Retirement Report

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1. NFTs, In Your IRA: The IRS Puts a New Spin on Investing in NFTs.

The news media is filled with advertisements encouraging investors to purchase gold, silver, non-fungible tokens ("NFTs"), and even Bitcoins as part of their Individual Retirement Account ("IRA') investments. How appropriate are such investment in an IRA? At the heart of the issue is the general prohibition of IRAs holding certain types of *Collectibles*. The Internal Revenue Code provides that IRAs *acquiring*:

- Any work of art;
- Any rug or antique;
- Any metal or gem;
- Any stamp or coin;
- Any alcoholic beverage;
- Any other *tangible personal property* specified by the IRS.

will be treated as a taxable distribution to the IRA account owner equal to the cost of the collectible to the IRA owner. Congress permits certain gold and silver coins and bullion to be held by an IRA. These types of investments are usually made through *self-directed IRAs*, whose facilitators often misstate the rules that must be followed. An IRA owner must avoid being in *receipt* of the permitted investments, otherwise the IRA has immediate income. The United States Tax Court in a 2021 decision stated:

"An owner of a self-directed IRA may not take actual and unfettered possession of the IRA assets. It is a basic axiom of tax law that taxpayers have income when they exercise complete dominion over it."

In the 2021 case, the taxpayer set up a self-directed IRA that owned a limited liability company through which the IRA invested in gold coins that qualified as permissible IRA investments. Unfortunately, the IRA owner kept the gold coins in a safe at her house. The Internal Revenue Service ("IRS") requires that the gold be kept in the physical possession of a of a bank or an IRS-approved nonbank trustee. The United States Tax Court concluded that the Taxpayer/IRA Owner in the 2021 case was in receipt of the gold coins and owed taxes of nearly $270,000, plus penalties and interest.

Recently, the IRS informed taxpayers that it intended to issue guidance regarding NFT's held by an IRA. Specifically, the IRS will look through the NFT to the associated right or assets. If the associated right or asset is a collectible, the IRS may hold that the NFT is an impermissible asset with the negative consequences that follow. This view that an NFT can be considered associated with the underlying asset is not confined to tax law. In a recent case, a U.S. jury held that Hermès' Birkin Handbag was infringed by Mason Rothschild's use of MetaBirkin in relation to NFT's. The recent IRS pronouncement puts IRA owners on notice that such investments will be scrutinized by the IRS.

2. Waiving Missed RMDs.

Required Minimum Distributions (“RMDs”) are sometimes missed. The recent “SECURE 2.0” Act eased the penalty for missing RMDs. Further, the IRS appears to continue its unwritten policy of waiving the penalty in certain circumstances.

Before 2023, the IRS could impose a penalty of 50% for a missed RMD. SECURE 2.0 reduced the penalty to 25%, and further reduced to 10% if the RMD is taken, and a form 5329 is filed by the end of the second calendar year following the year that the RMD was missed.

Prior to SECURE 2.0, the IRS would frequently waive missed RMD penalties if the taxpayer filed and IRS Form 5329 requesting the waiver and providing a reasonable cause explanation for failing to take the RMD ("Waiver Option"). The IRS website has continued to inform taxpayers that this Waiver Option still remains available to taxpayers. Thus, taxpayers who miss RMD's should consider utilizing the Waiver Option relief and also consider the use of the current 10% penalty.