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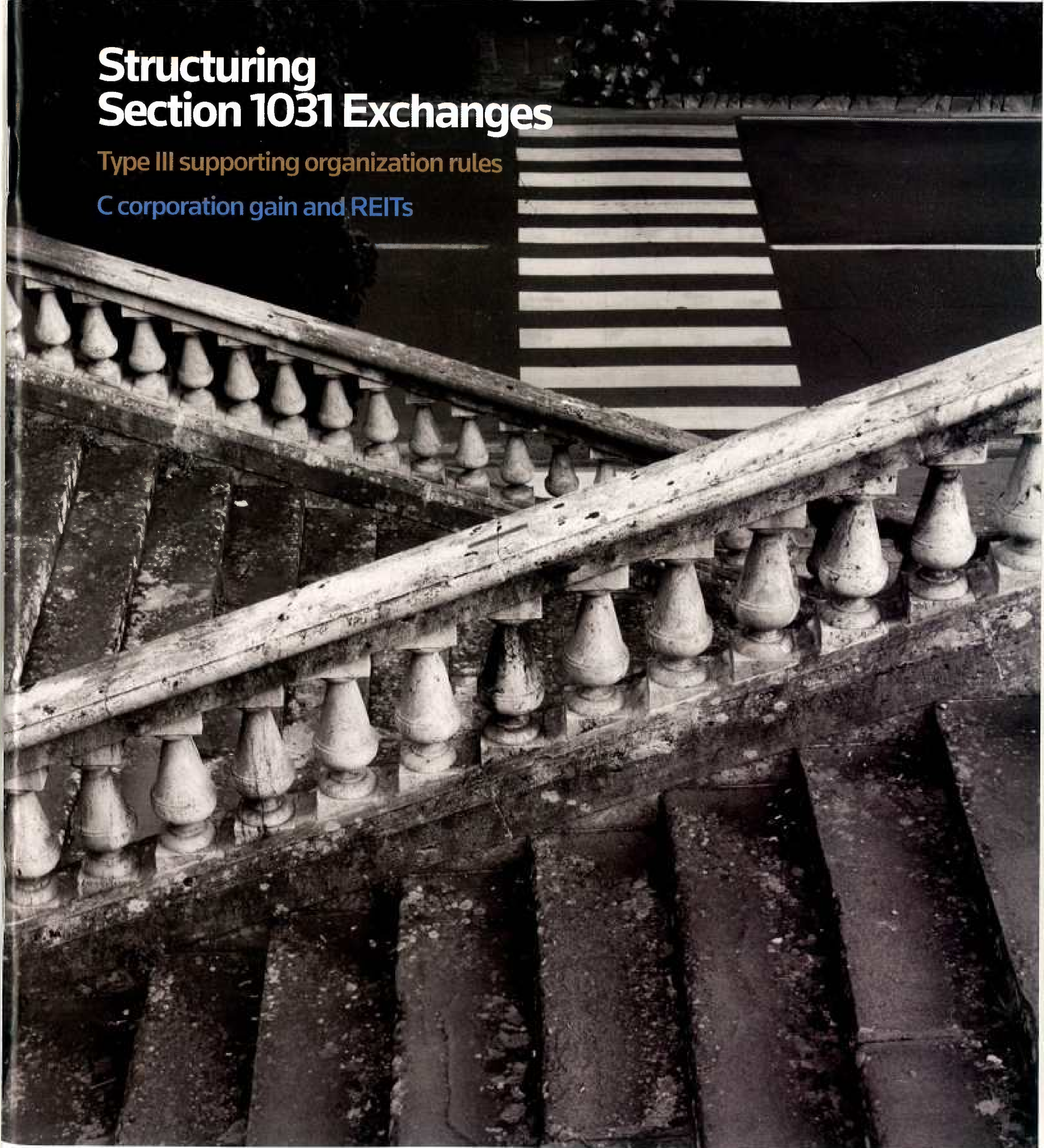

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Tax Court Finally Unveils Reverse Exchange Principle in *Bartell*, But Stay Tuned

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In *Bartell*, the Tax Court follows precedent in giving taxpayers freedom to choose the structure of Section 1031 exchanges as long as the proper form is followed.

On 8/10/16, the Tax Court released its long awaited opinion in *Bartell*, 147 TC No. 5, addressing standards applicable to accommodation ownership of property in a "reverse" Section 1031 exchange that is not within the safe harbor offered by Rev. Proc. 2000-37, 2000-2 CB 308 (the "Safe Harbor"). The opinion comes out squarely supporting a strictly form driven analysis of accommodation ownership arrangements in contrast to a "benefits and burdens" test asserted by the Service. This article reviews the positions of the taxpayer and the Service in *Bartell*, discusses the generally applicable law, and examines the Tax Court's analysis and conclusions. The article then identifies implications of the opinion for future like-kind exchange planning as well as a number of questions that remain open for advisors to ponder.

BACKGROUND

Bartell Drug Co. (BDC), an S corporation, was founded in 1890 and developed and owned a chain of retail drugstores in Seattle, Washington and surrounding areas over the ensuing 100 years. Ownership of the company had been in the Bartell family since its founding. In 1999-2002 (the years at issue), stock was held by George H Bartell, Jr and his children George D. Bartell and Jean Bartell Barber.

Before the 1980s, BDC owned some of the properties in which it operated and leased others. The locations were typically in grocery store-anchored shopping centers, with the BDC location being "in-line" with other merchants in a multi-tenant building. Starting in the 1980s, two major changes in the competitive landscape occurred that caused BDC to change its business model. First,

grocery stores started to operate pharmacies within their stores and attempted to bar free standing pharmacies in the centers they anchored. Second, national drugstore chains like Walgreens, Rite-Aid, and CVS started to expand on a massive scale and introduced the concept of free standing corner locations with drive through pharmacies. These became BDC's chief competitors.

In response, BDC began shifting to the free-standing location model untied to grocery store-anchored centers. This required transfer of old locations and acquisition and development of new ones. Jean Barber, Chief Financial Officer of BDC, was introduced to the concept of Section 1031 exchanges in the early-to-mid-1990s. In 1998, the company adopted a policy of employing Section 1031 exchanges as a means to defer taxation in the recycling of capital upon disposition of old locations and acquisition and development of new ones.

BDC identified a site in Lynnwood, Washington and, in May 1999, entered into a purchase agreement to acquire the Lynnwood site on which BDC intended to demolish existing improvements and construct a new free-standing pharmacy retail location. The agreement contained a generic clause providing that the seller and buyer would cooperate in accomplishing a Section 1031 exchange of the property should either wish to do so. Due diligence and planning for the new facility resulted in extensions of the contract closing date, ultimately into the summer of 2000.

To finance the proposed Lynnwood project, in March, 2000, BDC obtained a loan commitment from KeyBank involving the full $4 million expected cost to acquire the Lynnwood site and construct improvements. At some point before then, BDC had consulted Section 1031 Services (S1031S), a company offering qualified intermediary and accommodation ownership services in like-kind exchanges, about like-kind exchanges generally and construction exchanges particularly. S1031S's accommodation services were offered through single purpose entities wholly owned by an affiliate, Exchange Structures, Inc. The parties agreed that an entity named EPC Two LLC (EPC2), wholly owned by Exchange Structures, would be used for the Lynnwood transaction. The KeyBank loan commitment specifically noted that the borrower would be BDC or "an entity such as EPC TWO LLC acceptable to the Bank" that would acquire the Lynnwood site to permit a Section 1031 exchange, with BDC providing a guaranty of the loan.

BDC initially targeted a location known as White Center, in a suburb of Seattle, Washington as relinquished property in an exchange for Lynnwood. In April, 2000, S1031S sent an engagement letter to BDC for performance of intermediary services, and EPC2 sent an engagement letter for performance of "reverse warehousing" services. The documents made clear that all funds needed to acquire Lynnwood and construct improvements had to be supplied or arranged by BDC and that third-party loans must be non-recourse to EPC2. The charge for the warehousing was set at 0.5% of the value of the property held by EPC2.

These terms were reflected in a Real Estate Acquisition and Exchange Cooperation Agreement (REAECA) between BDC and EPC 2 dated 7/31/00. The REAECA provided that EPC2 would acquire the Lynnwood site, and cause improvements approved by BDC to be constructed. EPC2 would borrow funds from a lender approved by BDC and would have no separate obligation to supervise construction. Upon completion of improvements, EPC2 would lease the Lynnwood site to BDC on a triple net basis for rent equal to amounts needed to service debt incurred by EPC2 to build the improvements, plus a small fixed monthly amount. BDC had the option to acquire the Lynnwood property to complete a Section 1031 exchange at a price, set for 24 months, equal to the cost to acquire the Lynnwood land and build the improvements. EPC2 was completely indemnified by BDC against any cost or loss associated with ownership of the Lynnwood property, except those arising from its gross negligence, willful misconduct, or breach of its obligations under the REAECA. While not clear from the Tax Court opinion, the parties' briefs in the litigation indicate that the REAECA also provided that EPC2 would report itself as owner of the Lynnwood property for federal income tax purposes during the period it held title to the property.[1]

EPC2's purchase of the Lynnwood property closed on 8/1/00, and site preparation and demolition of existing improvements started on 8/31/00. Building permits were issued in December, 2000. EPC2 executed construction surety bonds and a construction contract with a contractor chosen by BDC in January, 2001. Construction commenced in January, 2001 and was completed in July, 2001. On 7/11/01, the lease between EPC2 and BDC went into effect. Rental payments under the lease were $2000 per month plus amounts due to pay interest on the KeyBank loan.

Meanwhile, BDC had changed its mind regarding the property it would relinquish in connection with acquisition of the Lynnwood site. In August, 2000 (i.e. after execution of the REAECA), BDC acquired a site in Everett, Washington (Everett) that it later decided to sell. BDC determined this was a preferable relinquished property for the Lynnwood exchange and the REAECA was ultimately amended in December, 2001 to replace the reference to White Center as the intended relinquished property with a reference to the Everett property. In September, 2001, BDC entered into a contract to sell the Everett location for approximately $4.3 million. Using S1031S as a qualified intermediary, BDC closed this sale on 12/28/01, resulting in net proceeds of $4,132,752 that were received by S1031S. In the

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1 This is inferred from factual statements in the Petitioners' Opening Brief filed in the case, which discloses that, during construction, Exchange Structures, sole owner of EPC Two, reported and capitalized property taxes relating to Lynnwood. It ultimately took an offsetting deduction, and in 2001, BDC treated interest payments to KeyBank as rental payments to EPC Two, and EPC Two treated the payments as income, with an offsetting interest deduction. Petitioner's Opening Brief ¶ 77 at p. 15, ¶ 89-90 at p. 17.

intervening period, the KeyBank loan maturity had been extended into 2002.

In December, 2001, BDC assigned its right under the REAECA to acquire the Lynnwood property to S1031S. On 1/3/02, pursuant to this assignment, S1031S acquired the Lynnwood property from EPC2 using the funds from the sale of Everett, plus an additional $128,194 supplied by BDC, and Lynnwood was deeded to BDC. The transaction resulted in deferral of $2.8 million in gain realized on the sale of Everett.

AUDIT AND LITIGATION

The Service initiated an audit of the BDC 2001 tax return in early 2004 and concluded that the like-kind treatment claimed by BDC should be rejected. The Service reasoned that BDC should be treated as having acquired the Lynnwood property on its initial purchase, thereby precluding BDC from receiving the Lynnwood property in an exchange for the Everett property 18 months later. The Safe Harbor in Rev. Proc. 2000-37 was inapplicable to the transaction because (1) the transaction had commenced prior to the September 2000 effective date of the Revenue Procedure, (2) EPC2's accommodation ownership period far exceeded the Safe Harbor's 180-day maximum, and (3) the identity of the relinquished property was switched shortly before the exchange (which was long after the 45-day identification period in the Safe Harbor had run). A Notice of Proposed Adjustment was issued on 12/10/04 and Notices of Deficiency were issued to the BDC shareholders in August and October, 2005. The shareholders filed Tax Court petitions and the case was tried before Tax Court Judge Gale in October, 2006. Briefing was completed in early 2007 and the case was fully submitted with the filing of both the Service and taxpayer reply briefs on 3/19/07. George H. Bartell, Jr. died two years later, and his estate was substituted as a party-petitioner.

THE CONTROVERSY: FORM VERSUS BENEFITS AND BURDENS?

Despite the length of time it took for the Tax Court to reach a decision, the issue raised in *Bartell* is actually a simple one to articulate: Can a Section 1031 exchange be completed by a taxpayer who hires an unrelated accommodation party to hold and improve intended replacement property, if (1) the taxpayer supplies all capital, controls construction of improvements, and leases the property prior to receipt, and (2) the accommodation party has no substantial economic interest in the replacement property other than a fixed fee? In other words, must an accommodation party have the benefits and burdens associated with the property it holds for the Section 1031 exchange to be respected?

The Tax Court's answer in *Bartell* was "No, the accommodation party need not have benefits and burdens of ownership."

THE ARGUMENTS AND ULTIMATE RESOLUTION (WITH CAVEATS)

The taxpayers' arguments in *Bartell* focused on the liberality accorded by Section 1031 authorities to accommodation ownership structures designed to facilitate like-kind exchanges. Citing a long line of cases,[2] as well as the Service's own positions,[3] the taxpayers asserted that no applicable authority had imposed the traditional "benefits and burdens" test, most frequently associated with the *Grodt & McKay* case, on such accommodation ownership structures.[4] The Service responded that none of the existing authorities adopted a different test for Section 1031 than for other tax ownership inquiries, the Safe Harbor established in Rev. Proc. 2000-37 clearly did not establish a rule of general application, and the Tax Court had employed a benefits and burdens approach in *DeCleene*, 115 TC 457 (2000), that should be applicable to the BDC transaction.

The Tax Court agreed with both sides that the transaction was outside the Safe Harbor and the disposition of the case would be determined by applicable case law. The Tax Court primarily focused on three cases, concluding that *Alderson*, 317 F.2d 790 (CA-9, 1963), *rev'g* 38 TC 215 (1962), and *Biggs*, 69 TC 905 (1978), *aff'd* 632 F.2d 1171 (CA-5, 1980), supported an accommodation ownership regime for Section 1031 that does not require the accommodation title holder to have the benefits and burdens of property ownership. It also found that its analysis and decision in *DeCleene* was distinguishable from the taxpayers' situation. These cases and the Court's analysis of them will be examined in the order addressed in the opinion.

DeCleene involved property ("NewProp") initially owned outright by a taxpayer who wanted to build improvements on NewProp to serve as

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a replacement business facility in exchange for its current business facility ("OldProp"). The taxpayer was approached by a buyer for OldProp and structured a transaction in which it transferred NewProp as a raw land to the buyer, arranged for construction of improvements on NewProp using financing obtained and guaranteed by the taxpayer, and then traded OldProp to the buyer for the newly improved NewProp. The Tax Court in *Bartell* observed, as it had in *DeCleene*, that the taxpayer had dealt directly with the buyer of OldProp, and had not employed an independent accommodation party to facilitate the transaction. Further, the Tax Court employed a benefits and burdens test to conclude that the taxpayer in *DeCleene* should not be regarded as having divested its ownership of NewProp to the buyer, given that the buyer was bound to redeliver the newly improved NewProp back to the taxpayer.

The government asserted that in substance the same thing happened in *Bartell* as in *DeCleene:* a self-exchange. This assertion was rejected by the court in *Bartell* on two bases: (1) no third-party accommodation party had been involved, and (2) the taxpayer had directly acquired NewProp and held it for a year before initiating the transaction with the buyer, who was the ultimate transferee of OldProp. The court concluded that in *DeCleene* it had properly treated the transaction under consideration as a "self-exchange" but the case did not stand for the proposition that the benefits and burdens test for accommodation ownership is generally applicable to a reverse Section 1031 exchange. In reaching its conclusion, the *Bartell* court drew a line between "cases where the taxpayers made outright purchases of the replacement property and then subsequently sought to retrofit the transaction into the form of a Section 1031 exchange," which were not accorded like-kind exchange treatment, and the interposition of an accommodation party at the outset of a contemplated exchange.[5]

The Tax Court in *Bartell* then took up the cases it determined were dispositive. The opinion makes much of the fact that *Alderson* is a Ninth Circuit decision and that an appeal in *Bartell* lies in that appellate court. The *Bartell* opinion characterizes *Alderson* as a Section 1031 accommodation ownership case involving title to replacement property in an exchange that passes through an accommodation owner (a title company) having no independent investment in the property and acting solely as an intermediary, which held ownership of the property for a short period (ten days). However, the Court seems to have missed certain nuances and intricacies of California real property practice and procedure.[6] While *Alderson* may stand for the proposition that an accommodating party need not assume benefits and burdens of ownership, the case does not seem to support a premise that this is also the situation where accommodation ownership is more than transitory.

A contemplated reverse exchange that will not fall squarely within the Safe Harbor should still follow the strictures of the Safe Harbor as closely as possible.

The Tax Court also relied on its decision, affirmed by the Fifth Circuit, in *Biggs*. In that case, a title company (Shore) acting as an accommodator held title to intended replacement property for 4 1/2 months, after having purchased it with funds supplied by the taxpayer. Shore's agreement with the taxpayer allowed the taxpayer to acquire title at the same price paid by Shore for the property, plus any costs incurred by Shore while holding the property. The taxpayer also executed an indemnity protecting Shore from any obligations arising from acquiring or owning the property. Shore contracted to sell the property to the buyer of the taxpayer's relinquished property, and interrelated contracts closed within two days of each other in which Shore deeded the property it held to the taxpayer and the taxpayer deeded his property to the buyer.

The Fifth Circuit rejected the Service's contention that Shore acted in an agency capacity and that the taxpayer had "effected an exchange with himself."[7] Instead, according to the Tax Court in *Bartell*, "the incidents of ownership Shore assumed were thus sufficient for it to be treated as the owner of the replacement property during the period it held title.....[n]otably for the issue at hand, Shore did not have any beneficial ownership of the replacement property." In effect, the Tax Court explained that the arrangement between the taxpayer and Shore in *Biggs* paralleled the arrangement between BDC and EPC2 insofar as beneficial ownership was concerned–and this did not preclude a successful Section 1031 exchange from being completed by the taxpayer. The Tax Court considered *Biggs* a reverse exchange pattern whose outcome was directly applicable to the BDC transaction.

Even more so, the Tax Court concluded that *Alderson* and other cases

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2 *Coastal Terminals, Inc.*, 320 F.2d 333, 12 AFTR2d 5247 (CA-4, 1963); *Alderson*, 317 F.2d 790, 11 AFTR2d 1529 (CA-9, 1963); *Coupe*, 52 TC 394 (1969); *J.H. Baird Publishing Co.*, 39 TC 608 (1962); and *Barker*, 74 TC 555 (1980).

3 Ltr. Rul. 200111025; Rev. Proc. 2000-37, 2000-2 CB 308.

4 *Grodt & McKay Realty, Inc.*, 77 TC 1221 (1981).

5 *Bartell*, 147 TC No. 5, 58, n.17, *citing Bezdjian*, 845 F.2d 217, 61 AFTR2d 88-1105 (CA-9,1988), *aff'g* TCM 1987-140; *Dibsy*, TCM 1995-477; *Lee*, TCM 1986-294.

6 Under California law it appears that the title company had, at best, instantaneous ownership of the replacement property in the exchange. Although, as the opinion recites, this deed (as well as others involving the relinquished property) was dated and apparently put into the hands of the title company on August 21, it was not recorded until immediately after funds to close the purchase transaction were deposited by the relinquished property buyer. It clearly appears that despite the dating of deeds, no transfer of ownership occurred until the deeds were recorded, assuming normal California escrow practice was used. (This practice dictates that a deed is not effective until delivered from a grantor to a grantee and that delivery of deeds placed in escrow does not occur until all conditions precedent to closing are satisfied—the most important of which is typically payment of the purchase price for a property being sold.)

7 See *Bartell*, 147 TC at 57.

established a rule that respects third-party exchange facilitator ownership of replacement property regardless of the transitory and "nominal" nature of the ownership. It concluded, that this remained true even though BDC leased the Lynnwood property for six months prior to consummation of the exchange, and that the accommodation ownership period significantly exceeded the 4 ½-month period in *Biggs*. No opinion was expressed on whether such accommodation ownership of replacement property was subject to a maximum duration, only that the 18-month period faced by the court in *Bartell* did not prevent it from reaching a taxpayer favorable conclusion.

Interestingly, despite urging from the taxpayers, the Tax Court did not review or adopt the more comprehensive rationale for accommodation ownership as not requiring benefits and burdens that the Service had propounded in Ltr. Rul. 200111025, but had rejected in establishing its litigating position in *Bartell*. The Letter Ruling examined a transaction involving a reverse exchange accommodation ownership structure and concluded that agency analysis was the appropriate test for determining whether the taxpayer prematurely acquired the replacement property. The ruling set forth a three-part analysis:

1. Was the accommodation party an agent of the taxpayer under applicable caselaw?
2. Did the taxpayer intend that the arrangement be part of a like-kind exchange?
3. Was the acquisition and holding of replacement property contractually integrated with the disposition and exchange of relinquished property?

Despite the appeal of this approach, the authors cannot conclude that it has become the de facto standard for analyzing accommodation ownership arrangements in light of the absence of any express discussion of this approach by the Tax Court in the *Bartell* opinion, and the fact that the court's analysis in *Bartell* is significantly less restrictive.

DISCUSSION AND ANALYSIS OF THE *BARTELL* OPINION

Although the facts in *Bartell* arose before the issuance of Rev. Proc. 2000-37, it is useful to observe that, but for two points–the duration of the accommodation arrangement and the change in relinquished property–the terms of the BDC arrangement would have complied with the Revenue Procedure's Safe Harbor. EPC2 was not a "disqualified person" with respect to BDC. The REAECA was a written agreement entered into prior to initiation of the arrangement. EPC2 was a U.S. tax filer that reported ownership of the Lynnwood property and held title that would satisfy the "qualified indicia of ownership" test included in the Safe Harbor. While these similarities were clearly not dispositive, it is tempting to say that the Tax Court must have observed them.

Additionally, the Tax Court placed considerable emphasis on the fact that in all of the prior favorable rulings (i.e. *Alderson*, *Biggs*, etc.), and including the facts in *Bartell*, the taxpayers remained invested in real estate through the use of a third-party exchange facilitator, and did not touch ownership of exchange property until the exchange occurred. The use of this feature distinguishes disqualifying exchanges, in which the taxpayer directly purchased what it ultimately wanted to treat as replacement property upon subsequent disposition of another property, "from the myriad of other cases where taxpayers seeking 1031 treatment were careful to interpose a title-holding intermediary between themselves and outright ownership of the replacement property."[8] The theoretical underpinning of the case is that Section 1031 is a special place in tax law where form trumps substance, and therefore a mere title-holding intermediary is respected and essential. In *Bartell*, the court abides by the wide latitude afforded to taxpayers in structuring Section 1031 exchanges so long as the proper form is followed. Ultimately, provided that the final result is in form an exchange of property with another taxpayer for another like-kind property, the exchange will qualify for deferred tax treatment under Section 1031.

Even when an accommodation party would be a disqualified person for purposes of Rev. Proc. 2000-37, making the Safe Harbor unavailable, the accommodation party should be unrelated to the taxpayer or the transaction will run afoul of the principle that replacement property in an exchange should not be acquired from a related person.

OPEN QUESTIONS

The rationale and logic of the *Bartell* opinion begs the asking of the following questions:

Given that the Tax Court in Bartell completely dispenses with benefits and burdens and instead wholly embraces a form-driven outcome, is the accommodation party in a non-Safe Harbor reverse Section 1031 exchange (a "NSH Reverse") required to report tax ownership attributes of parked property when it has absolute (or nearly) zero benefits and burdens of the parked property? It seems somewhat inconsistent to permit the taxpayer in a NSH Reverse to have the benefits and burdens of property parked with an accommodating party, yet require the accommodator to pay the taxes and receive the depreciation

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8 *Bartell*, 147 T.C. at 50.

on the parked property. However, the whole artifice of a NSH Reverse employing an accommodating party that holds bare legal title and nothing more, may be sustained by the fact that the accommodating party still treats the parked property as its own for tax purposes. Eliminate that factor and it is much more difficult to justify that a NSH Reverse should be respected for tax purposes under Section 1031. Based on the briefs filed by the parties, it is assumed that the accommodator in *Bartell* claimed the tax benefits on the parked property. This suggests that the accommodation party in a NSH Reverse must treat the parked property as its own for tax purposes. One reason this seems appropriate is that it avoids any need to determine how the basis carryover rules of Section 1031(c) would operate when the taxpayer still holds relinquished property following acquisition of tax ownership of replacement property. In fact, the conundrum created by this issue is one of the reasons that the accommodation ownership Safe Harbor of Rev. Proc. 2000-37 was adopted in the first place and included the requirement that an Exchange Accommodation Titleholder report itself as tax owner of property subject to a qualified exchange accommodation arrangement.

What is the continuing effect of DeCleene and Rev. Proc. 2004-51 on NSH Reverses? Rev. Proc. 2004-51, 2004-2 CB 294, barring ownership of property transferred to an EAT by the taxpayer when the taxpayer will receive the property back from the EAT, is still clearly applicable for purposes of structuring an arrangement to fall within the Safe Harbor of Rev. Proc. 2000-37. Moreover, since the Tax Court distinguished *DeCleene* in its opinion in *Bartell*, *DeCleene* remains good law. Accordingly, we think that *DeCleene* and Rev. Proc. 2004-51 still impose issues with the use of a third-party accommodator to acquire property from a taxpayer, construct improvements, and transfer the improved property back to the taxpayer as replacement property. Divestment of already-owned property by a taxpayer requires more than just an accommodation title holder when the taxpayer is arranging to receive that property back along with new improvements. However, in light of *Bartell*, taxpayers should consider structuring all purchases of property via an accommodation party, which means that *DeCleene* and Rev. Proc. 2004-51 may have a diminished practical effect on certain future NSH Reverses.

The amount of time a parking transaction can exist was left open-ended by *Bartell* because the court declined to signal what it would do with a period longer than it faced in the case.

Does the Bartell analysis apply to accommodation ownership of relinquished property transferred in an "Exchange First" reverse exchange? None of the accommodation ownership cases cited by the court in *Bartell* dealt with whether a taxpayer is considered to have divested itself of formerly-owned property (not intended to be returned to the taxpayer). On the other hand, the principle in *Bartell* that an accommodating party holding bare legal title is respected for purposes of Section 1031 arrangements should apply whether the NSH Reverse is an Exchange Last or Exchange First transaction. Further, an Exchange First transaction might be recast as a "pure" reverse exchange with the accommodation party, leading to the next question.

What is the status of "pure" reverse exchanges, such as illustrated by Ltr. Rul. 9814019? The Tax Court in *Bartell* focused solely on whether BDC completed an exchange by acquiring replacement property from a third party (EPC2) or itself when using an accommodation ownership arrangement. No consideration was given to whether a "pure" reverse exchange is possible when, in a two-party transaction, a taxpayer first acquires replacement property from X and promises to transfer specified relinquished property later to X. This is, in effect, what happened in *Rutherford*, TCM 1978-505, and was the subject of positive Service analysis in Ltr. Ruls. 9814019 and 9823045, in which a taxpayer received an easement over certain land from the owner and, by preagreement, later transferred its rights to an existing easement to the same landowner. The availability of this option for exchanges remains unclear. In order to permit such transactions, a methodology for establishing basis in replacement property when the taxpayer still holds relinquished property would have to be established.

PRACTICAL PLANNING POINTERS FROM *BARTELL*

Assuming the Tax Court's decision is not appealed or that it is ultimately affirmed by the Ninth Circuit, what lessons are to be taken? An initial list would include:

- In arranging a reverse Section 1031 exchange, structuring should still be within the Safe Harbor, particularly if the taxpayer is outside the Ninth Circuit and the Fifth Circuit, because the court in *Bartell* placed significant emphasis on precedent from these circuits in reaching its holding.
- A contemplated reverse exchange that will not fall squarely within the Safe Harbor should still follow the strictures of the Safe Harbor as closely as possible. Accordingly, a taxpayer entering into an NSH Reverse should try to follow the rules for documentation and choice of accommodation parties consistent with the Rev. Proc. 2000-37 Safe Harbor. Similarly, a specific relinquished property should still be identified in the applicable agreement, even if provisions are included allowing opportunity to change the

identity of the relinquished property as permitted by the *Bartell* Court.

- When a Safe Harbor transaction is chosen, it may be advisable to provide a NSH Reverse option to the taxpayer should the transaction not be concluded as originally contemplated. This would probably involve elimination of any "put" option for the accommodation party to transfer the warehoused property back to the taxpayer on its own initiative and for an outside time limit allowing the taxpayer to complete the contemplated exchange. Recitals that announce the parties' intent to fall within Rev. Proc. 2000-37 would be modified to provide for such a backup plan, making the taxpayer's intent to exchange applicable even if the Safe Harbor became unavailable. Clearly, the parties should eliminate commonly-used language stating that the accommodator is acting as agent of the taxpayer for non-income tax purposes, which may result in duplicate transfer taxes on transfer of warehoused property from the accommodator to the taxpayer, depending on local law transfer tax rules.
- Even when an accommodation party would be a disqualified person for purposes of Rev. Proc. 2000-37, making the Safe Harbor unavailable, the accommodation party should be unrelated to the taxpayer or the transaction will run afoul of the principle that replacement property in an exchange should not be acquired from a related person due to Section 1031(f)(4), as interpreted in Rev. Rul. 2002-83, 2002-2 CB 927, and the Tax Court and appellate decisions in *Teruya Bros.*, 124 TC 45 (2005), *aff'd* 580 F.2d 1038, 104 AFTR2d 2009-6274 (CA-9, 2009), *cert. denied* 559 U.S. 939 (2010), and *Ocmulgee Fields, Inc.*, 132 TC 105 (2009), *aff'd* 613 F.3d 1360, 106 AFTR2d 2010-5820 (CA-11, 2010).
- The amount of time a parking transaction can exist was left open-ended by *Bartell* because the court declined to signal what it would do with a period longer than it faced in the case. Consequently, the duration of fixed price purchase options, which are limited to costs incurred by the accommodator in NSH Reverses should not exceed 24 months (as this was the period for BDC's option to purchase the Lynnwood property from EPC2) or the transaction will not be clearly within the precedent of *Bartell*.
- The accommodation party should be the borrower on third-party loans used to finance the purchase and/or construction of improvements to property held by an accommodator, because doing so furthers the "form" of the transaction, even though the accommodation party does so (consistent with the court's reasoning in *Bartell*) via a special purpose vehicle (SPV) with no other assets, and the taxpayer provides full indemnification to the accommodator.

A MODEST PROPOSAL

The Tax Court in *Bartell* again reminded the Service that it tends to be quite skeptical of positions unduly restricting taxpayer access to the benefits of Section 1031. More than 15 years ago, the Service concluded that accommodation ownership arrangements were not abusive and could serve as the basis to complete reverse exchanges. At the time, however, the Service felt constrained to impose a time limit that effectively made these transactions inapplicable when taxpayers wished to construct any significant improvements as like-kind exchange replacement property or expected to have difficulty selling relinquished property within a fairly tight time frame of 180 days.

In the wake of *Bartell* and in the interests of sound tax administration, the authors urge the Service to simply amend the Rev. Proc. 2000-37 Safe Harbor to permit a 24-month qualified exchange accommodation arrangement period, as well as to extend the period to identify relinquished property in an "Exchange Last" reverse exchange. Undoubtedly, taxpayer advisors would embrace the certainty afforded by these changes. This would also significantly reduce the need to refine the answers to the difficult open questions posed above. ●