# Everything You Ever Wanted To Know About 1031 Exchanges and the Tax-Saving Opportunities

## Table Of Contents

# Introduction To 1031 Exchanges

**A 1031 Exchange (Tax-Deferred Exchange) Is One Of The Most Powerful Tax Deferral Strategies Remaining Available For Taxpayers.** Anyone involved with advising or counseling real estate investors should know about tax-deferred exchanges, including Realtors, lawyers, accountants, financial planners, tax advisors, escrow and closing agents, and lenders. Taxpayers should never have to pay income taxes on the sale of property if they intend to reinvest the proceeds in similar or like-kind property.

**The Advantage of a 1031 Exchange** is the ability of a taxpayer to sell income, investment or business property and replace with **like-kind replacement property** without having to pay federal income taxes on the transaction. A sale of property and subsequent purchase of a replacement property doesn't work, there must be an **Exchange.** Section 1031 of the Internal Revenue Code is the basis for tax-deferred exchanges. The IRS issued "safe harbor" Regulations in 1991, which established approved procedures for exchanges under Code Section 1031. Prior to the issuance of these Regulations, exchanges were subject to challenge under examination on a variety of issues. With the issuance of the 1991 Regulations, tax-deferred exchanges became easier, affordable and safer than ever before.

**The Disadvantages of a Section 1031 Exchange** include a reduced basis for depreciation in the replacement property. The tax basis of replacement property is essentially the purchase price of the replacement property minus the gain, which was deferred on the sale of the relinquished property as a result of the exchange. The replacement property thus includes a deferred gain that will be taxed in the future if the taxpayer cashes out of his investment.

**Exchange Techniques.** There is more than one way to structure a tax-deferred exchange under Section 1031 of the Internal Revenue Code. However, the 1991 "safe harbor" Regulations established procedures which include the use of an Intermediary, direct deeding, the use of qualified escrow accounts for temporary holding of "exchange funds" and other procedures which now have the official blessing of the IRS. Therefore, it is desirable to structure exchanges so that they can be in harmony with the 1991 Regulations. As a result, exchanges commonly employ the services of an Intermediary with direct deeding.

**Exchanges can also occur without the services of an Intermediary** when parties to an exchange are willing to exchange deeds or if they are willing to enter into an Exchange Agreement with each other. However, two-party exchanges are rare since in the typical Section 1031 transaction, the seller of the replacement property is not the buyer of the taxpayer's relinquished property.

# The Basic Rules For A 1031 Exchange

**1. The Relinquished Property Must Be Qualifying Property.** Qualifying property is property (or equipment) held for investment purposes or used in a taxpayer's trade or business. Investment property includes real estate, improved or unimproved, held for investment or income producing purposes. Property used in a taxpayer's trade or business includes his office facilities or place of doing business, as well as equipment used in his trade or business. Real estate must be replaced with like-kind real estate. Equipment must be replaced with like-kind equipment.

**2. Property Which Does Not Qualify For A 1031 Exchange** includes –

- A personal residence
- Land under development for resale
- Construction or fix/flips for resale
- Property purchased or held for resale
- Inventory property
- Corporation common stock
- Bonds
- Notes
- Partnership interests

As explained below, common stock may (or may not) include ditch stock, which is sold with farmland.

**3. Replacement Property Title Must Be Taken In The Same Names As The Relinquished Property Was Titled.** If a husband and wife own property in joint tenancy or as tenants in common, the replacement property must be deeded to both spouses, either as joint tenants or as tenants in common. Corporations, partnerships, limited liability companies and trusts must be in title on the replacement property the same as they were on the relinquished property.

**4. The Replacement Property Must Be Like-Kind.** For real estate exchanges, like-kind replacement property means any improved or unimproved real estate held for income, investment or business use. Improved real estate can be replaced with unimproved real estate. Unimproved real estate can be replaced with improved real estate. A 100% interest can be exchanged for an undivided percentage interest with multiple owners and vice versa. One property can be exchanged for two or more properties. Two or more properties can be exchanged for one replacement property. A duplex can be exchanged for a fourplex. Investment property can be exchanged for business property and vice versa. However, as referenced above, a taxpayer's personal residence cannot be exchanged for income property, and income or investment property cannot be exchanged for a personal residence, which the taxpayer will reside in.

**5. Any Boot Received In Addition To Like Kind Replacement Property Will Be Taxable (to the extent of gain realized on the exchange).** This is okay when a seller desires some cash or debt reduction and is willing to pay some taxes. Otherwise, boot should be avoided in order for a 1031 Exchange to be completely tax free.

The term "boot" is not used in the Internal Revenue Code or the Regulations, but is commonly used in discussing the tax consequences of a Section 1031 tax-deferred exchange. Boot received is the money or the fair market value of "other property" received by the taxpayer in an exchange. Money includes all cash equivalents plus liabilities of the taxpayer assumed by the other party, or liabilities to which the property exchanged by the taxpayer is subject. "Other property" is property that is non-like-kind, such as personal property received in an exchange of real property, property used for personal purposes, or "non-qualified property." "Other property" also includes such things as a promissory note received from a buyer (Seller Financing).

**A Rule Of Thumb for avoiding "boot" is to always replace with property of equal or greater value** than the relinquished property. Never "trade down." Trading down always results in boot received, either cash, debt reduction or both. Boot received is mitigated by exchange expenses paid. See *The Rules Of Boot In A Section 1031 Exchange* (below) for a detailed explanation of these rules.

# The Basic Types Of Exchanges

**A Simultaneous Exchange** is an exchange in which the closing of the relinquished property and the replacement property occur on the same day, usually back-to-back. There is no interval of time between the two closings. This type of exchange is covered by the Safe harbor Regulations.

**A Delayed Exchange** is an exchange where the replacement property is closed on at a later date than the closing of the relinquished property. The exchange is not simultaneous or on the same day. This type of exchange is sometimes referred to as a "Starker Exchange" after the well known Supreme Court case in which ruled in the taxpayer's favor for a delayed exchange before the Internal Revenue Code provided for such exchanges. There are strict time frames established by the Code and Regulations for completion of a delayed exchange, namely the 45-Day Clock and the 180-Day Clock (see detailed explanation below). Delayed exchanges are covered by the Safe harbor Regulations.

**A Reverse Exchange** (Title-Holding Exchange) is an exchange in which the replacement property is purchased and closed on before the relinquished property is sold. Usually the Intermediary takes title to the replacement property and holds title until the taxpayer can find a buyer for his relinquished property and close on the sale under an Exchange Agreement with the Intermediary. Subsequent to the closing of the relinquished property (or simultaneous with this closing), the Intermediary conveys title to the replacement property to the taxpayer. The

IRS has issued new safe harbor guidance on Reverse Exchanges (see below).

**An Improvement Exchange** (Title-Holding Exchange) is an exchange in which a taxpayer desires to acquire a property and arrange for construction of improvements on the property before it is received as replacement property. The improvements are usually a building on an unimproved lot, but also include enhancements made to an already improved property in order to create adequate value to close on the Exchange with no boot occurring. The Code and Regulations do not permit a taxpayer to construct improvements on a property as part of a 1031 Exchange after he has taken title to property as replacement property in an exchange. Therefore, it is necessary for the Intermediary to close on, take title and hold title to the property until the improvements are constructed and then convey title to the improved property to the taxpayer as replacement property. Improvement Exchanges are done in the context of both Delayed Exchanges and Reverse Exchanges, depending on the circumstances. The IRS has issued new safe harbor guidance on Reverse Exchanges (including title-holding exchanges for construction or improvement)

## Delayed Exchanges – The Exchange Process And Time Clocks

A taxpayer desiring to do a 1031 Exchange lists and/or markets his property for sale in the normal manner without regard to the contemplated 1031 Exchange. A buyer is found and a contract to sell the property is executed. Accommodation language is usually placed in the contract securing the cooperation of the buyer to the seller's intended 1031 Exchange, but such accommodation language is not mandatory.

When contingencies are satisfied and the contract is scheduled for a closing, the services of an Intermediary are arranged for. The taxpayer enters into an Exchange Agreement with the Intermediary, which permits the Intermediary to become the "substitute seller" in accordance with the requirements of the Code and Regulations.

The Exchange Agreement usually provides for:

- An assignment of the seller's Contract to Buy and Sell Real Estate to the Intermediary.

- A closing where the Intermediary receives the proceeds due the seller at closing. Direct deeding is used. The Exchange Agreement will comply with the requirements of the Code and Regulations wherein the taxpayer can have no rights to the funds being held by the Intermediary until the exchange is completed or the Exchange Agreements terminates. The taxpayer "cannot touch" the funds.

- An interval of time where the seller proceeds to locate suitable replacement property and enter into a contract to purchase the property. The interval of time is subject to the 45-Day and 180-Day rules.

- An assignment of the contract to purchase replacement property to the Intermediary.

- A closing where the Intermediary uses the exchange funds in his possession and direct deeding to acquire the replacement property for the seller.

**The 45-Day Rule for Identification.** The first time timing restriction for a delayed Section 1031 exchange is for the taxpayer to either close on Replacement Property or to identify the potential Replacement Property within 45 days from the date of transfer of the exchanged property. The 45-Day Rule is satisfied if replacement property is received before 45 days has expired. Otherwise, the identification must be by written document (the identification notice) signed by the taxpayer and hand delivered, mailed, faxed, or otherwise sent to the Intermediary. The identification notice must contain an unambiguous description of the replacement property. This includes, in the case of real property, the legal description, street address or a distinguishable name.

After 45 days, limitations are imposed on the number of potential Replacement Properties, which can be received as Replacement Properties. More than one potential replacement property can be identified under one of the following three conditions:

**The Three-Property Rule** - Any three properties regardless of their market values.

**The 200% Rule** - Any number of properties as long as the aggregate fair market value of the replacement properties does not exceed 200% of the aggregate FMV of all of the exchanged properties as of the initial transfer date.

**The 95% Rule** - Any number of replacement properties if the fair market value of the properties actually received by the end of the exchange period is at least 95% of the aggregate FMV of all the potential replacement properties identified.

Although the Regulations only require written notification within 45 days, it is recommended practice for a solid contract to be in place by the end of the 45-day period. Otherwise, a taxpayer may find himself unable to close on any of the properties, which are identified under the 45-day letter. **After 45 days have expired, it is not possible to close on any other property, which was not identified in the 45-day letter.** Failure to submit the 45-Day Letter causes the Exchange Agreement to terminate and the Intermediary will disburse all unused funds in his possession to the taxpayer.

**The 180-Day Rule for Receipt of Replacement Property.** The replacement property must be received and Exchange completed no later than the earlier of 180 days after the transfer of the exchanged property or the due date (with extensions) of the income tax return for the tax year in which the exchanged property was transferred. The replacement property received must be substantially the same as the property, which was identified under the 45-day rule described above. There is no provision for extension of the 180 days for any circumstance or hardship.

As noted above, the 180-Day Rule is shortened to the due date of a tax return if the tax return is not put on extension. For instance, if an Exchange commences late in the tax year, the 180 days can be later than the April 15 filing date of the return. If the Exchange is not complete by the time for filing the return, the return must be put on extension. Failure to put the return on extension can cause the replacement period for the Exchange to end on the due date of the return. This can be a trap for the unwary.

# Reverse Exchanges –
# The Exchange Process and Time Clocks

**Safe Harbor Reverse Exchanges -** Rev. Proc. 2000-37 issued by the IRS on September 15, 2000 established recognition of and "safe harbor" guidance on Reverse Exchanges which comply with the guidelines. These are known as "Safe Harbor Reverse Exchanges." Reverse Exchanges which are not in compliance with the guidelines are not prohibited by Rev. Proc. 2500-37 but must stand or fall on their own merits and are referred to as "Non-Safe Harbor Reverse Exchanges.

Reverse Exchanges of either type are common and occur when a taxpayer arranges for an Exchange Accommodation Titleholder (EAT) (usually the Intermediary) to take and hold title to replacement property before a taxpayer finds a buyer for his relinquished property. Sometimes the exchange accommodation titleholder will take and hold title to the relinquished property until a buyer can be found for it. Reverse Exchanges of either type are useful in circumstances where a taxpayer needs to close on the purchase of replacement property before a relinquished property can be sold or where the taxpayer desires ample time to search for suitable replacement property before selling a relinquished property which starts 45 and 180-day clocks for Delayed Exchanges.
Reverse Exchanges are also common where a taxpayer wants to acquire a property and construct improvements on it before taking title to the property as replacement property for an exchange. This is necessary if the value of the improvements is important for replacing with property of equal or greater value in order to avoid a taxable "trade-down."

**Rev. Proc. 2004-51 issued in 2004** added an additional requirement for Reverse Exchanges to be under the safe harbor "umbrella." Any property which has been previously owned by the taxpayer within the prior 180-days is now declared ineligible for protection under the Rev. Proc. 2000-37 safe harbor procedures.

**The Safe harbor Reverse Exchange Time-Clocks.** The safe-harbor procedures impose compliance requirements which require analysis for impact and planning that can be summarized as follows –

- **The Five-Day Rule.** A "Qualified Exchange Accommodation Agreement" must be entered into between the taxpayer and the exchange accommodation titleholder (qualified intermediary in most cases) within five business days after title to property is taken by the exchange accommodation titleholder in anticipation of a Reverse Exchange.
- **The 45-Day Rule.** The property to be "relinquished" (the relinquished property) must be identified within 45 days. More than one potential property to be sold can be identified in a manner similar to the rules of delayed exchanges (i.e., the three-property rule, the 200% rule, etc.)
- **The 180-Day Rule.** The Reverse Exchange must be completed within 180 days of taking title by the exchange accommodation titleholder.

**The 180-Day Clock** – As with Delayed Exchanges where the exchange must be completed within 180 days, Reverse Exchanges must be completed within 180 days. In the past, since there was been no statutory limitation of time in which to be in title, it was common for the Exchange Accommodation Titleholder to be in title on the parked property for a year or more during which the taxpayer would find a buyer for his relinquished property or during which time the taxpayer would have improvements constructed on the property being held by the Titleholder.

180 days may be a suitable time for a buyer to be found for the relinquished property. But, 180 days is a problem with respect to construction/improvement exchanges. The 180-day time limit within which to complete a safe harbor Reverse Exchange is probably insufficient for most large "build to suit" exchanges.

**What if the taxpayer has not yet found a buyer for his relinquished property by the end of 180 days?** In this case, the taxpayer can discontinue his attempt to accomplish a Reverse Exchange and take deed to the replacement property. Or the taxpayer may decide to extend his Reverse Exchange outside of the protection of the safe harbor procedures. The safe harbor guidance issued by the IRS is optional, not mandatory. Reverse Exchanges that do not comply with the requirements of Rev. Proc. 2000-37 stand or fall on their own merits and should be considered to have a higher degree of audit risk now that guidelines have been issued for Safe Harbor Reverse Exchanges.

**Rev. Proc. 2000-37 imposes responsibilities and burdens on the Exchange Accommodator Titleholder.** The Accommodator is required to report for federal income tax purposes the "tax attributes" of ownership of the property it is in title on. It is possible that the Accommodator will be required to depreciate the property just as a true owner would be required to do; this remains unclear.

Rents and expenses attributed to ownership of the property may have to be reported by the Accommodator. There was no specific requirement requiring Accommodators to do this prior to Rev. Proc. 2000-37.

## The Role Of The Qualified Intermediary

The role of the Qualified Intermediary is essential to completing a successful and valid delayed exchange. The Qualified Intermediary is the glue that puts the buyer and seller of property together into the form of a 1031 Exchange. Where such an intermediary (often called an exchange facilitator) is used, the intermediary will not be considered the agent of the taxpayer for constructive receipt purposes notwithstanding the fact that he may be an agent under state law and the taxpayer may gain immediate possession of the money or property under the laws of agency.

In order to take advantage of the qualified intermediary "safe harbor" there must be a written agreement between the taxpayer and intermediary expressly limiting the taxpayer's rights to receive, pledge, borrow or otherwise obtain the benefits of the money or property held by the intermediary.

A qualified intermediary is formally defined as a person who is not the taxpayer or a disqualified person who enters into a written agreement (the "exchange agreement") with the taxpayer and, as required by the exchange agreement, acquires the relinquished property from the taxpayer, transfers the relinquished property, acquires the replacement property, and transfers the replacement property to the taxpayer. The qualified intermediary does not actually have to receive and transfer title as long as the legal fiction is maintained.

The intermediary can act with respect to the property as the agent of any party to the transaction and further, an intermediary is treated as entering into an agreement if the rights of a party to the agreement are assigned to the intermediary and all parties to the agreement are notified in writing of the assignment on or before the date of the relevant transfer of property. This provision allows a taxpayer to enter into an agreement for the transfer of the relinquished property (i.e., a contract of sale on the property) and thereafter to assign his rights in that agreement to the intermediary. Providing all parties to the agreement are notified in writing of the assignment on or before the date of the transfer of the relinquished property, the intermediary is treated as having entered into the agreement and, upon completion of the transfer, as having acquired and transferred the relinquished property.

There are no licensing requirements for Intermediaries. They need merely be not an unqualified person as defined by the Internal Revenue Code in order to be qualified. The Code prohibits certain "agents" of the taxpayer from being qualified. Accountants, attorneys and realtors who have served taxpayers in their professional capacities within the prior two years are disqualified from serving as a Qualified Intermediary for a taxpayer in an exchange.

## Criteria For Selecting A Qualified Intermediary

Intermediaries serve as a limited purpose depository institution and hold all of the Exchange Cash during the course of a 1031 Exchange. As a result, Intermediaries usually hold substantial sums of money on behalf of their exchange clients. There are no federal or state regulations or supervision of Intermediaries. Exchanges often deposit vast sums of money with affiliates of small escrow companies, title companies or law firms that are little more than shell corporations. Even affiliates of large title insurance company or financial institutions can go bankrupt. Taxpayers are unsecured creditors when an Intermediary becomes bankrupt or insolvent. Funds held by Intermediaries are invested in a variety of ways, including pooled cash funds with stock brokerages and segregated liquid asset money market accounts. Obviously, the selection of an Intermediary who will be entrusted with the funds of a 1031 Exchange is an important matter.

Intermediaries offer widely varying services as an Intermediary and have widely varying professional training, skills and competence. Intermediaries are usually attorneys, tax accountants, title company affiliates or realtors. Many intermediaries have no training as a tax professional or as an exchange professional and offer no consultation to a taxpayer on tax issues related to the Exchange or on the technical requirements for completion of a successful exchange. Some Intermediaries simply bank funds.

Intermediaries take their fees or compensation in a variety of ways. Some Intermediaries charge little or no fees for their services and retain interest earned on the funds in their possession. Some Intermediaries charge higher fees for their services and forward all interest earned on funds in their possession to the client at the end of the exchange. Some do a little of both. Some Intermediaries take an override on interest earned on Exchange funds and forward the rest to the client. Interest earned on funds held by an Intermediary can vary widely also, depending on where the funds are invested or held on deposit.

Here are some of the things taxpayers should consider when engaging the services of an Intermediary -

- Does the Intermediary have experience and a verifiable reputation?
- Is the Intermediary a tax professional capable of consulting on 1031 tax issues?

- Is the Intermediary willing to meet with you, consult you on exchange strategies, issues and execution of exchange documents?
- Is the Intermediary a member of the Federation Of Exchange Accommodators, a professional organization that expects its members to perform services at the highest level of competence and trust?
- Is the Intermediary bonded with a fidelity bond of $2.5 million or more for each occurrence?
- Does the Intermediary forward all interest earned on funds to the client?
- Does the Intermediary deposit Exchange Funds in segregated and FDIC insured accounts?
- Can the Intermediary offer clients dual signature escrow accounts or put funds with a bank trust department?
- Are Exchange Funds available for disbursement within 24 hours?
- Does the Intermediary manage closings in order to avoid inadvertent boot and related taxes, which usually cost more than the fees they charge?
- Is the Intermediary experienced with and willing to assist the taxpayer with title-holding exchanges (Reverse and Improvement Exchanges)?

**1031 Corporation complies with all of these expectations.**

# The Rules of “Boot”<br>In A Section 1031 Exchange

**A Taxpayer Must Not Receive "Boot"** from an exchange in order for a Section 1031 exchange to be completely tax free. Any boot received is taxable (to the extent of gain realized on the exchange). This is okay when a seller desires some cash and is willing to pay some taxes. Otherwise, boot should be avoided in order for a 1031 Exchange to be tax free.

**The term "boot"** is not used in the Internal Revenue Code or the Regulations, but is commonly used in discussing the tax consequences of a Section 1031 tax-deferred exchange. Boot received is the money or the fair market value of "other property" received by the taxpayer in an exchange. Money includes all cash equivalents plus liabilities of the taxpayer assumed by the other party, or liabilities to which the property exchanged by the taxpayer is subject to. "Other property" is property that is not like-kind, such as personal property received in an exchange of real property, property used for personal purposes, or "non-qualified property." "Other property" also includes such things as a promissory note received from a buyer (Seller Financing).

**Boot can be in advertent and result from a variety of factors.** It is important for a taxpayer to understand what can result in boot if taxable income is to be avoided. The most common sources of boot include the following:

**Cash boot received** during the exchange. This will usually be in the form of "net cash received" at the closing of either the relinquished property or the replacement property.

**Debt reduction boot** which occurs when a taxpayer's debt on replacement property is less than the debt which was on the relinquished property. As with cash boot, debt reduction boot can occur when a taxpayer is "trading down" in the exchange.

**Sale proceeds** being used to service costs at closing which are not closing expenses. If proceeds of sale are used to service non-transaction costs at closing, the result is the same as if the taxpayer received cash from the exchange, and then used the cash to pay these costs. Taxpayers are encouraged to bring cash to the closing of the sale of their relinquished property to pay for the following non-transaction costs:

- Rent prorations.
- Utility escrow charges.
- Tenant damage deposits transferred to the buyer.
- Property tax prorations? Maybe, see explanation below.
- Any other charges unrelated to the closing.

**Tax prorations** on the relinquished property settlement statement can be considered as service of debt based on PLR 8328011. Under this rationale exchange cash used to service tax prorations should not result in taxable boot. However, taxpayers may want to bring cash to the relinquished property closing anyway in order to resolve this issue.

**Excess borrowing** to acquire replacement property. Borrowing more money than is necessary to close on replacement property will cause cash being held by an Intermediary to be excessive for the closing. Excess cash held by an Intermediary is distributed to the taxpayer, resulting in cash boot to the taxpayer. Taxpayers must use all cash being held by an Intermediary for replacement property. Additional financing must be no more than what is necessary, in addition to the cash, to close on the property.

**Loan acquisition** costs with respect to the replacement property, which are serviced from exchange funds being brought to the closing. Loan acquisition costs include origination fees and other fees related to acquiring the loan. Taxpayers usually take the position that loan acquisition costs are being serviced from the proceeds of the loan. However, the IRS may take a position that these costs are being serviced from Exchange Funds. This position is usually the position of the financing institution also. There is no guidance in the form of Treasury Regulations on this issue at the present time, which is helpful.

**Non-like-kind property,** which is received from the exchange, in addition to like-kind property (real estate). Non-like-kind property could include the following:

- Seller financing, promissory note
- Sprinkler equipment acquired with farm land
- Ditch stock in a mutual irrigation ditch company acquired with farmland (possible issue). Big T Water acquired with farmland (possible issue).

Acquisition of ditch stock or Big T water is a possible issue with the IRS. Most taxpayers report their exchanges of farmland by taking the position that water on the farmland is indistinguishable from, and the same thing as real estate. The IRS has been known to have a different view.

**Boot Offset Rules -** Only the *net* boot received by a taxpayer is taxed. In determining the amount of net boot received by the taxpayer, certain offsets are allowed and others are not, as follows:

- Cash boot paid offsets cash boot received (but only at the same closing table).

  *Cash boot paid at the replacement property closing table does not offset cash boot received at the relinquished property closing table (Reg. §1.1031(k)-1(j)(3) Example 2). This rule probably also applies to inadvertent boot received at the relinquished property closing table because of prorations, etc. (see above).*

- Debt incurred on the replacement property offsets debt-reduction boot received on the relinquished property.
- Cash boot paid offsets debt-reduction boot received.
- Debt boot paid **never** offsets cash boot received (net cash boot received is always taxable).
- Exchange expenses (transaction and closing costs) paid (relinquished property and replacement property closings) offset net cash boot received.

**Rules of Thumb**:

- Always trade "across" or up. Never trade down (the “even or up rule”). Trading down **always** results in boot received, either cash, debt reduction or both. The boot received can be mitigated by exchange expenses paid.
- Bring cash to the closing of the relinquished property to cover charges, which are not transaction costs (see above).

- Do not receive property which is not like-kind.
- Do not over finance replacement property. Financing should be limited to the amount of money necessary to close on the replacement property in addition to exchange funds which will be brought to the replacement property closing.

## Seller Carrybacks and Dispositions

**A Seller Financed Sale** is usually incompatible with a desire to do a Section 1031 Exchange of real estate. The reason is that a promissory note is property received which does not meet the requirement that real estate be exchanged solely for other like-kind property (real estate). If seller financing is necessary due to circumstances, and if a delayed exchange with the use of an Intermediary is employed, it is possible to salvage Section 1031 Exchange treatment by one of the following procedures:

- The taxpayer can bring cash to the closing table in exchange for the promissory note. The boot offset rules described above make the note not taxable. Boot "paid" offsets boot "received. This can be done at either the relinquished property closing or the replacement property closing. However, do not use acquisition financing to fund the cash at the replacement property closing table; the IRS will interpret that as incurring additional debt boot paid to offset cash boot received, which doesn't work. If cash is brought to the replacement property closing table, the Intermediary will have to hold the note until the closing occurs.

- The Intermediary can take and hold the promissory note as part of the exchange proceeds and hold the note until a disposition occurs, including holding for cash to be brought to the replacement property closing table as described above. Or, perhaps the note can be paid while it is being held by the Intermediary and prior to the closing of the replacement property. Or, the taxpayer or an investor could buy the note from the intermediary while it is in the Intermediary's possession (see below).

- The Intermediary could sell the promissory note to a financial institution or investor and use cash received to acquire qualifying replacement real estate for the seller under the Exchange Agreement.

- The Intermediary could use the promissory note in his possession as consideration for the acquisition of replacement property. A problem with this is that in the hands of the seller of the replacement property, the note is a third-party note not eligible for installment sale reporting under IRC §453. Accordingly, there is disincentive for the seller to take the note as part of the consideration to be received from the sale of his property. This problem is compounded if the seller is also trying to do a 1031 Exchange of his property.

## Related Party Exchanges

(Two-Year Holding Period Requirement)

**Exchange of property between related parties.** There is a special rule for exchanges between related parties (IRC §1031(f)), which requires related taxpayers exchanging property with each other to hold the exchanged property for at least two years following the exchange to qualify for non-recognition treatment. If either party disposes of the property received in the exchange before the running of the two-year period, any gain or loss that would have been recognized on the original exchange must be taken into account on the date that the disqualifying disposition occurs.

**Sale to an unrelated party, replacement from a related party.** A taxpayer will often desire to sell to an unrelated party and receive replacement property from a related party. This type of related party transaction does not work, according to the IRS, if the related party receives cash (Rev. Rul. 2002-83). The IRS reasons that if the taxpayer or a related party "cashes out" of property in this manner, IRC §1031(f)(4) "kicks in" and the exchange is disallowed. However, if the related party is also doing an exchange (and is not "cashing out") then it is okay to receive replacement property from a related party according to PLR 200440002 and PLR 200616005.

**Sale to a related party, replacement from an unrelated party.** A taxpayer will often sell to a related party but receive replacement property from an unrelated party. This is OK but It has been unclear whether the related party was required to hold the property it acquired from the taxpayer for two years. Instructions to Form 8824 seem to imply that the two-year rule applies. Tax and exchange professionals have generally advised their clients to comply with the two-year rule. However, PLR 200706001, PLR 200712013 and PLR 200728008 released in 2007 say that the two-year rule does not apply to a related party who purchased the relinquished property from the taxpayer.

**Related parties under the rules are the following -**

- Members of a family, including only brothers, sisters, half-brothers, half-sisters, spouse, ancestors (parents, grandparents, etc.), and lineal descendants (children, grandchildren, etc.);
- An individual and a corporation when the individual owns, directly or indirectly, more than 50% in value of the outstanding stock of the corporation;

- Two corporations that are members of the same controlled group as defined in §1563(a), except that "more than 50%" is substituted for "at least 80%" in that definition;
- A trust fiduciary and a corporation when the trust or the grantor of the trust owns, directly or indirectly, more than 50% in value of the outstanding stock of the corporation;
- A grantor and fiduciary, and the fiduciary and beneficiary, of any trust;
- Fiduciaries of two different trusts, and the fiduciary and beneficiary of two different trusts, if the same person is the grantor of both trusts;
- A tax-exempt educational or charitable organization and a person who, directly or indirectly, controls such an organization, or a member of that person's family;
- A corporation and a partnership if the same persons own more than 50% in value of the outstanding stock of the corporation and more than 50% of the capital interest, or profits interest, in the partnership;
- Two S corporations if the same persons own more than 50% in value of the outstanding stock of each corporation;
- Two corporations, one of which is an S corporation, if the same persons own more than 50% in value of the outstanding stock of each corporation; or
- An executor of an estate and a beneficiary of such estate, except in the case of a sale or exchange in satisfaction of a pecuniary bequest.
- Two partnerships if the same persons own directly, or indirectly, more than 50% of the capital interests or profits in both partnerships, or
- A person and a partnership when the person owns, directly or indirectly, more than 50% of the capital interest or profits interest in the partnership.

A disqualifying disposition does not include dispositions by reason of the death of either party, the compulsory or involuntary conversion of the exchanged property if the exchange occurred before the threat or imminence of the conversion, or dispositions where it is established to the satisfaction of the IRS that neither the exchange nor the disposition had as one of their principal purposes the avoidance of federal income tax.

# Multiple-Asset Exchanges And Personal Residences

A Multiple-Asset Exchange occurs when a taxpayer is selling/exchanging a property, which includes more than one type of asset. A common example is a farm property including a personal residence, farmland and farm equipment.

The Treasury Department has issued Regulations, which govern how multiple-asset exchanges are to be reported. The Regulations establish "exchange groups" which are separately analyzed for compliance with the like-kind replacement requirements and rules of boot. Farmland must be replaced with qualifying like-kind real property. Farm equipment must be replaced with qualifying like-kind equipment. A personal residence is not 1031 property and is accounted for under the rules applicable to the sale of a personal residence.

The Multiple-Asset Regulations are ambiguous concerning how the personal residence portion of a multiple-asset exchange should be accounted for. However, it is common practice for the closing on the relinquished property to be bifurcated into two separate closings; one for the personal residence and the other for the remainder of the property. The proceeds applicable to the sale of the personal residence are usually disbursed to the taxpayer and not retained by the Intermediary in the exchange escrow. The balance of the proceeds is retained by the Intermediary for use in acquiring like-kind replacement property under the Exchange Agreement.

Another common example of multiple-asset exchanges is a real property sale that includes personal property (i.e. furniture and appliances). Rental properties including this type of personal property are multiple-asset exchanges. Hotel properties are a good example of a multiple-asset exchange including real and personal property.

Even a sale/exchange of a rental property includes a combination of real and personal property. In practice, the value of the personal property that is transferred with a rental property is commonly disregarded for calculation and income tax reporting purposes. However, there is no de minimis rule, which permits a taxpayer to disregard the value of personal property, even if it is nominal.

The Multiple-Asset Regulations are complex and require the services of a tax professional for analysis purposes and income tax reporting. The tax professional is essential and will help in determining values, allocations of sale price and purchase prices to the elements of the transaction. Exchanges that include personal property of significant value should reference the personal property in the exchange agreement and be completed in a manner that complies with all of the exchange rules concerning identification, etc.

# Personal Property Exchanges
(In A Nutshell)

As explained above, exchanges frequently include personal property. However, personal property exchanges are just as common as real property exchanges. Personal property exchanges commonly occur with respect to corporate or business aircraft and ships, construction equipment, farm equipment, and even livestock.

The like-kind rules are more challenging for personal property than for real property. The like-kind provisions contained in the Regulations establish safe harbor definitions of like-kind replacement personal property if the replacement property is within the same "General Asset Class" or within the same "Product Class."

The General Asset Classes are found in the Regulations (§1.1031(a)-2(b)(2)) and can be summarized as follows -

- Office Furniture, Fixtures, And Equipment
- Information systems (computers and peripheral equipment)
- Data Handling Equipment, Except Computers
- Airplanes (airframes and engines), except those used in commercial or contract carrying of passengers or freight, and all helicopters (airframes and engines)
- Automobiles, Taxis
- Buses
- Light General Purpose Trucks
- Heavy General Purpose Trucks
- Railroad cars and locomotives, except those owned by railroad transportation companies
- Tractor units for use over-the-road
- Trailers and trailer-mounted containers
- Vessels, barges, tugs, and similar water transportation equipment, except those used in marine construction, and
- Industrial steam and electric generation and/or distribution systems

The Product Classes are found in Sectors 31, 32 and 33 (pertaining to manufacturing industries) of the North American Industry Classification System (NAICS) set forth in Executive Office of the President, Office of Management and Budget, North American Industry Classification System, United States, 2002 (NAICS Manual) as periodically updated.

The classes are broad for classes of equipment such as farm equipment, office equipment and hotel furnishings. Vehicles must be replaced with similar types of vehicles.

The services of a tax professional are essential for successful personal property exchanges and related compliance with the like-kind replacement property rules.

## Partnership And Co-Ownership Issues

Investment real estate is commonly owned by co-owners in a partnership containing two or more partners, or by co-owners as tenants in common. An exchange of a tenant in common interest in real estate poses no problems and is eligible for 1031 Exchange treatment. However, an exchange of an interest in a partnership is not permitted under the Code and Regulations.

If a partnership owns property and desires to sale/exchange the property, then the partnership is the entity that is the Exchanger and party to the Exchange Agreement. The partnership will take title to the replacement property.

Frequently, individual partners in a partnership desire to take their share of the proceeds of sale of the partnership property, replace with qualifying 1031 replacement property in their own names and end their relationship with the partnership. This presents problems that require careful planning and is not without tax risk.

If a partnership involving two partners wishes to discontinue the partnership, sell the property, and go their separate ways - with either the cash or a 1031 Exchange, it is necessary for the individual partners to receive deed to the property in advance of the sale. This is done in the context of a distribution of property from the partnership to its partners. The individual partners are then generally required to hold the property as tenants in common for an unspecified period of time (decent interval of time) in order to comply with the "held for" requirement of 1031 Exchanges that requires a taxpayer to have "held" qualifying property for business or investment purposes prior to the exchange.

If a partnership with multiple partners wishes to exchange property but some of the partners want to "cash out" or go separate ways, it is common for the partnership to do a "split-off." The partnership distributes tenancy in common title to a portion of the partnership property to those individual partners who wish to proceed in separate directions, and the partnership (and its remaining partners) proceed with an exchange in the name of the partnership.

The services of a tax professional is essential for tax planning and structuring for successful exchanges of partnership and co-ownership interests in real estate.

# What is a TIC?

(Tenancy In Common Investment)

Tenancy in common investments (“TIC” or “TIC Investments”) have become a booming industry in the United States in recent years. A tenancy in common investment (better known as a TIC) is an investment by the taxpayer in real estate which is co-owned with other investors. Since the taxpayer holds deed to real estate as a tenant in common, the investment qualifies under the like-kind rules of §1031. TIC investments are typically made in projects such as apartment houses, shopping centers, office buildings, etc. TIC sponsors arrange TIC syndications to comply with the limitations articulated by the IRS with Rev Proc 2002-22 which, among other things, limits the number of investors to 35.

This type of an investment can appeal to taxpayers who are tired of managing real estate. TICs can provide a secure investment with a predictable rate of return on their investment. Management responsibilities are provided by management professionals. Cash returns on these types of investments are typically in the 6% to 7% range. Syndicators of TICs are called “sponsors.” Investment offerings can be made directly by the Sponsor or by brokers who can assist taxpayers with an assortment of offerings currently on the market.

TIC investments are treated by most sponsors as securities because they meet the definition of securities either in the state where the property resides or in the various states where the sponsor intends to offer the investment for sale. The SEC has not ruled on this issue but most states are quite clear in their statutes that these investments are securities under state law. This means that only licensed security dealers may market these investments. However, even though the investments may be securities under state law, the investment is a real estate investment for purposes of §1031.

A number of sponsors of TIC investments do not agree that the investment is a security under state law. They structure their TIC so that the investment is a real estate investment not subject to state security laws. Usually this means that the TIC sponsor will not be responsible for management of the investment and independent management will be employed.

TIC investments are commonly structured in one of the following ways –

- A single-tenant property with an established credit rating,
- Multiple tenants subject to a single master lease with the TIC sponsor who subleases to the tenants,
- Multiple tenants each with separate leases managed by professional management.

Taxpayers considering a TIC investment need to be prepared for an investment which may last for several years with limited liquidity. Taxpayers should research track records and management performance of sponsors who are offering TIC investments. They should also carefully review any available proforma operating statements and prospectus. A financial advisor should be consulted when necessary.

A list of TIC sponsors and brokers by state can be found on the website of the Tenant In Common Association (TICA) at www.ticassoc.org.

## What Realtors Should Know About 1031 Exchanges

**Realtors are Often the First to Recognize the Potential Benefits of a Section 1031 Exchange** to a seller of real estate. When a seller is going to replace qualifying real estate with other replacement real estate, a Section 1031 Exchange should be suggested. It is possible for a seller to employ the services of an Exchange Intermediary at any time after a contract is executed up to the day of closing on the contract. It is too late after the closing has occurred.

**Accommodation Language in the Contract.** Accommodation language is usually placed in Contracts to Buy and Sell Real Estate wherein the other party to the contract is informed and agrees to cooperate with the 1031 exchange. Typical accommodation language might read as follows:

> **For a Seller -** "A material part of the consideration to the seller for selling is that the seller has the option to qualify this transaction as a tax deferred exchange under Section 1031 of the Internal Revenue Code. Purchaser agrees to cooperate in the exchange provided purchaser incurs no additional liability, cost or expense" or
>
> **For a Buyer -** "This offer is conditional upon the seller's cooperation at no cost to allow the purchaser to participate in an exchange under Section 1031 of the Internal Revenue Code at no additional cost or expense. Seller hereby grants buyer permission to assign this Contract to an Intermediary not withstanding any other language to the contrary in this Contract".

**Accommodation language is not mandatory** and can be omitted if it puts the taxpayer to a disadvantage for other parties to know about his plan to sell and replace property under IRC §1031 and related closing pressures under the exchange 'time clocks."

**Assignment of Contracts.** If a Realtor knows that a buyer intends to assign the contract to an Intermediary in connection with an exchange, it is helpful to reference the buyer as "John Doe or Assigns" on the contract.

**The standard form Contract to Buy and Sell Real Estate used by Colorado Realtors** contains a provision wherein the contract is not assignable by a buyer without the seller's permission. The standard form Contract does not limit a seller's right to assign the contract. When a Realtor is assisting a buyer with a contract, which is going to be assigned to an Intermediary in connection with a 1031 Exchange, this paragraph should be eliminated so that the buyer can proceed with an assignment with no contract restrictions. If the "not assignable" paragraph is not eliminated, then an addendum to the contract is usually prepared by the Intermediary, which makes the contract assignable by the buyer.

**An Exchange Addendum To Contract To Buy And Sell Real Estate** issued by the Colorado Real Estate Commission containing all necessary accommodation language is also available. Use of this Addendum makes contract accommodation language unnecessary and automatically provides for assignability of a contract by the buyer in an exchange transaction.

**Settlement Statements.** Section 1031 of the Internal Revenue Code imposes no requirements and provides no guidance with respect to preparation of Settlement Statements for an exchange of property. The law governing the preparation of settlement statements is Colorado Real Estate Law and requirements, which apply to title companies under insurance regulations. The Colorado Real Estate Commission has no special requirements concerning exchanges involving an Intermediary.

**Intermediaries often instruct closers to name the Intermediary as the seller** of a property on behalf of their client. This is not required by IRC §1031 and creates additional closing burdens since it requires the Intermediary to sign the settlement statements.

**An occasional (but unnecessary) practice** is for the title company closing on the transaction to prepare a second set of settlement statements in which the Intermediary is shown as a buyer and seller. The Intermediary's set of statements "mirror" each other as to debits and credits. The thinking here is that the settlement statements should reflect a "chain of title." This practice is not required by IRC §1031.

**Our recommendation is to prepare one set of settlement statements** in the normal manner which total to zero proceeds due to or from the Exchanger. The settlement statements should be made to total to zero proceeds due to or from the Exchanger by showing a debit or credit for "Exchange Funds - 1031 Corporation" as a transaction item "above the bottom line". The amount of "Exchange Funds" is the amount of funds being transferred to or from the Intermediary in connection with the closing.

# The Tax Rules For Sale Of A Personal Residence

(In A Nutshell)

**The Taxpayer Relief Act of 1997,** signed into law on August 5, 1997, brought sweeping changes to the tax rules applicable to the sale of a personal residence. Gone are all of the old rules - including the two-year rollover requirement and the over 55, once-in-a-lifetime, $125,000 tax-free gain rule. These rules were completely repealed.

**In A Nutshell, Effective For Sales After May 6, 1997, The New Rules Are -**

- $500,000 tax-free gain for married, joint-filing couples; $250,000 for single persons.
- All residence sales after May 6, 1997 are eligible for this exclusion.
- **1st Two-Year Rule -** Must live in residence for any two out of prior five years.
- **2nd Two-Year Rule** - A second home sale within a two-year period is not eligible for this exclusion. Can only use this exclusion once in any two-year period.
- Except for the two-year Rules, no limit on number of times this exclusion is available.
- No age restrictions.
- **(EXCEPTION)** A residence which was originally acquired as replacement property in a 1031 Exchange must be owned for five years as well as lived in for two out of those five years to qualify (American Jobs Creation Act of 2004).

**A prorata exclusion is available** for taxpayers on sales which are less than two years apart, or for failure to meet either of the two-year rules due to change of employment, health or other reasons to be specified by Treasury Regulations. For instance, one year of residence or second sale after one year = 50% of the above referenced exclusion.

**A rental property converted to a personal residence** and sold after May 6, 1997 is eligible for this exclusion subject to the two-year rules. Any depreciation of any kind taken on the property after May 6, 1997 remains taxable at a 25% maximum tax rate (rental, home office, etc.) even though the property is converted to a personal residence.

**Taxpayers with a gain exceeding these exclusion amounts** get no relief and must pay tax on the excess amount at the new maximum capital gain tax rates; generally 15%. There is no relief from a rollover into a replacement residence as there was under the old law.

# The Capital Gains Rules

(In A Nutshell)

**The Jobs and Growth Tax Relief Reconciliation Act of 2003** made significant changes to the way long-term capital gains are taxed. Prior to enactment of the new law, long-term capital gains were taxed at a maximum rate of 20% (10% for taxpayers in the 10% & 15% tax brackets). The new reduced tax rates for long-term capital gains are effective for sales on or after May 6, 2003.

**In A Nutshell,** here are the rules for long-term capital gains on the sale of investment real estate effective May 6, 2003 -

| Maximum Tax Rate | Long-Term Capital Gains (Property held 12 months or longer) |
|---|---|
| 15% | Taxpayers in a regular tax bracket higher than 15% |
| 5% | Taxpayers in the 15% or 10% regular tax brackets |
| 0% | Taxpayers in the 15% or 10% regular tax brackets commencing in year 2008. |

**A married couple filing jointly in 2006** using the standard deduction is in a 10%/15% tax bracket until adjusted gross income exceeds $78,200.

**Depreciation Taken On Real Estate Investments** is taxable at a maximum 25% tax rate (15% for taxpayers in 10% and 15% tax bracket).

# Capital Gain Worksheet

Sale of Depreciable Real Estate

## Calculation of Adjusted Basis –

| | | | |
|---|---|---|---|
| Purchase price | | $ | (1) |
| Improvements added after purchase | | | (2) |
| Deferred gain from previous 1031 exchange, if any | | ( ) | (3) |
| Less depreciation taken during ownership | | ( ) | (4) |
| **Adjusted Basis** | (lines 1 + 2 - 3 - 4) | $ | (5) |

## Calculation of Capital Gain -

| | | | |
|---|---|---|---|
| Sale price | | $ | (6) |
| Less adjusted basis | (line 5 above) | ( ) | (7) |
| **Capital Gain** | (lines 6 minus 7) | $ | (8) |

## Type of Capital Gain -

| | | | |
|---|---|---|---|
| 25% rate gain | (line 4 above) | $ | (9) |
| 15% rate gain | (lines 8 minus 9) | | (10) |
| **Total Capital Gain** | (lines 9 + 10) | $ | (11) |

## Tax Due at Maximum Capital Gains Rate -

| | | | |
|---|---|---|---|
| 25% rate gain x 25% | (line 9 x 25%) | $ | (12) |
| 15% rate gain x 15% | (line 10 x 15%) | | (13) |
| **Total Capital Gains Tax** | (lines 12 + 13) | $ | (14) |

# MACRS Depreciation Useful Lives

(Quick Reference)

## 3-year 200% DB Class (150% DB for farmers) includes -

- Semi trucks (tractor units used over the road)
- Breeding hogs

## 5-Year 200% DB Class (150% DB for farmers) includes -

- Automobiles
- Trucks
- Breeding and Dairy Cattle
- Breeding Sheep and Goats
- Computers, calculators and typewriters
- Construction equipment
- Asset used in personal and prof. services
- Assets used in retail/wholesale trade
- Assets used in mfg of electronic products
- Research and experimentation property
- Furniture, appliances, window covering and carpeting used in residential rental property

## 7-Year 200% DB Class (150% DB for farmers) includes -

- Office furniture and fixtures
- Equipment
- Fences (farm properties only)
- Grain storage bins (and potato storage structures)

## 10-Year 150% DB Class includes -

- Single-purpose agricultural or horticultural structures

## 15-Year 150% DB Class includes -

- Service stations
- Car washes
- Land improvements (fences, sidewalks, roads, landscaping, etc.)

## 20-Year 150% DB Class includes -

- Farm buildings

## 27.5-Year SL Class includes -

- Residential real estate

## 39.0-Year SL Class includes -

- Non-residential real property
- Leasehold improvements, non residential real property