
TAX-FREE LIKE-KIND EXCHANGES

Second edition

By
Bradley T. Borden, M.B.A., C.P.A., J.D., LL.M.

[Click here to go to Table of Contents](#)

[Click here to go to List of Letters, Forms and Agreements](#)

[Click here to go to order page \("Add to Cart"\)](#)



Civic Research Institute

4478 U.S. Route 27 • P.O. Box 585 • Kingston, NJ 08528

Copyright © 2015

By Civic Research Institute, Inc.
Kingston, New Jersey 08528

The information in this book is not intended to replace the services of trained legal or accounting professionals. Civic Research Institute, Inc. provides this information without advocating the use of or endorsing the issues, theories, precedent, guidance, resources, or practical materials or programs discussed herein. Any application of the issues, theories, precedent, guidance, resources, or practical materials set forth in this book is at the reader's sole discretion and risk. The author, editors, and Civic Research Institute, Inc. specifically disclaim any liability, loss or risk, personal or otherwise, which is incurred as a consequence, directly or indirectly, of the use and application of any of the contents of this book.

All rights reserved. This book may not be reproduced in part or in whole by any process without written permission from the publisher.

This book is printed on acid free paper.

Printed in the United States of America

Library of Congress Cataloging in Publication Data
Tax-free like-kind exchanges, Second edition/Bradley T. Borden

ISBN 978-1-939083-005

Library of Congress Control Number: 2015933472

Preface

Congress enacted the first like-kind exchange provision almost 100 years ago. Since then Section 1031 like-kind exchanges have become very popular among property owners who wish to exchange property tax free. As the popularity of Section 1031 exchanges has increased, so has the complexity of Section 1031. Congress, courts, and Treasury have considered various aspects of Section 1031, providing a significant body of law to guide property owners and tax advisors in planning like-kind exchanges. The increasing complexity and numerous nuances of Section 1031 suggest the need for this comprehensive coverage of tax-free like-kind exchanges.

Section 1031 is peculiar among tax provisions in its universal applicability. One qualified intermediary claims to have facilitated the exchange of a \$15,000 property. Apparently, the owner, after considering the cost of doing the exchange, determined that the tax savings and desire to reinvest the proceeds in like-kind property outweighed the cost of structuring the transaction as a Section 1031 exchange. On the other end of the spectrum, the world's largest corporations structure multibillion dollar transactions as Section 1031 exchanges. To fully serve the market of tax advisors and exchange facilitators, this book covers Section 1031 from its basic concepts to its most complicated and sophisticated exchange structures. Therefore, both those advising multinational corporations and those advising single-asset property owners will be able to turn to its pages for discussions of issues that arise in the numerous exchange contexts.

To obtain the benefits of Section 1031, exchangers generally must comply with strict rules governing the transfer of relinquished property, the identification of replacement property, and the receipt of replacement property. To comply with those rules, even routine exchanges generally require careful documentation. The book includes sample documents that will help introduce the novice to the intricacies of exchanges and the exchange process, and the seasoned practitioner may find some aspect of the documents informative. Nonetheless, the documents are intended to be examples of typical exchange documents. No one should use any portion of a document without giving careful thought to each provision in the document. Although many exchanges have common characteristics, each exchange is unique and requires careful consideration. The documents for each exchange will also be unique and require careful attention. Furthermore, different provisions in the documents will have differing relevance and importance depending upon the party considering the documents.

This second edition of the book incorporates the updates from the 2011 supplement and adds updates that have occurred since 2011. The recent updates include recent cases and rulings relating to related party exchanges; reverse exchanges and leasehold improvements exchanges; the potential use of series LLCs in exchanges; and the basic nonrecognition requirements, including the holding and use requirement, the like-kind property requirement, and the exchange requirement. This second edition also includes a new chapter on industry-specific exchanges with a lengthy discussion of exchanges of art and other collectibles. Although the general rules of Section 1031 apply to exchanges of art and other collectibles, they raise several unique issues and warrant a

lengthy discussion. That chapter also includes a discussion of Section 1031 exchanges and mortgage defeasance. The chapter should continue to grow with subsequent editions as other industry-specific exchanges warrant additional specific coverage.

Acknowledgements

Many people have assisted with the development and production of this book. I thank my wife Sam and daughter Claire for their support and encouragement, and I dedicate this work to them.

The sample documents included in the appendices are the product of the efforts of many. Several people at my former law firm, Oppenheimer, Blend, Harrison & Tate, Inc., have participated in different ways in preparing documents that form the basis of those documents. David Shechtman also shared a model for the sample trust agreement.

I thank Timothy Hurley, Eric Pauly, and Joline Wang for their help with research projects and cite checking. They made significant contributions to several sections of this book through their research efforts. I thank Zach and Qunitin Nelson for preparing the figures used in the book.

I also thank the people who put the book together. The idea for this book is Deborah Launer's at Civic Research Institute. She offered support, encouragement, and prodding as I worked on the book and supplement. I thank her for the opportunity to write this book and her support and encouragement. It was a pleasure to work with Maxine Idakus as she edited the manuscript and prepared it for publication. I thank her for the care she took in her work to improve the manuscript. Deborah and Maxine are true professionals and a pleasure to work with.

Although many people made contributions to this book, I alone accept responsibility for any errors in it and the views and interpretations it contains.

Bradley T. Borden, M.B.A., C.P.A., J.D., LL.M.

About the Author

Bradley T. Borden, M.B.A., C.P.A., J.D., LL.M., is a professor of law at Brooklyn Law School. He has extensive experience with Section 1031 exchanges. He has helped property owners of all sizes structure exchanges to come within Section 1031, has advised exchange companies with respect to document preparation and entity structure, and has served as expert witness in matters that raise Section 1031 issues. He is a past chair of the Sales, Exchanges & Basis Committee of the American Bar Association Section of Taxation. Brad is a prolific author and frequent speaker. He has numerous tax publications, including articles in law reviews and national tax journals, book chapters, and books. He earned a J.D. and LL.M. in taxation from the University of Florida Fredric G. Levin College of Law and a B.B.A. and M.B.A. from Idaho State University. Brad lives in Brooklyn, New York, with his wife and daughter.

Table of Contents

<i>Preface</i>	v
<i>About the Author</i>	vii

Chapter 1: Overview, History, and Policy of Section 1031 and the Section 1031 Industry

¶ 1.1 Overview of Section 1031	1-2
[1] Tax Benefits of Section 1031	1-2
[2] Section 1031 Requirements	1-3
¶ 1.2 History of Section 1031	1-3
[1] Constitutional Period (1913-1921): Defining Income and Realization	1-4
[2] Legislative Period (1921-1935): Nonrecognition, Enactment of Section 1031, and Its Early Development	1-4
[3] Judiciary Period (1935-1991): Emergence of Exchange Structures	1-6
[4] Administrative Period (1991-Present): Growth and Industry Development	1-10
[a] Deferred Exchange Safe Harbors	1-10
[b] Revenue Procedure 2000-37: Title-Parking Safe Harbor	1-12
[c] Revenue Procedure 2002-22: Tenancy-in-Common Interests as Replacement Property	1-12
¶ 1.3 Section 1031 Tax Policy	1-13
[1] Continuation of Investment	1-13
[2] Inability to Pay	1-14
[3] Lock-in Effect	1-14
¶ 1.4 Section 1031 Industry	1-15
[1] Attorneys and CPAs	1-15
[2] Title Companies and Financial Institutions	1-16
[3] Qualified Intermediaries	1-16
[a] Affiliated Intermediaries	1-18
[b] Private Intermediaries	1-18
[c] Attorneys and CPAs as Intermediaries	1-18
[d] Friends and Acquaintances as Intermediaries	1-19
[4] Accommodation Titleholders	1-19
[5] Tenancy-in-Common Promoters and Broker-Dealers	1-20
[6] Qualified Intermediaries as Tax Advisors	1-20
[7] Qualified Intermediaries as Tax Advisors	1-20
[a] Roles of Qualified Intermediaries	1-21
[i] Role of Qualified Intermediary Acting Solely as Exchange Facilitator	1-21
[ii] Role of Qualified Intermediary Acting as Tax or Legal Advisor	1-22
[b] Definition of the Practice of Law	1-22

[c] Duty of Nonattorney Engaged in Unauthorized Practice of Law 1-28

[d] Duty of Care in Giving Tax Advice 1-30

[e] Potential Damages for Bad Tax Advice 1-30

[f] Possible Detrimental Effect of Communicating With Qualified Intermediary 1-30

[8] Qualified Intermediary Collapses 1-31

Chapter 2: Computing and Reporting Section 1031 Nonrecognition, Boot, and Basis

¶ 2.1 Tax Gain and Loss 2-3

 [1] Tax Gain 2-3

 [2] Transaction Costs and Closing Costs 2-4

 [3] Tax Loss 2-6

 [4] Realization and Recognition 2-6

¶ 2.2 Nonrecognition 2-7

¶ 2.3 Boot and Gain Recognition 2-7

 [1] Gain Realized in Excess of Boot 2-8

 [2] Boot in Excess of Gain Realized 2-9

¶ 2.4 Basis and Gain Deferral 2-10

 [1] Effect of Gain/Loss Recognized and Boot Received on Replacement Property Basis 2-11

 [2] Allocating Basis to Non-Like-Kind Property 2-12

 [3] Effect of Loss 2-13

 [4] Effect of Additional Consideration Given 2-14

¶ 2.5 Liability Relief 2-15

 [1] Liability Relief Boot 2-19

 [a] Definition of Liability Relief 2-19

 [b] Effect of Liability Relief on Basis 2-20

 [2] Liability-Netting 2-21

 [3] Cash-Netting 2-23

 [4] Cash Receipt 2-24

 [5] Proximate Borrowing 2-25

¶ 2.6 Installment Sale Aspects of Section 1031 Exchanges 2-26

 [1] Deferred Exchange Taxable Year Straddles 2-27

 [a] Bona Fide Intent Requirement 2-28

 [b] Receipt of Boot 2-29

 [c] Amount of Recognized Gain 2-29

 [2] Exchanger-Financed Exchanges 2-30

 [a] Recognizing Gain Under the Installment Method 2-31

 [b] Complete Gain Deferral 2-32

 [3] Other Financing Arrangements 2-33

 [a] Third-Party Note Acquisition 2-33

 [b] Note as Consideration for Replacement Property 2-34

¶ 2.7 Depreciation and Depletion Recapture 2-34

[1] Depreciation Recapture	2-34
[a] Section 1245 Recapture	2-34
[b] Section 1250 Recapture	2-36
[c] Section 1250 Gain	2-36
[d] Cost-Segregated Property	2-37
[i] Cost-Segregation Studies	2-37
[ii] Exchange of Cost-Segregated Property	2-37
[2] Section 1254 Depletion Recapture	2-40
¶ 2.8 Depreciating Replacement Property	2-41
[1] Overview	2-42
[a] Property Placed in Service Before February 27, 2004	2-42
[b] Property Placed in Service After February 27, 2004	2-43
[i] Change in Method of Accounting	2-44
[ii] Previous Owner's Treatment Disregarded	2-44
[iii] Scope of Regulations	2-44
[2] Symmetrical Depreciation Exchanges	2-45
[3] Asymmetrical Depreciation Exchanges	2-46
[a] Recovery Period Not the Same	2-46
[i] Longer Recovery Period	2-46
[ii] Shorter Recovery Period	2-47
[b] Depreciation Method Not the Same	2-47
[i] Less Accelerated Replacement Property Depreciation Method	2-47
[ii] More Accelerated Replacement Property Depreciation Method	2-47
[c] Recovery Period and Depreciation Method Not the Same	2-48
[d] Appropriate Convention	2-48
[i] Midmonth Property Exchanged	2-49
[ii] No Midmonth Property Exchanged	2-49
[4] Depreciation in Year of Disposition and Year of Replacement	2-49
[a] Relinquished MACRS Property	2-49
[b] Replacement MACRS Property	2-50
[c] Deferred Transactions	2-53
[5] Special Rules for Determining Depreciation Allowances	2-53
[a] Excess Basis	2-53
[b] Depreciable and Nondepreciable Property	2-54
[c] Automobile Exchanges	2-55
[d] Optional Depreciation Tables	2-56
¶ 2.9 Replacement Property Holding Period	2-57
¶ 2.10 Accounting for Exchange Expenses in Like-Kind Exchanges	2-57
[1] Exchange Expenses Paid Out of Exchange Proceeds	2-58
[2] Exchange Expenses Paid With Out-of-Pocket Funds	2-61
[3] Effect of Liability Relief and Liability Assumption	2-62
[4] General Accounting Treatment of Exchange Expenses	2-63
¶ 2.11 Reporting Section 1031 Exchanges	2-64
[1] Interest and Penalty Standards	2-64

- [a] Taxpayer Penalties 2-65
 - [i] Substantial Authority and Reasonable Basis 2-65
 - [ii] Reasonable Cause and Good Faith 2-67
- [b] Return Preparer Penalties 2-68
- [2] Form 8824 (Like-Kind Exchanges) 2-69
 - [a] Form 8824 Overview 2-69
 - [b] Completing Form 8824 2-69

Chapter 3: Requirements for Section 1031 Nonrecognition

- ¶ 3.1 Section 1031 Requirements 3-3
- ¶ 3.2 Exchange Requirement 3-4
 - [1] Property-for-Property Requirement 3-5
 - [a] Failed Exchange: Actual Receipt of Money 3-6
 - [b] Failed Exchange: Constructive Receipt of Money 3-7
 - [c] Successful Exchange: Contingency Contract 3-8
 - [d] Successful Exchange: Escrow Deposit 3-8
 - [e] Accidental Receipt of Proceeds 3-8
 - [2] Reciprocal Requirement 3-9
 - [a] Buyer/Seller-Facilitated Exchange 3-9
 - [b] Intermediary-Facilitated Exchange 3-11
 - [c] Direct-Deed Structures 3-11
 - [d] Buyer-Facilitated Improvements Exchange 3-12
 - [e] Circular Exchanges, Omnibus Exchanges, and Partitions 3-15
 - [3] Transfer Requirement 3-15
 - [a] Land Leases 3-16
 - [i] Entering Into Lease as Lessor 3-16
 - [ii] Entering Into Lease as Lessee 3-18
 - [b] Sale-Leasebacks 3-19
 - [c] Land-Building Splits 3-22
 - [i] Failed Attempts 3-22
 - [ii] Successful Splits 3-23
 - [d] Transactions Involving Mineral Interests 3-25
 - [i] General Types of Mineral Interests 3-26
 - [ii] Assignment of Mineral Estate 3-27
 - [iii] Execution of Mineral Lease 3-27
 - [iv] Assignment of Oil Payment 3-27
 - [v] Assignment of Mineral Estate, Retention of Royalty 3-28
 - [vi] Assignment of Royalty Interest 3-28
 - [vii] Assignment of Lessee’s Interest 3-28
 - [viii] Assignment of Lease, Retention of Royalty Interest or Oil Payment 3-28
 - [ix] Other Natural Resource Interests 3-28
 - [e] Transactions Involving “Surreal Estate” Interests 3-28
 - [i] Synthetic Leases 3-29
 - [ii] Tax-Law-State-Law Disconnect 3-30

[4] Single-Taxpayer Requirement	3-32
¶ 3.3 Qualified-Use Requirement	3-33
[1] Holding Requirement	3-33
[2] Use Requirement	3-34
[a] Definitions of Business-Use Property and Investment Property	3-34
[i] Business-Use Property	3-35
[ii] Investment Property	3-36
[iii] Personal-Use Property	3-37
[b] Intent at Time of Exchange	3-38
[c] No Holding Period Requirement	3-39
[d] Property Acquisition Followed by Exchange	3-40
[i] Cooperative-Buyer Exchange	3-40
[ii] Contracted-Property Exchange	3-42
[iii] Exchange Following Acquisitive Business Restructuring	3-43
[iv] Contract and Option Exchanges	3-44
[e] Business Use or Investment	3-44
¶ 3.4 Like-Kind Property Requirement	3-44
[1] General Definition of Like-Kind Property	3-45
[2] General Definition of Like-Kind Real Property	3-45
[a] Conflicting Intrastate Laws	3-46
[b] Conflicting Interstate Laws	3-46
[3] Partial Real Property Interests	3-47
[a] Leases of Real Property	3-47
[i] Leases of Thirty or More Years	3-47
[ii] Leases of Fewer Than Thirty Years	3-49
[iii] Leases That Are Personalty Under State Law	3-50
[b] Remainder and Reversionary Interests	3-50
[c] Life Interests	3-52
[d] Easements	3-52
[e] Rights in Natural Resources	3-53
[i] Timber Rights	3-53
[ii] Unharvested Crops	3-56
[iii] Mineral Interests	3-57
[iv] Water Rights	3-59
[f] Real Estate Improvements	3-63
[g] Development and Other Similar Rights	3-65
[h] Rights Inseparable From Real Property	3-66
[4] Concurrent Real Property Interests	3-66
[5] Definition of Like-Kind Personal Property	3-67
[a] Depreciable Tangible Personal Property	3-67
[i] General Asset Classes	3-67
[ii] Product Classes	3-68
[iii] Similar-Use Test	3-69
[b] Intangible Personal Property	3-69
[i] Rights in Intangibles	3-70

- [ii] Intangible’s Underlying Property 3-75
 - [c] Nondepreciable Tangible Personal Property 3-77
 - [6] U.S. and Foreign Property 3-78
 - [7] Livestock 3-79
 - ¶ 3.5 Qualified Asset Requirement 3-79
 - [1] Disqualified Assets 3-79
 - [a] Stock in Trade and Property Held Primarily for Sale 3-79
 - [b] Stocks, Bonds, and Notes 3-84
 - [c] Other Securities or Evidences of Indebtedness or Interest 3-85
 - [d] Interests in Partnership 3-85
 - [e] Certificates of Trust or Beneficial Interests 3-85
 - [f] Choses in Action 3-85
 - [2] Treatment of Disregarded Entities 3-86
 - ¶ 3.6 Related Party Exchanges 3-86
 - [1] Definition of Related Party 3-87
 - [a] Family Members 3-87
 - [b] Corporations 3-87
 - [i] Individuals Related to Corporations 3-87
 - [ii] Related Corporations 3-88
 - [iii] Stock Ownership Attribution Rules 3-90
 - [c] Trusts and Estates 3-91
 - [d] Tax-Exempt Entities 3-92
 - [e] Partnerships 3-93
 - [2] Direct Related Party Exchanges 3-93
 - [a] Two-Year Holding Period 3-94
 - [b] Effect of Section 1031(f)(1) 3-95
 - [i] Bump From Section 1031 Nonrecognition 3-95
 - [ii] Recognition in Year of Subsequent Disposition 3-95
 - [c] Scope of Section 1031(f)(1) 3-96
 - [3] Section 1031(f) Exceptions 3-96
 - [a] Subsequent Nonrecognition Transfers 3-96
 - [b] Non-Tax-Avoidance Exception 3-97
 - [i] Non-Tax-Free Cash-Out 3-98
 - [ii] Section 1031(f)(1) Bifurcated Exchange 3-99
 - [iii] Comparative Tax Price Analysis 3-100
 - [iv] Related Party Acquisitions in Anticipation of Exchange.....3-100
 - [4] Indirect Related Party Exchanges 3-101
 - [a] Exchanges Facilitated by a Qualified Intermediary 3-102
 - [b] Nonabusive Exchanges 3-104
 - [c] Applying Comparative Tax Price Test 3-104
 - [d] Indirect Transfers to Related Parties 3-105

Chapter 4: Deferred Exchanges

- ¶ 4.1 Exchange Versus Sale and Purchase 4-2
- ¶ 4.2 Deferred Exchanges Under Common Law 4-3

¶ 4.3	Statutory Rules Governing Deferred Exchanges	4-3
	[1] Timing Requirements	4-4
	[a] Identification Period	4-4
	[b] Exchange Period	4-5
	[c] Exchanges Affected by Disasters or Terroristic or Military Action	4-5
	[i] Disaster Event	4-5
	[ii] Treasury Declaration	4-6
	[iii] Qualifying Exchangers	4-7
	[2] Replacement Property Identification	4-9
	[a] Property Received Prior to End of Identification Period	4-9
	[b] Manner of Identifying Replacement Property	4-9
	[c] Documentation and Delivery Requirements	4-9
	[d] Description Requirement	4-9
	[i] Real Property	4-10
	[ii] Personal Property	4-10
	[e] Identifying Alternative and Multiple Properties	4-10
	[i] Three-Property Rule	4-11
	[ii] 200 Percent Rule	4-11
	[iii] 95 Percent Rule	4-11
	[iv] Definition of Fair Market Value	4-12
	[f] Identification of Incidental Property	4-12
	[g] Revocation of Identification	4-12
	[3] Receipt of Identified Replacement Property	4-13
	[a] Substantially-the-Same Requirement	4-13
	[b] Property to Be Produced	4-14
	[4] Fraudulent Identification	4-14
¶ 4.4	Section 1031 Deferred Exchange Safe Harbors	4-15
	[1] Security or Guarantee Arrangements	4-16
	[a] Security Interest	4-16
	[b] Standby Letter of Credit	4-17
	[c] Third-Party Guarantee	4-17
	[d] Cessation of Safe Harbor	4-17
	[2] Qualified Escrow Accounts and Qualified Trusts	4-17
	[a] Qualified Escrow Accounts	4-18
	[b] Qualified Trusts	4-19
	[c] Cessation of Qualified Escrow Account or Qualified Trust	4-19
	[d] Receipt of Other Property	4-20
	[3] Qualified Intermediaries	4-20
	[a] Qualification Requirement	4-21
	[b] Exchange Agreement Requirement	4-22
	[c] Transfer-Through-the-Intermediary Requirement	4-22
	[i] Transfer of Title	4-23
	[ii] Intermediary Agreement	4-23
	[iii] Assignment to Intermediary	4-24
	[d] Receipt of Other Property	4-24

- [4] Interest and Growth Factors 4-25
- [5] Safe Harbor Combinations 4-26
- [6] The (g)(6) Restrictions 4-27
 - [a] Exception for Failure to Identify Replacement Property 4-27
 - [b] Exception for Receipt of All Replacement Property 4-27
 - [c] Exception for Certain Contingencies 4-28
 - [d] Exception for Payment of Transaction Items 4-29
- [7] Disqualified Persons 4-30
 - [a] Exchanger’s Agent 4-30
 - [i] Exchange-Related Services Disregarded 4-30
 - [ii] Routine Services Disregarded 4-31
 - [b] Person Related to Exchanger 4-32
 - [c] Person Related to Exchanger’s Agent 4-33
- [8] Loss of Safe Harbor Status 4-34
- ¶ 4.5 Taxation of Exchange Proceeds Held by
Qualified Intermediary 4-34
 - [1] General Rule 4-35
 - [2] Exceptions to the General Rule 4-36
- ¶ 4.6 Tax Consequences of Qualified Intermediary Failures 4-37
 - [1] Scope of IRS Failed Qualified Intermediary Safe Harbor 4-38
 - [2] Safe Harbor Method for Reporting Failed Like-Kind Exchanges 4-39
- ¶ 4.7 Deferred Exchanges of Distressed Property 4-46
 - [1] Foreclosures Generally 4-48
 - [2] Exchanging Foreclosed Property 4-49
 - [a] Exchanging Zero-Equity Property 4-49
 - [b] Role of Qualified Intermediary in Foreclosures 4-50
 - [3] Section 1038 Seller-Financed Reacquisitions 4-52
 - [a] Seller’s Gain 4-53
 - [b] Seller’s Basis in Reacquired Property 4-55
 - [c] Reacquired Exchange Property 4-56

Chapter 5: Reverse Exchanges

- ¶ 5.1 Theoretical Aspects of Reverse Exchanges 5-2
- ¶ 5.2 Failed Attempts at Reverse Exchanges 5-4
- ¶ 5.3 Structuring Reverse Exchanges Through Title-Parking Arrangements 5-6
 - [1] Safe Harbor for Title-Parking Reverse Exchanges 5-6
 - [a] Safe Harbor 5-6
 - [b] Ten Requirements 5-7
 - [i] Exchanger-EAT Relationship 5-7
 - [ii] EAT’s Tax Status 5-7
 - [iii] Qualified Indicia of Ownership 5-7
 - [iv] Bona Fide Intent 5-8
 - [v] Written Agreement 5-8
 - [vi] Tax Reporting 5-8
 - [vii] Relinquished Property Identification 5-9
 - [viii] Replacement Property Holding Period Limitation 5-9

	[ix] Relinquished Property Holding Period Limitation	5-9
	[x] Aggregate Holding Period Limitation	5-10
[c]	Permitted Arrangements	5-10
	[i] EAT May Serve as Qualified Intermediary	5-11
	[ii] Guarantee Allowed	5-11
	[iii] Other-Than-Market Loans Allowed	5-11
	[iv] Other-Than-Market Leases Allowed	5-12
	[v] Other-Than-Market Services Allowed	5-12
	[vi] Option-Type Agreements Allowed	5-13
	[vii] Adjustments for Economic Risk Allowed	5-13
	[d] Limitation for Exchanger-Owned Property	5-14
[2]	Nonsafe Harbor Title-Parking Arrangements	5-14
	[a] Benefits and Burdens Test	5-15
	[b] Agency Test	5-15
	[c] Pure Reverse Exchanges	5-17
	[d] Failed Safe Harbor Exchanges	5-17
¶ 5.4	Exchange Companies and Reverse Exchanges	5-17
	[1] Asset Security	5-18
	[2] Timely Services	5-19
	[3] Documentation	5-20
¶ 5.5	Reverse Exchange Structures	5-20
	[1] Exchange-Last Transaction	5-20
	[2] Exchange-First Transaction	5-23
	[3] Choosing Between Exchange-Last and Exchange- First Structures	5-26
	[a] Reasons for Choosing Exchange-Last Structure	5-26
	[i] Simplify Financing Arrangements	5-26
	[ii] Delay Disposition of Relinquished Property	5-26
	[iii] Delay Needed to Identify Relinquished Property	5-26
	[iv] Hedge Against Changes in Value	5-26
	[v] Exchanger May Build on Replacement Property	5-27
	[vi] Avoid Early Disclosure of Intent to Sell	5-27
	[vii] Comply With Buyer's Request	5-27
	[b] Reasons for Using Exchange-First Structures	5-27
	[i] Replacement Property Used as Collateral	5-27
	[ii] Management Problems	5-27
	[iii] Closing Imminent	5-28
	[iv] Replacement Property Is a TIC Interest	5-28
[4]	Combination Safe Harbor Exchanges	5-28
	[a] Multiple Relinquished Properties for Single Replacement Property	5-28
	[b] Single Relinquished Property for Multiple Replacement Properties	5-30
¶ 5.6	Nontax Issues Raised by Reverse Exchanges	5-32
	[1] Qualified Intermediaries Serving as EAT	5-32
	[2] Double Titling Property	5-32
	[3] Use of Series LLCs in Title-Parking Arrangements	5-33

[a] Legal Aspects of Series LLCs	5-35
[i] Series LLC Formation and Formalities.....	5-36
[ii] Series Limited Liability	5-37
[iii] Property Ownership	5-40
[iv] Series Management and Ownership.....	5-40
[v] Practical Aspects of Series LLCs.....	5-42
[b] Tax Classification of Series LLCs.....	5-42
[i] Tax-Entity Classification Generally.....	5-43
[ii] Proposed Regulations.....	5-45
[c] EAT Structure.....	5-46

Chapter 6: Improvements Exchanges

¶ 6.1 The Goal of Improvements Exchanges	6-1
[1] Third-Party Improvements Exchanges	6-2
[a] Seller-Constructed Improvements	6-2
[b] Facilitator-Constructed Improvements	6-3
[i] Avoiding Agency Classification	6-3
[ii] Permitted Exchanger Involvement	6-5
[iii] Tracing Exchange Proceeds	6-5
[2] Safe Harbor Improvements Exchanges	6-5
[3] Related Party Facilitated Improvements Exchanges	6-6
[a] Control of Exchange Proceeds	6-8
[b] Viability of the Integrated-Plan Theory	6-8
[c] Avoiding Agency	6-9
[4] Possible Bifurcated Exchange Structure	6-9
¶ 6.2 Leasehold Improvements Exchanges	6-10
[1] Safe Harbor Leasehold Improvements Exchange	6-10
[a] Leasehold Improvements Exchange Structure	6-11
[i] Basis Allocation Between Improvements	
and Leasehold Interest	6-13
[ii] Depreciating Improvements and Leasehold Interests	6-13
[iii] Related Party as Contractor	6-13
[iv] Continuing Construction Begun by a Related Party	6-14
[b] Lease-Assignment Improvements Exchange	6-14
[2] Improvements Exchanges on Exchanger-Owned Property	6-15
[a] Revenue Procedure 2004-51 Safe Harbor Restriction	6-15
[b] Nonsafe Harbor Improvements Exchanges	
on Exchanger-Owned Property	6-17
¶ 6.3 Deferred Improvements Exchanges	6-18
[1] Using Exchange Proceeds to Acquire Replacement	
Property	6-19
[a] Avoiding Exchanger's Constructive Receipt	6-20
[b] Protecting Qualified Intermediary's Interests	6-21
[2] Modifying Exchange Agreement Language	6-21
[3] Identifying to-Be-Built Replacement Property	6-21
[4] 180-Day Period	6-23

Chapter 7: Exchanges and Proximate Business Restructurings

¶ 7.1	Section 1031 Issues Raised by Proximate Business Restructurings	7-2
	[1] Holding and Use Requirement	7-2
	[2] Exchange Requirement	7-3
	[3] Classification of Property Interest	7-3
¶ 7.2	Proximate Distributions	7-4
	[1] Distribution Followed by Exchange	7-4
	[2] Exchange Followed by Distribution	7-7
	[3] Midstream Distribution	7-9
	[4] Proximate Distribution Alternatives	7-9
¶ 7.3	Proximate Contributions	7-13
	[1] Contribution Followed by Exchange	7-14
	[2] Exchange Followed by Contribution	7-14
	[3] Midstream Contribution	7-18
¶ 7.4	Proximate Contributions and Distributions of Like-Kind Property	7-20
	[1] Introduction	7-20
	[2] Taxation of Precontribution Gain and the Anti-Mixing Bowl Rules	7-21
	[3] Section 704(c)(2)	7-24
	[a] Section 704(c)(1)(B) Nullification Interpretation	7-26
	[b] Recast-Contribution Interpretation	7-28
	[i] Transferred Basis of Like-Kind Property	7-28
	[ii] Exchanged Basis in Like-Kind Property	7-31
¶ 7.5	Proximate Conversions and S Elections	7-32
	[1] Proximate Conversions	7-32
	[a] Tax-Neutral Conversions	7-32
	[b] Tax-Affected Conversions	7-34
	[2] Proximate S Elections	7-36
¶ 7.6	Proximate Corporate Restructurings	7-36
	[1] Proximate Tax-Free Corporate Acquisitive Reorganizations	7-36
	[a] Midstream and Proximate Type B Reorganizations	7-37
	[b] Proximate and Type A and Type C Reorganizations	7-38
	[c] Midstream Type A and Type C Reorganizations	7-40
	[2] Proximate Taxable Corporate Acquisitions	7-41
	[a] Proximate and Midstream Taxable Stock Swaps	7-41
	[b] Proximate and Midstream Taxable Asset Acquisitions	7-42
	[c] Proximate and Midstream Taxable Mergers and Consolidations	7-43
	[i] Transactions Qualifying for Section 351 Nonrecognition	7-43
	[ii] Transactions Failing to Qualify for Section 351 Nonrecognition	7-44
	[3] Corporate Divisions	7-44
	[a] Asset-Distribution Divisions	7-44
	[b] Stock-Distribution Divisions	7-45
	[c] Asset-Contribution-Stock-Distribution Divisions	7-45
¶ 7.7	Proximate and Midstream Partnership Terminations	7-46

- [1] Midstream Actual Terminations 7-47
- [2] Proximate Actual Terminations 7-50
- [3] Midstream Technical Terminations 7-50
- [4] Proximate Technical Terminations 7-52
- ¶ 7.8 Proximate Partnership Mergers and Divisions 7-53
 - [1] Partnership Mergers 7-53
 - [a] Proximate Partnership Mergers 7-55
 - [b] Midstream Partnership Mergers 7-56
 - [2] Partnership Divisions 7-56
 - [a] Proximate Partnership Divisions 7-58
 - [b] Midstream Partnership Divisions 7-59
- ¶ 7.9 Partnership Debt Relief and Straddle Years 7-59
- ¶ 7.10 Disregarded Entity Restructurings 7-60

Chapter 8: Exchanges of Tenancy-in-Common Interests

- ¶ 8.1 Tax Partnership Versus Co-Ownership 8-2
- ¶ 8.2 General Definition of Tax Partnership 8-3
 - [1] Common Law Test for Defining Tax Partnerships 8-4
 - [a] Degree-of-Activity Test 8-4
 - [b] Type-of-Activity Test 8-5
 - [i] Pure Co-Ownership Arrangements 8-6
 - [ii] Manager-Provided-Support-Services Arrangements 8-6
 - [iii] Additional-Services Arrangements 8-6
 - [iv] Pure Services Arrangements 8-7
 - [v] Dealer Arrangements 8-7
 - [c] Source-of-Activity Test 8-7
 - [i] Member-Contributed Services 8-8
 - [ii] Third-Party-Compensated Services 8-9
 - [iii] Member-Compensated Services 8-9
 - [iv] Profits Interest as Compensation 8-9
 - [2] Section 761 Election 8-10
 - [a] Effect of Section 761 Election 8-10
 - [b] Making Section 761 Election 8-12
 - [i] Actual Election 8-12
 - [ii] Deemed Election 8-12
 - [c] Scope of Section 761 Election 8-13
 - [d] Section 761(a)(1) Election 8-16
 - [e] Section 761(a)(2) Election 8-17
- ¶ 8.3 Tenancy-in-Common Interests as Replacement Property 8-18
 - [1] Tax Considerations 8-19
 - [a] Legal Stature of Revenue Procedure 2002-22
and Tax Opinions in TIC Offerings 8-20
 - [b] Revenue Procedure 2002-22 Conditions 8-21
 - [i] Condition 1: TIC Ownership 8-22
 - [ii] Condition 2: Number of Co-Owners 8-22

	[iii] Condition 3: No Treatment of Co-Owners as Entity	8-22
	[iv] Condition 4: Co-Ownership Agreement	8-23
	[v] Condition 5: Voting	8-23
	[vi] Condition 6: Restrictions on Alienation	8-24
	[vii] Condition 7: Sharing Proceeds and Liabilities Upon Sale of Property	8-24
	[viii] Condition 8: Proportionate Sharing of Profits and Losses	8-24
	[ix] Condition 9: Proportionate Sharing of Debt	8-25
	[x] Condition 10: Options	8-25
	[xi] Condition 11: No Business Activities	8-26
	[xii] Condition 12: Management and Brokerage Agreements	8-27
	[xiii] Condition 13: Leasing Agreements	8-27
	[xiv] Condition 14: Loan Agreements	8-27
	[xv] Condition 15: Payments to Sponsor	8-28
[2]	Nontax Considerations	8-28
	[a] Securities and Real Estate Laws	8-28
	[b] Financial Aspects	8-29
	[c] Asset Protection Planning	8-29
¶ 8.4	Delaware Statutory Trusts	8-30
	[1] Legal Structure and Property Ownership	8-30
	[a] State-Law Classification	8-30
	[b] Acquisition of Property	8-31
	[c] Management and Operations	8-31
	[d] Termination	8-32
	[2] Tax Classification	8-32

Chapter 9: Multiple-Property Exchanges, Mixed-Use-Property Exchanges, and Exchange Programs

¶ 9.1	Multiple-Property Exchanges	9-2
	[1] Multiple-Property-Exchange Rules	9-3
	[2] Exchange Groups	9-4
	[3] Residual Group and Ungrouped Property	9-5
	[4] Computing Gain on Multiple-Property Exchanges	9-6
	[a] Exchange Group Surplus and Exchange Group Deficiency	9-6
	[b] Realized Gain Within Exchange Groups	9-7
	[c] Gain Recognized Within Exchange Groups	9-8
	[d] Total Recognized Gain in Multiple-Property Exchanges	9-9
	[5] Basis of Properties Received in Multiple-Property Exchanges	9-9
	[6] Treatment of Liabilities	9-11
	[a] Excess Liability Assumption	9-12
	[b] Excess Liability Relief	9-16
	[c] Significance of Liability Aggregation	9-19
¶ 9.2	Mixed-Use-Property Exchanges	9-19
	[1] Section 121 Gain Exclusion	9-19

- [2] Computing Gain 9-20
- [3] Computing Basis of Replacement Property 9-20
- [4] Variations of Mixed-Use-Property Exchanges 9-20
 - [a] Principal Residence Converted to Rental Property 9-21
 - [b] Business-Use Property Separate From Residence 9-22
 - [c] Multiple Uses of a Single Building 9-23
 - [i] No Boot Received Upon Single-Property Exchange 9-23
 - [ii] Boot Received Upon Single-Property Exchange 9-25
 - [iii] Single-Property Exchange With Gain in Excess
of Section 121 Exclusion 9-26
 - [iv] Residential Gain in Excess of Section 121
Exclusion 9-27
- [5] Safe Harbor for Exchanges of Second Homes 9-28
- [6] Exchanges of Second Homes Outside the Safe Harbor 9-33
- ¶ 9.3 Exchange Programs 9-36
 - [1] Scope of Exchange Program Safe Harbors 9-37
 - [a] Required LKE Program Characteristics 9-37
 - [i] Regular and Routine Buy/Sell Agreements 9-38
 - [ii] Single, Unrelated Intermediary 9-38
 - [iii] Master Exchange Agreement 9-38
 - [iv] (g)(6) Restrictions 9-38
 - [v] Assignment of Rights 9-38
 - [vi] Notice of Assignment 9-38
 - [vii] Replacement Property Identification 9-39
 - [viii] Funds Management 9-39
 - [ix] Property Matching 9-39
 - [x] Gain Recognition 9-39
 - [b] Exchanges Outside Safe Harbors 9-39
 - [2] LKE Program Safe Harbors 9-40
 - [a] Exchange Safe Harbors 9-40
 - [i] Distinct Exchange Safe Harbor 9-40
 - [ii] Identification Safe Harbor 9-40
 - [b] Funds Safe Harbors 9-40
 - [i] Check-Processing Safe Harbor 9-40
 - [ii] Joint Account Safe Harbor 9-41
 - [iii] Funds-Netting Safe Harbor 9-41
 - [iv] Exchanger-Financed-Purchase Safe Harbor 9-42
 - [v] Lease Security Deposit Safe Harbor 9-42
 - [c] Qualified Intermediary Safe Harbors 9-43
 - [i] Unbalanced-Exchange Safe Harbor 9-43
 - [ii] Assignment Safe Harbor 9-44
- ¶ 9.4 Conclusion 9-44

Chapter 10: Section 1031 and Estate Planning

- ¶ 10.1 Section 1031 Issues Raised by Death 10-1
- ¶ 10.2 Exchanges by Estates and Trusts 10-2

[1] Exchanges by Trusts Followed by Distributions	10-2
[2] Related Party Exchanges With Estates and Trusts	10-2
[a] Parties Related to Trusts	10-2
[b] Parties Related to Estates	10-3
[3] Exchanges by Grantor Trusts	10-3
¶ 10.3 Proximate and Midstream Death	10-3
[1] Midstream Death—Exchange Completed	10-3
[a] No Income to Beneficiaries	10-4
[b] Basis in Property Received After Death	10-4
[c] Identification of Replacement Property	10-4
[d] Section 1031(a)(3) Time Requirements	10-5
[e] Replacement Property Recipient	10-5
[f] Uncertain Sale Status	10-6
[2] Midstream Death—Exchange Not Completed	10-6
[3] Proximate Death	10-7
¶ 10.4 Exchanging Partial Interests	10-8
[1] Exchanges of Remainder Interests	10-8
[2] Exchanges of Life Interests	10-9
[a] Nonqualifying Life Interests	10-9
[i] Carved-Out Life Estate	10-10
[ii] Short Life Estate	10-10
[b] Qualifying Life Estates	10-10
¶ 10.5 Settlement Agreements as Section 1031 Exchanges	10-11

Chapter 11: State Tax Issues Affecting Like-Kind Exchanges

¶ 11.1 Scope and Nature of State Tax Issues Affecting Like-Kind Exchanges	11-1
¶ 11.2 State's Application of Federal Tax Law	11-1
¶ 11.3 Statutory Deviations From Federal Income Tax	11-3
¶ 11.4 State Claw-Back Rules and Practices	11-3
¶ 11.5 State Sales and Transfer Taxes	11-4

Chapter 12: Industry-Specific Exchanges

¶ 12.1 Overview of Industry-Specific Exchanges	12-1
¶ 12.2 Exchanges of Art and Other Collectibles	12-1
[1] Qualified-Use Requirement	12-2
[2] Like-Kind Art and Collectibles	12-4
[3] Structuring Transactions to Come Within the Qualified Intermediary Safe Harbor	12-7
¶ 12.3 Exchanges With Securitized Liabilities	12-10
[1] General Defeasance Structures	12-12
[a] Legal Defeasance	12-14
[b] In-Substance Defeasance	12-17
[2] Defeasance as Part of an Exchange	12-18
[a] Legal Defeasance as Part of an Exchange	12-18
[i] Exchange With Defeasance Discount	12-18

[ii] Defeasance Premium	12-23
[b] In-Substance Defeasance as Part of an Exchange	12-26

Appendix A: Common Fund and Management Documents

Explanation of Documents	A-1
Agreement for the Maintenance of a Common Fund	A-2
Management Agreement	A-4

Appendix B: Deferred Exchange Documents

Explanation of Documents	B-1
Letter to Exchanger	B-5
Letter to Exchanger's Advisor	B-6
Letter to Closing Company—Relinquished Property	B-7
Exchange Closing Instructions	B-8
Like-Kind Exchange Agreement	B-9
Trust Agreement.....	B-19
Assignment Agreement for Relinquished Property and Consent of Buyer	B-28
Identification Instruction Letter	B-30
Deferred Exchange Replacement Property Identification Form	B-31
Brochure—For Informational Purposes Only	B-32
Assignment Agreement for Replacement Property and Consent of Seller	B-34
Closing Instructions Pro Se—Replacement Property	B-36
Closing Instructions Advisor—Replacement Property	B-37
Letter to Closing Company—Replacement Property	B-38
Exchange Closing Instructions—Replacement Property	B-39
Termination Letter—Advisor	B-40
Termination Letter—Pro Se	B-41

Appendix C: Reverse Exchange Documents: Exchange-Last Structure

Explanation of Documents	C-2
Letter to Exchanger Acting Pro Se—Replacement Property	C-6
Letter to Exchanger's Attorney—Replacement Property	C-7
Letter to Escrow Officer—Closing Parked Replacement	C-8
Exchange Closing Instructions—Parked Replacement	C-9
Nonnegotiable Promissory Note	C-10
Exchange Accommodation Agreement	C-11
Lease Agreement	C-21
Letter to Exchanger—Relinquished Property Identification	C-35
Relinquished Property Identification Form	C-36
Brochure—For Informational Purposes Only	C-37
Like-Kind Exchange Agreement	C-38
Trust Agreement	C-52
Assignment Agreement for Replacement Property and Consent of Seller	C-60
Assignment Agreement for Parked Replacement Property and Consent of Seller	C-63

Assignment Agreement for Relinquished Property and Consent of Buyer C-66

Assignment Agreement for Option to Acquire Parked Replacement Property, Consent of Parties, and Exercise of Option C-68

Letter to Exchanger Acting Pro Se—Relinquished Property C-71

Letter to Exchanger’s Tax Advisor—Relinquished Property C-73

Letter to Escrow Officer—Closing of Relinquished Property C-74

Exchange Closing Instructions—Relinquished Property C-75

Letter to Exchanger—Replacement Property Identification C-77

Reverse Exchange Replacement Property Identification Form C-78

Brochure—For Informational Purposes Only C-79

Termination of Exchange Agreement—Pro Se C-81

Termination of Exchange Agreement—Attorney C-82

Termination of Exchange Accommodation Agreement—Pro Se C-83

Termination of Exchange Accommodation Agreement—Attorney C-84

Appendix D: Reverse Exchange Documents:

Exchange-First Structure

Explanation of Documents D-1

Letter to Exchanger Acting Pro Se D-3

Letter to Exchanger’s Attorney D-4

Letter to Escrow Officer—Exchange-First D-5

Exchange Closing Instructions—Exchange-First D-6

Nonnegotiable Promissory Note D-7

Exchange Accommodation Agreement D-8

Like-Kind Exchange Agreement D-19

Trust Agreement D-29

Assignment Agreement for Relinquished Property and Consent of EAT D-37

Assignment Agreement for Replacement Property and Consent of Seller D-39

Assignment Agreement for Option to Acquire Parked Relinquished Property, Consent of Parties, and Exercise of Option D-41

Exchange Closing Instructions—Relinquished Property D-44

Letter to Exchanger D-45

Letter to Exchanger’s Advisor D-46

Letter to Closer D-47

Appendix E: Leasehold Improvements Exchange Documents

Explanation of Documents E-1

Exchange Accommodation Agreement E-3

Promissory Note E-15

Security Agreement E-20

Acknowledgment E-26

Deed of Trust and Security Agreement E-28

Lease Agreement E-44

Construction Agreement E-62

Construction Loan Agreement E-65

Appendix F: Tenancy-in-Common Documents

Explanation of Documents F-1
Tenants-in-Common Agreement F-2
Management Agreement F-11

Table of Cases T-1

Table of Federal Statutes and Regulations T-7

Index I-1