

Workout-Driven Exchanges

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I. Introduction

Section 1031 is a very useful provision.¹ It allows a taxpayer to defer recognition of gain on the disposition of appreciated property - typically real estate. In the usual situation, a taxpayer desires to sell appreciated realty for a profit. If the taxpayer sells the property for cash or other property, the transaction is fully taxable. But if the taxpayer structures the transaction as an exchange pursuant to Section 1031, the taxpayer may receive “like kind” property without immediately recognizing his gain.

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¹ All section references herein are to the Internal Revenue Code of 1986, as amended.

In the current economic climate, real estate prices are plummeting, and foreclosures are on the rise. Economically distressed properties are being foreclosed and repossessed by lenders in transactions void of any cash profit to their owners. Nevertheless, these foreclosures are treated as sales for federal income tax purposes, and often they have adverse tax consequences.² Wise investors should consider using Section 1031 to defer phantom gain on the disposition of distressed property in foreclosure. Consider example 1 below:

Several years ago, taxpayer (T), an individual, purchased a shopping center (P) for \$1 million to hold for investment. Later, when P is worth \$3 million, T refinanced it by borrowing \$2.4 million from Bank (B). The loan from B is nonrecourse and is secured by a mortgage on P. Due to a number of tenant bankruptcies, occupancy rates at P have declined sharply, and T no longer is able to service the liability to B. When T's adjusted tax basis in P equals \$400,000 and the fair market value of P equals \$2 million, B forecloses and purchases P at a trustee's auction for the face amount of the liability (\$2.4 million). (Alternatively, prior to foreclosure, T transfers P to B pursuant to a deed in lieu of foreclosure.)

The facts of the example lead to the following general conclusions:

- Whether B acquires P through foreclosure or a deed in lieu of foreclosure, T's amount realized on the disposition of P is \$2.4 million - the principal amount of the nonrecourse liability.³

² [Add cross reference].

³ See *Comm'r v. Tufts*, 461 U.S. 300 (1983).

- T realizes gain on the disposition of P in the amount of \$2 million (\$2.4 million amount realized less \$400,000 adjusted basis).⁴
- At the current long-term capital gain rate of 15%, T's resulting federal income tax liability from the disposition of P is \$300,000.⁵
- T receives no cash from the disposition of P with which to pay the resulting tax.

If the liability T owed to B had been recourse, the conclusions would be slightly different:

- T's amount realized on the disposition of P would have been \$2 million - the fair market value of P at the time of the foreclosure.⁶
- T would realize gain on the disposition of P in the amount of \$1.6 million (\$2 million amount realized less \$400,000 adjusted basis).⁷
- At the current long-term capital gain rate of 15%, T's resulting federal income tax liability from the disposition of P would be \$240,000.⁸
- Because the liability is recourse, the additional \$400,000 of liability relief (the amount by which the liability exceeds the property's value) would be considered income from discharge of indebtedness ("DOI Income").⁹
- Assuming a maximum ordinary income rate of 35%, and that Section 108 does not apply, T's resulting federal income tax liability from the DOI Income would

⁴ See I.R.C. § 1001(a).

⁵ See I.R.C. § 1(h).

⁶ See Treas. Reg. § 1.1001-2.

⁷ See I.R.C. § 1001(a).

⁸ See I.R.C. § 1(h).

⁹ See I.R.C. § 61(a)(12); Treas. Reg. § 1.1001-2. This paper does not consider the applicability of any exceptions to DOI Income provided by Code Section 108.

be \$140,000.¹⁰ Combined with T's gain from the disposition of P, T's total federal income tax liability would be \$380,000.

- As in the prior iteration of the example, T receives no cash from the disposition of P with which to pay the resulting tax.

The prior example and conclusions are equally applicable to a variety of other situations. Consider example 2 below involving the acquisition of a tenancy-in-common ("TIC") interest through a Section 1031 exchange:

Taxpayer (T), an individual, owns real property X. X has a fair market value of \$2.6 million, is subject to a \$2 million nonrecourse liability, and has an adjusted basis of \$0. T desires to exchange X for a TIC interest (P) in a large, class A commercial real estate property (Project) that T otherwise would be unable to afford by himself. The minimum purchase requirement for a TIC interest in the Project is \$3 million. Pursuant to the exchange, T sells property X to an unrelated purchaser for \$2.6 million. At closing, the property X buyer satisfies the \$2 million liability against X and pays \$600,000 of exchange proceeds to a "qualified intermediary"¹¹ (QI) selected by T. T instructs the QI to purchase P from TIC Sponsor by paying \$600,000 cash and assuming a \$2.4 million portion of a nonrecourse liability owed to Bank, which encumbers the Project. Due to misrepresentations about the Project and mismanagement of the Project by TIC Sponsor, the Project does not generate sufficient cash to service the

¹⁰ See I.R.C. § 1(i)(2).

¹¹ See Treas. Reg. § 1.1031(k)-1(g)(4)(iii).

liability to B. At a time when T's adjusted tax basis in P equals \$400,000 (the difference between the \$2 million liability on X and the \$2.4 million liability on P) and the fair market value of P equals \$2 million, B forecloses and purchases P at a trustee's auction for the face amount of the liability (\$2.4 million). (Alternatively, prior to foreclosure, T transfers P to B pursuant to a deed in lieu of foreclosure.)¹²

In both examples, T is subject to a large tax liability (\$300,000 minimum) with no cash to pay the resulting tax. Thus, T must look to other sources to find the necessary funds to satisfy his tax liability. In both examples, T may avoid these adverse tax consequences by structuring the disposition (whether through foreclosure or a deed in lieu of foreclosure) as a Section 1031 exchange.

II. Foreclosures

[Add text].

A. The Process of Foreclosure

Generally, two types of foreclosure proceedings exist: judicial and nonjudicial. All states have procedures for judicial foreclosure. In a judicial foreclosure, after the maturity of a liability that has been accelerated due to a default (*e.g.*, for non-payment), the creditor may file an action requesting that the debtor's equity of redemption be

¹² At the time this article goes to press, hundreds of investors that purchased TIC interests from [DBSI] face the threat of similar foreclosure actions. **[Cite DBSI bankruptcy filing].**

“foreclosed.” If the creditor is successful, the court will issue a final judgment of foreclosure ordering that the property be sold (typically by the county sheriff) in satisfaction of the liability. The sheriff will conduct an auction (usually at the county courthouse) and the property will be sold to the highest bidder for cash. After confirmation of the sale and payment of the purchase price, the sheriff will execute a “Sheriff’s Deed” granting and conveying title to the property to the purchaser. Although the sheriff executes the deed and conveys the property, legal title passes directly from the debtor to the purchaser.

About half of the states also permit a nonjudicial or “power of sale” foreclosure. In these states, the deed of trust securing the liability will contain a power of sale clause providing that in the event of a default, the trustee named in the deed of trust can sell the collateral and repay the loan from the proceeds. Although a foreclosure sale is still necessary, the a nonjudicial foreclosure procedure does not require filing a lawsuit and obtaining a court order. Instead, after notice and a specified waiting period, the trustee may proceed to sell the property at auction to the highest bidder. Afterwards, the trustee will execute a “Trustee’s Deed” granting and conveying title to the property to the purchaser. Similar to judicial foreclosure, legal title passes directly from the debtor to the purchaser.¹³

Finally, in all states, the debtor and creditor may agree to a direct conveyance of the collateral from the debtor to the creditor in satisfaction of the liability by means of a deed in lieu of foreclosure. Creditors typically prefer a deed in lieu of foreclosure

¹³ See, e.g., *Sandel v. Burney*, 714 S.W.2d 40 (Tex. Ct. App. 1986, *no writ*) (“[A] foreclosure sale transfers legal title from the owner of the mortgaged property to the purchaser at the foreclosure sale. . . . The title never vests in the creditor, and the foreclosure deed is not a conveyance from the trustee or the creditor to the purchaser. In executing the foreclosure deed, the trustee does no more than effect the transfer of title from the debtor to the foreclosure purchaser.”).

because it reduces the time, cost and hassle of repossessing the collateral through foreclosure (whether judicial or nonjudicial). As a result, debtors may be able to extract value (e.g., additional sums of money) for agreeing to transfer a deed in lieu of foreclosure. In essence, the debtor is able to sell his equity of redemption.

B. Federal Income Tax Consequences of Foreclosure

Code Section 1001 provides that in the case of a sale or other disposition of unencumbered property, the amount realized includes any money received plus the fair market value of any property received. The origins of that rule are in the common law.¹⁴ Common law provides that the basis of the acquired property includes the amount of liability that the taxpayer assumes or incurs upon acquisition, and that the amount realized from the disposition of property includes liability from which the transferor is relieved upon disposition.¹⁵

In the property transaction context, the Supreme Court first addressed the effect of liability assumption and liability relief in *Crane v. Commissioner*.¹⁶ In *Crane*, a deceased party transferred property (an apartment building) to his wife through a will. At that time, the property's fair market value was \$262,000; however, a \$262,000 nonrecourse

¹⁴ This portion of the article discussing liability relief as consideration is adapted with permission from *Tax-Free Like-Kind Exchanges* by Bradley T. Borden, J.D., LL.M., M.B.A., C.P.A. (Copyright © 2008 Civic Research Institute, Inc, 4478 US Route 27, Kingston, NJ 08528.).

¹⁵ See *Crane v. Comm'r*, 331 U.S. 1 (1947) (holding that a taxpayer who sells property encumbered by a nonrecourse mortgage must include the unpaid balance of the mortgage in the amount realized). As used herein, liability relief also refers to liability assumed by the purchaser or property transferred subject to a liability.

¹⁶ 331 U.S. 1 (1947).

liability encumbered the property and left the taxpayer with zero equity.¹⁷ Nonetheless, the taxpayer took a \$262,000 basis in the property and took depreciation deductions. Seven years later, when the outstanding balance of the liability was \$250,000, the taxpayer transferred the property subject to the liability for \$2,500 net sale proceeds. Upon sale, the recipient taxpayer claimed that she had inherited an equity interest in the property whose value was zero, and accordingly claimed a zero basis in the property.¹⁸ The taxpayer also claimed amount realized equaled the \$2,500 net sales proceeds.

Two questions were before the Court. First, should the taxpayer's basis in the property include the liabilities assumed?¹⁹ The Court held that in a transfer of property by will, the recipient taxpayer acquires the entire property and the aggregate of the rights that go with ownership of the property, not simply the equity portion.²⁰ Thus, the taxpayer's basis includes the amount of liability.

¹⁷ Equity, for this purpose, is defined as the difference between the property's value and the amount of the liability to which the property is subject. Nonrecourse, for this purpose, is defined as an obligation to which no personal liability attaches. Upon nonpayment, the debt can only be satisfied from the collateral securing the obligation.

¹⁸ See *Crane*, 331 U.S. 1.

¹⁹ Because § 113(a)(5) of the 1938 Act (the current version is § 1014 of the 1954 Code, as amended, 26 U.S.C. § 1014) provided that the basis of property acquired by bequest, devise, or inheritance was the fair market value of the property at the time of acquisition, the Court indicated that the basis question depended on the meaning of the term "property."

²⁰ See *Crane*, 331 U.S. 1. The post-*Crane* case law reveals the influence of that case on the important questions of whether basis and amount realized include nonrecourse debt that the taxpayer used to acquire property (through purchase as opposed to inheritance). *Crane* did not specifically resolve this question because the recipient taxpayer in *Crane* acquired the property by devise and not by purchase. Nevertheless, *Crane*'s most lasting aspect has been its resolution of the basis question. The Supreme Court reasoned backwards from depreciation to basis and held that nonrecourse debt must be included in amount realized. In so doing, the Court invited the conclusion reached by subsequent courts that the basis of property acquired (through purchase) with nonrecourse debt should also include such debt. George Yin, *The Story of Crane: How a Widow's Misfortune Led to Tax Shelters*, in *TAX STORIES* (2003). See, e.g., *Blackstone Theater Co. v. Comm'r*, 12 T.C. 801 (1949) (holding that "[f]rom *Crane* we can deduce the following applicable principles: (a) [t]he basis for given property includes liens thereon, even though not personally assumed by the taxpayer . . .").

In its reasoning, the Court indicated that construing “property” to mean only the equity portion was not in accord with the depreciation provisions of the tax law.²¹ If the basis were only the equity portion, the depreciation would represent only a fraction of the property’s actual physical exhaustion.²² To represent actual physical exhaustion more closely, the Court reasoned that basis should include any liability assumed.²³ Further, an equity basis would require a basis recalculation with each payment on the liability, causing a tremendous accounting burden for both the government and the taxpayer.²⁴ Thus, the court held that basis includes liabilities assumed upon the acquisition of property.

Second, the Court considered whether amount realized includes liability relief. The Code defines amount realized as the sum of any money received plus the fair market value of any property received.²⁵ The Court held that the taxpayer’s amount realized on the disposition of the property includes liability relief.²⁶ The Court further held that since the basis of property includes liability incurred on acquisition, amount realized must include liability relief.²⁷ The Court stated that the buyer’s assumption of the mortgage was the same as the buyer paying the taxpayer cash for the property and the taxpayer using that amount to repay the outstanding liability.²⁸ Thus, amount realized includes liabilities relived upon disposition of property.

In its holding that basis includes the amount of liability incurred in the acquisition of property and that amount realized includes liability relief upon disposition of the

²¹ See Crane, 331 U.S. 1.

²² See *id.* See also Yin *supra* note 20.

²³ See Crane, 331 U.S. 1.

²⁴ See *id.*

²⁵ I.R.C. § 1001 (b) (2006).

²⁶ See Crane, 331 U.S. 1.

²⁷ See *id.*

²⁸ See *id.*

property, the *Crane* Court introduced the theory of symmetry. The Court also introduced a theory of economic benefit.²⁹ Although the liability was nonrecourse, the Court treated the liability as recourse because it believed the taxpayer would pay it to protect the equity in the property and prevent foreclosure.³⁰ The Court, however, did warn that if the value of the property is less than the amount of the liability, a taxpayer who is not personally liable cannot realize a benefit equal to the liability relieved.³¹ The Court addressed this issue thirty-five years later in *Commissioner v. Tufts*.³²

In *Tufts*, the Court considered whether a seller of property had amount realized equal to an unpaid nonrecourse liability when the amount exceeded the fair market value of the property sold.³³ The Court held that when a taxpayer sells or otherwise disposes of encumbered property and the purchaser assumes the liability, the amount realized includes the amount of liability relief.³⁴ Because the amount of liability relief in *Tufts* exceeded the value of the property, the Court was unable to utilize the theory of economic benefit to hold that amount realized includes liability relief.³⁵ Thus, the Court had to expand the symmetry argument first introduced in *Crane*.³⁶

Under the symmetry argument, if a taxpayer includes a liability in the property's basis upon acquisition, then the taxpayer must include the same liability in the amount realized upon disposition of the property.³⁷ The court reasoned that the economic benefit

²⁹ *See id.*

³⁰ Deborah A. Geier, *Tufts and the Evolution of Debt-Discharge Theory*, 1 FLA. TAX REV. 115 (1992).

³¹ *See Crane*, 331 U.S. 1 n.37.

³² 461 U.S. 300 (1983).

³³ *See id.*

³⁴ *See id.*

³⁵ *See id.*

³⁶ *See id.*; *see also* Yin, *supra* note 20. Although not labeled as such, the *Crane* Court first introduced the theory of symmetry. Ultimately, however, the Court in *Crane* utilized the economic benefit theory to support its holding.

³⁷ *See Tufts*, 461 U.S. 300; *see also* Yin, *supra* note 20.

theory had not been critical to the *Crane* holding and interpreted *Crane* to have approved the Commissioner's decision to treat a nonrecourse liability as a true loan.³⁸

Loan proceeds are not included in gross income when received, but are included in basis of property if used to acquire the property.³⁹ The exclusion of loan proceeds from income, and the inclusion of the amount of a loan in a purchaser's basis, are both predicated on the assumption that the debtor has an obligation to repay the loan.⁴⁰ The taxpayer is able to take depreciation deductions based upon the use of the untaxed loan proceeds to acquire property.⁴¹ Unless the outstanding amount of the liability is included in amount realized, the debtor will have received untaxed income at the time the loan was extended and will have received an unwarranted increase in basis of the property.⁴² This scenario could allow the taxpayer to withdraw cash or value from property tax free.⁴³ Including liability relief in amount realized, avoids this absurdity. Therefore, the *Tufts* Court held that the basis of acquired property includes the amount of liabilities that the taxpayer assumes in the acquisition, and that the amount realized on the disposition of the property includes liabilities from which the transferor is relieved.⁴⁴

³⁸ See *Tufts*, 461 U.S. 300.

³⁹ See *id.*

⁴⁰ See *Yin*, *supra* note 20.

⁴¹ See *id.*

⁴² See *Tufts*, 461 U.S. 300. See also *Yin*, *supra* note 20.

⁴³ The taxpayer could receive cash tax-free by borrowing against property and then transferring it subject to the liability while retaining the cash. The taxpayer could withdraw value tax-free by using the property until its value decreases below the amount of the outstanding balance of the loan and transferring the property subject to the loan tax-free. Section 1031(d) adopts *Crane* and *Tufts* and includes debt relief in amount realized and treats the exchanger as receiving cash equal to the amount of debt relief.

⁴⁴ See *Geier*, *supra* note 30. Both *Crane* and *Tufts* concerned nonrecourse obligations. However, the Court did not consider the discharge of indebtedness doctrine because it was not presented to the Court. Under this doctrine, the amount realized on a sale or other disposition of property that secures a recourse liability does not include amounts that are (or would be if realized and recognized) income from the discharge of indebtedness under § 61(a)(12). Thus, if the debt is "recourse," the transaction should be bifurcated. Under this approach, the asset is considered sold for its fair market value (resulting in the realization of gain or loss on the disposition under § 1001), and the sale proceeds are then considered used to settle the outstanding indebtedness (resulting in the realization of income from the discharge of indebtedness under § 61(a)(12)). If the debt is "nonrecourse," the government collapses the two component parts into the

Regulations provide greater specificity regarding the different tax treatment of cancelled nonrecourse and recourse liability. In general, if a debtor transfers assets securing a nonrecourse loan to a creditor in full satisfaction of the liability, the transfer is treated as a sale or exchange of those assets.⁴⁵ As such, gain or loss must be recognized equal to the difference between the debtor's amount realized and the adjusted basis of the property foreclosed upon,⁴⁶ and the amount realized shall include the full amount of nonrecourse liability.⁴⁷

In the case of a sale or other disposition (including foreclosure) of property that is subject to a recourse liability, the amount realized will also include the amount of the recourse liabilities from which the debtor is relieved, but only up to the fair market value

disposition under § 1001 by including the entire debt in amount realized (the “collapsed” approach). No cancellation-of-indebtedness income is deemed realized, which was the approach utilized in *Tufts*.

⁴⁵ See *Helvering v. Hammel*, 311 U.S. 504 (1941); *Electro-Chemical Engraving Co. v. Comm’r*, 311 U.S. 513 (1941); *Freeland v. Comm’r*, 74 T.C. 970 (August 5, 1980) (“In short, we believe that . . . a reconveyance by the mortgagor to the mortgagee constitutes a sale even though the mortgagor ha[s] no personal liability on the debt.”); *Yarbro v. Comm’r*, 737 F.2d 479 (5th Cir. 1984). See also Rev. Rul. 76-111, 1976-1 C.B. 214 (“It is well established that, for federal income tax purposes, the transfer of assets in consideration of a cancellation of indebtedness is equivalent to a sale upon which gain or loss is recognized in the amount of the difference between the basis of the assets transferred and the amount of the indebtedness that is cancelled in consideration of the transfer.”); Rev. Rul. 90-16, 1990-1 C.B. 12; G.C.M. 38385 (May 23, 1980)(“It is well established that a foreclosure sale, in which the property securing the debt is repossessed from the mortgagor, constitutes a taxable sale or exchange.”). **[Need to verify/revise this cite].**

⁴⁶ I.R.C. § 1001(a).

⁴⁷ Treas. Reg. § 1.1001-2(c)(ex. 7) (“In 1974 E purchases a herd of cattle for breeding purposes. The purchase price is \$20,000 consisting of \$1,000 cash and a \$19,000 note. E is not personally liable for repayment of the liability and the seller's only recourse in the event of default is to the herd of cattle. In 1977 E transfers the herd back to the original seller thereby satisfying the indebtedness pursuant to a provision in the original sales agreement. At the time of the transfer the fair market value of the herd is \$15,000 and the remaining principal balance on the note is \$19,000. At that time E's adjusted basis in the herd is \$16,500 due to a deductible loss incurred when a portion of the herd died as a result of disease. As a result of the indebtedness being satisfied, E's amount realized is \$19,000 notwithstanding the fact that the fair market value of the herd was less than \$19,000. E's realized gain is \$2,500 (\$19,000 – \$16,500).”).

of the property disposed of in the exchange.⁴⁸ To the extent that the recourse liability from which the debtor is relieved exceeds the fair market value of the property disposed of in the exchange, the debtor will recognize discharge of indebtedness income to the extent of the excess.⁴⁹ Any excess liability forgiven over the fair market value will result in ordinary DOI Income.⁵⁰

Thus, a foreclosure (or transfer of property pursuant to a deed in lieu of foreclosure) results in a constructive sale of the property for federal income tax purposes. Such sale will result in taxable gain to the debtor if the debtor's adjusted basis in the property is less than his amount realized. A debtor facing foreclosure may avoid adverse tax consequences through the use of a carefully-tailored Section 1031 exchange.

III. Code Section 1031 in Workouts

[Add text].

⁴⁸ Treas. Reg. § 1.1001-2(a)(2) (“The amount realized on a sale or other disposition of property that secures a recourse liability does not include amounts that are (or would be if realized and recognized) income from the discharge of indebtedness under section 61(a)(12).”).

⁴⁹ Treas. Reg. § 1.1001-2(c)(ex. 8) (“In 1980, F transfers to a creditor an asset with a fair market value of \$6,000 and the creditor discharges \$7,500 of indebtedness for which F is personally liable. The amount realized on the disposition of the asset is its fair market value (\$6,000). In addition, F has income from the discharge of indebtedness of \$1,500 (\$7,500 - \$6,000).”); Rev. Rul. 90-16, 1990-1 C.B. 12 (ruling that where X transferred real property to a bank having a fair market value of \$10,000x and an adjusted basis of \$8,000x in full satisfaction of a recourse loan in the amount of \$12,000x, X realized gain of \$2,000x on the transfer of the real property (to the extent the fair market value of the real property exceeded the adjusted basis therein) and \$2,000x income from discharge of indebtedness (to the extent the amount of the liability exceeded the fair market value of the real property)).

⁵⁰ Revenue Ruling 90-16; Treas. Reg. § 1001-2(a)(2).

A. General Rules

Code Section 1031 provides in general:

No gain or loss shall be recognized on the exchange of property held for productive use in a trade or business or for investment if such property is exchanged solely for property of like kind which is to be held either for productive use in a trade or business or for investment.⁵¹

If, however, the taxpayer receives any money or non-like kind property in the exchange (i.e., “boot”), then gain, if any, must be recognized to the extent of the amount of such boot.⁵² For this purpose, consideration received in the form of liability relief is considered boot (“liability-relief boot”).⁵³ The liability netting rules provide, however, that consideration given in the form of cash or an assumption of liabilities (or receipt of property subject to a liability) offsets liability-relief boot.⁵⁴ The liability netting rules are equally applicable where the liability encumbering the relinquished property is repaid at closing and a new liability is obtained to finance the acquisition of the replacement property.⁵⁵

Actual or constructive receipt of money or other property instead of like kind replacement property is a sale and not an exchange, even though the taxpayer may ultimately reinvest in like-kind property.⁵⁶ Generally, the active and constructive receipt

⁵¹ I.R.C. § 1031(a).

⁵² I.R.C. § 1031(b).

⁵³ Treas. Reg. § 1.1031(b)-1(c).

⁵⁴ *Id.*; Treas. Reg. § 1.1031(d)-2 (exs. 1 and 2).

⁵⁵ *See* Comm’r v. North Shore Bus. Co., 143 F.2d 114 (2d Cir. 1944); *Barker v. Comm’r*, 74 T.C. 555 (1980); TAM 8003004 (September 19, 1979). **[confirm.]**

⁵⁶ *See* Treas. Reg. § 1.1031(k)-1(f)(1).

principles apply in the Section 1031 context.⁵⁷ If, however, the taxpayer falls within one of the safe harbors provided in the section 1031 safe harbors, the taxpayer will not be considered in actual or constructive receipt of money or other property for purposes of Code Section 1031. The safe harbors generally include certain security or guarantee arrangements, qualified escrow accounts and qualified trusts, and transfers involving QIs.

[Consider adding discussion of how a TP normally avoids constructive receipt of liability-relief boot using the QI safe harbor.]

B. Section 1031 and Workouts

In the examples above, T has \$2.4 million liability relief. If the liability is nonrecourse, T's resulting tax liability is \$300,000. If the liability is recourse, T's resulting tax liability is \$380,000. T wonders whether he might change his tax result by engaging in a Section 1031 exchange. T asks whether he may engage in a Section 1031 exchange with zero equity in P, and if so, how the exchange should be structured as a practical matter.

1. Zero Equity Section 1031 Exchange

The initial inquiry is whether T may use a Section 1031 exchange to defer gain (and possibly DOI Income) that he would otherwise recognize on foreclosure (or on transfer of a deed in lieu of foreclosure) of P. The question boils down to whether T may

⁵⁷ See Treas. Reg. § 1.1031(k)-1(f)(2). See also **[cite actual and constructive receipt cases]**.

exchange property in which he has zero or negative equity. The legal answer is affirmative; the practical answer is less certain.

There are no indications in Code Section 1031 or elsewhere that a taxpayer must have equity in the relinquished property in order to complete a Section 1031 exchange with such property.⁵⁸ Furthermore, the Treasury Regulations define an exchange as “a reciprocal transfer of property, as distinguished from a transfer of property for a money consideration only.”⁵⁹ The Supreme Court has been careful to hold that “property” means the gross, physical property, and not just the net equity in such property.⁶⁰ Therefore, a taxpayer should be permitted to exchange property in a Section 1031 exchange, even if the taxpayer has no equity in such property.

If the exchange involves a QI, a question arises as to whether the QI is required to hold “money or other property” from the exchange in order for the exchange to be valid. The answer is negative. “No cash” exchanges frequently occur in the following scenarios:

- T, who has minimal equity in his relinquished property, has zero cash to deposit with QI after payment of closing costs from the sale, through QI, of the relinquished property.
- T, through QI, sells relinquished property to buyer who pays cash equal to the liability on the relinquished property and provides an installment note for the balance of the purchase price. The note, but no cash, is deposited with QI.

⁵⁸ See American Bar Association Tax Section’s Report on Open Issues in Section 1031 Like-Kind Exchanges, Q-8 (July 14, 1994).

⁵⁹ Treas. Reg. § 1.1002-1(d).

⁶⁰ See *Crane v. Comm’r*, 331 U.S. 1 (1947).

- T, through QI, sells encumbered relinquished property to buyer and deposits the net equity with QI. QI uses 100% of the net equity to buy replacement property A (unencumbered). To avoid liability-relief boot, T instructs QI to purchase replacement property B, although QI has no cash to pay the purchase price. At closing, T funds the purchase price with a combination of cash and new liability sufficient to avoid liability-relief boot in the exchange.
- T, through QI, sells encumbered relinquished property to buyer and takes all of the net equity as boot. T deposits nothing with QI. To avoid liability-relief boot, T instructs QI to purchase replacement property, although QI has no cash to pay the purchase price. At closing, T funds the purchase price with a combination of cash and new liability sufficient to avoid liability-relief boot in the exchange.

Thus, it is evident that there is no requirement that a QI must hold even \$1 of cash or other property in order to have a valid Section 1031 exchange.

2. Use of the Safe Harbors

Although his zero equity Section 1031 exchange is permissible, T nevertheless must be careful to structure the exchange within the confines of Section 1031. Upon foreclosure or a transfer of deed in lieu of foreclosure, the taxpayer immediately will receive “other property” in the form of liability relief.⁶¹ Moreover, the taxpayer will be in actual or constructive receipt of such property before receiving the replacement property (and before assuming any offsetting liabilities in connection with the

⁶¹ See Treas. Reg. § 1.1031(b)-1(c).

replacement property) unless the taxpayer is able to take advantage of one of the safe harbors set forth in the regulations. Thus, the taxpayer must be careful to structure the foreclosure or transfer of deed in lieu of foreclosure in a manner that qualifies under one of the safe harbors.

A foreclosure generally does not include a cash transfer by the acquirer, so the safe harbors for security or guarantee arrangements, and qualified escrow accounts, and qualified trusts will be inapplicable. Therefore, the QI safe harbor is the only viable option. The taxpayer will use the safe harbor merely to facilitate the transfer of property.

The QI safe harbor provides that “[i]n the case of a taxpayer’s transfer of relinquished property *involving* a qualified intermediary, the qualified intermediary is not considered the agent of the taxpayer for purposes of section 1031(a).”⁶² Thus, it is readily apparent that the QI must be an active participant in transferring the relinquished property to the purchaser. Furthermore, the regulations require that the taxpayer and the QI enter into a written “exchange agreement.”⁶³ Pursuant to the exchange agreement, the QI must (i) acquire the relinquished property from the taxpayer, (ii) transfer the relinquished property, (iii) acquire the replacement property, and (iv) transfer the replacement property to the taxpayer.⁶⁴

Regardless of whether the QI acquires and transfers property under general principles of federal tax law, solely for purposes of the QI safe harbor, a QI is treated as acquiring and transferring the relinquished property if either (a) the QI acquires and transfers legal title to that property (an “Actual Title Transfer”), or (b) the QI enters into

⁶² See Treas. Reg. § 1.1031(k)-1(g)(4)(i) (emphasis added).

⁶³ See Treas. Reg. § 1.1031(k)-1(g)(4)(iii)(B).

⁶⁴ See Treas. Reg. § 1.1031(k)-1(g)(4)(iii)(B).

an agreement with a person other than the taxpayer for the transfer of the relinquished property to that person and, pursuant to that agreement, the relinquished property is transferred to that person (a “Deemed Transfer”).⁶⁵ For this purposes, a QI is treated as entering into an agreement for the transfer of relinquished property if the rights of a party to the agreement are assigned to the QI and all parties to that agreement are notified of the assignment in writing on or before the date of the transfer.⁶⁶

Where distressed property is to be relinquished via foreclosure, the taxpayer will encounter difficulty in satisfying the requirement that the QI be involved in the transfer of the relinquished property through acquiring the relinquished property from the taxpayer and transferring it to the buyer. If distressed property is to be sold via a judicial or nonjudicial foreclosure proceeding, the taxpayer will have no direct involvement in the conveyance of the property to the buyer. The taxpayer and the buyer will not negotiate or sign any agreements. Instead, the sheriff or trustee, as applicable, will conduct the foreclosure auction and, afterwards, will execute the deed and grant and convey the relinquished property to the highest bidder. Thus, there is no contract or other agreement that can be assigned by the taxpayer to the QI pursuant to the Deemed Transfer provision.

If the Deemed Transfer option is foreclosed, an Actual Transfer is the only remaining option, assuming the taxpayer can find a QI willing to take title to the distressed property. In an Actual Transfer, the taxpayer will transfer title to the relinquished property to the QI prior to the foreclosure sale. After the auction, the QI, like the taxpayer, will have no direct involvement with the conveyance of the

⁶⁵ See Treas. Reg. § 1.1031(k)-1(g)(4)(iv)(A) and (B).

⁶⁶ See Treas. Reg. § 1.1031(k)-1(g)(4)(v).

relinquished property to the buyer. Again, the sheriff or trustee, as applicable, will execute the deed and grant and convey the relinquished property to the highest bidder. Thus, although the QI previously may have acquired legal title to the replacement property from the taxpayer, because the sheriff or trustee consummates the actual transfer, it is unclear whether the QI has satisfied the requirement that the QI acquire *and transfer* the relinquished property. A taxpayer in such situation may argue that because title transfers from the QI to the buyer, the QI should be viewed as the transferor of the relinquished property. It remains to be seen whether such argument has merit.

Given the uncertainties of using the QI safe harbor in a foreclosure, a taxpayer desiring to do a Section 1031 exchange of a distressed property facing foreclosure would be well advised to utilize a transfer of deed in lieu of foreclosure if possible. If the taxpayer and mortgagor agree to use a deed in lieu of foreclosure, the parties typically will execute an “Agreement in Lieu of Foreclosure” specifying the terms of the conveyance. In anticipation of a Section 1031 exchange, the taxpayer should include an exchange cooperation clause in such agreement. Prior to the conveyance, the taxpayer may assign his rights under the Agreement in Lieu of Foreclosure to the QI. Provided all parties to the Agreement in Lieu of Foreclosure are timely notified of the assignment in writing, a transfer of the relinquished property to the mortgagor pursuant to the deed in lieu of foreclosure will be treated as the acquisition and transfer of such property by the QI, thus satisfying the Deemed Transfer requirements.

Most creditors prefer a deed in lieu of foreclosure because it terminates the debtor’s equity of redemption and is faster, cheaper, and less cumbersome than a traditional foreclosure. In fact, many creditors are willing to provide additional

consideration to a debtor who agrees to transfer a deed in lieu of foreclosure. Thus, a taxpayer facing foreclosure, but desiring to accomplish a Section 1031 exchange, is in a relatively strong bargaining position to obtain the lender's agreement to cooperate with the Section 1031 exchange.

3. Workout-Exchange Structure

Picking up the prior examples, T decides to structure the foreclosure of P using a Section 1031 exchange. T realizes that if B forecloses and P is sold at auction by the sheriff or a trustee, T's Section 1031 exchange may be in jeopardy. Therefore, to avoid potential issues with his desired Section 1031 exchange, T approaches B and offers to transfer P to B via a deed in lieu of foreclosure if B will cooperate with T's Section 1031 exchange. B readily agrees. Thereafter, T and B enter into an Agreement in Lieu of Foreclosure containing the terms of their agreement. T engages QI pursuant to a written exchange agreement and assigns his rights under the Agreement in Lieu of Foreclosure to QI, and all parties to such agreement are notified of the assignment in writing. Afterwards, on date 1, T executes a deed conveying P to B in satisfaction of the liability encumbering P. For purposes of the Section 1031 exchange, QI is treated as acquiring P from T and transferring P to the buyer. Within 45 days, T identifies replacement property R, and within 180 days, T (through QI) acquires R using a cash down payment of \$300,000 and assuming a \$2.1 million liability encumbering R. Because T has assumed a liability and paid cash in the total amount of \$2.4 million, T recognizes no gain or loss on

the exchange of P for R. Furthermore, rather than paying his \$300,000 to the Treasury, T has preserved his \$300,000 by sinking it into R as his down payment.

In the alternative, if the foreclosure is imminent and T does not have sufficient time to structure the transaction as the transfer of a deed in lieu of foreclosure, or if the mortgagor is not willing to cooperate with this alternative, T's best option is to transfer title to P to the QI prior to the foreclosure sale. After the sale, title will pass to the foreclosure buyer directly from the QI. T will be left to argue that the QI in fact transferred legal title to the relinquished property to the buyer. If T's argument prevails, then the result of the prior example should be the same. If T's argument fails, then T will be in constructive receipt of the debt relief, meaning his Section 1031 exchange will fail.

IV. Section 1038 Seller-Financed Reacquisitions

Seller-financed reacquisitions present the debtor with tax consequences that are the same as those discussed above in the third-party-financed transactions. Special rules apply, however, to the reacquiring seller who finances a property acquisition. For example, assume Sam sold Driggs Ranch to Donna for \$20,000 cash and an \$80,000 note from Donna secured by Driggs Ranch. At the time of the sale, Sam had \$50,000 basis in Driggs Ranch. Sam later reacquired Driggs Ranch from Donna after Donna defaulted on the note. By that time, Donna had paid three \$10,000 installments on the note, and Sam had recognized \$25,000 on the money received from Donna.⁶⁷ Sam paid \$5,000 in legal

⁶⁷ This example assumes that Sam uses the installment method to report gain from the sale of Driggs Ranch. Sam had received the \$20,000 down payment and three \$10,000 installments.

and other fees to reacquire Driggs Ranch from Donna and to cancel the outstanding balance on the note in exchange for taking the property back.

Section 1038(a) generally provides that Sam would recognize no gain or loss on such reacquisition, but exceptions to the general rule complicate matters, if certain facts exist.⁶⁸ Furthermore, the tax consequences would become more complicated if Sam had transferred the property to Donna as part of a Section 1031 exchange, or if Donna were an EAT holding Driggs Ranch as part of an exchange-first title-parking reverse exchange. Section 1038 is important to the extent it affects the computation of gain or loss on property reacquisitions and the seller's basis in the reacquired property.

A. Seller's Gain Computation

Section 1038(a) generally provides that a seller does not recognize gain or loss on the reacquisition of real property encumbered by indebtedness issued to the seller and that no debt becomes worthless as part of the reacquisition. For that provision to apply, the seller must reacquire the property in partial or full satisfaction of the indebtedness.⁶⁹ The seller must, however, recognize gain on the reacquisition if the seller receives money or other property from the debtor prior to the reacquisition and the amount of money and property received exceeds the gain the seller has already recognized.⁷⁰ The amount of gain recognized by the seller on the reacquisition shall not exceed the difference between

⁶⁸ Several articles provide in-depth analyses of Section 1038. *See, e.g.*, R. Arnold Handler, *Tax Consequences of Mortgage Foreclosures and Transfers of Real Property to the Mortgagee*, 31 TAX L. REV. 193 (1976); C. Douglas Miller, *Acquisition of Real Estate Securing Indebtedness: Federal Income Tax Consequences to the Creditor*, 16 U. KAN. L. REV. 23 (1967); Jerry A. Kasner, *Repossessions of Real Property—A New Tax Treatment*, 5 SANTA CLARA LAWYER 19, (1964).

⁶⁹ I.R.C. § 1038(a)(2).

⁷⁰ I.R.C. § 1038(b).

the sale price and seller's basis in the property.⁷¹ Gain recognized by the seller prior to the reacquisition and money the seller pays to reacquire the property further reduces the amount of gain the seller recognizes on the reacquisition.⁷²

Section 1038 will apply to Sam since she took back a note from Donna on the sale of Driggs Ranch, Driggs Ranch secured the note, and Sam reacquired Driggs Ranch from Donna in full satisfaction of the note. Because Sam had received money from Donna prior to the reacquisition, however, the Section 1038(b) exception to the general nonrecognition rule will apply and Sam will recognize gain on the reacquisition. Prior to the reacquisition, Sam recognized \$25,000 of gain on \$50,000 of cash she received. The Section 1038(b) exception provides that Sam shall recognize gain on the reacquisition because the amount of money (\$50,000) she received prior to the reacquisition exceeds the amount of gain she had recognized (\$25,000). The gain she recognizes shall be the difference (\$50,000) between the sales price (\$100,000) and Sam's adjusted basis (\$50,000), reduced by the gain Sam recognized prior to the reacquisition (\$25,000) and the amount she paid in connection to the reacquisition of the property (\$5,000).⁷³ Thus, Sam must recognize \$20,000 on the reacquisition. Because Sam recognized gain under the installment method on the original sale, Code Section 453 determines the character of gain she recognizes on the reacquisition.⁷⁴ Under Code Section 453, Sam's gain should be capital gain, assuming she held Driggs Ranch as a capital asset.⁷⁵

⁷¹ I.R.C. § 1038(b)(2).

⁷² I.R.C. § 1038(b)(A), (B).

⁷³ The sales price "is the gross sales price reduced by the selling commissions, legal fees, and other expenses incident to the sale of such property which are properly taken into account in determining gain or loss on such sale." I.R.C. § 138(b)(flush language). For purposes of this analysis, assume that the sales price equals the sum of money Donna pays plus the amount of her note.

⁷⁴ Reg. § 1.1038-1(d).

⁷⁵ Reg. § 1.453-9(a) (attributing gain on the disposition of an installment not received in exchange for property to the property).

B. Seller's Reacquired Basis

Section 1038 in a sense nullifies the original sale.⁷⁶ Thus, the basis the seller takes in the reacquired property should generally reflect the basis the seller would have had, had the sale never occurred, but it must reflect changes that result from transfers of money. To get to that point, Section 1038(c) starts with the basis the seller has in the indebtedness and increases it by the amount of gain the seller recognizes on the reacquisition and the amount the seller pays to reacquire the property. Sam's basis in the note from Donna should have been \$25,000 on the date of reacquisition.⁷⁷ Section 1031(c) requires her to increase that amount by the \$20,000 of gain she recognizes on the reacquisition and the \$5,000 she pays to reacquire the property. Thus, her basis in the reacquired Driggs Ranch will be the \$50,000 basis she had in it at the time of sale.

The Section 1038 basis rules create an interesting situation for Sam. Sam had sold Driggs Ranch once and recognized \$25,000 on that sale. She recognized another \$20,000 on the reacquisition of Riggs Ranch. The Section 1038 basis rules in a sense nullify the original sale, and leave Sam in a position that she would have been in had she not sold the property. Consequently, if Sam were to sell Driggs Ranch immediately after reacquisition for \$100,000, she would recognize the \$50,000 of gain again. Thus, the

⁷⁶ S. Rep. No. 1361, 88th Cong., 2d Sess. 5 (1964) ("Apart from any payments [the seller] may have received, [the seller] is in no better position than he was before he made the sale. As a result, your committee has concluded that instead of the repossession of the property being treated as a second sale of the property back to its original holder, it is desirable to consider instead that the first sale has been nullified."); Reg. § 1.1038-1(g)(3) ("[T]he reacquisition . . . is in a sense considered a nullification of the original sale.")

⁷⁷ Sam's original basis in the note should have been \$40,000 (\$50,000 minus the \$10,000 Sam recognized on the sale and receipt of the \$20,000 down payment). _____. Gain Sam recognized on the three \$10,000 installments would have reduced her basis in the note by \$15,000. _____.

rules require Sam to recognize the gain twice on a single piece of property. The result appears to treat the gain Sam recognizes as a form of rent or other income from the property, with a character determined by her holding intent.

C. Reacquired Exchange Property

Section 1038 would become important in the Section 1031 context if an exchanger finances the acquisition of the relinquished property or if an intended exchange-first reverse exchange fails. In either situation, if both Section 1031 and 1038 apply, the exchanger could potentially be left with one low-basis property and one high-basis property. Exchanger-financed transactions may not be common, but they do occur. For example, an exchanger may lend to the relinquished property buyer, who transfers the proceeds to the qualified intermediary. In such a transaction, the exchanger will take a note from the buyer secured by the relinquished property.⁷⁸ If the exchange satisfies all of the requirements of Section 1031, the exchanger will recognize no gain or loss on the transfer of the relinquished property and take a basis in the replacement property equal to the relinquished property basis.⁷⁹

To illustrate an exchanger-financed exchange, Sam transfers Driggs Ranch to Donna as part of a Section 1031 exchange. To help Donna finance the transaction, Sam lends Donna \$80,000, which Donna transfers, along with \$20,000 of her own money, to a QI and takes title to Driggs Ranch, subject to the \$80,000 liability. Sam directs the QI to use the \$100,000 to acquire Rirey Ranch. Assuming the transaction qualifies for Section

⁷⁸ See *124 Front St. v. Comm'r*, 65 T.C. 6 (1975); Borden, *supra* note 14 at ¶2.6[2].

⁷⁹ I.R.C. § 1031(a), (b).

1031 nonrecognition, Sam would take a \$50,000 basis in Rirey Ranch and an \$80,000 basis in the note from Donna.⁸⁰ She would recognize no gain or loss as Donna makes payments on the note because the note represents a loan, not consideration for Driggs Ranch. Payments on the note would reduce Sam's basis in the note, so after receiving \$30,000 from Donna, Sam's basis in the note would be \$50,000. Section 1038 would appear to apply if Donna later defaulted on the note and Sam reacquired Driggs Ranch in satisfaction of the note.

Section 1038 applies if the sale of the property gives rise to indebtedness to the seller that is secured by the property.⁸¹ Sam's loan to Donna and transfer of Driggs Ranch through a QI raises the question of whether the sale gave rise to the indebtedness.⁸² As stated above, the Section 1031 regulations treat the QI as acquiring Driggs Ranch from Sam and transferring it to Donna. The regulations also specifically limit that fiction to Section 1031.⁸³ If the Section 1031 regulations do not apply for Section 1038 purposes, Donna should be the Section 1038 acquirer of Driggs Ranch,⁸⁴ and the law should treat the sale as giving rise to the indebtedness. Consequently, Section 1038 should apply when Sam reacquires the property from Donna in satisfaction of the note.

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⁸¹ I.R.C. § 1031(a)(1).

⁸² Adam Handler warns that Section 1038 "may not be available if the indebtedness arose out of an exchange of property facilitated by the use of a qualified intermediary." Adam M. Handler, *Proposed Regs. Coordinate Deferred Exchanges and Installment Sale Rules*, ____ J. TAX'N ____ (Jul. 1993).

⁸³ Reg. § 1.1031(k)-1(g)(4) ("In the case of a taxpayer's transfer of relinquished property involving a qualified intermediary, the qualified intermediary is not considered the agent of the taxpayer for purposes of section 1031(a)."); Reg. § 1.1031(k)-1(n) (providing that no inference should be drawn outside of Section 1031 about the application of the safe harbors).

⁸⁴ Even if she is not the purchaser for Section 1038 purposes, Section 1038 applies to reacquisitions from persons who purchase property from the original purchaser. Reg. § 1.1038-1(a)(4).

Upon reacquisition, Sam would recognize no gain or loss under the Section 1038(a) general rule. If Section 1038 disregards the Section 1031 safe harbors, Sam will likely be in constructive receipt of the \$20,000 that Donna transferred to the QI. If Sam is in constructive receipt of the \$20,000 for Section 1038 purposes, she would recognize \$45,000 of gain on the reacquisition of Driggs Ranch.⁸⁵ If Section 1038 ignores the Section 1031 transaction, Sam's basis in the note should be \$50,000—the Section 453 basis. Based on that assumption, Sam would take a \$100,000 basis in Driggs Ranch, which would include the \$50,000 basis she would have had in the note from Donna plus the \$45,000 gain and the \$5,000 she paid to reacquire the property.⁸⁶

That result is consistent with Section 1038 and respects the Section 1031 exchange. The basis Sam had in Driggs Ranch carries over to Rirey Ranch. If Sam were to sell Rirey Ranch, she would recognize the \$50,000 of deferred gain. The reacquisition of Driggs Ranch should create Section 1038 gain, but should Sam's basis in Driggs Ranch should not reflect any additional latent gain. Thus, Sam should take a \$100,000 basis in Driggs Ranch. Even though the reacquisition nullifies the transfer of Driggs Ranch, it should not nullify the exchange. Nullifying the exchange would create a similar result, but Sam's basis in Rirey Ranch would become its \$100,000 cost basis and her basis in Driggs would be the \$50,000 basis computed in the nonexchange context.⁸⁷ That result complicates matters, however, because Sam would have to recomputed any depreciation she had taken with respect to Rirey Ranch. Furthermore, if Sam had sold

⁸⁵ I.R.C. § 1038(b). Sam would have received three \$10,000 installments on the note, and if the safe harbor did not apply, she probably would have constructively received the \$20,000 that Donna transferred to the QI. The \$80,000 that Sam loaned to her should be disregarded for Section 1038 purposes, and Sam the note should be a seller-financed purchase.

⁸⁶ I.R.C. § 10318(c).

⁸⁷ See *supra* Section IV.A. and B.

Rirey Ranch before reacquiring Driggs Ranch, nullifying the exchange would require Sam to recomputed the gain she recognized on the sale of Rirey Ranch. Nullifying the Driggs Ranch transfer without nullifying the exchange helps Sam avoid those complexities without significantly altering her overall tax situation.

Section 1038 may come in Section 1031 exchanges most often in failed reverse exchanges. For example, as part of an intended exchange-first reverse exchange, Sam might have transferred Driggs Ranch to Donna who acted as an exchange accommodation titleholder (EAT).⁸⁸ Sam would lend Donna the \$100,000 needed to acquire Driggs Ranch and carry back a note and mortgage in Driggs Ranch. Sam would acquire Rirey Ranch as part of a Section 1031 exchange and take a \$50,000 basis in Rirey Ranch. After transferring the property to Donna, Sam may have been unable to find an interested buyer for the property because of a market downturn. As a consequence, Donna would likely exercise her option to transfer the Driggs Ranch back to Sam in full satisfaction of the note.

Section 1038 should govern Sam's reacquisition of Driggs Ranch. The result that obtained in the deferred exchange context should also obtain in the reverse exchange context. Thus, Sam should recognize gain to the extent that she received any payments from Donna on indebtedness. If Driggs Ranch was not income-producing property, Donna probably would not have made payments on the note. As a consequence, Sam may recognize no gain on the reacquisition of Driggs Ranch. In that situation, her basis in the note should be \$100,000 and should carryover to Driggs Ranch on the

⁸⁸ See Borden, *supra* note 14 at ____ (discussing exchange-first reverse exchanges).

reacquisition.⁸⁹ That would help ensure that the transaction does not create duplicate gains. Thus, the result is the same as in the deferred exchange context and appears to produce the best outcome.

V. Conclusion

[To Come].

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⁸⁹ Sam's basis in the note should equal the amount that Donna borrowed, and it would not decrease because Donna would make no payments on the note.