IRS OKS REVERSE LIKE-KIND EXCHANGE WHERE TWO RELATED PARTIES USED THE SAME SWAP FACILITATOR

PLR 201242003

A new PLR deals with the unique situation of two related parties each vying to acquire the same property using a reverse like-kind exchange under Code Sec. 1031 and Rev Proc 2000-37, 2000-2 CB 308. IRS ruled that the party successfully consummating the reverse like-kind exchange could defer tax under Code Sec. 1031 even though it used the same exchange accommodation titleholder (i.e., the same swap facilitator) as the other party.

Background. Under Code Sec. 1031, gain or loss isn't recognized currently on the exchange of property held for productive use in a trade or business or for investment for property of like kind that will be held for productive use in a trade or business or for investment. The replacement property must be identified within 45 days after the date that the property given up in the exchange is relinquished. Additionally, the taxpayer must actually receive the replacement property no later than (a) 180 days after the date that the property given up in the exchange is relinquished, or (b) the due date (with regard to extensions) for the taxpayer's return for the year in which the relinquished property is given up, whichever is earlier. (Code Sec. 1031(a)(3))

When a two-way (or direct) exchange of like-kind property isn't possible, the solution often is a multiparty deferred exchange. In a regular deferred exchange, Seller gives up his property first. Often, however, the replacement property must be received first, before Seller has transferred his property. In this situation, the transaction is structured as a reverse multiparty like-kind exchange.

Reverse exchange safe harbor. In Rev Proc 2000-37, 2000-2 CB 308, IRS said it wouldn't challenge the qualification of property as either replacement or relinquished property, or the treatment of the exchange accommodation titleholder (EAT) as the beneficial owner of either type of property, if the property is held in a “qualified exchange accommodation arrangement” (QEAA).

Property is held in a QEAA if all the following requirements are met:

1. Qualified indicia of ownership (QIO) of the property are held by the EAT from the date of acquisition by the EAT until the property is transferred to the taxpayer as replacement property or to someone other than the taxpayer or a disqualified person as relinquished property. Among other conditions, the EAT can't be the taxpayer or a disqualified person under Reg. § 1.1031(k)-1(k)). QIO means legal title, other indicia of ownership treated as beneficial ownership of the property under applicable principles of commercial law (e.g., a contract for deed), or interests in an entity that is disregarded as an entity separate from its owner for

tax purposes (e.g., a single member limited liability company) and that holds either legal title to the property or such other indicia of ownership.

2. When the QIO of the property is transferred to the EAT, it is the taxpayer's bona fide intent that the property represent either replacement property or relinquished property in an exchange intended to qualify for Code Sec. 1031 treatment.
3. No later than five business days after QIO of the property are transferred to the EAT, the taxpayer and the EAT enter into a written QEAA providing that: (a) the EAT is holding the property for the benefit of the taxpayer to facilitate an exchange under Code Sec. 1031 and Rev Proc 2000-37; (b) both parties agree to report the acquisition, holding, and disposition of the property as provided in Rev Proc 2000-37; and (c) the EAT will be treated as the beneficial owner of the property for all federal income tax purposes. Both parties must report the federal income tax attributes of the property on their federal returns in a manner consistent with this agreement.
4. No later than 45 days after the transfer of QIO of the replacement property to the EAT, the relinquished property is properly identified in a way consistent with the identification requirements in Reg. § 1.1031(k)-1(c). The taxpayer may properly identify alternative and multiple properties under the rules of Reg. § 1.1031(k)-1(c)(4).
5. No later than 180 days after the transfer of QIO of the property to the EAT, (a) the property is transferred (either directly or indirectly) through a qualified intermediary (as defined in Reg. § 1.1031(k)-1(g)(4)) to the taxpayer as replacement property; or (b) the property is transferred to a person who is not the taxpayer or a disqualified person as relinquished property.
6. The combined time period that the relinquished property and the replacement property are held in a QEAA does not exceed 180 days.

Facts. Taxpayer and a party related to it (Related Party) each owned separate multifamily residential apartment properties, and each was interested in acquiring Property as replacement property through transactions separately structured as like-kind exchanges. The problem was that Property's seller required the sale/purchase of Property to close on Date 1, but neither Taxpayer nor Related Party had disposed of any property for exchange by that date. Therefore, Taxpayer and Related party **each** initiated a reverse like-kind exchange under the safe harbor provisions of Rev Proc 2000-37. Each entered into a QEAA with the same unrelated EAT, identified as EATX. Taxpayer and Related Party represented that each complied with the requirements of Rev Proc 2000-37, including the requirement that Taxpayer and Related Party have a bona fide intent to acquire Property as replacement property in a Code Sec. 1031 like-kind exchange when EATX acquired QIO in Property.

In its QEAA, Taxpayer acknowledged that EATX had entered into a concurrent QEAA for Property with Related Party, which gave the latter rights to acquire Property, in

whole or part, to complete like-kind exchanges. Also, Taxpayer's right to acquire Property is subject to it giving notice to EATX of its intention to acquire Property, in whole or part. However, the agreement said Taxpayer's rights would terminate upon prior delivery of such notice by Related Party. The agreement also provided that if Related Party gave prior notice of its intent to acquire Property, EATX had no further obligation to transfer Property to Taxpayer, whether in connection with the exchange described in the agreement or otherwise.

Related Party, in turn, simultaneously entered into its own QEAA with EATX for Property, listing Taxpayer as the other party that may acquire Property under Taxpayer's QEAA, under substantially the same terms and conditions.

On Date 1, EATX acquired title to Property using funds that Taxpayer advanced. On Date 2 (which was within the 45-day identification period) Taxpayer and Related Party each identified property that each proposed to transfer as relinquished property according to terms of its respective QEAA with EATX. Before Date 3, Taxpayer's qualified intermediary sold one of the three properties Taxpayer identified as potential relinquished property. On Date 3 EATX transferred Property to Taxpayer to complete Taxpayer's exchange.

Favorable ruling. The PLR concludes that EATX may enter into QEAAs with more than one entity, including persons related to Taxpayer, each of which has a bona fide intent to acquire the same property as the replacement property for their respective exchanges. Rev Proc 2000-37 , does not prohibit an accommodation party from serving as an EAT to multiple taxpayers under multiple and simultaneous QEAAs for the same parked property. The fact that Related Party's QEAA failed because Taxpayer timely acquired Property under its QEAA using the same EAT does not invalidate Taxpayer's QEAA.

Thus, the PLR concludes that based on the information submitted, and each representation made (including the representation that Taxpayer and Related Party each had a bona fide intent to acquire Property pursuant to each of its QEAAs), Taxpayer's QEAA to acquire Property is a separate and distinct QEAA as defined in Rev Proc 2000-37 (with separate application of the identification rules of Reg. § 1.1031(k)-1(c)(4))). That result holds true even though Related Party simultaneously entered into a separate QEAA with the same EAT to acquire the same property.

References: For like-kind exchanges, see FTC 2d/FIN ¶ I-3050 ; United States Tax Reporter ¶ 10,314 ; TaxDesk ¶ 22,420 ; TG ¶ 10450 .