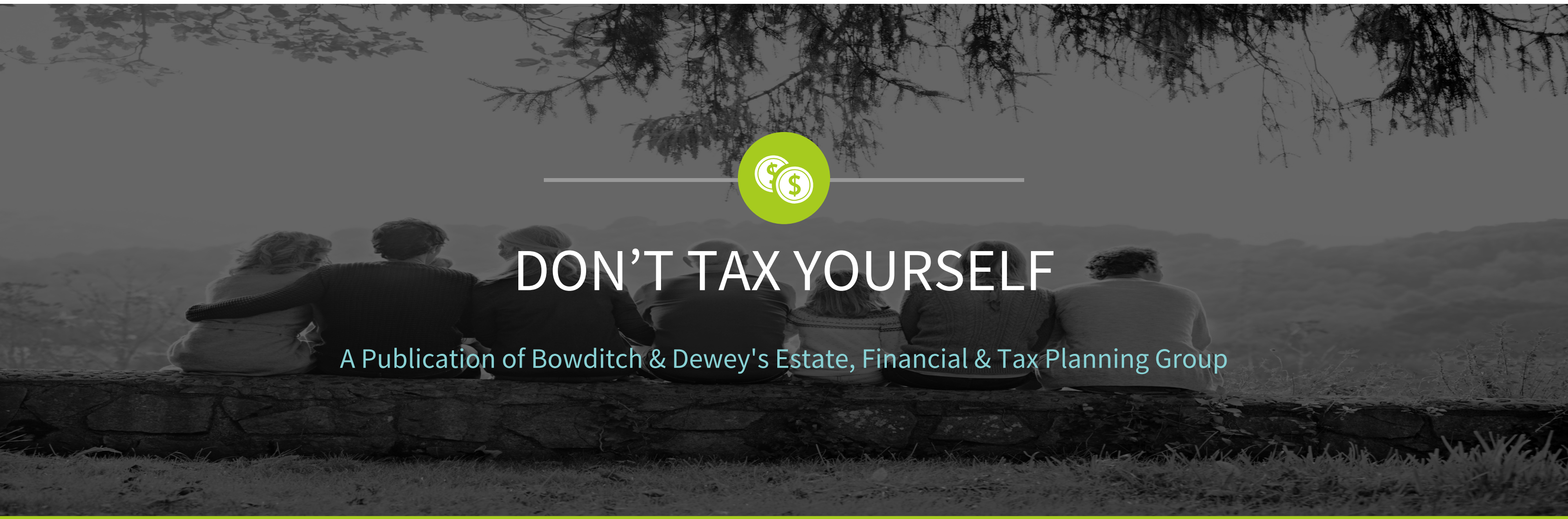

Cryptocurrency Wash-Sale Loss Harvesting

BY BOWDITCH & DEWEY • JUNE 13, 2023

The IRS wash-sale rule does not currently apply to cryptocurrency because the IRS considers virtual currencies to be *property* rather than *securities*. In general, a taxpayer who exchanges cryptocurrency for goods, services or cash, using their basis in the cryptocurrency must report gain or loss from the sale or exchange. Cryptocurrencies, stocks, bonds, and other investment property are, generally, capital assets. Capital assets held longer than a year are subject to the capital gains tax rates instead of the higher ordinary income tax rates.

Realized losses on capital assets can offset gains from other capital assets. If the price of a capital asset drops below the taxpayer’s basis in the asset, said asset can be sold at a loss, thus “realizing” the loss for income tax purposes. Sophisticated investors have learned to strategically sell capital assets at a loss in order to offset gains from sold appreciated capital assets, or ordinary income (subject to limitations); this strategy is referred to as “tax-loss harvesting.”

Harvested capital losses must first be applied to offset capital gains, however, if the amount of capital loss exceeds capital gain, it can be used to offset up to $3,000.00 of ordinary income for that tax year. Further, a taxpayer can carry forward losses into the following tax years, indefinitely until the loss is exhausted.

Generally, the wash-sale rule disallows tax deductions for securities sold at a loss, that are replaced with the same, or a “substantially identical” security within 30 days of the sale (Treasury Regulation Sec. 1.1091-1(a)). Importantly, the 30 days rule applies both before and after the day of the sale, creating a total 61-day window in which the taxpayer cannot buy the same or a “substantially identical” security without sacrificing their harvested loss.

Before the wash-sale rule, a taxpayer could sell a security at a loss, immediately repurchase the security at (essentially) the same price, and claim the loss against capital gains and income. Effectively, the taxpayer maintained the same portfolio position while harvesting tax losses.

By instituting the wash-sale rule, the IRS added more risk to loss harvesting because the seller cannot rebuy within the

61-day window without (basically) forfeiting the loss deduction, risking the potential appreciation of the security while it is outside of their portfolio.

However, the wash-sale rule does not apply to property, and therefore, it does not apply to cryptocurrency. So, cryptocurrency, which is defined as property by the IRS and, generally, a capital asset in the hands of most taxpayers, can be harvested for tax losses without risking the taxpayer's portfolio position.

This tax loophole is well known by the IRS and Congress has repeatedly made plans (that have fallen through) to address it. However, despite the GOP's recent refusal to address the crypto loophole, the fact that the cryptocurrency wash sales is a well-known secret has led many tax preparers to be wary of the consequences of over-using the current loophole. Therefore, any taxpayer seeking to harvest tax losses via their cryptocurrency portfolio should consult with their tax professional.