Federal Income Tax Planning For Commercial Real Estate Transactions Teleconference

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I. Developments With Like-Kind Exchanges

A. Among other things, trust certificates and interests in a partnership may <u>not</u> be received tax-free in a like kind exchange.

1) *Tip:* In any transaction intended to be a like-kind exchange, *always* confirm that the replacement property is not carved out of the "like-kind" category

B. Tenancies in common interests (TICs) are gaining in popularity

1) The TIC must be properly structured

2) Consult IRS Revenue Procedure 2002-22 to avoid "partnership" issue

3) Prepare and enter into a TIC agreement

4) For illustration, see IRS Private Letter Ruling 200625009

5) Delaware statutory trusts (DSTs) are also gaining in popularity

a) There are differences between DSTs and TICs

b) Consult IRS Revenue Ruling 2004-86 to avoid trust reclassification

c) Avoid the "seven deadly sins"

6) *Tip:* The size of the TIC or DST can generally be tailored to the re-investment needs of the taxpayer

C. The IRS takes a hard line with respect to like-kind exchanges of intangibles

1) See TAM 200602034

a) The IRS rejects a multiple-asset business/single asset theory

b) Each asset of the business must be analyzed

c) The IRS is stricter on non-real property exchanges

d) The IRS is even more strict on intangible property exchanges

e) Match first, the nature of rights; then, the underlying property

f) Intangibles comprising a "going concern" are value-ineligible

2) *Tip:* Sect. 1031 extends well beyond exchanges of real property

3) *Tip:* The mere character of an intangible as a "patent," "trademark," etc. is not enough. You must look at the general asset class or product class of the underlying property as well

4) *Tip:* Foreign intangibles cannot be exchanged tax-free for domestic intangibles

D. Insufficient identification puts an exchange at risk of being taxable

1) See TAM 200602034

a) Mere general description of property is not enough

b) No valid identification, no tax-free exchange

2) *Tip:* More detail is better when identifying replacement property. Do not risk blowing a tax-free exchange with an insufficient identification

E. Funds held by qualified intermediaries

1) The IRS replaced 1999 proposed regs with newly proposed regs

2) New proposed regs treat exchange funds as loans

3) The exchange agreement can provide otherwise

4) Proposed regs would apply after final regs issued

5) Until final regs are issued, any reasonable method is fine

6) *Tip:* Avoid confusion and specify who owns the funds at the outset

II. Energy Policy Act of 2005

A. A new tax deduction is available for "energy-efficient commercial building property"

1) Deduction or up to $1.80 per square foot is available

a) Energy efficient commercial building property

i. Lighting

ii. Heating and cooling

iii. Building envelope

2) Property must be placed in service before Dec. 12, 2008

3) Building energy costs must be reduced by 50% or more

4) A partial deduction is available for certain investments

5) Deduction is generally available to the person who pays

6) *Tip:* This deduction is a win/win: Accelerated recovery of improvement costs, plus lower energy bills