



Current Federal Tax Developments

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Kaplan Financial Education

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This Week We Look At:

IRS begins 2023's Dirty Dozen Tax Scams with problematical ERC refund claims

IRS announces position on evaluating when a non-fungible token is a collectible

C corporation not allowed to take home office expenses for owner-employee's home

IRS email reminder that BBA opt-outs must be made on original returns

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IRS begins 2023's Dirty Dozen Tax Scams with problematical ERC refund claims

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Too Good to Be True ERC Claims Named Number One 2023 Dirty Dozen Tax Scam



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- “IRS opens 2023 Dirty Dozen with warning about Employee Retention Credit claims; increased scrutiny follows aggressive promoters making offers too good to be true,” IR-2023-49, 3/20/23
- IRS kicks off annual announcement of the “dirty dozen” tax scams
- Number one relates to ERC claims being pushed by various promoters to taxpayers
- The IRS had already posted warnings in this area, as recently as the prior week

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<https://www.irs.gov/newsroom/dirty-dozen-irs-warns-of-scammers-using-fake-charities-to-exploit-taxpayers>



Too Good to Be True ERC Claims Named Number One 2023 Dirty Dozen Tax Scam

For the start of the annual Dirty Dozen list of tax scams, the IRS spotlighted Employee Retention Credits following blatant attempts by promoters to con ineligible people to claim the credit. Renewing several earlier alerts, the IRS highlighted schemes from promoters who have been blasting ads on radio and the internet touting refunds involving Employee Retention Credits, also known as ERCs. These promotions can be based on inaccurate information related to eligibility for and computation of the credit.

<https://www.irs.gov/newsroom/dirty-dozen-irs-warns-of-scammers-using-fake-charities-to-exploit-taxpayers>



Too Good to Be True ERC Claims Named Number One 2023 Dirty Dozen Tax Scam

"The aggressive marketing of these credits is deeply troubling and a major concern for the IRS," said IRS Commissioner Danny Werfel. "Businesses need to think twice before filing a claim for these credits. While the credit has provided a financial lifeline to millions of businesses, there are promoters misleading people and businesses into thinking they can claim these credits. There are very specific guidelines around these pandemic-era credits; they are not available to just anyone. People should remember the IRS is actively auditing and conducting criminal investigations related to these false claims. We urge honest taxpayers not to be caught up in these schemes."

<https://www.irs.gov/newsroom/dirty-dozen-irs-warns-of-scammers-using-fake-charities-to-exploit-taxpayers>



Too Good to Be True ERC Claims Named Number One 2023 Dirty Dozen Tax Scam

"Businesses should be wary of advertised schemes and direct solicitations promising tax savings that are too good to be true," Werfel said. "They should listen to the advice of their trusted tax professional. Taxpayers should remember that they are always responsible for the information reported on their tax returns. Improperly claiming this credit could result in taxpayers having to repay the credit along with potential penalties and interest."

<https://www.irs.gov/newsroom/dirty-dozen-irs-warns-of-scammers-using-fake-charities-to-exploit-taxpayers>



Too Good to Be True ERC Claims Named Number One 2023 Dirty Dozen Tax Scam

The IRS is stepping up enforcement action involving these ERC claims, and people considering filing for these claims – only valid during the pandemic for a limited group of businesses – should be aware they are ultimately responsible for the accuracy of the information on their tax return. The IRS Small Business/Self-Employed division has trained auditors examining these types of claims, and the IRS Criminal Investigation Division is on the lookout for promoters of fraudulent claims for credits.

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<https://www.irs.gov/newsroom/dirty-dozen-irs-warns-of-scammers-using-fake-charities-to-exploit-taxpayers>



Too Good to Be True ERC Claims Named Number One 2023 Dirty Dozen Tax Scam

Third party promoters of the ERC often don't accurately explain eligibility for and computation of the credit. They may make broad arguments suggesting that all employers are eligible without evaluating an employer's individual circumstances. For example, only recovery startup businesses are eligible for the ERC in the fourth quarter of 2021, but these third-party promoters fail to explain this limitation. In addition, some third parties do not inform employers that they cannot claim the ERC on wages that were reported as payroll costs in obtaining Paycheck Protection Program loan forgiveness.

Additionally, some of these advertisements exist solely to collect the taxpayer's personally identifiable information in exchange for false promises. The scammers then use the information to conduct identity theft.

The IRS reminds all taxpayers that the willful filing of false information and fraudulent tax forms can lead to serious civil and criminal penalties.

<https://www.irs.gov/newsroom/dirty-dozen-irs-warns-of-scammers-using-fake-charities-to-exploit-taxpayers>



Too Good to Be True ERC Claims Named Number One 2023 Dirty Dozen Tax Scam

Eligible taxpayers can claim the ERC on an original or amended employment tax return for qualified wages paid between March 13, 2020, and Dec. 31, 2021. However, to be eligible, employers must have:

- Sustained a full or partial suspension of operations due to orders from an appropriate governmental authority limiting commerce, travel or group meetings because of COVID-19 during 2020 or the first three quarters of 2021,
- Experienced a significant decline in gross receipts during 2020 or a decline in gross receipts during the first three quarters of 2021, or
- Qualified as a recovery startup business for the third or fourth quarters of 2021.

<https://www.irs.gov/newsroom/dirty-dozen-irs-warns-of-scammers-using-fake-charities-to-exploit-taxpayers>



IRS Issues Notice to Treat Some NFTs as Collectibles

- Notice 2023-27, 3/21/23
 - Non Fungible Tokens (NFTS) are specific blockchain items that may be linked to ownership of some item, such as art or images
 - The IRS has issued a notice indicating that they plan to “look through” the NFT to determine if the NFT is a collectible under IRC §408(m)(2)
 - The implications of such a determination:
 - If it is acquired by an IRA or plan, treated as a distribution
 - Subject to the higher 28% capital gain tax rate (IRC §1(h))
 - Affects various other IRC sections noted in the Notice

<https://www.irs.gov/pub/irs-drop/n-23-27.pdf>



IRS Issues Notice to Treat Some NFTs as Collectibles

An NFT is a unique digital identifier that is recorded using distributed ledger technology and may be used to certify authenticity and ownership of an associated right or asset. Ownership of an NFT may provide the holder a right with respect to a digital file (such as a digital image, digital music, a digital trading card, or a digital sports moment) that typically is separate from the NFT. Alternatively, NFT ownership may provide the holder a right with respect to an asset that is not a digital file, such as a right to attend a ticketed event, or certify ownership of a physical item. For purposes of this notice, the right that an NFT provides or the ownership of an asset that an NFT certifies is referred to as the NFT's associated right or asset.

<https://www.irs.gov/pub/irs-drop/n-23-27.pdf>



IRS Issues Notice to Treat Some NFTs as Collectibles

Section 408(m)(1) provides that the acquisition by an individual retirement account (IRA) of a collectible shall be treated as a distribution from the IRA equal to the cost to the IRA of the collectible. Section 408(m)(1) also provides that the acquisition by an individually directed account under a qualified plan under section 401(a) of a collectible shall be treated as a distribution from the account equal to the cost to the account of the collectible.

<https://www.irs.gov/pub/irs-drop/n-23-27.pdf>



IRS Issues Notice to Treat Some NFTs as Collectibles

Pending the issuance of that guidance, the IRS intends to determine whether an NFT constitutes a section 408(m) collectible by analyzing whether the NFT's associated right or asset is a section 408(m) collectible (referred to in this notice as the "lookthrough analysis"). **Under the look-through analysis, an NFT constitutes a section 408(m) collectible if the NFT's associated right or asset is a section 408(m) collectible.**

<https://www.irs.gov/pub/irs-drop/n-23-27.pdf>



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For example, a gem is a section 408(m) collectible under section 408(m)(2)(C), and therefore an NFT that certifies ownership of a gem constitutes a section 408(m) collectible.

Similarly, an NFT does not constitute a section 408(m) collectible if the NFT's associated right or asset is not a section 408(m) collectible. For example, a right to use or develop a "plot of land" in a virtual environment generally is not a section 408(m) collectible, and therefore, an NFT that provides a right to use or develop the "plot of land" in the virtual environment generally does not constitute a section 408(m) collectible.

<https://www.irs.gov/pub/irs-drop/n-23-27.pdf>



IRS Issues Notice to Treat Some NFTs as Collectibles

Applying the look-through analysis to an NFT if its associated right or asset is a digital file raises the question as to whether the digital file constitutes a “work of art” under section 408(m)(2)(A) (in which case, the NFT would be a section 408(m) collectible). The Treasury Department and the IRS are considering the extent to which a digital file may constitute a “work of art” under section 408(m)(2)(A).

Footnote: The Treasury Department and the IRS currently believe that digital files are not included under any of the categories listed in section 408(m)(2)(B)-(E) (any rug, antique, metal, gem, stamp, coin, or alcoholic beverage).

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IRS Issues Notice to Treat Some NFTs as Collectibles

The Treasury Department and the IRS request comments on any aspect of NFTs that might affect the treatment of an NFT as a section 408(m) collectible. In particular, the Treasury Department and the IRS request comments on the following:

- Does this notice provide an accurate definition of an NFT or are there other definitions of NFTs that should be used in future guidance?
- With respect to the look-through analysis—
 - Are there instances in which there are concerns with applying the analysis and in which an alternate analysis may be more appropriate?
 - What burdens does the analysis impose?

<https://www.irs.gov/pub/irs-drop/n-23-27.pdf>



IRS Issues Notice to Treat Some NFTs as Collectibles

- With respect to the look-through analysis—
 - How might the analysis be applied to an NFT with more than one associated right or asset (for example, if one of the associated rights or assets of an NFT is a section 408(m) collectible but another one is not a section 408(m) collectible)?
 - How might the potential for the owner of an NFT to receive additional rights or assets (such as additional NFTs) due to ownership of the NFT (even in the absence of a specific contractual right under the NFT) be treated?
- Are there other factors to consider when determining whether an NFT is a section 408(m) collectible? For example –
 - What factors might be considered to determine whether a digital file constitutes a “work of art” under section 408(m)(2)(A)?

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IRS Issues Notice to Treat Some NFTs as Collectibles

- Are there other factors to consider when determining whether an NFT is a section 408(m) collectible? For example –
 - What factors might be used to determine whether an asset is “tangible personal property” under section 408(m)(2)(F), particularly in the context of digital files?
 - What factors might be relevant if the NFT’s associated right is less than full ownership of an asset (for example, if the associated right is simply personal use of a digital file)?
- Does the application of section 408(m) to an individually directed account under a qualified plan raise any issues other than those raised for individual retirement accounts?
- What other guidance relating to NFTs would be helpful?

<https://www.irs.gov/pub/irs-drop/n-23-27.pdf>



Deduction for Home Office Denied to C Corporation



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- *Greatest Common Factor v. Commissioner*, TC Memo 2023-39, 3/23/23
 - C corporation claimed a deduction for expenses related to owner's office in home
 - Corporation had a single contract with US Department of Defense that required all work be done on an Air Force Base

<https://www.taxnotes.com/research/federal/court-documents/court-opinions-and-orders/corporation%e2%80%99s-deductions-denied%2c-accuracy-related-penalty-upheld/7g86p>



Deduction for Home Office Denied to C Corporation

Renting home space to an employer has an interesting limitation found at IRC §280A(c)(6):

(6) Treatment of rental to employer. Paragraphs (1) and (3) shall not apply to any item which is attributable to the rental of the dwelling unit (or any portion thereof) by the taxpayer to his employer during any period in which the taxpayer uses the dwelling unit (or portion) in performing services as an employee of the employer.

However, in this case the taxpayer did not have a rental agreement with the corporation and nothing was mentioned in the case about whether the taxpayer tried to deduct related expenses on his Form 1040.

<https://www.taxnotes.com/research/federal/court-documents/court-opinions-and-orders/corporation%e2%80%99s-deductions-denied%2c-accuracy-related-penalty-upheld/7g86p>



Deduction for Home Office Denied to C Corporation

Two key problems for the deduction. The first one:

A C corporation “may deduct payments made to lease home office space from an employee (or from its owner) as rent if they are ordinary and necessary expenses [under section 162] directly connected with or pertaining to the corporation's trade or business.” *Id.* **Here there is no evidence in the record indicating that there was any such rental agreement. Further, there is no evidence that petitioner expended any of its funds in maintaining the alleged home office.** There are therefore no grounds on which petitioner, a C corporation, could deduct the expenses related to Mr. Fyfe's home office under section 162.

<https://www.taxnotes.com/research/federal/court-documents/court-opinions-and-orders/corporation%e2%80%99s-deductions-denied%2c-accuracy-related-penalty-upheld/7g86p>



Deduction for Home Office Denied to C Corporation

And then the second, not minor one:

We also note that even if Mr. Fyfe were the taxpayer, he would not be entitled to home office deductions because the dwelling was not “exclusively used on a regular basis . . . as the principal place of business for any trade or business of the taxpayer.” §280A(c)(1)(A). During the years in issue petitioner's only income was from Kinsey. Mr. Fyfe's work for Kinsey was performed at the Los Angeles Airforce Base. Because of the classified nature of his work for Kinsey, Mr. Fyfe was not allowed to take home any work.

<https://www.taxnotes.com/research/federal/court-documents/court-opinions-and-orders/corporation%e2%80%99s-deductions-denied%2c-accuracy-related-penalty-upheld/7g86p>



IRS Reminds Us (Concisely) That BBA Opt-Out Only Can Be Done on a Timely Return`



- CCA 202312001, 3/24/23
 - Email advice is most often looking at one side of a conversation
 - In this case, though, the query is rather obvious

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<https://www.irs.gov/pub/irs-wd/202312001.pdf>

IRS Reminds Us (Concisely) That BBA Opt-Out Only Can Be Done on a Timely Return

ID: CCA_2022121407553343 [Third Party Communication:
UILC: 6221.01-00 Date of Communication: Month DD, YYYY]

Number: **202312001**
Release Date: 3/24/2023

From: [REDACTED]
Sent: Wednesday, December 14, 2022 7:55:33 AM
To: [REDACTED]
Cc:
Bcc:
Subject: RE: delinquent election invalid?

Yes. An election out of BBA can only be made on a timely filed return (including extensions).

Jenni Black (she/her)
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Phone: (202) 317-5216



<https://www.irs.gov/pub/irs-wd/202312001.pdf>

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