

A CASE OF NONACQUIESCENCE: I.R.S. OPPOSES *BARTELL* DECISION

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The I.R.S. has announced that it disagrees with the ruling in *Bartell v. Commr.*¹ in an Action on Decision (“A.O.D.”) issued on August 14, 2017, expressing its “nonacquiescence” with the case. In *Bartell*, the taxpayer attempted to effect a like-kind exchange wherein the exchange facilitator held replacement property for 17 months before property was transferred to a qualified intermediary and then to the taxpayer in a so-called reverse exchange. The A.O.D. indicates that the I.R.S. will not follow the holding on a nationwide basis but will recognize the precedential impact of the opinion on cases arising within the jurisdiction of the deciding circuit to the holding.

Following an adverse Tax Court decision, the I.R.S. generally issues an A.O.D. to explain whether it agrees or disagrees with the ruling and whether it will follow the ruling in the future. An A.O.D. is formal memorandum that sets forth the tax litigation position the I.R.S. will take with regard to a court decision. It is not binding on the taxpayers and cannot be cited as precedent but is generally used to provide guidance to I.R.S. employees working on similar issues.

The I.R.S. issues three types of A.O.D.’s² that express either “acquiescence,” “acquiescence in result only,” or “nonacquiescence.” Generally, in the first two instances, the I.R.S. acknowledges that it accepts the ruling and will follow it when dealing with the same controlling facts. However, *acquiescence* does not indicate approval or disapproval with the court’s reasoning in the case, while *acquiescence in result only* indicates disagreement with some or all the court’s reasoning. The I.R.S. does not agree with the holding of the case and does not intend to follow the decision although the case was not appealed.

In the *Bartell* case, it is important to point out that the Tax Court based its decision on the case law before Treas. Reg. §1.1031(k)-1 and Rev. Proc. 2000-37.³ Neither Code §1031 nor the regulations addressed the situation in *Bartell*, wherein replacement property is “parked” with the accommodating party in a reverse exchange.

Treas. Reg. §1.1031(k)-1 allows for a “deferred exchange,” which is a like-kind exchange in which, pursuant to an agreement, a taxpayer transfers property held for productive use in a trade or business or for investment (“relinquished property”) and subsequently receives property to be held either for productive use in a trade or business or for investment (“replacement property”).⁴

¹ *Estate of Bartell v. Commr.* 147 T.C. No 5 (2016). For detailed discussion of the case please see our article “[New Developments in the World of Reverse Like-Kind Exchanges.](#)”

² I.R.B. 2012-4 (November 13, 2012).

³ At the time the *Bartell* transaction was undertaken, Treas. Reg. §1.1031(k)-1 did not cover deferred exchange transactions.

⁴ I.R.B. 2017-33 (August 14, 2017).

Rev. Proc. 2000-37,⁵ which was issued after the exchange facilitator acquired the title to the replacement property in *Bartell*, provides a safe harbor for taxpayers seeking to park relinquished property or replacement property with an exchange accommodation titleholder (“E.A.T.”) in anticipation of a like-kind exchange. If the safe harbor requirements are met (*inter alia* the E.A.T. does not hold the property for more than 180 days), the E.A.T. – and not the exchanging taxpayer – is considered the owner of the property held by the E.A.T., regardless of who has the benefits and burdens of the ownership.

In *Bartell*, the Tax Court ruled that for Code §1031 purposes an exchange facilitator may be treated as the owner of the replacement property regardless of whether it has the benefits and burdens of ownership.⁶

As stated above, the I.R.S. announced its nonacquiescence with the *Bartell* case. Thus, the A.O.D. addresses that for transactions outside the scope of the deferred exchange regulations, the I.R.S. will not follow the Tax Court opinion. Similarly, in determining whether a reverse exchange outside the scope of Rev. Proc. 2000-37 meets the requirements of Code §1031, the I.R.S. will not follow the principle that an exchange facilitator may be treated as the owner of property regardless of whether it possesses the benefits and burdens of ownership.⁷



⁵ Rev. Proc. 2000-37, 2000-2 C.B. 308.

⁶ *Supra*, note 4.

⁷ *Id.*