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1031 Exchange: IRC Section 1031: Determining "Property Held for Sale" vs. "Property Held for Investment"

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Real estate held as "stock in trade or other property primarily for sale" is excluded from the tax deferral benefits of IRC Section 1031. Stock in trade describes property which is included in the inventory of a dealer and is held for sale to customers in the ordinary course of business. The gain on the sale of this property is taxed as ordinary income.

Substantiating the Investment Intent

To qualify for a §1031 exchange, a taxpayer must be able to support that their "intent" at the time of the purchase was to hold the property for investment. Listed below are some factors the IRS may review to determine whether or not the intent was to hold the property for investment. The burden of substantiating the investment intent is the responsibility of the taxpayer and the items below are not an exhaustive list but provide useful indicators in determining the taxpayer's intent.

- * The purpose for which the property was initially acquired.
- * The purpose for which the property was subsequently held.
- * The purpose for which the property was being held at the time of sale.
- * The extent of advertising, promotion of other active efforts used in soliciting buyers for the sale of the property.
- * The listing of property with brokers.
- * The extent to which improvements, if any, were made to the property.
- * The frequency, number and continuity of sales.
- * The extent and nature of the transaction.
- * The ordinary course of business of the taxpayer.

Can a "Dealer" Perform an Exchange?

The fact that a taxpayer is considered a dealer does not automatically disqualify them from performing an exchange.

A dealer may segregate assets that they intend "to hold for productive use in a trade or business or for investment" from their dealer property. Some dealers have been advised by their attorneys to form a separate entity, such as an LLC, specifically to hold title to property that may be able to qualify for an exchange sometime in the future.

Review with Legal and/or Tax Advisor

It is important that all taxpayers, and particularly dealers, review their transaction with an attorney or accountant before proceeding with an exchange. There are many issues not covered in this short discussion which may affect the ability of a taxpayer to successfully defend an exchange transaction.