Office of Chief Counsel
Internal Revenue Service

memorandum

CC:LM:RFP:CHI:2:TL-N-4793-00
JELamartine

date:

to: Tom Jurinek, Team Manager, Group LMSB:CTM:1355
Attn: Savannah Pettigrew

from: Steven R. Guest, Associate Area Counsel - LMSB

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subject: [redacted] - EIN [redacted]
[redacted] - SSN [redacted]
[redacted] - SSN [redacted]

DISCLOSURE STATEMENT

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ISSUE:

Whether the partnership sold partnership property or the partners had a qualified exchange of like-kind property under § 1031.

DISCUSSION:

The facts are as outlined in your request for advice. In summary, the subject building was held in trust with the partnership as the beneficiary of the trust. All negotiations to sell the building were done in the name of the [redacted] as the seller. On [redacted] the partnership accepted an offer from an unrelated entity for $[redacted]. Shortly before the closing, on [redacted] the partnership conveyed and quitclaimed to [redacted] and [redacted] as tenants in common all interest in the property. The closing took place on [redacted] and the sales proceeds were distributed as follows. First, the mortgage which was in the name of the partnership was paid off. The remaining amount was used to pay off $[redacted] of [redacted] s personal loan; $[redacted] to [redacted]'s intermediary; and $[redacted] to an escrow account relating to a security deposit for a restaurant tenant. The quitclaim deed was recorded on [redacted].

It is our understanding that [redacted] has conceded the § 1031 issue but that this issue still remains for [redacted] It is also our understanding that the basis in the property is affected if we determine that the partnership, and not the partners as individuals, sold the property. This would create an adjustment on [redacted]'s return also.

With respect to the § 1031 issue, because [redacted] received the funds by virtue of his personal loan being paid, it does not qualify as a like-kind exchange. We have discussed this with National Office and we believe that this is a strong issue for the government. The subsequent real estate transfers involving the Nebraska property are probably of no consequence here because [redacted] received money and not the property in the exchange.

As for the question of whether the partnership sold the building and not the individuals, we have sufficient basis to conclude that in substance the partnership sold the property. In Chase v. Commissioner, 92 T.C. 874 (1989), the Tax Court held that where the property had been held in a partnership and transferred to the partners just before the sale in order to gain 1031 treatment, the partnership had in substance sold the property. In that case, the partnership agreement prohibited distribution of any property other than cash and the partners received their distributive share as partners. Here, though [redacted] and [redacted] were [redacted]% partners, the distribution was not proportionate and there is apparently no prohibition in the partnership agreement to distributing the property. Therefore, our facts are somewhat weaker there than in the Chase case. See, Magneson v. Commissioner, 753 F.2d 1490 (9th Cir. 1985) where the court refused to apply the substance over form doctrine and allowed 1031 treatment. Nonetheless, because of the timing of the quitclaim deed; the fact that there was only one deed for both partners and the deed was not recorded until after the closing, and that all sales negotiations were carried on in the name of the partnership, we have a sufficient case to argue that it was the partnership which sold the property. Because the exchange of partnership interests under § 1031(a)(2)(D) do not receive tax-free treatment, this result not only affects the basis but would also be another potential argument against [redacted] that he would not be entitled to 1031 treatment.

If you have any questions, please call Jan E. Lamartine at 312-886-9225, ext. 327.

STEVEN R. GUEST
Associate Area Counsel

By: ______________________
JAN E. LAMARTINE
Senior Attorney