



# Current Federal Tax Developments

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Kaplan Financial Education



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## This Week We Look At:

IRS announces non-acquiescence in Tax Court case on taxpayer asserting substance over form

IRS highlights bad tax advice on social media

IRS rules that assets held in intentionally defective grantor trust do not obtain date of death basis

IRS releases proposed battery regulations for new EV credits

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IRS announces non-acquiescence in Tax Court case on taxpayer asserting substance over form

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## IRS Official Declines to Follow 2021 Substance Over Form Decision



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- AOD 2023-02, 3/13/2023
  - Looks at 2021 case of *Complex Media Inc. v. Commissioner*, TC Memo 2021-14
  - The Tax Court analyzed what situations would allow a taxpayer to argue for substance over the form of a transaction entered into.
  - The burden is higher than on the IRS--but how much higher

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<https://www.taxnotes.com/research/federal/irs-guidance/actions-on-decisions/irs-won%e2%80%99t-acquiesce-in-complex-media-holding-on-corporate-transactions/7g4dg>



## IRS Official Declines to Follow 2021 Substance Over Form Decision

### Tax Court Decision

Therefore, we now conclude that the additional burden the taxpayer has to meet in disavowing transactional form relates not to the quantum of evidence but instead to its content — not how much evidence but what that evidence must show by the usual preponderance. The Commissioner can succeed in disregarding the form of a transaction by showing that the form in which the taxpayer cast the transaction does not reflect its economic substance.

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## IRS Official Declines to Follow 2021 Substance Over Form Decision

### Tax Court Decision

For the taxpayer to disavow the form it chose (or at least acquiesced to), it must make that showing and more. In particular, the taxpayer must establish that the form of the transaction was not chosen for the purpose of obtaining tax benefits (to either the taxpayer itself, as in *Estate of Durkin*, or to a counterparty, as in *Coleman*) that are inconsistent with those the taxpayer seeks through disregarding that form. When the form that the taxpayer seeks to disavow was chosen for reasons other than providing tax benefits inconsistent with those the taxpayer seeks, the policy concerns articulated in *Danielson* will not be present.

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## IRS Official Declines to Follow 2021 Substance Over Form Decision



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- AOD 2023-02, 3/13/2023
  - In *Complex Media* taxpayer carried this burden
  - IRS specifically disagreed on two points

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## IRS Official Declines to Follow 2021 Substance Over Form Decision

### AOD

#### *Issue 1:*

Nonacquiescence to the court's conclusion that the parties' failure to report the transactions fully or consistently should not be a major factor in a decision whether to allow a taxpayer to disavow the form of its transactions and also to the standard the court applied to allow petitioner to disavow its form in this case.

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<https://www.taxnotes.com/research/federal/irs-guidance/actions-on-decisions/irs-won%e2%80%99t-acquiesce-in-complex-media-holding-on-corporate-transactions/7g4dg>



## IRS Official Declines to Follow 2021 Substance Over Form Decision

### AOD

#### Issue 2:

Nonacquiescence to the court's determination that the fair market value of a "Deferred Payment Right" (as described therein) for purposes of section 351(b)(1) is not equal to its issue price.

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## IRS Highlights Bad Tax Advice Trending on Social Media



Photo by [Sara Kurfeß](#) on [Unsplash](#)

- “Dirty Dozen: Taking tax advice on social media can be bad news for taxpayers; schemes circulating involving tax forms,” IR-2023-61, 3/28/2023
  - IRS issues dirty dozen warning about bad tax advice on social media
  - Remember that *anyone* can post on social media, so you must evaluate the message
    - No one has necessarily fact checked the issue
    - In some cases you have simple fraudsters posting online

<https://www.irs.gov/newsroom/dirty-dozen-taking-tax-advice-on-social-media-can-be-bad-news-for-taxpayers-schemes-circulating-involving-tax-forms>



## IRS Highlights Bad Tax Advice Trending on Social Media

"There are many ways to get good tax information, including from a trusted tax professional, tax software and IRS.gov. But people should be incredibly wary about following advice being shared on social media," said IRS Commissioner Danny Werfel. "The IRS continues to see a lot of inaccurate information that could get well-meaning taxpayers in trouble. People should remember that there is no secret way to fill out a form and simply get a larger refund that they aren't entitled to. Remember, if it sounds too good to be true, it probably is."

<https://www.irs.gov/newsroom/dirty-dozen-taking-tax-advice-on-social-media-can-be-bad-news-for-taxpayers-schemes-circulating-involving-tax-forms>



## IRS Highlights Bad Tax Advice Trending on Social Media

### **Trending on social media: Fraudulent form filing and bad advice**

Social media can connect people and information from all over the world. Unfortunately, sometimes people provide bad advice that can lure good taxpayers into trouble. The IRS warns taxpayers to be wary of trusting internet advice, whether it's a fraudulent tactic promoted by scammers or it's patently false tax-related scheme trending across popular social media platforms.

The IRS is aware of various filing season hashtags and social media topics leading to inaccurate and potentially fraudulent information. The central theme involves people trying to use legitimate tax forms for the wrong reason. Here are just two of the recent schemes circulating online:

<https://www.irs.gov/newsroom/dirty-dozen-taking-tax-advice-on-social-media-can-be-bad-news-for-taxpayers-schemes-circulating-involving-tax-forms>



## IRS Highlights Bad Tax Advice Trending on Social Media

### Form 8944 fraud

A recent example of bad advice circulating on social media that could lead to fraudulent form filing involves Form 8944, Preparer e-file Hardship Waiver Request. There are wildly inaccurate suggestions being made about this form. Posts claim that Form 8944 can be used by taxpayers to receive a refund from the IRS, even if the taxpayer has a balance due. This is false information. Form 8944 is for tax professional use only.

While Form 8944 is a legitimate IRS tax form, it's intended for a targeted group of tax return preparers who are requesting a waiver so they can file tax returns on paper instead of electronically. It is not in any way a form the average taxpayer can use to avoid tax bills. Taxpayers who intentionally file forms with false or fraudulent information can face serious consequences, including potentially civil and criminal penalties.

<https://www.irs.gov/newsroom/dirty-dozen-taking-tax-advice-on-social-media-can-be-bad-news-for-taxpayers-schemes-circulating-involving-tax-forms>



## IRS Highlights Bad Tax Advice Trending on Social Media

### Form W-2 fraud

This scheme, which is circulating on social media, encourages people to use tax software to manually fill out Form W-2, Wage and Tax Statement, and include false income information. In this W-2 scheme, scam artists suggest people make up large income and withholding figures as well as the employer its coming from. Scam artists then instruct people to file the bogus tax return electronically in hopes of getting a substantial refund.

The IRS, along with the Security Summit partners in the tax industry and the states, are actively watching for this scheme. In addition, the IRS works with payroll companies and large employers – as well as the Social Security Administration – to verify W-2 information.

The IRS and Summit partners warn people not to fall for this scam. Taxpayers who knowingly file fraudulent tax returns potentially face significant civil and criminal penalties.

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## IRS Highlights Bad Tax Advice Trending on Social Media



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- “Dirty Dozen: Taking tax advice on social media can be bad news for taxpayers; schemes circulating involving tax forms,” IR-2023-61, 3/28/2023
  - Note - social media can be very useful for tax information, but it *must always be vetted*
    - Confirm details claimed in the article or post
    - As a professional, remember to not trust the statement until you find binding confirmation
    - Best options will provide cites to supporting information - need to know *why* the statement is true

<https://www.irs.gov/newsroom/dirty-dozen-taking-tax-advice-on-social-media-can-be-bad-news-for-taxpayers-schemes-circulating-involving-tax-forms>

## Assets Held in IDGT Do Not Obtain Basis Adjustment at Death of the Grantor per IRS



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- Revenue Ruling 2023-2, 3/29/23
  - Intentionally Defective Grantor Trust - what is it? Trust structured so:
    - Transfer treated as a completed gift
    - But treated as owned by grantor for income tax purposes
  - Often uses right to substitute assets to create the structure

<https://www.irs.gov/pub/irs-drop/rr-23-02.pdf>



## Assets Held in IDGT Do Not Obtain Basis Adjustment at Death of the Grantor per IRS



- Revenue Ruling 2023-2, 3/29/23
  - Some advisers argued to IRC §1014 by meeting §1014(b)(2)

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## **Assets Held in IDGT Do Not Obtain Basis Adjustment at Death of the Grantor per IRS**

### **IRC §1014(b)(1)**

(b) Property acquired from the decedent. For purposes of subsection (a), the following property shall be considered to have been acquired from or to have passed from the decedent:

- (1) Property acquired by bequest, devise, or inheritance, or by the decedent's estate from the decedent;

<https://www.irs.gov/pub/irs-drop/rr-23-02.pdf>



## **Assets Held in IDGT Do Not Obtain Basis Adjustment at Death of the Grantor per IRS**

### **ISSUE**

Is there a basis adjustment under §1014 of the Internal Revenue Code (Code) to the assets of a trust on the death of the individual who is the owner of the trust under chapter 1 of the Code (chapter 1) if the trust assets are not includible in the owner's gross estate pursuant to chapter 11 of the Code (chapter 11)?

<https://www.irs.gov/pub/irs-drop/rr-23-02.pdf>



## Assets Held in IDGT Do Not Obtain Basis Adjustment at Death of the Grantor per IRS

### FACTS

In Year 1, A, an individual, established irrevocable trust, T, and funded T with Asset in a transfer that was a completed gift for gift tax purposes. A retained a power over T that causes A to be treated as the owner of T for income tax purposes under subpart E of part I of subchapter J of chapter 1 (subpart E). A did not hold a power over T that would result in the inclusion of T's assets in A's gross estate under the provisions of chapter 11. By the time of A's death in Year 7, the fair market value (FMV) of Asset had appreciated. At A's death, the liabilities of T did not exceed the basis of the assets in T, and neither T nor A held a note on which the other was the obligor.

<https://www.irs.gov/pub/irs-drop/rr-23-02.pdf>

## **Assets Held in IDGT Do Not Obtain Basis Adjustment at Death of the Grantor per IRS**

### **ANALYSIS**

For property to receive a basis adjustment under §1014(a), the property must be acquired or passed from a decedent. For property to be acquired or passed from a decedent for purposes of §1014(a), it must fall within one of the seven types of property listed in §1014(b). Asset does not fall within any of the seven types of property listed in §1014(b).

<https://www.irs.gov/pub/irs-drop/rr-23-02.pdf>



## Assets Held in IDGT Do Not Obtain Basis Adjustment at Death of the Grantor per IRS

First, upon A's death, Asset was not "bequeathed," "devised," or "inherited" within the meaning of §1014(b)(1). A "bequest" is the act of giving property (usually personal property or money) by will. Black's Law Dictionary (11th ed. 2019). The Supreme Court defined "bequest" as a "gift of personal property by will" for purposes of the predecessor provision of §102 that, as today, excluded gifts, bequests, devises, or inheritance from gross income for income tax purposes. *United States v. Merriam*, 263 U.S. 179, 184 (1923).

<https://www.irs.gov/pub/irs-drop/rr-23-02.pdf>



## Assets Held in IDGT Do Not Obtain Basis Adjustment at Death of the Grantor per IRS

A “devise” is the act of giving property, especially real property, by will. Black's Law Dictionary (11th ed. 2019). Volume 97 of the *Corpus Juris Secundum* notes that although “bequest” and “bequeath” strictly refer to a gift by will of personal property, the words may be given a broader meaning to include real property which, under the narrower definition, would be a devise. See 97 C.J.S. Wills §1861 (2022).

An “inheritance” is property received from an ancestor under the laws of intestacy or property that a person receives by bequest or devise. Black's Law Dictionary (11th ed. 2019).

<https://www.irs.gov/pub/irs-drop/rr-23-02.pdf>



## Assets Held in IDGT Do Not Obtain Basis Adjustment at Death of the Grantor per IRS

In *Bacciocco v. United States*, 286 F.2d 551, 554-55 (6th Cir. 1961), the court found that property transferred in trust prior to the decedent's death is not bequeathed or inherited because it did not pass either by will or intestacy. The court stated, “[w]e construe those terms [bequest and inheritance] according to their usual and normal meaning” and noted that the decedent's death did not transfer the assets to the trust. *Id.* at 554-56. This does not imply that property in a trust could never fall within the meaning of §1014 (such as property included in the decedent's gross estate or property specifically described by §§1014(b)(2), (3), or (4)); however, in the facts outlined above, the trust property does not fall within the meaning of those terms.

<https://www.irs.gov/pub/irs-drop/rr-23-02.pdf>



## Assets Held in IDGT Do Not Obtain Basis Adjustment at Death of the Grantor per IRS

The Congressional committee report explaining the basis of property acquired from a decedent for purposes of §1014(b) (then designated §113(a)(5) of the 1939 Code) stated that the provision “applies basically to property in the decedent’s probate estate and includible in his gross estate under §811(a) [the predecessor provision of §2031(a)]. In addition, it applies to property acquired by certain specifically described methods of disposition which are treated as though the acquisition was by bequest, devise, or inheritance.” H.R. Rep. No 83-1337 at 4407-08 (March 9, 1954). Citing that report, the court in *Collins v. United States*, 318 F. Supp. 382, 386 (C.D. Cal. 1970) stated, “[i]t seems clear that property cannot be said to come from a decedent by ‘bequest, devise, or inheritance’ unless it is part of the decedent’s probate estate under the laws of the state of his domicile.” The court determined that payments made to a widow by her deceased husband’s employers, under contracts negotiated by her husband, did not pass from the decedent under §1014 and so would not acquire a basis determined by the contract’s FMV at the decedent’s death but instead were income with respect to a decedent that would not receive a basis adjusted to date of death value.

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<https://www.irs.gov/pub/irs-drop/rr-23-02.pdf>





## **Assets Held in IDGT Do Not Obtain Basis Adjustment at Death of the Grantor per IRS**

Second, Asset does not fall within any of the remaining types of property listed in §1014(b). Asset is not described in §§1014(b)(2), (3), or (4) because A did not retain a power to revoke or amend T or hold a power to appoint Asset. Asset also is not described by §1014(b)(6) because it is not community property. Finally, Asset is not described by §§1014(b)(9) or (10) because it is not included in A's gross estate under the provisions of chapter 11. Because at A's death Asset does not fall within any of the seven types of property listed in §1014(b), Asset does not receive a basis adjustment under §1014(a) at A's death.

<https://www.irs.gov/pub/irs-drop/rr-23-02.pdf>



## Assets Held in IDGT Do Not Obtain Basis Adjustment at Death of the Grantor per IRS

### HOLDING

A creates T, an irrevocable trust, retaining a power which causes A to be the owner of the entire trust for income tax purposes under chapter 1 but does not cause the trust assets to be included in A's gross estate for purposes of chapter 11. If A funds T with Asset in a transaction that is a completed gift for gift tax purposes, the basis of Asset is not adjusted to its fair market value on the date of A's death under §1014 because Asset was not acquired or passed from a decedent as defined in §1014(b). Accordingly, under this revenue ruling's facts, the basis of Asset immediately after A's death is the same as the basis of Asset immediately prior to A's death.

<https://www.irs.gov/pub/irs-drop/rr-23-02.pdf>

## IRS Issues Proposed New EV Battery Regulations



- REG-120080-22, Publication Date in *Federal Register* April 17, 2023, FS-2023-08, March 2023
  - IRS publishes battery sourcing rules for EV
  - Cars will need to meet these rules to get full \$7,500 credit if placed in service after April 17, 2023
    - Critical minerals
    - Battery component

<https://public-inspection.federalregister.gov/2023-06822.pdf>

<https://www.irs.gov/pub/taxpros/fs-2023-08.pdf>



## IRS Issues Proposed New EV Battery Regulations

For vehicles placed in service on or after April 18, 2023, the credit amount will depend on the vehicle meeting the critical minerals requirement (\$3,750) and/or the battery components requirement (\$3,750). A vehicle meeting neither requirement will not be eligible for a credit, a vehicle meeting only one requirement may be eligible for a \$3,750 credit, and a vehicle meeting both requirements may be eligible for the full \$7,500 credit.

<https://public-inspection.federalregister.gov/2023-06822.pdf>

<https://www.irs.gov/pub/taxpros/fs-2023-08.pdf>

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