

“LIKE-KIND” PROPERTY

To qualify for tax deferred exchange treatment under IRC §1031, the relinquished property must be exchanged for replacement property that is of “like-kind”. For real property exchanges the term “like-kind” refers to the nature or character of the property and not to its grade or quality. For example, it does not matter whether the real property involved is improved or unimproved because that fact only relates to the grade or quality of the property and not to its kind or class. Treas. Reg. §1.1031(a)-1(b). In essence, all real property is “like-kind” with all other real property. Generally, however, for personal property exchanges the relinquished and replacement property must both be in either the same General Asset Class or the same Product Class. To qualify for an exchange the Exchanger must have held the relinquished property for investment, or for “productive use in their trade or business,” and must intend to do the same with the replacement property. The following are examples of “like-kind” properties:

- Residential for commercial
- Bare land for rental property
- Fee simple interest for 30-year leasehold
- Single family rental for multi-family rental
- Non-income producing raw land for income producing rental property
- Rental mountain cabin for a dental office in which the Exchanger intends to practice
- Corporate twin-engine aircraft for a corporate jet
- Mitigation credits for restoring wetlands for other mitigation credits
- Buses for buses
- Garbage routes for garbage routes
- Livestock of the same sex (Note: livestock of different sexes are not of “like kind”)

EXCHANGES OF FOREIGN PROPERTY

Exchangers may exchange properties throughout the United States. When taxpayers relocate within the United States they can essentially “take” their investment properties with them by completing an exchange. For example, the Exchanger who is moving from California to Montana may relinquish in California and acquire near their new home in Montana.

Prior to 1989, however, Exchangers were able to perform an exchange of a United States property for a foreign investment property, such as a rental house in Los Angeles for a rental villa in France. After the Revenue Reconciliation Act of 1989, IRC §1031 was amended such that real property located in the United States and real property located outside the United States are not like-kind. Treas. Reg. §1.1031(h). It is somewhat unclear by what “property located in the United States” means, but there is some indication that property located in the Virgin Islands may qualify as “property located within the United States” for purposes of favorable exchange treatment. Private Letter Ruling 9038030 (June 25, 1990). Moreover, a taxpayer who sells foreign property and buys foreign property, and who is subject to capital gains tax on their U.S. tax return, may want to consider an exchange since foreign property is considered to be of like-kind to other foreign property. For example, the taxpayer who relinquishes a rental property in Canada and acquires another like kind property in Canada, or relinquishes a rental apartment in Singapore and acquires a rental condominium in Hong Kong, may benefit from a tax deferred exchange. It is important to note that in exchanges involving personal property the determining factor as to whether the personal property is foreign or domestic is the location of the predominant use of the property because personal property used predominately within the United States and personal property used predominantly outside the United States are not of a like kind. The code generally requires a two year holding period for both the relinquished and replacement properties in determining the predominant use “like kind” requirement for the exchange.

Brief Exchange Communications

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