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Section 1031: Who can be owner of your replacement property? - by Pamela Michaels

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In the world of Section 1031 exchanges, one of the most frequent inquiries relates to the name in which title to the replacement property may be held without violating the requirements of Section 1031. In the Northeast, most want to acquire properties in an LLC either to protect against potential personal liability and/or to provide ease of management of the asset where multiple investors are involved. This is especially true where the purchase of the replacement property is being financed, as lenders tend to want one borrower.

Under Section 1031, the person or entity that files the tax return for the relinquished property must also file the tax return for the replacement property. However, this requirement does not mean that title to the relinquished and replacement properties must be the same, although the "tax owner" should be the same. The reason why has to do with the law on disregarded entities. Disregarded entities are entities that are not recognized for Federal tax purposes, which means the entity does not file a separate Federal tax return. All reporting is done by the person or entity which owns the disregarded entity and is recognized for Federal tax purposes.

This article summarizes rules relating to entities that may be "disregarded" for purposes of Section 1031 and is designed to assist in cases where a taxpayer would like to take title to the replacement property in a manner that is different from the manner in which they held title to the relinquished property.

General Rules

Virtually any natural or legal person (individual, corporation, partnership, LLC, trust, etc.) may perform a 1031 exchange.

The "tax owner" of the relinquished property (generally as determined by the status of legal title) should also be the "tax owner" of the replacement property, e.g., if John Public is on title to the relinquished property, then John Public should acquire title to the replacement property.

Exception to Rule 2

If the transferor of the relinquished property or the transferee of the replacement property is a "disregarded entity" for federal tax purposes (See Treas. Reg. § 301.7701) or the "owner" of a disregarded entity, then the entity is treated as if it does not exist and the owner and the entity are,

in effect, interchangeable as the taxpayer (i.e., the entity may sell and the owner may buy and vice versa). For example, if A owns 100% of the interests in an entity that is a “disregarded entity,” then A may sell the relinquished property and the entity may take title to the replacement property and vice versa.

What entities are not disregarded?

C Corporations (“regular”): Not disregarded;
S Corporations: Not disregarded;
General Partnerships: Not disregarded; and
Limited Partnerships: Not disregarded.

The IRS has ruled that where an otherwise non-disregarded entity has two members under local law, but one of the members is a disregarded entity that is owned by the other member, the eligible entity is treated as having only one member. Thus, the entity cannot be a partnership for tax purposes; it must be classified either as a disregarded entity or as an association taxable as a corporation. [Rev. Rul. 2004-77, 2004-31 I.R.B. 119]

Limited Liability Companies (LLCs) are not disregarded except in the following cases where the LLC has not made an election to be treated for tax purposes as a corporation:

100% of the interests are owned by a single legal or natural person. [PLRs 9751012; 9807013; 19911033];
100% of the interests are owned by husband and wife as community property in a community property state. [Rev. Proc. 2002-69, 2002-2 CB831]

The IRS has ruled that a two-member LLC formed under Delaware law was disregarded for 1031 exchange purposes where all economic interests were held by one member and the function of the second member was solely to prevent a bankruptcy filing or other violation of the LLC’s covenants with lenders [PLR 199911033]. The IRS has ruled that the acquisition of all the ownership interests held by two different owners by a single buyer in a single transaction constituted an acquisition of the underlying assets owned by the LLC. [Rev. Rul. 99-6, 1991-1 C.B 432]

In all cases, every taxpayer should consult with their tax and/or legal advisor to ensure that the desired structure is acceptable for 1031 exchange purposes and that ultimately the same “tax owner” is both relinquishing real property held for investment and acquiring a like-kind replacement property.

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