Tax Deferred Exchange Services

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MARITAL STATUS OF THE EXCHANGOR

The marital status of the Exchangor may raise issues for the successful completion of the exchange. There are no problems for the exchange if the exchangor's marital status remains the same for the sale of Relinquished Property and the acquisition of the Replacement Property. The exchangor needs to go out of title to the Relinquished Property and come into title to the Replacement Property with the same legal status: Separate estate on both properties or community or marital property on both properties subject to certain state laws.

That is often easier said than done. The exchangor may own the Relinquished Property as his or her separate property, but the exchangor wishes to acquire the Replacement Property as community or marital property. Or, the exchangor may be required by the lender to acquire the Replacement Property as community or marital property in order to qualify for financing.

We urge the exchangor to maintain the same legal ownership status for both the Relinquished Property transaction and Replacement Property transaction during the course of their tax deferred exchange. The IRS may contend that only a partial exchange was completed by the exchangor if the legal status is not identical.

Example:

The exchangor owns Relinquished Property as her separate estate. The lender providing financing for the Replacement Property requires that the Replacement Property be acquired as a community property asset. Exchangor's Relinquished Property has a fair market value of $100,000. The Replacement Property has a fair market value of $150,000. Here is how the IRS could possibly characterize the exchange:

Relinquished Property	$100,000 Exchangor Asset
Replacement Property	$ 75,000 Exchangor & $75,000 Exchangor's spouse
Exchange Shortfall	<$ 25,000>

In our practice as Qualified Intermediary's we attempt to convince the exchangor's lender to make the loan to the exchangor individually on the Replacement Property as his separate estate. If the lender insists on the spouse being involved, we suggest that that spouse only guarantee exchangor's loan, but not become a co-owner.

If the lender will accept nothing less than a deed to both exchangor and exchangor's spouse for the Replacement Property, we complete the tax deferred exchange with exchangor acquiring the replacement property as his separate property. Then we have the exchangor convey the property by deed to exchangor and exchangor's spouse as community property for "lender purposes only." We are not certain that this methodology will entirely solve exchangor's problem, but at least a good faith argument can be made that exchangor completed the exchange as his separate property. He changed his separate property into community property only because of lender requirements.

Sometimes this issue can be dealt with before closing of the Relinquished Property, and by conveying an individual one-half interest to the spouse before closing the sale of the Relinquished Property (if legal and appropriate in the state of the couple's primary residence). In such a scenario, one may be able to match the vesting of the Sale Property with of the purchase of the Replacement Property as a community asset.