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The Five-Year Like-Kind Exchange: *Starker v. Commissioner*, 75-1 U.S. Tax Cas. 87, 142 (D. Ore. 1975)

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Note

The Five-Year Like-Kind Exchange

Starker v. Commissioner, 75-1 U.S. Tax Cas. 87, 142 (D. Ore. 1975)

I. INTRODUCTION

Section 1031[1] of the Internal Revenue Code of 1954 provides that no gain or loss will be recognized if certain qualifying property is "exchanged" for like-kind qualifying property[2] rather than sold. The recent case of *Starker v. Commissioner*,[3] has extended the definition of "exchange" far beyond the typical contemporaneous swapping of property situation to which the section had previously been applied.

II. THE FACTS

In *Starker* the taxpayers entered into two separate exchange agreements with two corporations. Both agreements provided that the taxpayers would transfer their timberland to the corporation and the corporation would transfer like-kind property to the taxpayers in the future. The agreements were very specific as to the execution and timing of the transactions.

The agreement with Longview Fibre Company was entered into on April 1, 1967. It provided that after the taxpayers conveyed a warranty deed for the timberland, Longview would credit a special "Exchange Value" account with $105,811.00. Longview could transfer like-kind properties to the taxpayers and debit the "Ex-

1. INT. REV. CODE OF 1954 [hereinafter cited as CODE] § 1031(a) provides that no gain or loss shall be recognized if property held for productive use in trade or business or for investment is exchanged solely for property of a like-kind which is to be held for productive use in trade or business or for investment. CODE § 1031(b) provides for the situation where the exchange is not "solely" for like-kind property. In such case, gain is usually recognized to the extent of the other property which is called "boot." This article will not include a discussion of boot.
2. Like-kind is described in Treas. Reg. § 1.1031(b) (1967) as referring to the "nature or character of property." Property of the same "class" is like-kind property; therefore, exchanging improved for unimproved real estate qualifies for nonrecognition of gain or loss.
3. 75-1 U.S. Tax Cas. 87,142 (D. Ore. 1975).

change Value" account for the cost of such property so long as the parties agreed in writing to the value of the property so transferred. At the end of each year the amount remaining in the "Exchange Value" account was increased by six per cent to reflect the increase in the fair market value of the growing timber.[4] The taxpayers had no control over the cash used by Longview to purchase the like-kind property nor any right to demand cash instead of property. If any credit balance remained in the "Exchange Value" account on April 1, 1972, Longview had the right to pay it in cash to the taxpayers. The effect was to give the taxpayers five years in which to receive like-kind property from the corporation.

Longview conveyed eight separate pieces of property to the taxpayers, the first on October 7, 1968, and the last on January 17, 1972. During this same five-year period the "Exchange Value" account was credited with a total of $17,012.67 for the six per cent growth of the timber which was not yet "exchanged" at the end of each of the five years. No balance remained in the account on April 15, 1972, and, therefore, no cash was received by the taxpayers. The agreement with the other corporation, Crown Zellerbach, was essentially similar and no cash was ever paid to the taxpayers under this exchange either. The United States District Court for the District of Oregon held that both exchange transactions qualified for non-recognition of gain treatment pursuant to section 1031.

The two main issues raised in this case were both decided in favor of the taxpayers. The first one concerned whether the facts of the case warranted a finding that the taxpayers' timberland was "held for productive use in trade or business or for investment" rather than primarily for sale, and whether the property received in the exchange was also "held either for productive use in trade or business or for investment?"[5]

This issue was decided primarily on a factual basis and has little import beyond the facts of this case. The taxpayers convinced the court by demonstrating that the specific piece of property traded and the properties received were never held primarily for sale even though the taxpayers had sold other properties and timber during 1965 to 1972.[6] At the time of trial they held all the proper-

4. The taxpayers in *Starker* stated in their brief:

> Growth per cent is a widely accepted forestry term and concept totally unrelated to interest . . . . The 'growth factor' was to cover as nearly as possible an equal amount of growth between what plaintiff's land would produce to what they hoped to get from delayed delivery . . . ."

Brief for Plaintiff at 8.

5. CODE § 1031 is not an elective provision; therefore, this first issue must be answered in favor of the taxpayers in order to qualify for § 1031.

6. Is there a category of taxpayers who hold property "primarily for

ties received pursuant to the exchange except one tract which had been traded with the state for two other tracts. The taxpayers relied on *Malat v. Riddell*[7] in which the Supreme Court defined "primarily" to mean "of first importance" for section 1221(1) purposes. The Oregon court agreed with the taxpayers and rejected the Government's contention that a purpose may be primary if it is a "substantial" one.[8]

III. THE GOVERNMENT'S POSITION

The second issue brought the major triumph for the taxpayers. As set out in the district court opinion the issue was "whether section 1031 of the Internal Revenue Code covers transactions in which a taxpayer disposes of all his rights in property for a promise from the transferee to convey like-kind properties in the future."[9] The Government argued that the taxpayers had liquidated their investment in the timberland and had constructively received the "Exchange Value" when they transferred all rights in their land to Longview and Crown Zellerbach and no further services or actions were required of them. Pursuant to *United States v. Davis*,[10] in

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trade?" Timberland to be cut could continually be exchanged for young timber. In this way capital gains could be avoided and a sizable estate accumulated. No doubt this occurs with all kinds of property, but with timberland the increase in value is far steadier and more predictable.

7. 383 U.S. 569 (1966).
8. Lurking in the background is the complicating factor of whether the taxpayers are dealers in real estate. CODE § 1031(a) specifically provides that property held "primarily for sale" does not qualify for non-recognition treatment. A factual determination that the taxpayers were dealers in timberland would disqualify them from use of § 1031.

   This issue was sidestepped in *Malat* by both the taxpayer and the Government. CODE § 1031, defining the types of assets which qualify for non-recognition upon exchange, does not imitate the language of § 1221 which defines capital assets for determining capital gains and losses. The phrase "to customers in the ordinary course of his trade or business" is deleted from § 1031. The result is that a person can be denied § 1031 treatment if he holds either the transferred property or the received property "primarily for sale," regardless of whether he is a dealer or in the trade or business of selling such property. *See* Wineburg v. Commissioner, 326 F.2d 157 (9th Cir. 1963); Brooks Griffin, 49 T.C. 253 (1967); Ethel Black, 35 T.C. 90 (1960). However, if the taxpayers were shown to be dealers, they would have an even harder time proving that this property had been segregated from the start and that it was not held primarily for sale.

   In *Starker*, the Government did not attempt this backdoor approach.
9. 75-1 U.S. Tax Cas. at 87,143.
10. 370 U.S. 65 (1962). *Davis* was a case involving a divorce. In it, the value of the marital rights given up by the wife was held to be equal

an arm's length transaction such as this, the fair market value of the property given is equal to the fair market value of the property received. Therefore, the Government credited the taxpayers with gain to the extent of the fair market value of the land in excess of its adjusted basis in the seller's hands. The Government also argued that the land was held primarily for sale in the ordinary course of the taxpayers' trade or business, making the gain ordinary and not capital and thus subject to the higher ordinary income tax rates.[11] Furthermore, it contended that the six per cent growth factor was in essence interest and also taxable at ordinary income rates. Finally, the Government argued that this transaction was not a section 1031 exchange because trading timberland for a promise is not a like-kind exchange.

The Government's position on constructive receipt is supported by Revenue Ruling 60-31[12] which contains four examples of deferred income agreements, all of which involve cash basis taxpayers. In the first example, a wage earner defers income as it is earned. In the second, an author does not report income until the publisher receives money from sales of the novel. Both taxpayers are allowed to report the income as they receive it in later years. In the last two examples a baseball player attempts to defer the bonus payment he receives for signing a playing contract and a boxer attempts to postpone the income he receives for fighting a single bout. Both of these taxpayers are deemed to have constructively received the income immediately and are not allowed to postpone reporting and being taxed until later years. The income from boxing and the bonus are single transactions in which no further actions are required on the part of the taxpayers; earning income does not depend upon future events as do the sales receipts of the publisher in the author's case. The Government applied this same reasoning in the present case, arguing that the taxpayers had done all that was required of them, *i.e.*, transferred the warranty deeds to Longview and Crown Zellerbach.

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to the value of the stock given by the husband. The "exchange" was made pursuant to an agreement incorporated in the court decree. Typically, CODE § 1001(b) would require that the fair market value of the wife's marital rights be established in order to determine the husband's gain on the disposition of his stock; however, the Court in *Davis* held that the amount of gain in a taxable transaction can be determined if either the fair market value of the property given up or that received is ascertainable.

11. Under CODE § 631 the taxpayers could elect to treat the cutting of the timber as a sale or exchange of § 1231 property, which would result in capital gain or ordinary loss. An outright sale of the entire timberland appears not to qualify for this election.

12. Rev. Rul. 60-31, 1960-1 CUM. BULL. 174.

The Government did not think these taxpayers would qualify for the open transaction exception to the constructive receipt doctrine. Under this exception, taxpayers are allowed to report income as it is actually rather than constructively received in those situations where the future payment is indeterminable.[13] The transaction was closed on April 28, 1972, when the "Exchange Value" account was credited with $105,811.00. With the exception of the six per cent growth interest, the taxpayers could not argue that this was an open transaction in which the value of the property given or received was unknown. Once the value of the property given is known, *United States v. Davis*[14] requires that in an arm's-length transaction the fair market value of the property received equals the fair market value of the property given. Therefore, income should have been reported when the "Exchange Value" account was credited.[15]

The Government also attempted to apply section 483[16] to the six per cent timber growth factor. If the transaction is characterized as a sale, the growth factor should be characterized as interest. The taxpayers had completely given up legal title to their timberland, yet they had to wait for the exchanged properties. If they were not credited for the timber growth, they certainly would have wanted an interest payment to compensate them for losing the use of their money. The Government found no difference for tax purposes between retaining the growth of the trees or receiving a cash interest payment.

If the transaction were deemed an exchange rather than a sale, the Government had another line of attack. It compared sections 1033 and 1034 with section 1031. Under section 1033 a taxpayer whose property is destroyed, stolen or condemned can reinvest the

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13. In an open transaction, payments received go first to reduce basis, with the remaining payments representing capital gains. There is no ordinary income, and the gain may be spread over a period of years rather than concentrated in one tax year. For this reason, the IRS will almost always argue that a transaction is closed. Burnett v. Logan, 288 U.S. 404 (1931).

14. 383 U.S. 569 (1966).

15. Under the Government's argument, when the taxpayers actually received all the "exchange" property, their tax basis was equal to the adjusted basis of the timberland given up plus the amount of gain recognized when the account was credited. The tax basis in this case was the fair market value of the property given up, $105,811.00.

16. CODE § 483 imputes interest to any sale or exchange where payments extend for more than one year. Typically, no interest is stated in the agreement. However, § 483 also imputes interest (ordinary income) at five per cent compounded semi-annually whenever stated interest is below four per cent.

proceeds in similar property within a certain time period,[17] without recognizing gain. Likewise, under section 1034 a taxpayer can sell his residence and acquire a new one within one year without recognizing gain. The Government argued that section 1031 specifically does not provide for the sale-reinvestment approach because Congress contemplated only a contemporaneous exchange of property. In the present case the exchange was permitted to go on for five years, four years longer than the statutory one-year reinvestment period in section 1034.[18]

The Government's attempted analogy fails to consider the underlying policies of sections 1033 and 1034. The main thrust of section 1033 is to allow a taxpayer to replace destroyed, stolen, or condemned property without recognition of gain. The sale-reinvestment provision is the only way to deal with the practicalities of condemned property taken by the state or destroyed property replaced with insurance proceeds. The sale-reinvestment provision of section 1034 also reflects the reality of the normal situation where the homeowner sells his residence and buys a different one. In contrast, however, in business and investment transactions, properties are often exchanged between parties without the necessity of a sale.

Lastly, the Government argued that this case pushed the definition of like-kind exchange one step further than any other case and well-beyond the intended scope of section 1031. Never before under section 1031 had a taxpayer released his "bundle of rights" without contemporaneously receiving like-kind property.

IV. THE TAXPAYERS' POSITION

The taxpayers' approach was to bring themselves under the protection of section 1031. To do so they set up their exchange very carefully relying heavily on the case of *Alderson v. Commissioner*.[19] The Ninth Circuit, to which *Starker* would be appealed, held in *Alderson* that the taxpayer's exchange qualified under section 1031. In that case the taxpayers originally agreed to sell their property.

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17. CODE § 1033(a)(3)(B) specifies rules for determining the time period, which is usually two years.
18. Some authors suggest that CODE § 1031 should be amended to include the "sale-reinvestment" technique. *See* Note, *Section 1031 Exchange of Like Kind Property: A Court in Trouble*, 22 Sw. L.J. 517 (1968). Under this approach, CODE §§ 1031, 1033 and 1034 would be in harmony on the sale-reinvestment type transactions.
19. 317 F.2d 790 (9th Cir. 1963). For a detailed discussion of *Alderson* and its effect on tax planning see West & Chodorow, *New Case Points Up Planning Techniques in Tax-Free Exchanges of Real Estate*, 20 J. TAXATION 52 (1964).

The parties then amended the agreement to permit a like-kind exchange if the second party could acquire the other property and exchange it with the taxpayers within one month; if not, the original sale for cash was to be carried out. The court found that the taxpayers had wanted to exchange their property from the beginning but could not find suitable property until the last minute.[20]

Alderson v. Commissioner, as the strongest case in the Ninth Circuit for taxpayers, set the stage for the taxpayers in *Starker* in two main areas. First, it established the principle that a taxpayer may qualify for section 1031 treatment even though the other party to the exchange did not assume the benefits and burdens of the ownership of his property before exchanging it, but merely acquired title solely for the purpose of exchange.[21] Second, the court

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20. A similar case was decided in favor of the taxpayer in the Fourth Circuit. *See* Coastal Terminals, Inc. v. United States, 207 F. Supp. 560 (E.D.S.C. 1962), *aff'd*, 320 F.2d 333 (4th Cir. 1963).

The closest case factually to *Alderson* is J.H. Baird Publishing Co., 39 T.C. 608 (1962). In *Baird*, a three party exchange was executed whereby the taxpayer deeded its Berryhill publishing property to a realty company. While retaining use of the property rent free until the realty company could acquire a lot, construct a new building and transfer the building to the taxpayer. The realty company immediately deeded the Berryhill property to a Sunday school for $60,000 and used the proceeds to acquire a lot and construct a new building. It then deeded this new property to the taxpayer, almost one year after the taxpayer had transferred the Berryhill property to the realty company. The tax court found that the taxpayer had retained beneficial ownership of the Berryhill property and, therefore, the exchange was "mutual and reciprocal" and qualified under CODE § 1031.

Although never mentioned in the opinion or briefs of the *Starker* case, an argument could have been made that the taxpayers in *Starker* also retained beneficial ownership of their property. Beneficial ownership of a publishing company involves possession and use of the facilities in order to continue publication of the magazine, while beneficial ownership of timberland involves retention of the growth of the timber although the pure possessory interest is of no value. The taxpayers in *Starker* did retain the six per cent growth value of the timber. Therefore, arguably they retained beneficial ownership of the timberland until Longview and Crown Zellerbach could find suitable like-kind timberland. The taxpayers in *Starker* did not attempt this approach, but instead, mounted a head-on attack on CODE § 1031.

21. The Commissioner has fought the application of CODE § 1031 to "fabricated" exchanges. Because very few natural exchange situations exist, taxpayers usually set up agreements that require the other party to buy like-kind property solely for the purpose of exchange. If like-kind property cannot be found within a certain amount of time, the agreements provide that the "buyer" can give cash. The Commissioner's position has not been successful in these cases. *See* Coastal Terminals, Inc. v. United States, 320 F.2d 333 (4th Cir. 1963); W.D. Haden Co. v. Commissioner, 165 F.2d 588 (5th Cir. 1948); Antone Borchard,

in *Alderson* interpreted *Commissioner v. Court Holding Co.*[22] and *Gregory v. Helvering*,[23] two cases usually included as part of the Government's arsenal, as supportive of the taxpayers' position. These two cases have often been cited for the proposition that substance and not form should guide a court in determining tax transactions. As stated in *Gregory* the issue should be:

> Putting aside, then, the question of motive in respect of taxation altogether, and fixing the character of the proceeding by what actually occurred, what do we find?[24]

Court Holding Co. emphasized the substance versus form dichotomy in the following way:

> The incidence of taxation depends upon the substance of a transaction. The tax consequences which arise from gains from a sale of property are not finally to be determined solely by the means employed to transfer legal title. Rather, the transaction must be viewed as a whole, and each step from commencement of negotiations to the consummation of the sale, is relevant.[25]

Typically, a taxpayer will structure his transaction in such a way that superficially a Code section will apply. The Government, relying on *Court Holding Co.* and *Gregory*, will ignore the steps the taxpayer has taken and view the substance and result of the transaction. However, in a like-kind exchange *Gregory* and *Court Holding Co.* become the taxpayers' strongest weapons. Legislative history supports the position that no gain or loss should be recognized ". . . if the taxpayer's money is still tied up in the same kind of property"[26] and the courts have used *Gregory* and *Court Holding Co.* in an atypical manner to support taxpayers who structure a transaction with a tax-avoidance motive in which they retain an investment in like-kind property.[27] Any transaction in which tax-

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24 CCH Tax Ct. Mem. 1643 (1965); Mercantile Trust Co. v. Commissioner, 32 B.T.A. 82 (1935). As discussed in the conclusion of this note, the Government in Rev. Rul. 75-291, 1975 INT. REV. BULL. No. 29, appears to have accepted defeat. *See* Schaner, *Tax Free Exchanges of Real Estate*, 2 U. ILL. L.F. 466 (1966) for a history of CODE § 1031 cases from *Mercantile* to *Alderson*.

22. 324 U.S. 331 (1945).
23. 293 U.S. 465 (1935).
24. *Id.* at 469.
25. 324 U.S. at 334.
26. H.R. REP. No. 704, 73d Cong., 2d Sess. 13 (1939).
27. *Court Holding Co.* and *Gregory* involved corporations which tried to structure a transaction in order to take the best advantage of the Code. The taxpayers lost in both cases; therefore, it is an anomoly to see the courts use these two cases to support taxpayers under CODE § 1031. Apparently, the courts feel that it is hard to abuse § 1031 when its wording calls for the application of a "substance" test, *i.e.*, a continued investment in like-kind property. No specific outline as to the "form" of the exchange is given in § 1031.

payers start with business or investment property (not held primarily for sale) and end up with like-kind property will usually qualify for non-recognition treatment under section 1031.[28]

Even before *Starker* taxpayers utilized a myriad of imaginative like-kind exchanges.[29] The number of parties, type of escrow, transfer of titles, transfer of possession, timing of transfers, employment of agents, options involved, and types of property exchanged differ in each transaction. The case law demonstrates only one major constraint on the taxpayers' construction of such an exchange, *i.e.*, they must avoid the receipt of cash or control over cash.[30] The result is a modified "substance over form" rule.

In *Carleton v. United States*,[31] the taxpayer sold an option on his ranch to a corporation, but reserved the right to require the corporation to transfer like-kind property instead of cash. He then found another ranch and instructed the corporation to buy and exchange it. The corporation entered into an option with the third party and then transferred the option and the amount of money required to exercise the option to the taxpayer in exchange for his ranch. He in turn exercised the option and used the cash to buy the new ranch. In substance, all that the taxpayer received was a ranch for a ranch; however, the Fifth Circuit held that section 1031 was not applicable because receipt of cash indicated a sale. It did note that section 1031 would have applied if the corporation had carried out the original agreement and transferred the ranch instead of the option and cash.

The Ninth Circuit came to a similar result in *J.M. Rogers*,[32] where the taxpayer sold an option on his land, but also retained the right to require like-kind property in exchange. During negotiations for the like-kind property the option was exercised and the

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28. The courts, under the guise of "substance over form," have approved the application of CODE § 1031 to situations which come very close to sale-reinvestment transactions. In view of the legislative history which indicates a congressional desire not to tax a continued investment in like-kind property, this judicial interpretation of § 1031 is justifiable.
29. Coastal Terminals, Inc. v. United States, 320 F.2d 333 (4th Cir. 1963); Alderson v. Commissioner, 317 F.2d 790 (9th Cir. 1963); W.D. Haden Co. v. Commissioner, 165 F.2d 588 (5th Cir. 1940); Antone Borchard, 24 CCH Tax Ct. Mem. 1643 (1965); J.H. Baird Publishing Co., 39 T.C. 608 (1962); Mercantile Trust Co. v. Commissioner, 32 B.T.A. 82 (1935).
30. The House debates on the Revenue Act of 1924 indicate that gain must be recognized if property is reduced to cash at any time during the transaction. *See* the debate between Representatives LaGuardia and Green, 65 CONG. REC. 2799 (1924).
31. 385 F.2d 238 (5th Cir. 1967). *See* Note, *supra* note 18.
32. 44 T.C.126 (1965).

taxpayer used the cash to purchase the like-kind property. Again, the court held that the receipt of cash pushed the transaction into the sale-reinvestment category and outside the required exchange transaction of section 1031.

The parties in *Starker* did not make this mistake since their agreement made it clear that at no time did the taxpayer have the right to ask for cash or control over the cash.

> The Starkers did not have control over the cash used by Longview Fibre to purchase like-kind properties selected by the Starkers in exchange for their land. Nor did the Starkers have the right under the contract to demand cash in lieu of property.[33]

V. THE RESULT: A DECISION FOR THE TAXPAYERS

The taxpayers were successful in convincing the court that the Ninth Circuit in *Alderson* had already approved an exchange in which the second party acquired title to property solely for the purpose of making an exchange with the taxpayer. *Starker*, however, was different because the exchange was not contemporaneous. How, then, did the court turn aside the Government's contention that what the taxpayer really did was exchange timberland for a promise, which is not like-kind property?

One possible answer is that the court was looking past the promise which the corporations had given to the taxpayers to what was promised, *i.e.*, that Longview and Crown Zellerbach would convey timberland, which is like-kind property. Coupled with this is the fact that the "Exchange Account" was unfunded which is strong evidence that the taxpayers were really bargaining for timberland and not cash. The court must have also been influenced by the fact that no cash was ever received by the taxpayers even though they could have received cash if the like-kind property were not found within five years. It had already been decided that the possible receipt of cash does not destroy the section 1031 exchange as long as there is an intention to exchange properties if it is at all possible.[34] The only problem presented by *Starker* which had not been previously answered by the courts was the non-contemporaneous exchange element. The Code and Regulations lent no guidance in this area. However, since the court found no other errors in the taxpayers' transaction, and since a contemporaneous exchange was not required by the Code, the court allowed section 1031 treatment for the *Starker* arrangement.

Once the court adopted this viewpoint, the Government argument that this was a closed transaction was irrelevant since all like-

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33. 75-1 U.S. Tax Cas. at 87,143.
34. 32 B.T.A. 82 (1935).

kind exchanges are closed, *i.e.*, the amount of value received is known. And categorizing a transaction as "closed" does not necessarily imply that it is a sale and not an exchange.

Not only did the taxpayers successfully avoid recognition of gain on the exchange, they also avoided having to pay imputed interest under section 483[35] which applies not only to delayed payments under a sales agreement but also to exchange agreements. The taxpayers pointed out in their brief that section 483(f)(3) specifically states that no interest will be imputed "... if no part of any gain on such sale or exchange would be *considered* as gain from the sale or exchange of a capital asset[36] or property described in section 1231." From that basis they argued that since section 1031 is applicable and no gain of any nature was to be *recognized*, no interest should be imputed either. The Government conceded the taxpayers' argument and did not contest the issue any further.[37]

A careful distinction must be made between "considered," "realized," and "recognized." The Code uses the word *considered* when describing the gain from the sale or exchange. The Regulations, when referring to section 483(f)(3) state that:

> The determination of whether the exception of the preceding sentence applies shall be made without regard to whether any gain or loss is realized on the sale or exchange, whether any realized gain or loss would be recognized or whether some other provisions of law . . . applies or would apply, to some or all of the gain.[38]

The result is that under section 483 interest should be imputed in the present case since the exchange was of a capital asset even though no gain was recognized under section 1031. If it had relied on its own Regulations the Government might have convinced the court that the timber growth factor of six per cent was actually an interest payment and $17,012.67 would have been recognized as ordinary income by the taxpayers. If the court concluded that the six per cent growth factor was not interest, then the Regulations would require that five per cent[39] compounded semi-annually be used as the interest factor. Under either approach, at least $14,000.00[40] should have been reported as ordinary interest income.

35. *See* note 16 *supra*.
36. The timberland was a capital asset in the hands of the taxpayer.
37. Interest was not imputed in *Starker* because the statute of limitations had run on all the years involved in the exchange except 1967, the only year for which the taxpayer signed a waiver.
38. Treas. Reg. § 1.483-2(b)(3)(i) (1966).
39. Treas. Reg. § 1.483-1(c)(2) (1959).
40. The six per cent growth factor which was applied to the year end balances of the "Exchange Account," resulted in an increase in the ac-

VI. CONCLUSION

The taxpayers' victory in *Starker* appears complete. Their main argument was that *Alderson v. Commissioner* had already approved an exchange where the second party acquired property solely for the purpose of exchanging it with the taxpayer. On August 24, 1975, three months after *Starker*, the IRS issued Revenue Ruling 75-291[41] which approved a factual situation similar to that in *Alderson* and cited *Alderson* as a reference.

The Government's main argument had been that *Starker* was different from *Alderson* because in the former the exchange took five years, while in the latter case the exchange was contemporaneous. On December 1, 1975, the Solicitor General withdrew the appeal in *Starker* thereby indicating that at least the Department of Justice agreed with the taxpayers in *Starker*. However, two questions still remain unanswered. First, what position will the IRS take when the next non-contemporaneous exchange case arises? Second, if *Starker* is good law, what constitutes a reasonable time for making the exchange? The exchange in *Starker* took five years. It is unclear whether a ten-year exchange will qualify for section 1031 treatment.

For the practitioner the *Starker* case will make the section 1031 exchange a far more flexible tool. As in *Starker*, cash must be kept out of the "seller's" control both in the agreement and in the actual execution. Another caveat is that the Government may rely on its own Regulations and attempt to impute interest pursuant to section 483.

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count of $17,012.67. Applying the five per cent factor to those same year end balances would result in "interest" of at least $14,000.

41. Rev. Rul. 75-291, 1975 INT. REV. BULL. No. 29, at 17.