

## **Like-Kind Exchanges Under IRC Code Section 1031**

Whenever you sell business or investment property and you have a gain, you generally have to pay tax on the gain at the time of sale. IRC Section 1031 provides an exception and allows you to postpone paying tax on the gain if you reinvest the proceeds in similar property as part of a qualifying like-kind exchange. Gain deferred in a like-kind exchange under IRC Section 1031 is tax-deferred, but it is not tax-free.

The exchange can include like-kind property exclusively or it can include like-kind property along with cash, liabilities and property that are not like-kind. If you receive cash, relief from debt, or property that is not like-kind, however, you may trigger some taxable gain in the year of the exchange. There can be both deferred and recognized gain in the same transaction when a taxpayer exchanges for like-kind property of lesser value.

### **Who qualifies for the Section 1031 exchange?**

Owners of investment and business property may qualify for a Section 1031 deferral. Individuals, C corporations, S corporations, partnerships (general or limited), limited liability companies, trusts and any other taxpaying entity may set up an exchange of business or investment properties for business or investment properties under Section 1031.

### **What are the different structures of a Section 1031 Exchange?**

To accomplish a Section 1031 exchange, there must be an exchange of properties. The simplest type of Section 1031 exchange is a simultaneous swap of one property for another.

Deferred exchanges are more complex but allow flexibility. They allow you to dispose of property and subsequently acquire one or more other like-kind replacement properties.

To qualify as a Section 1031 exchange, a deferred exchange must be distinguished from the case of a taxpayer simply selling one property and using the proceeds to purchase another property (which is a taxable transaction). Rather, in a deferred exchange, the disposition of the relinquished property and acquisition of the replacement property must be mutually dependent parts of an integrated transaction constituting an exchange of property. Taxpayers engaging in deferred exchanges generally use exchange facilitators under exchange agreements pursuant to rules provided in the Income Tax Regulations. .

A reverse exchange is somewhat more complex than a deferred exchange. It involves the acquisition of replacement property through an exchange accommodation titleholder, with whom it is parked for no more than 180 days. During this parking period the taxpayer disposes of its relinquished property to close the exchange.

## **What property qualifies for a Like-Kind Exchange?**

Both the relinquished property you sell and the replacement property you buy must meet certain requirements.

Both properties must be held for use in a trade or business or for investment. Property used primarily for personal use, like a primary residence or a second home or vacation home, does not qualify for like-kind exchange treatment.

Both properties must be similar enough to qualify as "like-kind." Like-kind property is property of the same nature, character or class. Quality or grade does not matter. Most real estate will be like-kind to other real estate. For example, real property that is improved with a residential rental house is like-kind to vacant land. One exception for real estate is that property within the United States is not like-kind to property outside of the United States. Also, improvements that are conveyed without land are not of like kind to land.

Real property and personal property can both qualify as exchange properties under Section 1031; but real property can never be like-kind to personal property. In personal property exchanges, the rules pertaining to what qualifies as like-kind are more restrictive than the rules pertaining to real property. As an example, cars are not like-kind to trucks.

Finally, certain types of property are specifically excluded from Section 1031 treatment. Section 1031 does not apply to exchanges of:

- Inventory or stock in trade
- Stocks, bonds, or notes
- Other securities or debt
- Partnership interests
- Certificates of trust

## **What are the time limits to complete a Section 1031 Deferred Like-Kind Exchange?**

While a like-kind exchange does not have to be a simultaneous swap of properties, you must meet two time limits or the entire gain will be taxable. These limits cannot be extended for any circumstance or hardship except in the case of presidentially declared disasters.

The first limit is that you have 45 days from the date you sell the relinquished property to identify potential replacement properties. The identification must be in writing, signed by you and delivered to a person involved in the exchange like the seller of the replacement property or the qualified intermediary. However, notice to your attorney, real estate agent, and accountant or similar persons acting as your agent is not sufficient.

Replacement properties must be clearly described in the written identification. In the case of real estate, this means a legal description, street address or distinguishable

name. Follow the IRS guidelines for the maximum number and value of properties that can be identified.

The second limit is that the replacement property must be received and the exchange completed no later than 180 days after the sale of the exchanged property or the due date (with extensions) of the income tax return for the tax year in which the relinquished property was sold, whichever is earlier. The replacement property received must be substantially the same as property identified within the 45-day limit described above.

### **Are there restrictions for deferred and reverse exchanges?**

It is important to know that taking control of cash or other proceeds before the exchange is complete may disqualify the entire transaction from like-kind exchange treatment and make ALL gain immediately taxable.

If cash or other proceeds that are not like-kind property are received at the conclusion of the exchange, the transaction will still qualify as a like-kind exchange. Gain may be taxable, but only to the extent of the proceeds that are not like-kind property.

One way to avoid premature receipt of cash or other proceeds is to use a qualified intermediary or other exchange facilitator to hold those proceeds until the exchange is complete.

You cannot act as your own facilitator. In addition, your agent (including your real estate agent or broker, investment banker or broker, accountant, attorney, employee or anyone who has worked for you in those capacities within the previous two years) cannot act as your facilitator.

Be careful in your selection of a qualified intermediary as there have been recent incidents of intermediaries declaring bankruptcy or otherwise being unable to meet their contractual obligations to the taxpayer. These situations have resulted in taxpayers not meeting the strict timelines set for a deferred or reverse exchange, thereby disqualifying the transaction from Section 1031 deferral of gain. The gain may be taxable in the current year while any losses the taxpayer suffered would be considered under separate code sections.

### **How do you compute the basis in the new property?**

It is critical that you and your tax representative adjust and track basis correctly to comply with Section 1031 regulations.

Gain is deferred, but not forgiven, in a like-kind exchange. You must calculate and keep track of your basis in the new property you acquired in the exchange.

The basis of property acquired in a Section 1031 exchange is the basis of the property given up with some adjustments. This transfer of basis from the relinquished to the replacement property preserves the deferred gain for later recognition. A collateral affect is that the resulting depreciable basis is generally lower than what would

otherwise be available if the replacement property were acquired in a taxable transaction.

When the replacement property is ultimately sold (not as part of another exchange), the original deferred gain, plus any additional gain realized since the purchase of the replacement property, is subject to tax.