



## **Safe harbor for harbor-view property: Documenting use of the property is very important**

May 19, 2008 - Financial Digest

On February 15, the Internal Revenue Service (IRS) released Revenue Procedure 2008-16 (the Revenue Procedure), stating in Section 2.06 thereof:

"The service recognizes that many taxpayers hold dwelling units primarily for the production of current rental income, but also use the properties occasionally for personal purposes. In the interest of sound tax administration, this revenue procedure provides taxpayers with a safe harbor under which a dwelling unit will qualify as property held for productive use on a trade or business or for investment under 1031 even though a taxpayer occasionally uses the dwelling units for personal purposes."

The revenue procedure applies only to "dwelling units" that satisfy certain qualifying use standards. A "dwelling unit" is defined as "real property improved with a house, apartment, condominium, or similar improvement that provides basic living accommodations including sleeping space, bathroom and cooking facilities."

The qualifying use standards are as follows: In the case of relinquished property (a) the taxpayer must have owned the property for the 24-month period immediately preceding the exchange and (b) within each twelve month period that makes up the 24-month period (i) the property must have been rented to another person at a fair rental for not less than 14 days and (ii) the taxpayer's personal use of the property must not exceed the greater of 14 days or 10% of the number of days during the twelve month period that the property is rented.

While the calculations may be mechanical, determining fair rental and personal use is not. The Revenue Procedure directs taxpayers to Section 280A(d)(2) to determine the latter, but says the former will be determined based on all of the facts and circumstances.

What is clear is that documenting the use of the property is very important. So, while a dwelling unit that satisfies the qualifying use standards will be treated as having been held for investment or productive use in trade or business, even if some personal use has been made of it, only the taxpayer who meticulously documents the use of the property will ultimately be able to take advantage of the Revenue Procedure.

If you have questions about this or any other issues relating to Section 1031 or other real estate tax matters, please do not hesitate to contact the author.

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