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In this article, Borden examines several court decisions that have extended section 7503 deadlines to the next business day, and he argues that the same extension applies to the deadlines under section 1031 for like-kind exchanges of property.

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## I. The Predicament

Every so often, exchangers find themselves in a predicament that raises the question whether the section 1031 45-day identification and 180-day exchange periods can be extended if they fall on a weekend or holiday. For example, an exchanger may be prepared to close the acquisition of replacement property on a Friday that is one day before the Saturday end of the 180-day exchange period. Through no fault of the exchanger, the acquisition may not close on that Friday but on the following Monday. In that situation, the exchanger hopes there is authority to report the acquisition of the replacement property as occurring within the exchange period. In fact, the law appears to extend section 1031 deadlines that

fall on a weekend or holiday to the next business day.

## II. The Legal Landscape

The exchanger's situation in the example appears to be very clearly governed by section 7503, but the IRS has issued rulings that may confuse some exchangers and advisers. Thus, exchangers and their advisers must work through the statute, case law, and the IRS's position to identify the authority governing section 1031 deadlines that fall on weekends or holidays.

### A. Section 7503

Section 7503 provides that "when the last day prescribed under authority of the internal revenue laws for the performance of any act falls on a Saturday, Sunday, or a legal holiday, such act shall be considered performed timely if performed on the next succeeding day which is not a Saturday, Sunday, or a legal holiday."<sup>1</sup> Identifying replacement property and acquiring replacement property within the section 1031 period appear to come within the expansive "any act" language in the statute. Further, the statute, under a plain reading, appears to apply the section 7503 extensions to the 45-day and 180-day period deadlines. Thus, any section 1031 deadline that falls on a weekend or holiday would be extended to the next business day.

<sup>1</sup>The provision also provides that "for purposes of this section, the last day for the performance of any act shall be determined by including any authorized extension of time; the term 'legal holiday' means a legal holiday in the District of Columbia; and in the case of any return, statement, or other document required to be filed, or any other act required under authority of the internal revenue laws to be performed, at any office of the Secretary or at any other office of the United States or any agency thereof, located outside the District of Columbia but within an internal revenue district, the term 'legal holiday' also means a Statewide legal holiday in the State where such office is located."

The section 7503 regulations appear to confirm the applicability of the weekend/holiday rule to the identification and exchange periods. The regulations provide that “section 7503 is applicable only in case an act is required under authority of any internal revenue law to be performed on or before a prescribed date or within a prescribed period.”<sup>2</sup> Section 1031(a)(3)(A) provides that replacement property is not like-kind to relinquished property if it is not identified “on or before the day which is 45 days after the date on which the taxpayer transfers the property relinquished in the exchange.” Section 1031(a)(3)(B)(i) provides that the identified replacement property is not like-kind to relinquished property if it is not received before the earlier of “the day which is 180 days after the date on which the property is relinquished” or the due date of the exchanger’s tax return. Thus, both identification and receipt of replacement property within the prescribed periods are required for property to be valid replacement property that allows the exchanger to obtain section 1031 nonrecognition. Consequently, based on a plain reading of the statute and regulations, section 7503 appears to apply to the section 1031 deadlines.

## B. The IRS’s Position

The IRS has ruled generally concerning section 7503 in two revenue rulings, and it addressed the application of section 7503 to section 1031 exchanges in proposed regulations but did not include the specific reference in the final section 1031 regulations.

In Rev. Rul. 72-541, 1972-2 C.B. 645, the IRS interpreted the term “act” in section 7503 as being limited to “procedural steps in connection with the determination, collection, or refund of taxes.” It therefore refused to extend a period specified in old section 267(a)(2), which disallowed a deduction for certain payments not made to a related party within the two and a half months following the close of the tax year. Congress later overruled the IRS’s position in Rev. Rul. 72-541 by

amending section 267(a)(2) to provide section 7503 relief to related-party payers.<sup>3</sup>

In Rev. Rul. 83-116, 1983-2 C.B. 264, which supersedes Rev. Rul. 72-541, the IRS recounted its fraught history with section 7503. First, it recalled its position in Rev. Rul. 72-541 “that section 7503 of the Code applies only to acts required to be performed as procedural steps in connection with the determination, collection or refund of taxes.” Second, the IRS acknowledged that, in *Snyder*,<sup>4</sup> the Tax Court disagreed with its interpretation of the application of section 7503 and “held that section 7503 of the Code is not limited to acts required to be performed in connection with the determination, collection, or refund of taxes. Specifically, the court held that section 7503 applies to the 12-month period for liquidating corporate distributions under [former] section 337(a).”<sup>5</sup> Third, citing Congress’s amendment of section 267 to address the ruling in Rev. Rul. 72-541, the IRS took the position that “Congress did not intend the general procedural rule for timely performance in section 7503 to apply to all time limitations prescribed by the Code. Congress has indicated a preference to deal with time limitations in other than general procedural rules on an individual basis.”<sup>6</sup> Thus, the IRS confirmed that it will not follow the decision in *Snyder* and will continue to take the position that section 7503 is limited to procedural steps taken in the determination, collection, or refund of taxes and other time limitations on non-procedural acts that Congress has addressed individually.

The preamble to reg. section 1.1031(k)-1, issued in 1991, includes the following language regarding section 7503:

The proposed regulations provide that in determining the dates on which the identification and exchange periods end, section 7503 does not apply. Section 7503 provides that where the last day for performance falls on a Saturday, Sunday, or legal holiday, performance on the next

<sup>2</sup> Reg. section 301.7503-1(a).

<sup>3</sup> H.R. Rep. No. 95-645, at 3 (1977); S. Rep. No. 95-797, at 3 (1978).

<sup>4</sup> *Snyder v. Commissioner*, T.C. Memo. 1981-216.

<sup>5</sup> Rev. Rul. 83-116.

<sup>6</sup> *Id.* (citing H.R. Rep. No. 95-645, at 3; S. Rep. No. 95-797, at 3, the legislative history to the amendment to section 267).

succeeding day that is not a Saturday, Sunday, or legal holiday will be considered timely.

Some commentators suggested that the proposed regulations should be revised to provide that section 7503 does apply in determining the dates on which the identification and exchange periods end. However, Rev. Rul. 83-116, 1983-2 C.B. 264, provides that section 7503 is limited to procedural acts required to be performed in connection with the determination, collection, or refund of taxes. Because it is unnecessary to state a special rule for the application of section 7503 to deferred exchanges, the provision regarding application of section 7503 to section 1031 deferred exchanges has been deleted from the final regulations. In addition, because the timing requirements relating to the identification and exchange periods are statutory, requests for extension of the identification period or the exchange period through administrative relief under section 1.9100 will not be granted.<sup>7</sup>

This language reveals two important items. First, the IRS refrained from explicitly claiming that section 7503 does not apply to the section 1031 deadlines, so the final regulations include that language. Second, as of 1991, the IRS appeared committed to (or unable to take a position contrary to) its published position in Rev. Rul. 83-116 that section 7503 does not apply to non-procedural acts. Its position is contrary to case law that has uniformly applied section 7503 to non-procedural acts required by statute and that has consistently ruled against IRS challenges to a broad reading of section 7503.

### C. Case Law

Courts have consistently and definitively rejected the IRS's position in Rev. Rul. 72-541 and Rev. Rul. 83-116. They rejected the IRS's position before the IRS officially stated it in those rulings and have continued to do so. Even before Congress had enacted any version of section 7503,

the courts were lenient regarding non-procedural acts and granted extensions of statutory deadlines that ended on a weekend or holiday for those acts.

In *Campbell*,<sup>8</sup> a decision based on facts occurring before the enactment of section 7503, the Tax Court considered whether the 60-day period in former section 23(p)(1)(E) could be extended one day when the 60th day was on Memorial Day, a legal holiday. Because the facts preceded the enactment of section 7503, the court did not employ statutory interpretation to decide the case. Old section 23(p)(1)(E) allowed an employer to deduct amounts paid to an employee plan for the prior tax year if the employer paid the amounts to the plan within 60 days following the end of the tax year. The court acknowledged that the act to be performed was "an ordinary business transaction, i.e., the payment of money," so it was not a procedural act.

The court cited the Supreme Court's decision regarding a deadline prescribed by the federal rules of civil procedure, other decisions, and a local statute that extended deadlines that fell on weekends or legal holidays.<sup>9</sup> Based on that tangential authority, the court concluded that those "cases indicate an attitude of some leniency on the part of the courts recently in treating the problem here involved which appeals to us, and while the fact situations are not precisely the same as the one we have, we, nevertheless, conclude that petitioner's payment was timely made and that the deductions should have been allowed." Thus, the Tax Court, relying on Supreme Court authority, established common law relief for non-procedural acts with deadlines that fall on weekends or holidays.

In *Snyder*,<sup>10</sup> the case cited by the IRS in Rev. Rul. 83-116, the Tax Court considered whether a corporation liquidated within the 12-month period required under former section 337(a). The corporate taxpayer adopted a plan of liquidation on December 26, 1972, and distributed three parcels of property to complete the liquidation on December 26, 1973. The court did not determine

<sup>7</sup>T.D. 8346.

<sup>8</sup>*Campbell Chain Co. v. Commissioner*, 16 T.C. 1402 (1951).

<sup>9</sup>*Id.* at 1403-1405 (citing *Union National Bank v. Lamb*, 337 U.S. 38 (1949); *Sherwood Bros. v. District of Columbia*, 113 F.2d 162 (D.C. Cir. 1940); and Pa. Stats. Anno., Tit. 44, sections 11 and 14).

<sup>10</sup>*Snyder*, T.C. Memo. 1981-216.

whether the correct ending date without section 7503 was December 25, 1973, or December 26, 1973, because it reached the decision that section 7503 applied to extend the date to December 26. The IRS advocated for the application of its language in Rev. Rul. 72-541 that an “act” as used in section 7503 should be limited to “procedural steps in connection with the determination, collection, or refund of taxes.”

The court provided four reasons for disregarding the IRS’s arguments:

1. “We think [the IRS] reads the language of section 7503 too narrowly.”
2. “The fact of the matter is that the statute is not so confined, nor are the primary references in the committee reports.”
3. “We think it significant that section 7503 uses the word ‘prescribed,’ which has a broad connotation, and we see no reason not to accord it the usual and ordinary meaning.”
4. “Finally, we note that there is no indication that section 7503 was intended to be the exclusive vehicle for dealing with the effect of a time period expiring on a legal holiday.”

Regarding this final point, the Tax Court cited the common law deadline extension established by *Campbell*, which was decided before the enactment of section 7503, as support for extending the time to the day following a legal holiday. Thus, the Tax Court explicitly addressed and rejected the IRS’s position that section 7503 applies only to procedural acts. It continued to take that position.

In *E-B Grain*,<sup>11</sup> an opinion issued five days before the publication of Rev. Rul. 83-116, the Tax Court effectively preempted the IRS’s disregard of *Snyder*. In *E-B Grain*, the issue was whether a corporation made a distribution to its shareholders within the grace period allowed in former section 1375(f)(1), which allowed a corporation to make distributions within the first two and a half months following the close of the final tax year of the corporation’s subchapter S status. The last day of that grace period fell on a Saturday, and the corporation made distributions

on the following Monday. If the distributions had not been made within the grace period, they would have been taxable dividends.

In applying section 7503 to the deadline, the Tax Court reasoned that when possible, statutory language should “be accorded its ordinary and usual meaning” and found the “plain language of the statute to be contrary to the IRS’s position” that section 7503 applies only to “procedural steps in connection with the determination, collection, or refund of taxes.” The court rebuked the IRS for reading the language of section 7503 “too narrowly” and disregarded the IRS’s arguments that the *Snyder* court did not adequately consider legislative history.

The court reinforced its reasoning by citing *Campbell* as common law authority for holding “that considerations of fairness and convenience dictated that a nonprocedural statutory period should be extended to the following business day where the last day of the period fell on a legal holiday.” The court reaffirmed its position in *Snyder* that there is no indication that section 7503 was intended to be the exclusive vehicle for dealing with the effect of a period expiring on a legal holiday. It reiterated that “the *Campbell* rationale continues to have vitality and the same principles of fairness and convenience which were present in *Campbell* are presented with equal force in the present case, and dictate a similar result herein.” Thus, were section 7503 not to extend to non-procedural acts, the Tax Court could rely on its precedent in *Campbell* to extend the periods that fall on weekends or holidays to the next business day. This reasoning demonstrated that it did not read section 7503 as limiting its prior ruling that granted deadline relief to a non-procedural act.

The Tax Court also confirmed that it is “not bound by positions taken by [the IRS] in Revenue Rulings.”<sup>12</sup> That principle is just as applicable following the publication of Rev. Rul. 83-116 as it was five days before its publication. Thus, from the Tax Court’s perspective, the IRS’s position in Rev. Rul. 83-116 does not reflect the law and has no bearing on its decisions.

<sup>11</sup> *E-B Grain Co. v. Commissioner*, 81 T.C. 70 (1983), filed on August 3, 1983. Rev. Rul. 83-116 was published August 8, 1983.

<sup>12</sup> *Id.* at n.5 (citing *Dixon v. United States*, 381 U.S. 68, 73-74 (1965); *Jacklin v. Commissioner*, 79 T.C. 340, 351, n.13 (1982)).

In *Olsen*,<sup>13</sup> decided the year following the publication of Rev. Rul. 83-116, the Tax Court held that section 7503 is operative when the IRS and the taxpayer agreed to extend the assessment period to Sunday, July 31, 1983. The IRS sent a notice of deficiency on Monday, August 1, 1983. In that case, the taxpayers cited Rev. Rul. 72-541 and Rev. Rul. 83-116 to argue against the application of section 7503 to extend the assessment period one day to the Monday following the agreed termination date. The court disregarded the taxpayer's observation that the IRS disagreed with *Snyder* and cited to its *E-B Grain* decision, saying, "We again ruled that the plain language of section 7503 required its application with respect to any act prescribed by the internal revenue laws. Accordingly, we reaffirmed our holding in *Snyder* . . . that section 7503 cannot legitimately be read to apply only to procedural acts." Even if this language could technically be dicta (assuming sending the notice was a procedural act), the court's language is compelling and consistent with its other decisions. Thus, *Olsen* reaffirms the Tax Court's position that section 7503 applies broadly.

The court also recognized that in this case, it would reach the same conclusion even if section 7503 were limited to procedural acts because the mailing of a deficiency notice is a procedural act. The court concluded its opinion with this language: "Given the clear language of section 7503 which states that 'the last day for the performance of any act shall be determined by including any authorized extension of time' we are satisfied that respondent had until the next succeeding day, Monday, August 1, 1983, to issue a notice of deficiency."

In *Klotter*,<sup>14</sup> an unpublished opinion of the U.S. District Court for the Western District of Kentucky, the court considered whether section 7503 applied to a Saturday deadline that the taxpayer and IRS agreed to in a tax collection waiver. The IRS did not commence its collection

action until the Monday following that Saturday deadline, and the taxpayer argued that section 7503 should not apply to extend the deadline. The court recognized that the "any act" language in section 7503 made it applicable to acts of the IRS and taxpayers, the Saturday date was prescribed under the authority permitting extensions of time, and section 7503 applies to an authorized extension of time. The court thus found that the action commenced on the Monday was timely, as section 7503 applied to extend the period that otherwise would have ended on a Saturday.

Courts thus disregard the IRS's position and apply section 7503 universally. The Tax Court recognizes that even if section 7503 did not extend to all acts, the provision does not restrict the application of its common law ruling in *Campbell*. Thus, the courts rule that section 7503 and *Campbell* apply broadly to any act that has a statutory deadline. Even though a court has not considered whether section 7503 applies to the section 1031 deadlines, the language in the statute and case law indicate that it does. Exchangers and their advisers should take that into account in determining how to report the tax consequences of exchanges to which section 7503 may apply.

### III. Weighing Conflicting Authority

The rules governing the tax law's penalty provisions provide direction regarding the tax adviser's role in giving tax advice when legal authority appears to be in conflict. Those rules require an objective analysis of the applicable authority and prohibit taking into account the possibility that a tax return will be audited or that an item will be raised on audit.<sup>15</sup> The objective analysis requires identifying authority that supports a reporting position and authority that may be contrary to the reporting position.<sup>16</sup> Once that authority has been identified, the analysis requires determining the relevance and persuasiveness of the authority.<sup>17</sup> For example, a case or ruling is not particularly relevant if the

<sup>13</sup> *Olsen v. Commissioner*, T.C. Memo. 1984-411.

<sup>14</sup> *United States v. Klotter*, No. C 84-0357L(A) (W.D. Ky. 1985).

<sup>15</sup> Reg. section 1.6662-4(d)(2).

<sup>16</sup> Reg. section 1.6662-4(d)(3)(i).

<sup>17</sup> Reg. section 1.6662-4(d)(3)(ii).

authority is materially distinguished on its facts from the tax treatment at issue.<sup>18</sup> The type of document (that is, a case or ruling), for instance, affects its weight of authority.<sup>19</sup> “An authority does not continue to be an authority to the extent it is overruled or modified, implicitly or explicitly, by a body with the power to overrule or modify the earlier authority.”<sup>20</sup> The analysis requires taking all of these factors into account to determine the likelihood that a position would be upheld,<sup>21</sup> presumably by a court.

All the cases that have considered the applicability of section 7503 to any deadlines (including those that apply to non-procedural acts) have extended the deadline as provided in section 7503. Although none of those cases address the section 1031(a)(3) deadlines, the section 1031 deadlines are not merely procedural, so they would be subject to the same rules that apply to other non-procedural rules. Four Tax Court cases (*Campbell*, *Snyder*, *E-B Grain*, and *Olsen*) and one federal district court case (*Klotter*) have extended deadlines that fell on a weekend or holiday to the next business day. Apparently, no court has refused to apply section 7503 to extend a weekend or holiday deadline to the next business day. Thus, a significant body of case law supports applying section 7503 to the section 1031 deadlines.

The negative authority consists of two IRS rulings (Rev. Rul. 72-541 and Rev. Rul. 83-116). The IRS is a party to court cases when a federal income tax assessment is at issue. Courts have the authority to rule against the IRS, and, as the *E-B Grain* court reinforced, they are not bound by revenue rulings. When a court rules in a manner that is inconsistent with an IRS ruling, the court, at a minimum, implicitly overturns the ruling. Because courts can overrule or rule against IRS revenue rulings, judicial opinions should be afforded greater weight than IRS revenue rulings. In fact, to the extent the rulings have been overruled, they cease to be authority.

The Tax Court addressed and overruled Rev. Rul. 72-541 in *Snyder*. Courts have yet to explicitly overrule Rev. Rul. 83-116, but the *E-B Grain* court ruled that language that appeared in Rev. Rul. 83-116 did not accurately reflect the application of section 7503. *E-B Grain* thus appears to, at a minimum, implicitly overrule Rev. Rul. 83-116. Also, in *Olsen*, a case that may have been restricted to a procedural act, the Tax Court explicitly stated that the IRS’s position in Rev. Rul. 83-116 is inconsistent with the plain language of section 7503. Thus, the Tax Court, acting within the purview of its authority to overrule revenue rulings, has, at a minimum, implicitly overruled Rev. Rul. 83-116. The federal district court in *Klotter* did the same.

Based on this analysis, the weight of authority supporting the application of section 7503 to the section 1031 deadlines is substantially greater than the contrary authority. Not only should case law be afforded greater weight than IRS rulings, but case law addresses the IRS’s position concerning the application of section 7503 to non-procedural acts and overrules it. All the cases cited herein support applying section 7503 to the section 1031 deadlines. The courts read “any acts” in section 7503 broadly and have applied it to all deadlines and periods they have considered. Consequently, exchangers have the authority to apply section 7503 to their exchange deadlines. The authority supporting the application of section 7503 to the section 1031 deadlines is strong, and the contrary authority, to the extent still considered authority, is weak.

#### IV. Application to Section 1031 Deadlines

The IRS has taken the position that it disagrees with the published cases, so it may challenge the application of section 7503 to the section 1031 deadlines. But exchangers can rely on case law to argue against the IRS in that challenge. The objective analysis required by tax law requires disregarding the possibility that the IRS will raise an issue on audit and requires weighing authority and considering the likelihood that a reporting position will be upheld. Courts have consistently applied section 7503 or the principles in it to deadlines for non-procedural acts, so an objective analysis must conclude that courts would rely on the existing precedent and follow that pattern.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> Reg. section 1.6662-4(d)(3)(iii).

<sup>21</sup> Reg. section 1.6662-4(d)(2).

Although a rogue judge could deviate from the disciplined legal analysis described herein, the objective analysis neither requires nor permits taking that possibility into account. Thus, based on an objective analysis, the conclusion must be that the likelihood that the courts will apply section 7503 to the section 1031 deadlines is very high, so the likelihood the courts would uphold an exchanger's application of section 7503 to a section 1031 deadline is very high.

Weekends are two-sevenths of each week, or about 29 percent of the total days of each week, so, taking into account holidays, section 7503 could apply to as many as 30 percent of all section 1031 deadlines. Thus, the application of section 7503 to the section 1031 exchange periods would not appear to be unusual. Despite a nearly 1-in-3 possibility that section 1031 deadlines will fall on a weekend or holiday, exchangers most likely would not look to apply section 7503 with that level of frequency. Typically, exchangers would prefer to close on the acquisition of replacement property well before the end of the exchange period, and they typically would not deliberately put off closing until the last day of the exchange period. Prudence dictates not waiting until the end of the identification period to identify replacement property. Still, tax law supports the application of section 7503 to the section 1031 deadlines. Now consider some specific situations in which section 7503 might apply to the section 1031 deadlines.

### A. Application to the Exchange Period

Returning to the example presented above, the exchanger was unable to close the transaction on Friday within the statutory 180-day period but closed on the following Monday, a couple of days following the Saturday end of the 180-day period. The exchanger in that situation appears to have two reporting alternatives. First, the exchanger might side with the IRS, based on the IRS publications, that section 7503 does not apply to section 1031 deadlines and recognize gain because the exchanger acquired the replacement property after the 180th day. Second, the exchanger could take the position that section 7503 applies to the section 1031 deadlines, recognize that the deadline for acquiring replacement property must be extended to

Monday, and report the acquisition of the replacement property as occurring within the exchange period. As established above, the law supports treating the Monday acquisition as occurring during the exchange period.

The tax consequences to the exchanger under the first alternative are clear: The exchanger pays the tax on the recognized gain. The tax consequences to the exchanger in the second alternative should also be clear: The exchanger should be granted nonrecognition. Still, because of the IRS's refusal to acquiesce on the issue, the exchanger might consider what would happen if the IRS were to audit the transaction. If the IRS were to audit the transaction, the auditor may or may not raise the issue (of course, if the IRS never audited the transaction, the exchanger would not pay tax on it). The IRS has had very little success challenging the application of section 7503 to statutory deadlines, so the auditor may decide not to challenge its application to the facts in this example. If the IRS does not challenge the position, then the exchanger would not owe tax on the transaction.

If the auditor were to challenge the section 1031 nonrecognition on the transaction, and the matter was litigated, case law suggests that the IRS would lose, and the exchanger's reporting position would be upheld. If somehow the IRS were able to persuade a court to ignore precedent and not apply section 7503 to the transaction, the exchanger would owe tax. The authority supporting the application of section 7503 to the transaction is strong, so no penalties should be imposed in the unlikely event the IRS were to prevail.<sup>22</sup>

If the exchanger were to pay the tax in response to an IRS challenge, the exchanger would be in no worse position than it would be if it had chosen the first alternative, reported gain, and paid the tax with its return.<sup>23</sup> Because the support for applying section 7503 to the section 1031 deadlines is so strong, and the exchanger's

<sup>22</sup> Section 6662(a), (b)(2) (imposing a 20 percent penalty for a substantial understatement of tax), section 6662(d)(2)(B)(i) (providing the understatement of tax is reduced by positions supported by substantial authority).

<sup>23</sup> This assumes the exchanger would be able to obtain a return on the unpaid tax that would equal or exceed any interest that would be due on the subsequently-paid tax.

best outcome under the second alternative is positive and its worst outcome is not negative,<sup>24</sup> most exchangers would choose to apply section 7503 to the situation in this example.

## B. Application to the Identification Period

Section 7503 should apply to the identification period in the same manner that it applies to the exchange period. If the 45th day of the identification period falls on a weekend or holiday, the identification period should extend to the first business day following the weekend or holiday.

Although section 7503 appears to apply to the identification period, exchangers may be well advised to identify replacement property at least a few days before the end of the identification period. Early identification could be a sound practice regardless of what day of the week the identification period ends. Property that is not properly identified within the identification period is not valid replacement property, so the cost of a failed identification can be significant. If, after identifying replacement property and before the end of the identification period, an exchanger decides to change the identification, the rules allow the exchanger to revoke the prior identification and submit another identification. Needing to make that change beats failing to identify any property before the end of the identification period.

If the identification period ends on a weekend or holiday, exchangers would typically be well advised to identify property before the weekend on which the identification period will end, so they do not have to worry about missing the deadline. If something happens during the weekend that compels the exchanger to change the identification, the exchanger could rely on section 7503 for the position that a revocation and new identification on the first business day following the weekend comes within the identification period. The risks of section 7503 not applying to the identification period should be the

same as the risks of section 7503 not applying to the exchange period.

## C. Application to Tax-Year Straddles

Section 7503 could cause exchanges to straddle tax years, moving gain recognition to the tax year following the disposition of the relinquished property. For instance, if the 180th day of an exchange period was December 31 for a calendar-year taxpayer, and it fell on a Saturday or Sunday, section 7503 would extend the exchange period into the next tax year. If a qualified intermediary were holding unused exchange proceeds for an exchanger in that situation, the reg. section 1.1031(k)-1(g)(6) restrictions would not lapse until the subsequent tax year, at which time the QI would distribute those proceeds to the exchanger. The installment method would be available for the exchanger,<sup>25</sup> so the exchanger could defer gain recognition until the subsequent tax year.

If an exchanger decides not to complete an exchange before the end of the identification period, and the 45th day of the identification period falls on Saturday, December 31, the identification period would end on the first day following the weekend and any New Year's Day holiday. The reg. section 1.1031(k)-1(g)(6) restrictions would lapse, and the exchanger would be entitled to exchange proceeds at that time. The installment method could similarly apply in that situation,<sup>26</sup> so the exchanger could recognize gain on the distribution of the proceeds in the subsequent tax year. Because section 7503 is not elective,<sup>27</sup> the deadlines would appear to automatically extend whenever the section 1031 deadlines fall on a weekend or holiday.

## D. Qualified Intermediaries

Section 1031 QIs should be familiar with section 7503 and its application to section 1031 deadlines. Perhaps most significantly, they should understand that property identified outside the 45th day, when the 45th day falls on a weekend or

<sup>24</sup> If the IRS were to challenge the reporting position, the exchanger could either pay the tax and any interest due on the unpaid tax or contest the IRS's challenge. The exchanger's decision to contest the IRS challenge would suggest that the exchanger determined that the cost to contest the challenge would be less than the cost to merely pay the tax and any assessed interest.

<sup>25</sup> Reg. section 1.1031(k)-1(j)(2)(ii)(B).

<sup>26</sup> Reg. section 1.1031(k)-1(j)(2)(ii)(A).

<sup>27</sup> The application of the installment method in that situation is, however, elective. Section 453(d).

holiday, can still satisfy the identification requirement if the identification is properly made on the first business day following the weekend or holiday.

### V. Conclusion

Courts apply section 7503 and similar principles to non-procedural acts, so section 7503 appears to apply to the section 1031 deadlines. Although that application may not arise frequently, exchangers, their advisers, and section 1031 QIs should still be familiar with it and understand how it can affect the tax consequences of an exchange. ■

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