

IRS allows tax free exchange treatment for trademarks and other intangible assets

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The IRS has changed its position and will now allow tax-free treatment for trademarks and other intangible assets under the like-kind exchange provisions of IRS Code §1031. A like-kind exchange is a U.S. tax deferred exchange that allows for the disposal of an asset and the acquisition of another similar asset without generating a tax liability from the sale of the first asset. The historic analysis of tax-free exchange treatment for trademarks and other intangibles was based on IRS regulations which state that the goodwill or going concern value of a business cannot be of a “like kind” to the goodwill or going concern value of another business, per Reg. §1.1031(a)-2(c)(2). In January 2006, the IRS issued a Technical Advice Memorandum (TAM 200602034) which stated that the registered trademarks and trade names of a business entity cannot be exchanged tax-free under §1031 because they are too similar to goodwill and going concern value.

The IRS reconsidered this position and, on February 12, 2009, the Office of Chief Counsel issued Memorandum 200911006 which states that intangibles such as “trademarks, trade names, mastheads and customer-based intangibles” that can be described separately and valued apart from goodwill qualify as like-kind exchange property under §1031. The Memorandum also states that, except in rare and unusual situations, it is possible to describe separately and value these types of intangibles apart from goodwill. The Memorandum does not indicate that all trademarks and trade names automatically qualify for like-kind treatment and clearly states that the property still must satisfy all other requirements of §1031 including the “nature” and “character” rules set forth in Reg. §1.1031(a)-2(c)(1).

It is expected that additional guidance will be forthcoming from the IRS with interpretations of the types of trademarks and trade names that will be considered like-kind property. One particular issue that commentators expect to be addressed is whether, under the “nature” and “character” rules, the IRS will limit the application of §1031 treatment to situations in which the underlying property to which the trademark or trade name relates is itself like-kind property under the definitions set forth in the regulations.

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