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Finally — IRS Guidance on Exchanging Vacation Homes Revenue Procedure 2008-16 Provides Safe Harbor

Until now, the issue of whether a vacation home qualifies for tax deferral treatment under IRC §1031 was the subject of much scrutiny and uncertainty. To the delight of many tax practitioners, on February 15, 2008, the IRS eliminated that uncertainty by issuing Revenue Procedure ("Rev. Proc.") 2008-16, effective March 10, 2008, which provides a safe harbor for exchanges of vacation homes (defined as "dwelling unit" in the Rev. Proc.). Now taxpayers can have a clear understanding of the circumstances under which the IRS will not challenge whether a vacation home will qualify as property "held for investment" under §1031.

Vacation Home as Relinquished Property

For a vacation home to qualify as relinquished property, it must meet the following criteria:

It is owned by the taxpayer for at least 24 months immediately before the exchange ("qualifying use period"); and

Within the qualifying use period, in each of the two 12 month periods, (1) the taxpayer rents the dwelling unit at fair rental to another person for 14 days or more **and** (2) the taxpayer's personal use of the dwelling unit does not exceed the greater of 14 days or 10 percent of the number of days during the 12 month period that the dwelling unit was rented at fair rental value.

The first 12 month period immediately preceding the exchange ends on the day before the exchange takes place (and begins 12 months prior to that day). The second 12 month period ends on the day before the first 12 month period begins (and begins 12 months prior to that day).

Vacation Home as Replacement Property

For a vacation home to qualify as replacement property, it must meet the following criteria:

It is owned by the taxpayer for at least 24 months immediately following the exchange ("qualifying use period"); and

Within the qualifying use period, in each of the two 12 month periods, (1) the taxpayer rents the dwelling unit to another person at fair rental for 14 days or more **and** (2) the taxpayer's personal use of the dwelling unit does not exceed the greater of 14 days or 10 percent of the number of days during the 12 month period that the dwelling unit was rented at fair rental.

The 12 month period immediately after the exchange begins on the day after the exchange takes place and the second 12 month period begins on the day after the first 12 month period ends.

Personal use is defined broadly. Use by the taxpayer or other person having an interest in the dwelling unit and any family member¹ will be considered "personal use" by the taxpayer. Also, any arrangement whereby fair market rent is not paid will be considered "personal use" by the taxpayer. Notwithstanding the foregoing, use by family members will not be considered "personal use" by the taxpayer only if the dwelling unit is *rented at fair market rent* and the family member *uses it as his principal residence*.

Fair rental is based upon all of the facts and circumstances that exist when the rental agreement is entered into. All rights and obligations of the rental agreement are taken into account.

Note special rule for replacement property. If the taxpayer files a return reporting a transaction under §1031 based on the expectation that the dwelling unit will meet the qualifying use standards and subsequently determines that the dwelling unit does not meet the qualifying use standards, the taxpayer, if necessary, should file an amended return.

Exchanges of vacation homes outside the Rev. Proc. 2008-16 safe harbor. An exchange of a vacation home may still qualify under §1031 even though it falls outside the parameters of Rev. Proc. 2008-16. Any such circumstance will be subject to greater scrutiny and therefore should be carefully planned and reviewed by the taxpayer's tax advisor.

¹ Brothers and sisters (by the whole or half blood), spouses, ancestors, and lineal descendants.