result in cases where tax depreciable assets impact items of income on an AFS. For example, in the above lease scenario, the taxpayer would presumably be able to reduce AFSI for tax depreciation on the lease, but the CAMT Notice does not indicate whether the taxpayer would need to adjust interest income in the AFS to avoid the duplication of items. The CAMT Notice indicates that other items may be subject to adjustment in future guidance published in the Internal Revenue Bulletin.

Cancellation of Debt Income

In general, a discharge of indebtedness (a "discharge") typically results in cancellation of debt ("COD") income that is includable in taxable income for affected borrowers under Code Sec. 61(a)(11). Code Sec. 108(a)(1), however, provides several exceptions to this rule, including when the discharge occurs in a title 11 bankruptcy or to the extent the borrower is insolvent. Further, Code Sec. 108(b) provides that the amount of excluded COD income is applied to reduce certain tax attributes of the taxpayer (*e.g.*, net operating losses, credit carryovers).

Notice 2023-7 generally provides that, to the extent a discharge results in excluded COD income for tax purposes, the corporation excludes from AFSI an amount of financial statement gain resulting from a discharge equal to the amount of excluded COD income. This exclusion applies for purposes of calculating the AFSI for the tax year in which the discharge occurs. This rule will generally provide relief for troubled taxpayers. Notably, however, it appears that the adjustment only applies if the financial statement gains and excluded COD income occur in the same year. If there are differences between the timing of financial statement gain and excluded COD income, the rule may not be as beneficial. It is not uncommon for there to be timing differences for these items. For example, the modification of a debt instrument could potentially give rise to excluded COD income in certain scenarios if there is a significant modification within the meaning of Reg. §1.1001-3. The debt instrument would be subject to different rules for financial accounting purposes that could result in the realization of financial statement gain in a different year.

The CAMT Notice also indicates that if financial statement gain from a discharge is excluded from AFSI, "CAMT attributes" must be reduced by the amount of excluded COD income that results in a reduction of tax attributes for regular tax purposes. The CAMT Notice does not define what CAMT attributes are and requests comments on this matter.[10]

Items Unaddressed

The CAMT Notice addresses a lot of issues, but also leaves many issues unaddressed, which speaks of the magnitude of uncertainties and complexities that the CAMT has created. The CAMT Notice indicates that additional interim guidance will be issued to address the treatment under the CAMT of items that are marked-to-market for financial statement purposes, the treatment of certain items reported in other comprehensive income, and the treatment of embedded derivatives arising from certain reinsurance contracts. Also unaddressed in the CAMT Notice is the treatment of items of income associated with mortgage servicing contracts, which has lingering questions. For example, could income from a position that hedges mortgage servicing contracts be considered "any item of income in connection with a mortgage servicing contract" and thus be subject to adjustment for AFSI purposes? Further, it is unclear how mortgage servicing contracts with an excess servicing component will be treated under the CAMT regime as the statute defers to the Secretary to provide guidance to prevent the avoidance of tax in such a scenario.

CCA 202302011

Summary

In CCA 202302011, an individual purchased units of a cryptocurrency in 2022 for $1.00 per unit for personal investment purposes. After the taxpayer acquired the cryptocurrency, the per unit value decreased significantly, such that each unit was valued at less than one cent at the end of 2022. On December 31, 2022, the cryptocurrency continued to be traded on at least one cryptocurrency exchange, and the taxpayer-maintained dominion and control over the cryptocurrency, such that the taxpayer was able to sell, exchange, or transfer it. The taxpayer claimed a deduction under Code Sec. 165, taking the position that the cryptocurrency was either worthless or abandoned.

The government concluded that a loss was not allowable under Code Sec. 165 because the taxpayer had not abandoned or otherwise disposed of the cryptocurrency and the cryptocurrency was not worthless at the end of the 2022 tax year. The government went on to state that even if a loss had been sustained under Code Sec. 165, the loss would be disallowed in any event because Code Sec. 67(g) suspends miscellaneous itemized deductions for taxable years 2018 through 2025.

Background

Although not explicitly stated, the cryptocurrency considered in CCA 202302011 appears to be the stablecoin TerraUSD ("UST").[11] UST is an "algorithmic" stablecoin on the Terra blockchain. Unlike traditional stablecoins, which are backed by hard assets,[12] UST sought to maintain its U.S. dollar peg *via* an adjustment mechanism tied to LUNA, the native currency of the Terra blockchain. Somewhat simplified, the adjustment mechanism provided that holders of UST could swap 1 UST for $1 of

LUNA, destroying ("burning") the UST in the process. Similarly, holders of LUNA could swap (and burn) $1 of LUNA for 1 UST.

As long as the market believed LUNA had value, the U.S. dollar peg was maintained because any divergence between the price of 1 UST and 1 U.S. dollar created an arbitrage opportunity. For example, if UST were trading at $0.99, arbitragers could buy it for $0.99 and then exchange it for $1 worth of Luna, making an instant profit. If UST were trading at $1.01, arbitragers could buy $1 worth of Luna (for $1) and use it to buy a UST worth $1.01, making an instant profit. Both of these trades would have the effect of bringing the price of UST closer to $1.00.

In effect, the aggregate value of LUNA operated as a "cushion" to the U.S. dollar peg. To state the obvious, the ability of LUNA to cushion UST price volatility depended on the aggregate value of LUNA exceeding the number of UST outstanding. As it turns out, the price of LUNA was, unfortunately, highly correlated to market confidence in UST. In early May 2022, UST lost its U.S. dollar peg.[13] This sparked a loss of confidence that led UST holders to swap UST for LUNA *en masse* (remember 1 UST can always be swapped for $1 worth of LUNA, regardless of the price of LUNA). The resulting LUNA hyperinflation, coupled with the increasing loss of confidence in the overall protocol, led to dramatic devaluation of LUNA. Once the aggregate value of LUNA was less than the number of UST outstanding, the conversion process used to maintain the peg could no longer be successful and the protocol had effectively failed.

Terra's unraveling was rapid. Over the course of several days, the price of LUNA dropped from roughly $80/coin to virtually zero.[14] UST experienced a similar devaluation, falling to roughly $0.02 by the end of May.[15]

Discussion

Security Status

CCA 202302011 concludes that the cryptocurrency described in the guidance "is none of the items listed in Code Sec. 165(g)(2), and therefore Code Sec. 165(g) does not apply." It is somewhat unfortunate that the government was not more specific regarding which cryptocurrency was the subject of the ruling. If, as we suspect, the cryptocurrency in question is UST, then this conclusion would seem correct and relatively straightforward. However, it is not necessarily true that digital assets are never Code Sec. 165(g)(2) securities. For example, stocks and securities that trade in token form might be classified as Code Sec. 165(g)(2) securities—in those situations, the blockchain is just a means of tracking ownership. In addition, certain stablecoins could plausibly be classified as Code Sec. 165(g)(2)(C) securities, as we discuss below. If taxpayers do not infer from the facts of the ruling[16] that the stablecoin being described is UST, an algorithmic stablecoin, they may draw an overly broad conclusion that digital assets are *never* Code Sec. 165(g)(2) securities.

Code Sec. 165(g)(2)(C) defines a security (for purposes of Code Sec. 165(g)) to include (i) a share of stock in a corporation; (ii) a right to subscribe for, or to receive, a share of stock in a corporation; and (iii) a bond, debenture, note, or certificate, or other evidence of indebtedness, issued by a corporation or by a government or political subdivision thereof, with interest coupons or in registered form. Some commentators have suggested that "traditional" (non-algorithmic) stablecoin investments could be classified as debt instruments because holders have a legally enforceable claim to demand that the sponsor redeem its stablecoin for U.S. dollars, and have a reasonable expectation that the sponsor will have sufficient liquid assets to meet a redemption demand.[17] Most stablecoin issuers are corporate entities. Therefore, if one accepts that stablecoins are indebtedness, the only remaining requirement to fit into the third category of Code Sec. 165(g)(2) securities is that the stablecoin be in registered form. Could the blockchain satisfy that requirement? That may be a matter of interpretation.

It is not entirely clear how the term "registered form" should be interpreted for purposes of Code Sec. 165(g)(2)(C). One possibility is that the definition of registered form is governed by Code Sec. 165(j)(2)(B), which was enacted as part of the Tax Equity and Fiscal Responsibility Act ("TEFRA"). Code Sec. 165(j)(2)(B) sits within the same section as Code Sec. 165(g)(2)(C) and there is nothing in the legislative history which suggests that the definition of registered form provided by Code Sec. 165(j)(2)(B) was not intended to apply broadly to the entirety of Code Sec. 165. Nevertheless, the circumstances of its enactment (it post-dates the enactment of Code Sec. 165(g)(2)(C)) and its position within that Code section (under paragraph (j)) may indicate that Code Sec. 165(j)(2)(B) was primarily, and perhaps solely, intended to provide definitional rules for Code Sec. 165(j).[18] This has led some practitioners to suggest that the old case law governing the definition of registered form for purposes of Code Sec. 165(g)(2)(C) may still apply, rather than the definition of registered form under Code Sec. 165(j)(2)(B).[19] We consider both possibilities below.

Code Sec. 165(j)(2)(B) cross-references, through several intermediate cross-references, the definition of registered form under Reg. §5f.103-1(c).[20] Under Reg. §5f.103-1(c)(1), a debt instrument generally is in registered form if (i) the obligation is registered as to both principal and any stated interest with the issuer (or its agent) and any transfer of the obligation may be effected only by surrender of the old obligation and reissuance to the new holder; (ii) the right to principal and stated interest with respect to the obligation may be transferred only through a book entry system maintained by the issuer or its agent; or (iii) the obligation is registered as to both principal and stated interest with the issuer or its agent and can be transferred both by surrender and reissuance and through a book entry system. Reg. §5f.103-1(c)(2) states that an obligation is considered transferable through a book entry system if the ownership of an interest in the obligation is required to be reflected in a book entry, whether or not physical securities are issued; a "book entry" is a record of ownership that identifies the owner of an interest in the obligation. An obligation that would otherwise be considered to be in registered form is not considered to be in registered form as of a particular time if it can be converted at any time in the future into an obligation that is not in registered form.

The registered form requirements under Reg. §5f.103-1(c) have at times been flexibility interpreted. For example, in LTR 9626056,[21] the IRS ruled that a bankruptcy claim could be considered an obligation in registered form, because the judgement provided a record of the owner of principal and bankruptcy interest. Under a flexible interpretation, the blockchain might be viewed as creating a record of the "owner" of the debt principal represented by a stablecoin. However, one must also consider the purpose of the registered form requirements. If the definition of registered form is linked to Reg. §5f.103-1(c) by Code Sec. 165(j)(2)(B), these requirements would seem to be intended to combat money laundering and tax evasion by maintaining a record of who owns the principal and interest on a debt instrument. In that regard, a blockchain registry may fall short. Although the blockchain maintains a record, that record is pseudonymously tied to a private key, not an individual or entity.

As noted above, it is possible that the definition of registered form for purposes of Code Sec. 165(g)(2) is not tied to Reg. §5f.103-1(c) because Code Sec. 165(g) predates Code Sec. 165(j) (which provides the link to Reg. §5f.103-1(c)). Code Secs. 165(g) and 165(j) also appear to have different purposes. Code Sec. 165(j) is intended to discourage the use of bearer instruments on account of concerns that those instruments enabled money laundering and tax evasion. The registration requirements of Code Sec. 165(g)(2)(C), on the other hand, seem primary intended to distinguish publicly available debt instruments from private lending transactions (this is also probably why the provision only applies to debt issued by corporations; when Code Sec. 165(g) was enacted, publicly available debt was almost always issued by a corporation).[22] Thus, there are reasons to believe the definition of registered form for purposes of Code Sec. 165(g)(2)(C) is still governed by case law predating the promulgation of the Reg. §5f.103-1(c). Under this interpretation, whether an instrument is in registered form is tied to its ability to safeguard the holder against unauthorized transfers, not its ability to create transparency. For example, in *Miller v. Commissioner*,[23] the Tax Court stated: "Registration, for practical purposes, means that the obligation runs only to the registered owner. The primary purpose is to safeguard the investor or holder by making unregistered transfers ineffective."[24] We also note that a number of other cases held that debt instruments were in registered form solely based on the maintenance of a register (in some cases, even an informal register).[25] If the registration requirement was intended to distinguish publicly traded debt instruments from private lending arrangements in the context of Code Sec. 165(g)(2), then stablecoins (which trade with a high degree of liquidity) would arguably meet the registration requirements through the blockchain's maintenance of ownership records.

The government undoubtedly came to the correct conclusion in CCA 202302011 if, as we suspect, the cryptocurrency at issue was UST. UST is not backed by any assets and therefore cannot be considered debt. Nor is it stock within the commonly accepted meaning of that term.[26] However, for the reasons we have described, there is at least a possibility that certain digital assets would be considered securities for purpose of Code Sec. 165(g)(2). Stocks and securities trading in token form could be securities. Similarly, certain stablecoins could potentially be securities (in the context of traditional asset-backed stablecoins, we certain hope that Code Sec. 165(g) never becomes relevant, but the digital asset space seems to be full of surprises). Taxpayers should therefore bear in mind the limited facts and cursory analysis of this issue in CCA 202302011 and not generalize too broadly.

Individual Taxpayers and Miscellaneous Itemized Deductions

The government's conclusion that an individual is not eligible to claim a deduction under Code Sec. 165 for worthlessness or abandonment losses is hardly surprising

and is a consideration that was previously covered in the Journal in *Year-End Tax Considerations for Cryptocurrency Investors* (Vol. 19, No. 3). We will not reprise that analysis here.

Abandonment Considerations

Also unsurprising is the conclusion that the taxpayer did not abandon her cryptocurrency. In the facts of CCA 202302011, the taxpayer-maintained ownership of the cryptocurrency; retained the ability to sell, dispose, or transfer the cryptocurrency; and did not take any affirmative steps to abandon the cryptocurrency. As noted in CCA 202302011, courts have generally required (i) an intention to abandon the property, coupled with (ii) an affirmative act of abandonment.[27] Clearly, the taxpayer did not meet these requirements.

But what if the taxpayer had met those requirements? Could an intent (however misguided) coupled with affirmative steps to abandon cryptocurrency result in an abandonment for tax purposes? Unfortunately, many taxpayers received poor advice in the aftermath of the Terra collapse and many attempted to secure an ordinary deduction (as opposed to a capital loss subject to limitation) by abandoning their near-worthless UST and LUNA. If these taxpayers did in fact permanently abandon their digital assets, it appears they would have forfeited their ability to receive a capital loss upon disposing of the assets for their nominal value.[28] On the other hand, not all taxpayers are subject to the Code Sec. 67(g) limitation on miscellaneous itemized deductions. Could these taxpayers abandon digital assets to secure an ordinary, rather than capital, loss?[29]

CCA 202302011 is silent on whether there are steps the taxpayer could have taken to effectuate an abandonment. In other contexts, abandonment has been effectuated by written notice of an intention to abandon the property.[30] Could a taxpayer abandon a digital asset by providing written notice to its creators? It is not entirely clear that would be possible or sufficient in light of the decentralized nature digital asset ownership. That is, unlike a partnership or corporation where there are parties in control of the organization (and therefore able to consent to a requested abandonment), digital assets are (at least in theory) not subject to the control of any particular party. What if the cryptocurrency were held with a centralized cryptocurrency exchange? Could the taxpayer abandon the cryptocurrency by notifying the exchange of its intention and desire to abandon the property? Again, the answer is not clear. In the cases of stock and partnership interests, the abandonments were effectuated by providing written notice to the issuer (the corporation or partnership), not a broker or custodian with which those assets were held. We understand that certain taxpayers have attempted to abandon cryptocurrencies by documenting their intention to abandon the property in an internal memorandum and sending the asset to a "burn" address (a wallet that no person has access to). This arguably satisfies the requirements that the taxpayer manifest their intention to abandon the property with an affirmative act of abandonment. Further, it seems difficult to characterize such a transaction as something other than an abandonment because the burn account is not held by a party to whom the taxpayer might make a gift and nothing is received in exchange for the abandoned property (*i.e.*, there is no amount realized, which courts have described as a requirement for a sale or exchange).[31]

Worthlessness Evaluation

The criterion of worthlessness has generally been interpreted strictly: a deduction is unavailable if even a modest fraction of the investment can be recovered.[32] However, the treatment of trivial expected recoveries has been less certain. In Rev. Rul. 71-577,[33] the IRS ruled that the potential of receiving a trivial value, such as "one or two cents on the dollar" is insufficient to preclude a finding of worthlessness. Similarly, in *Buchanan v. United States*,[34] the court indicated that the phrase "wholly worthless" is not to be taken literally, stating:

> The proposition that the recovery of a tiny amount of a debt, even if fully anticipated rather than completely unpredictable, will not defeat a finding of worthlessness is in only superficial tension with the language quoted earlier from the treasury regulation ("wholly worthless") and the cases. That language is not intended to be taken literally. Its purpose is to emphasize that a nonbusiness debt is not deductible merely because it has lost most of its value.

In the case of Rev. Rul. 71-557, it is not entirely clear whether this ruling is focused on the insignificance of the value or the fact that there is only a *possibility* of receiving the trivial amount. Thus, Rev. Rul. 71-557 could possibly be reconciled with the authorities applying a stricter interpretation of worthlessness if one views it as an expression of the age-old standard that a taxpayer need not be an "incorrigible optimist" when evaluating the likelihood of recovery.[35] In the case of *Buchanan*, the statement above did not bear on the facts at issue in the case, as it was clear that the holder ultimately received a substantial sum

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from the borrower, and it should therefore be regarded as *dicta*. No other court has held that a debt instrument was worthless when there was an expectation of a trivial recovery. Nevertheless, these authorities did cause some to question whether a nominal or trivial value could result in an asset being considered worthless for U.S. federal income tax purposes.

In this respect, CCA 202302011's conclusion that the taxpayer's cryptocurrency was not worthless because it could be sold for mere fractions of a penny is significant. For individual taxpayers holding UST or LUNA at year end, the fact that the digital assets are worth a nominal sum does not appear to be sufficient to render those assets worthless in the eyes of the IRS. Thus, individual taxpayers will not suffer what could in effect be a nondeductible Code Sec. 165 loss at the end of 2022 (given Code Sec. 67(g)), which would forfeit their basis in the asset, merely because of the significant decline in the asset's value and its extremely limited prospects of recovery. This means that taxpayers can continue to hold such assets, for tax planning or other reasons, without worrying that they may inadvertently lose their basis.[36]

This is also welcome news for taxpayers that have used loss-harvesting platforms to trigger losses. These platforms generally allow taxpayer to transfer assets in exchange for one penny, under the premise that the transfer will be respected as a taxable sale.[37] CCA 202302011 would seem to lend support treating these transactions as *bona fide* sales, rather than an in-substance abandonment of an asset for which the loss would be subject to the limitations imposed on miscellaneous itemized deductions.

CCA 202302012

Summary

In CCA 202302012, an individual purchased units of a cryptocurrency for personal investment purposes. The taxpayer later transferred all of her cryptocurrency to a charitable organization described in Code Sec. 170(c). On her self-prepared Federal income tax return for the year of the donation, the taxpayer completed Part I, Section B of Form 8283, attached it to her return, and claimed a charitable contribution deduction of $10,000. The claimed $10,000 deduction was based on a value listed at the cryptocurrency exchange on which the cryptocurrency was traded at the date and time of the donation. The taxpayer did not obtain, or attempt to obtain, a qualified appraisal for the donation, and the taxpayer argued that no appraisal was required because the cryptocurrency had a readily ascertainable value.

CCA 202302012 concludes that (i) a qualified appraisal is required for cryptocurrency donations if a deduction greater than $5,000 is claimed and (ii) the reasonable cause exception will not excuse noncompliance with the qualified appraisal requirement.

Analysis

To claim a charitable contribution deduction, a taxpayer must satisfy certain substantiation requirements. In general, for contributions of property for which a deduction of more than $5,000 is claimed, the taxpayer must obtain a qualified appraisal of such property for the taxable year in which the contribution is claimed.[38]

To be a "qualified appraisal," an appraisal must be conducted by a "qualified appraiser" in accordance with generally accepted appraisal standards and meet certain other requirements described in the relevant regulations.[39] The term "qualified appraiser" means an individual who (i) has earned an appraisal designation from a recognized professional appraiser organization or has otherwise met minimum education and experience requirements set forth in regulations, (ii) regularly performs appraisals for which the individual receives compensation, and (iii) meets such other requirements described in regulations.[40]

A qualified appraisal is not required for donations of certain readily valued property specifically set forth in the Code and regulations, namely, cash, stock in trade, inventory, property primarily held for sale to customers in the ordinary course of business, publicly traded securities, intellectual property, and certain vehicles.[41] Other than publicly traded securities, none of these categories readily admits cryptocurrency held for investment. In respect to the publicly traded securities category, Reg. §1.170A-13(c)(7)(xi) defines the term "publicly traded securities" for purposes of Code Sec. 170 to mean securities as defined by Code Sec. 165(g)(2). Recall that Code Sec. 165(g)(2) defines a security as (i) a share of stock in a corporation; (ii) a right to subscribe for, or to receive, a share of stock in a corporation; or (iii) a bond, debenture, note, or certificate, or other evidence of indebtedness, issued by a corporation or a government or political subdivision thereof, with interest coupons or in registered form. CCA 202302012 concludes that a qualified appraisal is required because the taxpayer's cryptocurrency did not fall within a class of property specifically excluded from the requirement.

Most mainstream cryptocurrencies do not fall within the definition of a security under Code Sec. 165(g)(2).

However, as we have described above, this is not necessarily universally true, and it is possible that certain digital assets do in fact qualify as securities under Code Sec. 165(g)(2). Regardless of the security status of a particular asset, on purely policy grounds, liquid digital assets certainly ought to be excluded from the qualified appraisal requirement, given the readily available pricing information. However, it is admittedly difficult to find a technical basis for a broad traded property exclusion given the specific (and limited) exclusions in the Code and regulations. The government's position on this point is therefore not surprising.

CCA 202302012 then turned to examine whether the failure to meet the qualified appraisal requirement was due to a reasonable cause and not to willful neglect. The reasonable cause standard generally requires that the taxpayer have exercised ordinary business care and prudence as to the challenged item.[42] CCA 202302012 determines that the reasonable cause standard was not met because the taxpayer did not attempt to obtain a qualified appraisal. The IRS also noted that the appraisal requirement is described on Form 8283, such that a reasonable person reviewing their return should be aware of the requirement. CCA 202302012 then went on to say that "the reasonable cause exception was not intended to provide taxpayers with the choice of whether to obtain a qualified appraisal, but to provide relief where an unsuccessful attempt was made in good faith to comply with the requirements of section 170." Although the cases cited in CCA 202302012 certainly support that contention, the properties donated in those cases did not have a readily apparent value.[43] Therefore, taxpayers might possibly attempt to distinguish the donation of digital assets on the grounds that a reasonable person exercising ordinary business care and prudence would not expect that a formal appraisal of actively traded property would be required (because the appraisal would presumably be based on the same trading value the taxpayer used to determine the amount of the donation). Taxpayers might also argue that they reasonably believed cryptocurrencies were securities under the tax law in light of the widely publicized Securities and Exchange Commission ("SEC") actions treating cryptocurrencies as securities.

Announcement 2023-2

Summary

Announcement 2023-2[44] states that the Treasury Department and the IRS intend to implement the Infrastructure Investment and Jobs Act amendments to Code Secs. 6045 and 6045A by issuing new regulations specifically addressing the application of those Code sections to digital assets and providing forms and instructions for broker reporting. Until such new regulations are finalized: (i) brokers may report gross proceeds and basis as required by the existing law and regulations under Code Sec. 6045 as of December 23, 2022; (ii) brokers may furnish statements on transfers of covered securities as required by the existing law and regulations under Code Sec. 6045A as of December 23, 2022; and (iii) brokers will not be required to report or furnish additional information with respect to dispositions of digital assets under Code Sec. 6045, or issue additional statements under Code Sec. 6045A, or file any returns with the IRS on transfers of digital assets under Code Sec. 6045A(d).

Analysis

Cost basis reporting under Code Secs. 6045 and 6045A generally applies to any "specified security" after the "applicable date."[45] The Infrastructure Investment and Jobs Act amended the definition of a "specified security" to include digital assets.[46] The "applicable date" for digital asset cost basis reporting is January 1, 2023.[47] Some have questioned whether the Treasury Department and the IRS have the authority to delay the Code Sec. 6045 and Code Sec. 6045A digital asset reporting requirements. In that regard, it may be significant that the Code also provides that "[e]xcept as otherwise provided by the Secretary, the term 'digital asset' means any digital representation of value which is recorded on a cryptographically secured distributed ledger or any similar technology as specified by the Secretary."[48] Might that mean that the Treasury Department and the IRS are within their authority to provide that the term "digital asset" does not include a cryptographically secured digital representation of value until after the forthcoming regulations are finalized? There is at least a plausible technical "hook" for the delay. On a more practical level, it seems unlikely that the delayed effective date will be challenged.

It seems that the language in Announcement 2023-2 was carefully crafted to avoid creating any implications as to the current applicability of broker reporting to digital assets. Gross proceeds reporting (but not cost basis reporting) is required for commodities transactions.[49] For this purpose, a commodity includes "[a]ny type of personal property or an interest therein ... the trading of regulated futures contracts in which has been approved by the Commodity Futures

Trading Commission."[50] The Chicago Mercantile Exchange ("CME") currently offers bitcoin and ether futures and is regulated by the Commodities Futures Trading Commission ("CFTC"). However, some have pointed out that for an instrument to be classified as a commodity, trading on a CFTC regulated exchange is not necessarily sufficient; the definition of a commodity also requires that futures trading be "approved" by the CFTC. Our understanding is that bitcoin and ether futures were listed on the CME through a self-certification process, such that an explicit CFTC approval was not obtained.[51] Thus, whether bitcoin and ether transactions are subject to gross proceeds reporting under current law depends on how the definition of a commodity under Reg. §1.6045-1 is interpreted. Given this uncertainty and the taxpayer confusion that would be caused by reporting bitcoin and ether transactions but no other digital asset transactions, most brokers do not currently report such transactions on Form 1099-B.

Proposed regulations under Code Secs. 6045 and 6050W were received by the Office of Management and Budget's ("OMB's") Office of Information and Regulatory Affairs on January 10, 2023 (guidance under Code Sec. 6045A was not mentioned).[52] Taxpayer should therefore expect to see proposed regulations on at least some aspects of the digital asset cost basis reporting framework in the near future.

Form 1040 Digital Asset Question Updated

The 2021 Form 1040 page 1 included the following question:

> At any time during 2021, did you receive, sell, exchange, or otherwise dispose of any financial interest in any virtual currency?

The 2022 Form 1040 page 1 now includes the following question (the "Digital Asset Question"):

> At any time during 2022, did you: (a) receive (as a reward, award, or payment for property or services); or (b) sell, exchange, gift, or otherwise dispose of a digital asset (or a financial interest in a digital asset)?

The changes appear to be intended to provide a greater level of detail to taxpayers.[53] However, some practitioner comments were not addressed by the revisions.

For example, some practitioners suggested that the Digital Asset Question focus on transactions with income tax consequences so that it would provide useful information for purposes of determining the completeness of Form 1040.[54] The government did not adopt this suggestion and the 2022 Instructions to Form 1040 indicate that reporting is required for certain transactions that do not create an income tax liability (*e.g.*, gifts of digital assets).

Practitioners also suggested that the phrase "financial interest" be further defined, but this suggestion was not adopted.[55] As a result, the term "financial interest" could potentially be interpreted quite broadly to include (i) investment vehicles (*e.g.*, partnerships, trusts) owning digital assets; (ii) ownership of stock in a corporation that owns digital assets; and (iii) ownership of an index fund that owns stock in a corporation that owns a digital asset. IRS commentary on this matter has indicated that taxpayers should favor overreporting. Taken to an extreme, this suggestion would require that all taxpayers buying or selling an S&P 500 Index ETF should check yes when answering the Digital Asset Question (Tesla is included in the S&P 500 and Tesla currently holds bitcoin).

ENDNOTES

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1 Unless otherwise indicated, Code Sec. and Reg. § references are to the Internal Revenue Code of 1986, as amended (the "Code") or the applicable regulations promulgated pursuant to the Code (the "regulations").

2 (January 13, 2023).

3 *Id.*

4 IRB 2023-3, 374, (December 27, 2022).

5 For a discussion of such issues, *see* Joshua S. Tompkins *et al., Current Events Roundup: The New Stock Buyback Excise Tax, ILM 20224010, and Deitch v. Commissioner*, 19, 3 J. Tax'n Fin. Prods. (2022).

6 As a side note, it appears that the securities borrowing transaction executed by Bank resulted in tax ownership of Corporation X stock

transferring from the securities lender to Bank (the securities borrower).

[7] If the corporation is a member of a foreign-parented multinational group ("MNG"), the $1 billion AFSI threshold is modified to also include non-effectively connected income financial statement profits of foreign corporations (which is not AFSI by its terms) and is supplemented by a special three-year average $100 million AFSI test that only takes into account the group's actual AFSI (*i.e.*, U.S. ECI-related adjusted financial statement profits of foreign corporations and AFSI of domestic corporations, including controlled foreign corporation ("CFC") income).

[8] With respect to mortgage servicing contracts, the IRA indicates that the Secretary shall provide regulations to prevent the avoidance of tax imposed with respect to amounts not representing reasonable compensation (as determined by the Secretary).

[9] IRB 2023-3, 390 (December 27, 2022).

[10] The CAMT Notice also provides that, to the extent that the emergence from bankruptcy results in gain or loss on the AFS, such gain or loss is not taken into account for purposes of calculating AFSI in the year of emergence.

[11] For a full discussion of the Terra protocol, see *web.archive.org/web/20220510182707/https://docs.terra.money/docs/learn/protocol.html*.

[12] In a sense, UST did have *some* hard asset backing. The Luna Foundation Guard was an organization "mandated to build reserves supporting the $UST peg amid volatile market conditions." To do this, it raised $1 billion by selling LUNA and used the proceeds to acquire bitcoin that could be sold in an effort to defend the UST's US dollar peg. The Luna Foundation Guard's efforts were ultimately insufficient to maintain the peg, as described below.

[13] The actual events were somewhat more dramatic and involved Luna Foundation Guard attempts to defend the peg, tweets from the creator of the protocol (Do Kwon), temporary recoveries, and the ultimate collapse of the protocol.

[14] *www.Coinbase.com*.

[15] *Id*.

[16] *E.g.*, the $1 initial price, the decline in value in 2022, and the nominal value at the end of the year.

[17] *See* New York State Bar Association, *Report No. 1461—Report on Cryptocurrency and Other Fungible Digital Assets* (April 18, 2022) ("The principal hallmarks of indebtedness for federal income tax purposes are that the holder has a legally enforceable right to the repayment of a sum certain on demand or on a maturity date in the reasonably foreseeable future. Although instruments treated as indebtedness for federal income tax purposes typically have a positive yield in the form of stated interest or original issue discount, a non-yield bearing instrument such as a bank deposit or negative yield-bond can be debt for federal income tax purposes. Accordingly, in cases where a holder of a Sponsored USD Stablecoin has a legally enforceable claim to demand that the sponsor redeem its stablecoin for U.S. dollars, and has a reasonable expectation that the sponsor will have sufficient liquid assets to meet a redemption demand, we believe that it would be reasonable to characterize the stablecoin as indebtedness of the sponsor for federal income tax purposes.").

[18] Under Code Sec. 7806(b), no inference, implication, or presumption of legislative construction shall be drawn or made by reason of the location or grouping of any particular section or provision or portion of the Code. However, courts have sometimes looked to these items for guidance when interpreting an ambiguous provision. *See Montero-Martinez v. Ashcroft*, CA-9, 277 F3d 1137 (2002); *Buculei*, CA-4, 262 F3d 322 (2001); *Emery Worldwide Airlines, Inc.*, FedCl, 49 FedCl 211 (2001), *aff'd*, CA-FC, 264 F3d 1071 (2001).

[19] *See, e.g.*, David Garlock, *Federal Income Taxation of Debt Instruments*, ¶1603.02[B] ("[T]he question becomes whether the body of authorities defining 'registered form' survives the later regulatory definition. On the one hand, there is no specific cross reference between Code Sec. 165(g)(2) and the later definition. Moreover, although it is clear that the policy behind the registered form requirement for the TEFRA provisions and the portfolio interest exemption is to ensure that there is a record of ownership of the debt instrument, the same cannot be said for the registered form rule in Code Sec. 165(g)(2)(C). Instead, it appears that the registered form provision in Code Sec. 165(g)(2)(C) was intended to distinguish bonds that are generally held as capital investments and freely tradeable from loans arising from private lending transactions .... In the authors' view, a taxpayer reasonably can apply the narrower common law definition for registered form under Code Sec. 165(g)(2)(C), as there is no specific cross reference to the regulatory definition, and it is clear that Reg. §1.165-12 was promulgated under Code Sec. 165(j)."). *But see* Stephen D. Fisher, *Navigating the Maze at the Intersection of Code Secs. 165(g) and 166*, J. Tax'n Fin. Prods., 13, 4 (2016) (indicating that the definition of registered form looks to Reg. §5f.103-1(c)).

[20] Specifically, Code Sec. 165(j)(2)(B) provides that "registered form" has the same meaning as when used in Code Sec. 163(f). Code Sec. 163(f) does not define the term, but references Code Sec. 149(a)(3), which states that a book entry bond is treated as in registered form if the right to the principal of, and stated interest on, the bond may be transferred only through a book entry consistent with Treasury Regulations. Reg. §1.165-12(b)(1) provides that for obligations issued after September 21, 1984, "registered form" has same meaning as in section 103(j)(3) (which has been repealed) and Reg. §5f.103-1(c). Reg. §1.165-12(b)(2) addresses obligations issued after December 31, 1982, and on or before September 21, 1984.

[21] LTR 9626056 (June 28, 1996).

[22] *See supra* note 19.

[23] 32 TC 954, Dec. 23,699 (1959), *acq.*, 1959-2 CB 6, *rev'd. on other issues*, CA-10, 61-1 USTC ¶9156, 285 F2d 843 (1960).

[24] *Id.* at 965 and 966.

[25] *See* C. *Oestreicher*, 20 TC 12, Dec. 19,561 (1953) (informal register sufficient for an instrument to be considered in registered form); *Edith K. Timken*, 6 TC 483, 487 (1946) (numbered notes with a definite arrangement for assignment were in registered form).

Admittedly, IRS guidance and court decisions have at times indicated that the registered form inquiry is form-driven. *See* Rev. Rul. 73-101, 1973-1 CB 78 (taxpayer can claim a bad debt deduction after the loan is changed from registered form to unregistered form); *Wilfred J. Funk,* 35 TC 42, Dec. 24,401 (1960) (in determining whether an instrument is in registered form, it is the form of the instrument, not the intention of the parties, that controls). *See also* Lee Sheppard, *Distressed Debt Issues Redux*, 2014 TNT 7-3 (January 10, 2014) (comment from Helen Hubbard, IRS Associate Chief Counsel (Financial Institutions & Products), stating Rev. Rul. 73-101, 1973-1 CB 78 "does seem to say that intending that [the instrument] no longer be in registered form is not enough, [but] changing the instrument so that it is no longer in registered form is sufficient because it's a matter of form"). However, the term "form" in this context refers to the contractual rights and obligations of the borrower and its creditors under the debt agreement and is intended to draw a distinction between legal rights and entitlements and the intention of the parties. Therefore, a debt instrument should be considered "in registered form" if the contractual rights and obligations under the agreement ensure that unregistered transfers would be ineffective.

[26] UST does not confer any of the three rights of stock ownership: (i) to vote, and thereby exercise control; (ii) to participate in current earnings and accumulated surplus, and (iii) to share in net assets upon liquidation. *See I. Himmel,* CA-2, 64-2 USTC ¶9877, 338 F2d 815, 817 (1964).

[27] *See Massey-Ferguson, Inc.*, 59 TC 220, 225, Dec. 31,597 (1972) (citing *Boston Elevated Railway Co.*, 16 TC 1084, 1108, Dec. 18,282 (1951), *aff'd*, CA-1, 52-1 USTC ¶9336, 196 F2d 923 (1952)). "The mere intention alone to abandon is not, nor is non-use alone, sufficient to accomplish abandonment." *E.H. Beus*, CA-9, 58-2 USTC ¶9945, 261 F2d 176, 180 (1958), *aff'g* 28 TC 1133, Dec. 22,562 (1957). Some express manifestation of abandonment is required when the asset is an intangible property interest. *B.P. Citron*, 97 TC 200, 209-10, 213, Dec. 47,513 (1991) (finding that taxpayer abandoned a partnership interest when the limited partners voted to dissolve the partnership,

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directed that a final partnership return be filed, and treated partnership property as no longer belonging to the limited partners).

[28] In this respect, it is unfortunate that CCA 202302011 (January 10, 2023) was issued after year end when many taxpayers effectuated tax planning transactions (including abandonments).

[29] In the context of securities, abandonment losses are generally treated as capital. *See* Reg. §1.165-5(i). There is currently no similar rule for digital assets, such that losses would be ordinary on account of there being no "sale or exchange" if the digital asset is not a Code Sec. 165(g) security.

[30] *See, e.g.*, *J.C. Echols*, CA-5, 91-2 USTC ¶50,360, 935 F2d 703 (1991); *Pilgrim's Pride Corp.*, CA-5, 2015-1 USTC ¶50,211, 779 F3d 311 (2015).

[31] *W.F.C. Guest*, 77 TC 9, 24, Dec. 38,037 (1981) ("Generally, a sale is a transfer of property for money or a promise to pay money … [a]n exchange, on the other hand, is generally a reciprocal transfer of property.").

[32] *H.H. Bodzy*, CA-5, 63-2 USTC ¶9599, 321 F2d 331, 335 (1963) ("last vestige of value" must have "disappeared"); *D.M. Clanton,* 70 TCM 534, Dec. 50,863(M), TC Memo. 1995-416 (1995) ("partial worthlessness is insufficient"); *Rowan*, CA-5, 55-1 USTC ¶9188, 219 F2d 51, 56 (1955) (debt must become totally worthless); *L.S. Black*, 52 TC 147, 151, Dec. 29,551 (1969) (debt must become entirely worthless); *J.R. Weaver*, 49 TCM 249, Dec. 41,657(M), TC Memo. 1984-634 (1984) ("The debt is deemed totally worthless when there is no longer any reasonable ground for believing that any repayment will be made.").

[33] 1971-2 CB 129.

[34] CA-7, 96-2 USTC ¶50,334, 87 F3d 197, 200 (1996).

[35] *S. S. White Dental Mfg. Co.*, SCt, 1 USTC ¶235, 274 US 398, 47 SCt 598 (1927).

[36] For example, a taxpayer may want to shift the loss from one year to another.

[37] *See, e.g., www.unsellablenfts.com/sell-your-nfts*.

[38] Code Sec. 170(f)(11)(C).

[39] Code Sec. 170(f)(11)(E)(i). *See also* Reg. §1.170A-17 and Reg. §1.170A-13, as applicable.

[40] Code Sec. 170(f)(11)(E)(ii). *See also* Reg. §1.170A-17(b).

[41] *See* Code Sec. 170(f)(11)(A)(ii)(I); Reg. §1.170A-16(d)(2)(i).

[42] *See J. Crimi*, 105 TCM 1330, Dec. 59,453(M), TC Memo. 2013-51 at *99 (citing *R.W. Boyle*, SCt, 85-1 USTC ¶13,602, 469 US 241, 105 SCt 687 (1985)).

[43] In support of its position, the government cites *H.C. Schweizer*, 124 TCM 232, Dec. 62,113(M), TC Memo. 2022-102; *D. Pankratz*, 121 TCM 1178, Dec. 61,831(M), TC Memo. 2021-26; and *J. Crimi*, 105 TCM 1330, Dec. 59,453(M), TC Memo. 2013-51. Those cases involved the donation of art, oil fields, and undeveloped land.

[44] IRB 2023-02.

[45] Code Sec. 6045(g)(3)(A).

[46] Code Sec. 6045(g)(3)(B)(iv).

[47] Code Sec. 6045(g)(3)(C)(iii).

[48] Code Sec. 6045(g)(3)(D).

[49] *See* Reg. §1.6045-1(c)(2) (requiring reporting for "sales"); Reg. §1.6045-1(a)(9) (defining a sale to include a disposition of a commodities for cash). Commodities are not included in the definition of a "covered security" to which cost basis reporting applies. *See* Reg. §1.6045-1(a)(15); *See* Reg. §1.6045-1(d).

[50] Reg. §1.6045-1(a)(5)(i).

[51] *See* CFTC Statement on Self-Certification of Bitcoin Products by CME, CFE and Cantor Exchange, Release Number 7654-17 (December 1, 2017), available at *www.cftc.gov/PressRoom/PressReleases/7654-17* ("[T]he completion of the processes described above is not a Commission approval.").

[52] *www.reginfo.gov/public/do/eAgendaViewRule?pubId=202210&RIN=1545-BP71*.

[53] The IRS also produced a News Release reminding taxpayers to continue to report all digital asset income. *See* IR-2023-12 (January 24, 2023).

[54] *See* Comments on Virtual Currency Question on the Form 1040 and Instructions, American Institute of CPAs (August 29, 2022), available at 2022 TNTF 166-27; Draft 2022 Form 1040, Crypto Council for Innovation (December 9, 2022), available at *cryptoforinnovation.org/wp-content/uploads/2022/12/CCI-Comment-Letter-1040-IRS.pdf*.

[55] *Id.*

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