

Part I

Section 1091.—Loss from Wash Sales of Stock or Securities

26 CFR 1.1091-1: Losses from wash sales of stock or securities.

Rev. Rul. 2008-5

ISSUE

If an individual sells stock or securities for a loss and causes his or her individual retirement account or Roth IRA to purchase substantially identical stock or securities within 30 days before or after the sale, is the loss on the sale of the stock or securities disallowed?

FACTS

A, an individual, owns 100 shares of X Company stock with a basis of \$1,000. On December 20, 2007, A sells the 100 shares of X Company stock for \$600 (the “Sale”).

On December 21, 2007, A causes an individual retirement account (within the meaning of § 408) or a Roth IRA (within the meaning of § 408A), established for the exclusive benefit of A or A's beneficiaries, to purchase 100 shares of X Company stock for its then fair market value (the “Purchase”).

A executes the Sale and the Purchase with different, unrelated market participants.

A is not a dealer in stock or securities.

LAW AND ANALYSIS

Under § 408(a), the term “individual retirement account” means a trust created or organized in the United States for the exclusive benefit of an individual or his beneficiaries, but only if the written governing instrument creating the trust meets certain other requirements.

Under § 408(e)(1), generally, an individual retirement account is exempt from taxation.

Under §§ 408 and 72, any amount distributed from an individual retirement account is includible in the distributee’s gross income for the year of the distribution unless it is properly allocable to the account owner’s basis in the account. Under § 408A, a similar income inclusion rule applies to nonqualified distributions from a Roth IRA. An individual has basis in an individual retirement account only to the extent that the account includes nondeductible contributions.

Section 1091(a) provides that in the case of any loss claimed to have been sustained from any sale or other disposition of shares of stock or securities where it appears that, within a period beginning 30 days before the date of such sale or disposition and ending 30 days after such date, the taxpayer has acquired (by purchase or by an exchange on which the entire amount of gain or loss was recognized by law), or has entered into a contract or option so to acquire, substantially identical stock or

securities, then no deduction shall be allowed under § 165 unless the taxpayer is a dealer in stock or securities and the loss is sustained in a transaction made in the ordinary course of such business.

Section 1091(d) provides rules for determining the basis of stock or securities the acquisition of which resulted in the nondeductibility under § 1091 (or corresponding provisions of prior law) of the loss from the sale or other disposition of substantially identical stock or securities.

In Security First National Bank of Los Angeles, 28 BTA 289 (1933), the taxpayer sold bonds (at a market price) to a corporation of which the taxpayer was the sole shareholder. On the same day, in exchange for land, the corporation transferred the same bonds at the same price to a trust over which the taxpayer had absolute dominion and control. In finding that § 214(a)(5), the predecessor to § 1091(a), applied to disallow the loss, the court reasoned as follows:

The [taxpayer] did not personally reacquire substantially identical property and, strictly construed, the language of section 214(a)(5), above referred to, might not apply. However, the rule of strict construction should not be unduly pressed to permit easy evasion of a taxing statute. Carbon Steel Co. v. Lewellyn, 251 U.S. 501. Unless the respondent is right, a trust like this one could be used deliberately to accomplish the very thing which Congress intended to frustrate. ... Although title to the bonds was acquired by the trust, actual command over the property was still in the [taxpayer]. ... The difference between acquisition by him personally and acquisition by the trust amounts only to a refinement of title and may be disregarded so far as section 214(a)(5) is concerned.

Security First National Bank, 28 BTA at 314 - 315.

Applying this reasoning to the facts of this ruling, even though an individual retirement account is a tax-exempt trust, A has nevertheless acquired, for purposes of

§ 1091(a), 100 shares of X Company stock on December 21, 2007, by virtue of the Purchase. See also Shoenberg v. Commissioner, 77 F. 2d 446 (8th Cir. 1935).

HOLDING

The loss on the Sale of stock is disallowed under § 1091. A's basis in the individual retirement account or Roth IRA is not increased by virtue of § 1091(d). This ruling does not address any issues other than those specifically addressed herein. In particular, this ruling does not address (and no inference should be drawn with respect to) any issue arising under § 4975.

DRAFTING INFORMATION

The principal author of this revenue ruling is Roger E. Wade of the Office of Associate Chief Counsel (Financial Institutions & Products). For further information regarding this revenue ruling, contact Mr. Wade at (202) 622-3950 (not a toll-free call).