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Like Kind Replacement Property:
Animal, Vegetable, or Mineral?†

RIDGELEY A. SCOTT*

Gain or loss usually is recognized by a person who gives up property. If an exchange satisfies the terms of a nonrecognition statute, all or some of the gain or loss is deferred until there is a disposition of the replacement property. The like kind provision is the general nonrecognition rule for exchanges of property. Although the statute was enacted in 1921 to reduce uncertainty and litigation, there are several unanswered questions. Moreover, many like kind issues have been resolved on an ad hoc basis. Professor Scott traces the development of rules and standards, and suggests approaches which should lead to more logical results.

INTRODUCTION

The first modern federal income tax was enacted in 1913. Although the statute made it clear that deductions were one topic and income was another, they were silent as to the method for computing income. Under the 1913 regulations, income from an exchange was the fair market value of the property received reduced by the adjusted basis for the property given up.1 The rule from the 1913 regulations was enacted in 1918.2 In 1921 Congress expressed displeasure

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with the rule and concluded that gain should not be taxed unless the property received had a readily realizable market value. In 1924 however, Congress decided the readily realizable standard could not be applied with reasonable certainty, and went back to the 1918 approach.

The continuity of investment principle was established by a Civil War ruling on destruction of business property by fire. Losses were not deductible to the extent that they were compensated for by insurance. A 1914 letter concluded that a loss did not occur until the transaction was complete, hence an investment would continue until property irredeemably disappeared from the assets of a person. One person used this 1914 letter as the basis of his request for a reorganization ruling. In a 1915 letter, the Internal Revenue Service (IRS) found the transaction was not complete and concluded the exchange was tax-free. A series of letters issued over the next few years created a body of precedent for reorganizations. Reorganization gain was not realized unless the property received differed materially from the property given up.

Reasonable persons can easily disagree over whether there is a material difference between properties. When World War I ended unexpectedly, the Finance Committee had nearly completed work on the 1918 bill. A few days after the armistice, the Department of Treasury (Treasury) asked for modifications designed for a post-war economy. The Treasury emphasized a need for greater certainty in the treatment of business. The Finance Committee responded by amending the bill to provide nonrecognition for transfers to controlled corporations and reorganization exchanges. Although the control corporation clause was deleted without explanation by the Conference Committee, the reorganization material was enacted.

In 1921 the Treasury asked for nonrecognition in several situations. The general goals for the system were to increase revenue by denying deductions based on wash sales and other fictitious ex-

6. E.g., LTR (Apr. 1, 1915); LTR (Mar. 8, 1917), both reprinted in 1918 income tax serv. (corp. tr. co.) ¶ 398, 1302.
changes, and to stimulate the economy. The economy would be encouraged by modifying a presumption in favor of taxation, disapproving technical constructions which were economically unsound, encouraging business adjustments, and reducing litigation and uncertainty. Reducing uncertainty probably was the principal factor in the drive to stimulate the economy. Congress enacted the proposals. Hence gain was not recognized if the transaction was a reorganization, transfer to a controlled corporation, involuntary conversion or like kind exchange.  

These nonrecognition rules were continued without substantial question until the early thirties. As the Great Depression intensified, a search was begun for ways to reduce tax avoidance. A congressional study found that the nonrecognition rules had frequently been used as a means of tax avoidance. Repeal of all the nonrecognition provisions was suggested. The Treasury opposed the suggestion because of a potential loss of revenue and of possible severe handicapping of legitimate transactions. The Treasury also stated that twelve years of experience with the like kind statute indicated it did not result in tax avoidance. Congress found that the administrative cost of treating like kind exchanges as taxable transactions would exceed the additional revenue.  

There is no record of congressional consideration of repeal or substantial modification of the like kind statute after 1934.

The replacement property is deemed to be a continuation of the old investment if the transaction is a like kind exchange. Although most of the requirements of the statute are relatively easy to apply, ascertaining whether properties are sufficiently alike may be challenging. For property law purposes, an item is either real or personal property. This distinction was created under roman law. The feudal system amplified the importance of the distinction under English law. In addition, each piece of land is deemed unique. A seller or purchaser is usually entitled to the equitable remedy of specific performance to enforce his contract.  

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11. 5A Corbin on Contracts §§ 1143, 1145 (1964).
sonal property can never be like kind is logically as absurd as suggesting that no piece of land can be like kind to any other. Hence the problem is how to draw points of comparison and distinction for like kind purposes.

Administrative and judicial results do not reflect a reasonably consistent application of like kind principles. Although many IRS decisions tend to restrict the availability of nonrecognition of gain, some are surprisingly liberal. Court decisions reflect a similar pattern of inconsistency. This Article will trace the development of rules and standards, and suggest approaches which should lead to more logical results.

DEVELOPMENT OF A LIKE KIND STANDARD

Background

Dr. Thomas S. Adams was an economist who spent most of his working life as a university professor. Tax was his specialty, and he was employed by the Treasury from 1917 to 1922. Adams was the principal architect of the legislative recommendations which the Treasury presented to Congress in 1921, and he is generally recognized as the father of the 1921 Act.\(^1\)

During Finance Committee hearings, Adams was asked for an illustration. His response was an exchange of “stocks for stocks, or bonds for bonds—or where a factory was exchanged for another factory.”\(^3\) Since legislative reports do not offer substantial guidance for dealing with the like kind tests, the task of preparing rules or standards was delegated to the Treasury.

Pre-1921 Regulations

The continuity of investment doctrine was developed in rulings and letters on reorganization exchanges and casualty losses.\(^4\) The principle was adopted by the 1917 involuntary conversion regulation, and was applied by the 1918 involuntary conversion and exchange regulations.

Under the exchange regulation, the question was whether the replacement was “essentially different from the property disposed of . . . . In other words [there must be] a change in substance and not merely in form . . . to complete or close a transaction from which

\(^1\) Explanatory Note to the Legislative History of the 1921 Act, note 5 in 95 INTERNAL REVENUE ACTS OF 1909-1950.

\(^3\) Revenue Act of 1921: Hearings on the H.R. 8245 Before the Senate Finance Comm., 67th Cong., 1st Sess. 28 (1921) (statement of Dr. T.S. Adams, Tax Advisor, Department of Treasury).

\(^4\) See supra text accompanying notes 5-6.
income may be realized."\textsuperscript{18} The exchange language was not changed in subsequent versions of the regulations under the 1918 Act, and was included in the regulations under the 1921 Act.\textsuperscript{16} The regulations under the 1924 Act did not include an exchange clause. Perhaps it was deleted because the statutory nonrecognition provisions added by the 1921 Act appeared to provide sufficient coverage. When Congress was considering the 1934 Act, the primary concern was raising revenue by preventing tax avoidance. Apparently the exchange clause was resurrected as an additional weapon against tax avoidance. The 1934 language was whether the properties differed "materially in kind or extent . . . ."\textsuperscript{17} The 1934 language was continued and appears in the current regulations.\textsuperscript{18}

Presumably both versions of the exchange regulation employ the same test.\textsuperscript{18} Without interpretation, the clause is useless as a planning tool because reasonable minds can differ about the degree of change which would flow from a proposed transaction. In theory the provision could apply in two transactional patterns. If the owner of asset A exchanges it for asset B, and no material difference in the assets exists, then no gain or loss should be realized. No decision which reaches that conclusion has been located. The exchange provision has been applied in a variety of situations where the transaction resulted in a mere modification in the form of ownership.\textsuperscript{20} When a transfer is in recognition of the legal\textsuperscript{21} or equitable title\textsuperscript{22} of the recipient, application of the exchange doctrine is reasonable. If the recipient did not have a vested title before the exchange transaction, there is doubt about whether a transfer is mere modification of ownership.

The exchange regulation was frequently applied in divorce property settlement situations. If the parties were co-owners of an item of

\begin{itemize}
\item \textsuperscript{15} Treas. Reg. 45 (preliminary), arts. 1563-64 (1919), \textit{reprinted in} 134 \textit{Internal Revenue Acts of} 1909-1950.
\item \textsuperscript{17} Treas. Reg. 86, art. 111-1 (1935), \textit{reprinted in} 140 \textit{Internal Revenue Acts of} 1909-1950.
\item \textsuperscript{18} Treas. Reg. \S 1.1001-1(a) (1972).
\item \textsuperscript{21} E.g., Rev. Rul. 56-437, 1956-2 C.B. 507.
\item \textsuperscript{22} For example, a trust or estate usually does not realize gain on distribution of appreciated property to the beneficiaries. Treas. Reg. \S 1.661(a)-2(f)(l) (1973).
\end{itemize}
property, the exchange provision applied to partition of the item. When the values received by each person were about equal, gain or loss was not realized even if the parties received different properties. In one case, the husband received the stock of the family business corporation, and the wife received the family residence plus cash. Although a person who received cash for property was usually treated as having made a sale, the Tax Court found the cash qualified for exchange treatment because it was a jointly held asset.

When appreciated property was transferred in satisfaction of an ordinary contract claim, gain was realized. Even if the creditor held a mortgage or other security interest and the conveyance was made under threat of foreclosure, the transfer was deemed in response to the claim. The middle ground was when a claim created a degree of interest in the assets of another person. A marital property right similar to common-law dower or courtesy created an inchoate property right which did not appear to differ materially from a shareholder's claim for his portion of corporate earnings. In concluding that a corporation did not realize gain if it used appreciated property to pay a dividend, the courts emphasized the preexisting right of the shareholder. In reaching the contrary result where appreciated property was transferred in satisfaction of rights similar to common-law dower or courtesy, the courts emphasized the existence of an obligation.

The exchange regulation was not applied consistently in cases involving rights similar to common-law dower or courtesy. Although the person who conveyed property was subject to tax, the IRS did not attempt to tax the person who had released a marital property right. Unless an owner had a basis for a right, the entire amount received for a release appears to have been realized gain. Without offering an explanation, the IRS decided that gain was not realized when cash or property was received for releasing a marital property right. The inconsistencies were largely eliminated by the 1984 Act which included a nonrecognition rule for most marital property

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24. Id.
settlements.\textsuperscript{29}

\textit{Pre-1921 Legislative Materials}

The 1918 Act was the first statute which expressly covered exchanges. Shortly after the unexpected surrender of the central powers, the Treasury asked the Senate for changes designed to encourage business in a post-war economy. Property received would be deemed cash except in two situations which were described as pure paper transactions. One was an exchange of stock or securities in connection with a reorganization, and the other was a transfer of property to a controlled corporation. The Conference Committee clarified the reorganization material by adding a boot rule, and did not offer an explanation for deleting the control corporation provision.\textsuperscript{30}

The Treasury felt there was an urgent need for a control corporation rule. Shortly after the conference decision, the Treasury created an exemption by regulation. A few months later, the exemption was withdrawn because the Treasury decided it was not authorized by law.\textsuperscript{31}

The Treasury had a more ambitious legislative program in 1919. The proposal was based on several types of experience, including problems which came to light when the regulations were being drafted. In addition to variations on the control corporation and reorganization themes, the Treasury asked for involuntary conversion legislation. The Secretary of the Treasury did not approve the 1919 program, and no tax legislation was enacted until 1921.\textsuperscript{32}

\textit{Use Test}

The origin of the use test is not clear. The 1918 involuntary conversion regulation was eight times longer than the 1917 version. One new requirement was that the properties serve the same purpose.\textsuperscript{33} In


\textsuperscript{31} Treas. Reg. 45, art. 1566 (1919), \textit{modified}, T.D. 2924 (1919), \textit{both reprinted in} 134 \textsc{Internal Revenue Acts of 1909-1950}.

\textsuperscript{32} Letter from Carter Glass, Secretary of Treasury, to Joseph W. Fordney, Chairman, Ways and Means Committee (Nov. 3, 1919) (letter transmitting report in the form of notes); \textit{Notes on the Revenue Act of 1918, both reprinted in} 94 \textsc{Internal Revenue Acts of 1909-1950}.

\textsuperscript{33} Reg. 45, art. 47, \textit{reprinted in} 134 \textsc{Internal Revenue Acts of 1909-1950}. 

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1919 and 1921 the Treasury asked for involuntary conversion legislation which included a use test.\textsuperscript{34} In 1921 the Treasury made a like kind proposal which included a use test.

Under the 1921 Act, the properties must be of “like kind or use.”\textsuperscript{35} Since the requirements were expressed in disjunctive language, an exchange appeared to qualify if it satisfied either criteria. Hence a business could have avoided recognition on an exchange of land for movables. The Treasury may have had a different opinion. The first sentence of the regulations suggested the like kind test applied to investment properties only, while the use test was reserved for business properties. Subsequent comments made it clear that the Treasury also applied the like kind criterion to business properties. Thus like kind or use would become like kind and use and a business could not have avoided recognition from exchanging land for movables.\textsuperscript{36}

Inconsistency bred controversy which led to repeal of the use test. A 1924 Treasury report identified some of the classification problems and concluded that use was not a fair basis for determining tax liability. The Treasury suggested that like kind was an acceptable criterion. Congress agreed that use was not a fair test and enacted the Treasury proposal.\textsuperscript{37}

\textit{Origin of Like Kind Language}

Like kind is a term of uncertain ancestry. The phrase in kind refers to property other than cash. For example, an employee who makes free personal use of a company car has received a salary payment in kind.\textsuperscript{38} The 1918 involuntary conversion regulation was the first nonrecognition authority to employ the term in kind. Involuntary conversion treatment was available if the owner proceeded

immediately in good faith to replace the property . . . . [T]he gain . . . . is measured by the excess of the amount received over the amount . . . . expended to replace or restore the property substantially in kind, exclusive of any expenditures for additions or betterments. The new or restored property effects a replacement in kind only to the extent that it serves the same purpose as the property which it replaces without added capacity or element of additional value.\textsuperscript{39}

\begin{flushright}
\textsuperscript{34} Notes on the Revenue Act of 1918, at 15, \textit{reprinted in} 94 Internal Revenue Acts of 1909-1950.\\
\textsuperscript{35} Revenue Act of 1921, § 202(d)(1).\\
\textsuperscript{36} Treas. Reg. 62, art. 1566(a) (1921), \textit{reprinted in} 136 Internal Revenue Acts of 1909-1950.\\
\textsuperscript{37} Statement of the Changes Made in the Revenue Act of 1921 by the Treasury Draft and the Reasons Therefore 11-12 (1924), \textit{reprinted in} 66 Internal Revenue Acts of 1909-1950.\\
\textsuperscript{39} Treas. Reg. 45 (preliminary), art. 47 (1918), \textit{reprinted in} Internal Revenue
In 1919 the Treasury asked for involuntary conversion legislation. Nonrecognition would have been available for a "replacement in kind." In 1921 Congress adopted the Treasury proposal which required "acquisition of other property of a character similar or related in service or use to the [converted] property." The floor manager of the 1921 house bill used two phrases to describe a qualified replacement. One was "other similar property—that is, replaces the property destroyed or taken . . . ." The other phrase was "property of that same kind—for instance, a vessel [or] a house . . . ." He also suggested that the statute would merely continue existing Treasury practice. Even after sixty-five years, the criterion identified by the statute is not clear.

When the Treasury recommended making like kind the sole criterion in 1924, it did not suggest a meaning for the phrase. There was no mention of the definitional problem during hearings on the bill or in the legislative histories. The 1924 Act made like kind the sole criterion. Modifications were considered in 1934, 1969 and 1984. The statute was not amended in 1934, and the 1969 and 1984 changes were addressed to limited circumstances. There is no record of congressional consideration of the general like kind criterion after 1921.

**Congressional Intent**

The Treasury did not offer an explanation for the term like kind. During Finance Committee hearings, Adams was asked for an illustration. His response was an exchange of "stocks for stocks, or bonds for bonds—or where a factory was exchanged for another factory."
There are no other direct statements in any legislative report.

Various circumstances suggest a construction. One indication flows from comparing recognition and nonrecognition provisions. Property received in an exchange was deemed the equivalent of cash unless the transaction satisfied the conditions for nonrecognition.50 The 1918 exchange regulation was the first general modification of the system, and applied when there was no essential difference in the properties.51

The first group of nonrecognition statutes was enacted in 1921. The general goals for the system were to increase revenue by denying deductions based on wash sales and other fictitious exchanges and to stimulate the economy. The economy would be stimulated by modifying a presumption in favor of taxation, disapproving technical constructions which were economically unsound, encouraging business adjustments, and reducing litigation and uncertainty.52

Congress has offered what seem to be several different explanations of the purpose of the like kind provision.53 There are two approaches to the explanations. One is to assume they reflect a variety of ways to express the general goal of the statute. A more critical eye might reach the contrary conclusion because the explanations are not completely consistent. A 1981 article analyzed legislative documents from 1918 to 1934, and suggested the explanations should be categorized as expressing cashing-in, liquidity, and valuation purposes.54 The author observed that these purposes have never been carefully distinguished, and that

liquidity emerges as perhaps the purpose most consistent with section 1031, although that purpose is too vague to assist in interpretation. Cashing-in also survives as a purpose, although the taxable boot rule and the lack of a rule covering reinvestments show cashing-in not to have been a primary purpose. Valuation remains a purpose only in the pure exchange not involving boot.55

Congress does not seem interested in providing careful distinctions. The legislative history of the 1984 Act advances cashing-in and valuation as reasons for imposing time limits on deferred ex-

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50. Revenue Act of 1918, § 202(a).
52. See supra text accompanying note 8.
55. Bryce, supra note 54, at 58.
The discussion may also reflect the liquidity approach. Failure to state a clear purpose seems to support the idea that the various statements are merely different ways of expressing the general goal of the statute. The best legislative formulation of the general goal was offered in support of the substitute basis rule. The 1924 Senate report observed that the nonrecognition provisions are based on the theory that the exchanges are merely changes in form and not in substance. These provisions result not in an exemption but in a postponement of tax until the gain is realized by a pure sale or by such an exchange as amounts to a pure sale.

Exemptions usually are governed by conditions which are more strict than the requirements of a postponement. One case involved a contract which had been given a value for estate tax purposes. The owner argued that the contract could not have been given a value for income tax purposes because the amount which he might have received was very speculative. As contrasted to the estate tax, the income tax is a continuing affair. The Supreme Court observed that gain which was not taxed in a given year in effect could be taxed in a subsequent year and concluded that the contract would not be given a value for income tax purposes. Under the installment method of reporting, gain usually is not recognized when property is sold for buyer's promise to pay money in future years. The fact that the promise is negotiable or readily marketable, and could easily be converted to cash, ordinarily is not material. Hence transferring property for a promise which could easily be converted to cash is not a transaction which amounts to a pure sale.

Other statutes make nonrecognition available under similar circumstances. Under each statute the question is whether the replacement property is the deemed equivalent of the property given up. Suppose a person gives up all the stock and bonds in a mom-and-pop grocery store for a small percentage of the listed and readily marketable stock of a large conglomerate. If the exchange is a qualified reorganization, realized gain is not recognized. Differences in invest-

ment or economic position are not relevant because the stocks received are deemed the equivalent of the stocks and bonds given up.\textsuperscript{61}

Like kind postponement is available under comparable conditions. If the properties are like kind, apparent dissimilarities are not pertinent. In one case, a person gave up oil, gas, and other minerals for a hotel.\textsuperscript{62} The only apparent similarity between the properties was that each was an interest in land. The court observed that the statute "was not intended to draw any distinction between parcels of real property however dissimilar they may be in location, in attributes and in capacities for profitable use."\textsuperscript{63} The IRS promptly announced disagreement with the decision.\textsuperscript{64} Eleven years after it was affirmed on appeal, the IRS withdrew the disagreement and published agreement.\textsuperscript{65}

It has been suggested that Congress intended one standard for land and a different standard for movables.\textsuperscript{66} There is no evidence to support that observation. The legislative reports contain little or no information about what Congress had in mind. Many of the statements are contradicted by other statements. Contemporaneous regulations reflect more confusion than the legislative histories.\textsuperscript{67}

The 1921 regulation concluded that stock and evidence of indebtedness were not the same kind or class of property.\textsuperscript{68} In a 1928 opinion which was officially reported, the Board of Tax Appeals (Board) upheld the distinction.\textsuperscript{69} The Board found it was not necessary to point out the numerous differences in the character and uses of these two forms of property. Generally a share of stock evidences an interest in the ownership of a corporation, while a bond evidences simply an obligation of the corporation. The bondholder stands somewhat in the position of a mortgagee.\textsuperscript{70}

The Board concluded that the regulation properly construed the statute. That was the only judicial success for the distinction between stock and evidence of indebtedness. In a 1929 opinion which was

\begin{itemize}
\item 63. Id.
\item 64. Id.
\item 65. Id.
\item 66. E.g., California Fed. Life Ins. Co. v. Commissioner, 680 F.2d 85, 87 (9th Cir. 1982).
\item 67. See infra text accompanying note 77.
\item 68. Treas. Reg. 62, art. 1566(a) (1921), reprinted in 136 INTERNAL REVENUE ACTS OF 1909-1950.
\item 69. Edson v. Commissioner, 11 B.T.A. 621 (1928), rev'd sub nom. Edson v. Lucas, 40 F.2d 399 (8th Cir. 1930).
\item 70. Id. at 634-35.
\end{itemize}
reviewed, the Board overruled the 1928 opinion. After considering the legislative histories, the opinion observed that:

If the test lies in an identity of legal rights inherent in the property, the provision could be practically nullified. Is preferred stock only to be exchanged for preferred stock, and if so, is all preferred stock to be treated as of like kind? By virtue of what test is investment property to be classified if all real estate is treated as of a kind, such as city lots for a ranch, while securities are to be classified according to their “nature,” so that stocks of all classes are of like kind, such as common and preferred, but are not of like kind with debenture bonds? To say that industrial bonds on the one hand, and municipal, State and Federal bonds on the other, differ only in “grade or quality” and not in “kind or class” creates a strained distinction. Congress has laid down no such test in the Act and nothing in its legislative reports indicates such a restriction on the ordinary meaning of the language used. The regulation goes further than the statute and is unauthorized.

Although the IRS promptly announced disagreement, people prevailed in both cases. On appeal of the 1928 decision, the Eighth Circuit indicated that stocks and bonds were part of a class of property described as investment securities. On appeal of the 1929 decision, the Second Circuit held that stocks and bonds were part of the class of personal property.

Regulations

Standing by itself, the term like kind has little or no meaning. The task of publishing rules or standards was delegated to the Treasury. The 1921 regulation attacked the problem with lots of words and inconsistent propositions. Hence the Treasury seems to have been unable to formulate a satisfactory approach.

Under the 1921 regulation, properties were like kind if they had the same nature or character. Grade or quality was not to have been considered in ascertaining whether properties were like kind. Cursory examination of a dictionary or thesaurus reveals that the words standing by themselves have little or no utility for dealing with specific transactions. Several observations provided a degree of meaning. Land was land regardless of arguable differences. Hence the presence or absence of improvements went to grade or quality, and did

71. Greene v. Commissioner, 15 B.T.A. 401 nonacq., VIII-1 C.B. 54 (1929), aff’d, 42 F.2d 852 (2d Cir. 1930).
72. Id. at 407.
73. Edson, 40 F.2d at 400.
74. Greene, 42 F.2d at 854.
not affect nature or character. On the other hand, land and movables did not have the same nature or character since they differed in kind or class. Thus the Treasury seemed to have adopted the common-law distinction between land and movables. Evidence of indebtedness was a kind or class of property and corporate stock was another.

The regulations were not changed between 1921 and 1923. In 1923 the stock and evidence of indebtedness examples were deleted for transactions after 1922. Several changes were made by the 1924 regulations. Material relating to the use test was deleted for exchanges after 1924. The other modifications were addition of a rule for long-term leases and a boot example where a person gave up real estate for cash and real estate.

The regulations were not changed between 1924 and 1934. The 1934 regulation looks like a throw back to 1921 because it contains inconsistent statements and a use test. Most of the land examples are the same as those in the 1924 regulation. One modification was the deletion of a provision which approved exchanges of real estate for real estate. Since other clauses made it clear that land was a single class of property, the deleted material presumably was considered surplusage. The other change was the addition of an example permitting an exchange of urban land for a ranch or farm. The new example was added to publicize approval of a series of decisions rendered in the late twenties.

Other examples do not seem to have been carefully considered. The regulation observed that gain or loss is not recognized by a person who exchanges property held for productive use in his trade or business, together with cash, for other property of like kind for the same use, such as a truck for a new truck or a passenger automobile for a new passenger automobile to be used for a like purpose, or . . . exchanges investment property and cash for investment property.

There are several ways to look at those examples. They might have been a mere expression of results where a transaction was in part a like kind exchange and the balance was a cash purchase. It

76. Id.
77. Id.
82. See infra text accompanying notes 114-30.
does not require much imagination to put the examples to other uses. The investment clause appears to have covered any exchange, if both items were held for investment and the person had given up cash. Hence rare books would have been like kind to land. The business example also may have imposed a use test. Some IRS rulings seem to have extended the use clause into the sole criteria for certain business movables. Examples which lack conspicuous consistency fail to satisfy the congressional goal of reducing uncertainty.

The regulations were not changed from 1934 to 1939. The 1939 regulations added a boot example where an apartment house subject to a mortgage was exchanged for another apartment house plus cash. The regulations were not changed from 1939 to 1954. The 1954 regulations introduced several modifications. The primary goal of most of the changes was further illustration of the treatment of liabilities and other aspects of boot. An exchange of properties which are identified only as apartment houses, or as real estate, does not suggest modification of the general like kind criterion for land. The declaration that land and movables were not the same kind or class of property was included in every edition of the regulations from 1921 through 1953. Perhaps the Treasury felt the distinction was continued by examples where stock and an automobile were boot to exchanges of land. Several land exchanges include boot in the form of cash and mortgages.

It is not clear why the Treasury made land a class or kind of property. Adams was an economist who was intimately involved with the like kind situation. He may have concluded that so long as an investment was continued in the same general sort of illiquid asset, the Treasury was willing to live with differences which were bound to arise. The first exception was created in 1924, when a fee interest was equated to a leasehold of a fee with at least thirty years to run. A long-term leasehold created a substantial relationship between the property interest of the tenant and the leased land. There is common-law precedent for modifying the classification of property. The typical dispute over the title to farm land also involved equipment.

83. See infra text accompanying notes 341-64.
84. Treas. Reg. 103, §§ 19.112(b)(1)-1, 19.113(a)(6)-2 e.g. (2) (1939), reprinted in 143 INTERNAL REVENUE ACTS OF 1909-1950.
85. Treas. Reg. § 1.1031(d)-1(c) e.g. (1967); id.-1(e).
The same rules were applied to both types of property. Hence the distinction between land and movables was disregarded where there was a sufficient relationship between the properties.\textsuperscript{88}

In contrast to the treatment of land, the Treasury has not published a general criterion for classifying movables. Perhaps the Treasury was unable to formulate a satisfactory general standard.\textsuperscript{89} The 1921 regulation dealt with the subject in a tangential manner by concluding that land and movables were not the same kind or class of property. The regulation did contain material on stocks and evidences of indebtedness. Stocks were one kind or class of property, and evidences of indebtedness were another. The phrase "evidence of indebtedness" included notes and bonds, and classification was not affected by security. Hence the unsecured note of an insolvent individual was like kind to a secured bond issued by Standard Oil of New Jersey and listed on the New York Stock Exchange.\textsuperscript{90} Nevertheless, the Treasury concluded that evidence of indebtedness and stock were not of the same kind or class of property. The stock and evidence of indebtedness material was deleted in 1923.\textsuperscript{91}

The treatment of movables was not changed from 1923 to 1934. A motor vehicle clause was added in 1934.\textsuperscript{92} This clause equated a used truck to a new truck, and a used passenger automobile to a new passenger automobile.\textsuperscript{93} An automobile is designed primarily for transportation of people, while the principal purpose of a truck is moving inanimate objects. Since the vehicle clause does not differentiate between types of trucks, all trucks presumably are like kind.\textsuperscript{94} Hence a pickup is like kind to a weapons carrier or a semi-trailer. Since the vehicle clause does not distinguish between types of automobiles, all automobiles presumably are like kind.\textsuperscript{95} Thus a Chevette is a like kind to a Corvette or a Cobra. Some vehicles do not clearly fall into either category. A Volkswagen bus has seating for nine passengers. Deletion of most of the seats and a few other minor changes converts a bus into a transporter. Station wagons and vans are similar all-purpose vehicles. There is no apparent reason for

\textsuperscript{88} Id.
\textsuperscript{89} See infra text accompanying notes 144-46.
\textsuperscript{90} Treas. Reg. 62, art. 1566(a) (1921), reprinted in 136 INTERNAL REVENUE ACTS OF 1909-1950.
\textsuperscript{91} T.D. 2468, reprinted in II-1 C.B. 27 (1923).
\textsuperscript{92} Treas. Reg. 86, art. 112(b)(1)-1 (1934), reprinted in 140 INTERNAL REVENUE ACTS OF 1909-1950.
\textsuperscript{93} Id. See also infra text accompanying 114-30.
\textsuperscript{94} E.g., Treas. Reg. § 1.1031(d)-1(b) e.g. (1967) (a moving truck for a truck); North Shore Bus Co. v. Commissioner, 12 T.C.M. (P-H) 127 (1943), aff'd, 143 F.2d 114 (2d Cir. 1944) (an Old Yellow parlor car (bus) for a Model 40-R Twin Motor Coach (bus)).
\textsuperscript{95} E.g., Thomas Goggan & Bros. v. Commissioner, 45 B.T.A. 218, 224-25 (1941) (a Chrysler for a Buick).
differentiating between types of motor vehicles. Regardless of whether the vehicle is an automobile, a truck, or a hybrid, the owner has an investment in an asset designed to provide transportation.

The treatment of movables was not changed from 1939 to 1954. The 1954 regulation added a boot example which concludes that a moving truck and a truck are like kind.\(^8\) Hence the motor vehicle examples are the only coverage of exchanges of movables in the current regulations. The 1934 example is so bland that it has not been seriously challenged in fifty-two years.

**Boot**

The treatment of cash and other unqualified property has gone through several stages. The first boot statute was part of the reorganization material enacted in 1918. The statute provided for non-recognition of gain or loss if the value of the stock or securities received by a shareholder did not exceed the value of the stock or securities he gave up.\(^9\) Gain was recognized to the extent the value of the stock or securities a person received exceeded the value of the stock or securities he gave up.\(^8\) A shareholder who received cash or property other than stock or securities recognized all of his gain.\(^9\)

Like kind exchanges were added to the list of nonrecognition transactions in 1921. In response to a question during Finance Committee hearings, Adams indicated the need for a boot rule for like kind exchanges. Several days later, he suggested that gain should be recognized to the extent that boot exceeded basis.\(^10\) Congress accepted the Adams suggestion.\(^11\) People took advantage of the opportunity to obtain tax-free cash at the cost of a basis reduction, and early in 1923 emergency legislation was hastily enacted to end the practice.\(^12\) A person who received boot was treated as if he had sold property, and gain was recognized to the extent it was matched by boot. The new rule was retroactive to January 1, 1923, and is still in

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96. *E.g.*, Treas. Reg. § 1.1031(d)-1(e) (1967).
97. Revenue Act of 1918, § 202(b).
98. *Id*.
101. Revenue Act of 1921, § 202(b).
102. *See infra* text accompanying notes 467-68.
force. Application of the boot rule is not consistent. Sometimes an actual receipt of boot is ignored. One type of case involves people who are obligated to use cash in a specified manner, or who are being reimbursed for an expenditure. No boot is deemed received in those cases. Boot is received, however, in cases in which people receive property subject to indebtedness and cash, if they may use the cash in any manner they choose. In a 1980 opinion which was officially reported, the Tax Court concluded that the results were proper because in the latter case there was no restriction on the way the person used the cash. That line of reasoning is not supported by general tax principles. A person who receives cash and agrees to pay an obligation has borrowed money regardless of whether the obligation is recourse or nonrecourse. A borrower is not ordinarily taxed on receiving the proceeds of a loan. There is no apparent reason for a different treatment of the loan portion of a like kind exchange. Investigation has not identified any other context where a borrower is taxed when a loan is created.

In other cases, boot is present even though a person does not seem to receive anything. A person who is relieved from a personal liability receives the transferee’s promise to pay. Nonrecourse indebtedness is a different situation. Since no personal liability existed, the person does not receive anything which satisfies an accepted definition of money or property. The Supreme Court, however, has concluded that relief from nonrecourse indebtedness does result in receipt of money or property. The amount realized is the face value of the debt.

The 1954 regulation added several boot examples. A typical factual pattern involves giving up real estate for other real estate, cash,

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110. Id. See I.R.C. § 1031(d) (1986); Bittker, Tax Shelters, Nonrecourse Debt and the Crane Case, 33 Tax L. Rev. 277, 278 (1978).
and an automobile. The example illustrates operation of the rule for apportioning basis between properties received. A second factual pattern involves giving up an apartment building subject to a mortgage for another apartment building subject to a mortgage and cash. The example deals with assumption of liabilities and other computational details. The position of a person who both gives up and receives unqualified property is considered in the discussion of netting.

Reverse Boot

The boot rules apply to a person who receives unqualified property. A person who gives up unqualified property has paid reverse boot. Reverse boot is a common feature of trade-in transactions.

From 1909 to 1927 the IRS felt that a trade-in was not a closed transaction. Hence the result was the same regardless of whether the transaction was covered by the like kind statute, the exchange regulation, or occurred under an earlier revenue act. The administrative position and the like kind statute were not consistently asserted by the government. In a 1927 opinion which was officially reported, the Board allowed a deduction for a loss on a 1920 trade-in of vehicles. Although the decision failed to mention the exchange regulation, the IRS announced agreement in 1931. A pair of 1927 rulings applied the reverse boot rule under the like kind statute to an exchange of oil leases, and a trade-in of motor vehicles. In a 1928 decision which was officially reported, the Board allowed a deduction for a loss on a 1921 vehicle trade-in. Although the opinion did not

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111. Treas. Reg. § 1.1031(d)-1(c) (1967). Other examples of the same type involve: (1) real estate for other real estate and cash, and (2) a moving truck for a truck and cash. Treas. Reg. §§ 1.1031(b)-1(b), 1.1031(d)-1(b) (1967).
112. Treas. Reg. § 1.1031(d)-2 e.g. (2) (1956). The other example of this type involves an apartment building subject to mortgage for another apartment building and cash. Id. (1).
113. See Treas. Reg. § 1.1031-1(c) (1967).
114. See Announcement, fourth item on page under art. 141, VII-1 C.B. 231 (1928).
cite the like kind statute, the IRS promptly announced agreement. In addition, the IRS revoked the 1927 vehicle ruling, and issued another ruling which concluded that a trade-in plus cash was a sale. Hence the transaction was closed and realized gain or loss was recognized. Because the oil lease ruling was not disturbed, the IRS apparently felt a distinction was justified. Hindsight does not suggest a viable distinction, and there is no record indicating what the IRS had in mind. People were not always vigilant in their dealings with the government. In a 1929 opinion which was officially reported, the Board concluded that gain was recognized on a 1920 trade-in of vehicles. The opinion did not mention the exchange regulation.

The turning point was a 1930 decision which involved a person who traded in a printing press and related items. In an opinion which was officially reported, the Board applied the like kind statute. Although the person gave up cash, the court concluded that no gain was recognized because the property received was solely in kind to the property traded in. The IRS promptly announced agreement with the decision and reinstated the 1927 vehicle ruling. Thereafter, the statute was regularly asserted and consistently applied. In 1934 there was another judicial explanation for the reverse boot digression from the solely requirement. A person who paid cash was purchasing an additional investment in the like kind property.

The confusion prompted the Treasury to include trade-in examples in the 1934 regulation. An analysis based on the purpose for the boot rule leads to the conclusion that the example is justified. A person who receives boot is treated as if he had sold property, and gain is recognized to the extent it is matched by the boot. The example establishes a reverse boot rule. If as a part of an otherwise like kind exchange a person gives up cash, he has increased his investment in like kind property. Because a person who uses cash to purchase property does not realize gain or loss, there is no logical reason why the

119. Id.
121. Ives Ice Cream Co. v. Commissioner, 15 B.T.A. 376 (1929).
124. Hamilton v. Commissioner, 30 B.T.A. 160 (1934). Hamilton applied the reasoning on appeal of a reorganization case which was governed by a statute with an identical "solely" requirement. Securities Co. v. Commissioner, 25 B.T.A. 446 (1932), acq., X-1 C.B. 6 (1932), rev'd, 64 F.2d 330 (2d Cir. 1933).
126. See supra text accompanying notes 80-83.
purchase feature of an otherwise like kind exchange should cause a different result. Attractive as that reasoning may be it will not stand analysis. An exchange does not qualify under the general rule unless the transaction consists solely of like kind properties. There are two exceptions to the solely requirement. The boot rule provides for limited recognition of gain, and no recognition of loss.127 When a statute establishes a general rule and at least one exception, Congress is presumed to have considered and rejected other possible exceptions. Hence the general rule is not to be interpreted to create any other exception.128 The reverse boot rule may have obtained the force of law by tacit congressional approval through reenactment of the statute.129

The 1954 regulation added a reverse boot example which involves giving up real estate and stock for real estate. The example illustrates recognition of losses and other aspects of reverse boot.130

Netting

The consequences of receiving boot sometimes are modified by netting. Netting may be justified by several explanations. A person receives boot only to the extent he receives more unqualified property than he gave up. That explanation was offered in a 1927 ruling on an exchange of properties subject to mortgage debts, and followed in a similar 1959 ruling.131 A person who receives property for a payment of cash132 or an agreement to pay money in the future133 has purchased property. A purchaser who agrees to pay in the future is also a borrower.134 If a purchase, or purchase and loan, by itself would be tax-free the same event as part of an exchange transaction should produce the same result.135

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127. E.g., Revenue Act of 1924, §§ 203(d)(1) (boot gain), 203(f) (boot loss); I.R.C. §§ 1031(b) (boot gain), 1031(c), (boot loss) (1986).  
130. Treas. Reg. § 1.1031(d)-1(e) (1967).  
132. Carroll Furniture Co. v. Commissioner, 197 F.2d 718 (5th Cir. 1952).  
134. 1 B. BITTKER, supra note 38, at 6.2.  
135. See Hamilton v. Commissioner, 30 B.T.A. 160 (1934); Winter Holding Corp.
Desirable as the net approach may be, it will not stand analysis because it permits treating unqualified properties as if they were like kind properties. Indebtedness cannot be like kind property, and the amount realized from debt relief is the face amount of the obligation. Because the fact that the obligation is worth less than face amount is disregarded, undertaking another obligation does not look like an acceptable excuse for reducing the amount realized.

The net approach is not applied in a consistent manner. The regulation covers five of nine possible combinations, and rulings address two others. Perhaps the government feels the answers are self-evident in the remaining situations. Debt relief is offset by payment of cash, assumption of debt, or disposition of other property. Receipt of cash is offset by payment in cash. Receipt of cash is not offset by a payment of other property or assumption of indebtedness. Receipt of other property is offset by a payment of cash. Receipt of other property is not offset by assumption of debt or disposition of other property.136 There is no apparent justification for the inconsistent results.137


136. In tabular form, the combinations, results and authorities are:

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<tr>
<th>OFFSET</th>
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<tbody>
<tr>
<td>Debt Assumed</td>
<td>Debt Relief</td>
<td>1.1031(d)-2 e.g. (2)(b)</td>
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<tr>
<td>Cash</td>
<td>Debt Relief</td>
<td>1.1031(d)-2 e.g. (2)(c)</td>
</tr>
<tr>
<td>Other Property</td>
<td>Debt Relief</td>
<td>1.1031(d)-2 e.g. (2)(c)</td>
</tr>
<tr>
<td>Cash</td>
<td>Cash</td>
<td>Rev. Rul. 72-456, 1972-2 C.B. 468</td>
</tr>
<tr>
<td>Cash</td>
<td>Other Property</td>
<td>None. See explanatory note.</td>
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<th>NO OFFSET</th>
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<tr>
<td>Debt Assumed</td>
<td>Cash</td>
<td>1.1031(d)-2 e.g. (2)(b, c)</td>
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<tr>
<td>Other Property</td>
<td>Cash</td>
<td>None. See explanatory note.</td>
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<td>Debt Assumed</td>
<td>Other Property</td>
<td>1.1031(d)-2 e.g. (2)(c)</td>
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<td>Other Property</td>
<td>Other Property</td>
<td>Rev. Rul. 59-229, 1959-2 C.B. 180</td>
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Explanatory note: Presumably, general tax principles apply in situations not covered by a published authority. Receipt of other property is offset by cash paid because purchasing property ordinarily is tax-free. Receipt of cash is not offset by a disposition of property because selling property is taxable.

Construction of the Regulations

The term like kind was created by the Treasury. The first use of the term was in 1921 when the Treasury proposed a like kind statute. The proposal was enacted after extremely limited consideration. The task of publishing rules or standards was delegated to the Treasury.

The 1921 regulation was suspect because it contained inconsistent statements. Perhaps the Treasury was in a hurry and did not carefully consider the material. Another possibility is that those in charge of drafting the like kind provision did not receive adequate guidance. Adams generally is accepted as the father of the 1921 Act, and he presumably influenced the 1921 like kind regulation. He was an economist who appears long on ideas and short on implementation. Property other than land, stocks, and evidence of indebtedness do not seem to have been sufficiently important to demand attention by Adams or the Treasury. Post-1921 changes in the regulations are of little or no consequence to a search for a general understanding of the term like kind.

The Treasury was unable or unwilling to provide a definition for the term like kind. In addition to employing words which were not helpful, the Treasury appears to have adopted the common-law distinction between land and movables. There never has been a serious effort to systematically compare and classify properties. The common law was typically concerned with ownership of interests in property or injury to property. The usual remedies were money damages, or specific performance of an agreement. Because the general law is not likely to undertake comparisons of properties, determining characters appears more like a matter of philosophy.

Adams was the person who supplied most of the Treasury philosophy in 1921. The evidence suggests that if an investment continued in an illiquid asset such as land, the Treasury was willing to live with differences which were bound to arise. Movables, however, were another matter. They were mentioned for the sole purpose of distin-

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138. See supra text accompanying note 39.
139. See supra text accompanying notes 35-37.
140. See supra text accompanying notes 88-91; Treas. Reg. 62, art. 1566(a) (1921), reprinted in 136 INTERNAL REVENUE ACTS OF 1909-1950.
141. See supra text accompanying notes 77-85, 93-96.
142. See 5A CORBIN ON CONTRACTS §§ 1143, 1145 (1964); 2 AMERICAN LAW OF PROPERTY §§ 8.105, 10.9 (A. Casner ed. 1952); 6A id. § 28.12 (A. Casner ed. 1954).
143. See 5A CORBIN ON CONTRACTS §§ 1143, 1145.
144. See supra text accompanying note 12.
guising them from land. Hence the Treasury did not offer a positive approach to movables generally. It is easy to conclude that the Treasury was unable to formulate a satisfactory general classification for movables. Supposing that Congress intended a broad standard for land and no standard for movables seems absurd. The Treasury did offer a distinction between stock and evidence of indebtedness. That distinction was rejected because the classification was inappropriately narrow.

The Treasury and the IRS experienced difficulty with creative reorganizations. The initial approaches were to withhold advance approval of proposed deals and to reject claims for favorable treatment of completed transactions. In 1934 Congress was concerned with reducing tax avoidance. The House report gave enthusiastic approval to court decisions requiring compliance with the terms and underlying purpose of the reorganization statutes. The approval encouraged the Treasury to impose a purpose limit on most nonrecognition exchanges. The substance of the 1934 strict construction rule appears in the current regulations.

Treasury regulations are to "be sustained unless unreasonable or inconsistent with the statute." Under the strict construction regulation, the replacement property must substantially continue an investment. Hence differences between the properties must be more formal than substantial. The facts and circumstances surrounding a transaction must be examined to determine whether the exchange satisfies the express terms and underlying assumptions of a nonrecognition statute. The IRS does not have a good batting average in like kind cases where the strict construction regulation is cited in the opinion. The government won seven, and people prevailed in six, and one was a split decision. In a 1979 opinion, the Ninth Circuit observed that "[i]f the regulation purports to read into section 1031 a complex web of formal and substantive requirements, precedent indicates decisively that the regulation has been rejected . . . . We therefore analyze the . . . transaction with the courts' permissive attitude towards section 1031 in mind.

146. See supra text accompanying note 69.
150. Treas. Reg. § 1.1002-1(b), (c) (1960).
151. Starker v. United States, 602 F.2d 1341, 1352-53 (9th Cir. 1979) (land for an agreement to either convey land or cash within five years). In addition to Starker, people prevailed in Sayre v. United States, 163 F. Supp. 495 (S.D. W. Va. 1958) (farms were exchanged); City Inv. Co. & Subsidiaries v. Commissioner, 38 T.C. 1 (1962),
Like Kind Replacement
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The presumption of correctness has added force where the statute was drafted by members of the administration charged with enforcing it because Congress is presumed to have accepted their interpretation in passing the statute. The additional weight has not been enough in several cases involving rules announced by the 1921 regulation. A series of decisions reject the distinction between stocks and evidence of indebtedness. In a 1983 opinion which was reviewed, the Tax Court rejected the distinction between land and movables. The decision was affirmed by the Ninth Circuit.

Continuity of Investment

The term investment has two meanings for like kind purposes. One is the requirement that a person hold property given up and property received for productive use in trade or business, or for investment. The other is the suggestion that an exchange must result in continuation of an investment.

The continuity approach arose in the Civil War and survived to

nonacq., 1963-1 C.B. 5 (land for leaseback); Leslie Co. v. Commissioner, 64 T.C. 247, 252 (1975), nonacq., 1978-2 C.B. 3, aff'd, 539 F.2d 943, 947-49 (3d Cir. 1976) (land for leaseback); Crowley, Milner & Co. v. Commissioner, 76 T.C. 1031, 1035-38 (1981), aff'd, 689 F.2d 635 (6th Cir. 1982) (land for leaseback); Magnesin v. Commissioner, 81 T.C. 767, 769-73 (1983), aff'd, 753 F.2d 1490 (9th Cir. 1985) (land immediately reconveyed for interest in partnership). The government prevailed in Bloomington Coco-Cola Bottling Co. v. Commissioner, 189 F.2d 14 (7th Cir. 1951) (old building and cash for new building to be constructed was a sale); Commissioner v. P.G. Lake, Inc., 356 U.S. 260 (1958) (temporary transfer of an interest in an oil lease was an assignment of income); Bajette v. United States, 175 F. Supp. 120 (W.D. Ky. 1959) (modification of a coal mining lease arrangement was not an exchange of like kind properties); Black v. Commissioner, 35 T.C. 90, 94 (1960) (land held primarily for resale); Bernard v. Commissioner, 36 T.C.M. (P-H) 939, 942-43 (1967) (land held primarily for resale); Godine v. Commissioner, 46 T.C.M. (P-H) 1589, 1591 (1977) (motive for exchange not relevant); Behrens v. Commissioner, 54 T.C.M. (P-H) 829, 832 (1985), aff'd, 786 F.2d 1170 (8th Cir. 1986) (cash loan was boot). A split decision occurred in Meyer v. Commissioner, 58 T.C. 311 (7th Cir. 1972) (partnership interests), nonacq., 1975-1 C.B. 3, aff'd on one issue per curiam, 503 F.2d 556 (9th Cir. 1974).

the present day. The first Treasury application of the doctrine to a nonrecognition statute was by the 1924 reorganization regulation. Although the clause was continued in 1926, it did not appear in 1928 regulation. The Treasury revived the doctrine when it adopted the 1934 strict construction regulation, which was applicable to most nonrecognition statutes. The 1934 version was continued without substantial modification and is included in the current regulation.

Continuity of investment has little or no legislative support. The doctrine was not mentioned when the like kind provision was adopted in 1921, and there is no reference to the doctrine at any time when the statute was amended. The doctrine was mentioned as one of the reasons for not repealing the reorganization rules in 1934. While that might constitute legislative support for applying the doctrine in some reorganization situations, there is no evidence of a congressional desire to have the doctrine applied under the like kind statute. The only apparent justification for a rule of general application was a Treasury desire for another weapon to combat tax avoidance.

The IRS has searched for legislative support. Presumably because nothing better could be found, the IRS focused on the legislative history of the different sex statute. Although the context makes it clear that the remarks are addressed solely to livestock of different sexes, the IRS has applied investment difference language to a broad range of properties. In a 1978 opinion which was officially reported, the Tax Court seemed to reject the argument out of hand. While considering what to do about the decision, the IRS prepared a memo which concluded that land is land regardless of arguable differences and promptly announced agreement with the decision. Perhaps the IRS will not pursue the doctrine in situations which involve diverse interests in land. The IRS has been more successful in cases involving moveables. In a 1983 opinion, the Ninth Circuit accepted the livestock language as evidence of a strict construction approach for moveables generally, and concluded that the Swiss francs were not like kind to gold coins. Several rulings apply the livestock language to

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157. See supra text accompanying notes 5-8.
158. Treas. Reg. 65, art. 1574 (1924); Treas. Reg. 69, art. 1574 (1926), both reprinted in 137 INTERNAL REVENUE ACTS OF 1909-1950.
162. Id.
precious metals and coins. One author has observed that the rulings fail to state "which type is masculine and which feminine."163

Reducing uncertainty is one of the goals of the like kind statute. Comparing investment details increases uncertainty. Letters issued in 1980 and 1981 compared investments and concluded that gold bullion was like kind to silver bullion.164 After the difference in markets was pointed out, a 1982 ruling concluded the properties were not like kind.165 There is no apparent like kind difference between gold and silver, and attempting to create one introduces the sort of uncertainty Congress wanted to avoid.

The treatment of short-term leases is even more remarkable. The 1924 regulation announced that a lease of a fee with at least thirty years to run was like kind to land. Today that rule seems to have the force of law.166 The Treasury, however, has remained silent about short-term leases. A short-term lease may be an investment for like kind purposes.167 Several officially reported Tax Court opinions have concluded that short-term leases are not like kind to land.168 The test for ascertaining whether properties are like kind is strikingly similar to one of the conditions for a qualified replacement of involuntarily converted property. Under the involuntary conversion statute, the properties must have a similar nature.169 In 1951 Congress received proposals to broaden the involuntary conversion statute. The Chairman of the Ways and Means Committee observed that to permit a person "to defer gain while changing the nature of his investment would be a serious departure from the policy of existing law . . . ."170 In a 1937 opinion which was reviewed, the Board concluded that land was a qualified replacement for a ten year lease.171 The IRS promptly announced agreement with the decision. Rulings

163. 2 B. BITTKER, supra note 38, at 44-12 n.11.
164. LTR 8020107 (Feb. 25, 1980); LTR 8128102 (Apr. 20, 1981).
issued in 1946 and 1983 reach the same conclusion.\textsuperscript{172} Trying to as-
certain why short-term leases are not given the same treatment under the like kind statute is similar to playing a shell game. Deci-
sions which lack conspicuous consistency do not satisfy the congres-
sional goal of reducing uncertainty.

Congress rejected the continuity approach to the like kind statute. In 1924 the Treasury proposed making like kind the sole criterion for comparing properties and suggested there should be no distinc-
tion between productive use in a trade or business and investment. The changes were designed to deal with a controversy which arose from Treasury inconsistencies. The Treasury observed that the stat-
ute would not operate fairly if distinctions between productive use and investment were permitted. Congress accepted the fairness ob-
servation.\textsuperscript{173} It is implicit that business applications are not to be compared, and that investments are not to be compared. Hence the continuity approach is improper.

**LAND**

**Introduction**

The compatibility of land items depends on the purpose of an in-
quiry. In an action for breach of land contract, equity usually will con-
clude that the parcel is unique.\textsuperscript{174} Land items are sometimes
deemed comparable where value is the issue for purposes such as casual-
ity losses, eminent domain, and property taxation.\textsuperscript{175} Relevancy
is the criterion for determining the admissibility of evidence support-
ing an attempted comparison.\textsuperscript{176} Evidence has been rejected in cases in which the property was unique,\textsuperscript{177} and when there was no compa-
rable property in the jurisdiction.\textsuperscript{178} If evidence is admitted, the
question is the weight to be given to the evidence.\textsuperscript{179} The number of factors which have been considered may exceed the imagination of
mankind.\textsuperscript{180} Comparing items for like kind purposes is the opposite
extreme. Regardless of arguable differences, each tract is like kind to

\textsuperscript{172} Id.
\textsuperscript{173} Statement of the Changes Made in the Revenue Act of 1921 by the Treasury
Draft and the Reasons Therefore 11-12, \textit{reprinted in 66 Internal Revenue Acts of
C.B. 276.}
\textsuperscript{174} \textit{See supra} text accompanying note 11.
\textsuperscript{175} \textit{See generally} J. Bonbright, \textit{The Valuation of Property} (1937).
\textsuperscript{176} 2 J. Wigmore, \textit{Evidence in Trials at Common Law} § 462 (1979).
\textsuperscript{177} \textit{E.g.,} Joseph E. Seagram & Sons, Inc. v. Tax Comm., 14 N.Y.2d 314, 200
\textsuperscript{178} \textit{E.g.,} Deere Mfg. Co. v. Zeiner, 247 Iowa 1364, 1375-76, 78 N.W.2d 527,
534 (1956).
\textsuperscript{179} 2 J. Wigmore, \textit{supra} note 176 § 462.
\textsuperscript{180} Smith, \textit{Issues and Problems in the Valuation of Real Estate}, 30 N.Y.U. Tax
every other tract.181

Equating all items of land was the intent of Congress. The goals expressed by Congress and the Treasury included reducing uncertainty and encouraging business adjustments.182 During the 1921 Finance Committee hearings, Adams was asked for examples of qualified properties. He felt that a factory was like kind to another factory.183 Regulations from 1921 to the present clearly indicate that arguable differences in land items have no bearing on whether they are like kind.184 Hence it is clear that the Treasury and Congress did not want to leave room for debate about whether land items are sufficiently comparable.

State Law

The effect of state law is unclear. State law identifies property subject to ownership and the extent of ownership interests.185 There are several approaches to classifying property as land or a movable. Some authorities follow state law,186 others misconstrue it,187 still others offer excuses for not applying it,188 and another group ignores it.189 A series of approaches to state law does not satisfy the congressional goal of reducing uncertainty.

Physical Properties

An ambitious list would identify a large number of ways to compare items of land. Like kind approaches can be categorized as involving economic, location, or physical characteristics. The physical characteristics of land are not relevant. Unimproved land is like kind to improved land, and one case compares a hotel to oil, gas, and

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181. See infra text accompanying notes 190-98.
182. See supra text accompanying note 8.
183. See supra text accompanying note 49.
other minerals in the ground.\textsuperscript{190} In a 1941 opinion, the Fifth Circuit observed that a dissimilarity in attributes is not pertinent to classification and concluded the properties were like kind.\textsuperscript{191} The IRS has regularly applied the hotel case in situations where mineral interests are exchanged for items such as ranches.\textsuperscript{192}

The IRS has not come to grips with the attributes principle in situations which do not involve minerals. A 1979 memorandum concludes that land is land regardless of apparent dissimilarities.\textsuperscript{193} The memorandum did not signal a general change in IRS attitude. One ruling concluded that city railroad tracks and facilities were not like kind to replacement tracks and facilities located on a bypass around the city.\textsuperscript{194} The IRS may have based its findings on the fact that the new track caused elimination of numerous street crossings. One case involved facts which did not appear to be materially different from those facts set forth in the ruling. In a 1980 opinion which was reviewed, the Tax Court observed that the ruling did not elaborate a legal basis for the finding and held that the properties were like kind.\textsuperscript{195}

Likewise, the location of land is not relevant. Urban land is like kind to rural land, land items located in different states are like kind, and domestic land is like kind to foreign land.\textsuperscript{196} One case compared a city house and undeveloped land in a mangrove swamp.\textsuperscript{197} In a 1930 opinion which was officially reported, the Board observed that discussion was unnecessary and concluded that the properties were like kind.\textsuperscript{198} The IRS promptly announced agreement with the decision.\textsuperscript{199}

Economic considerations are also not relevant. The fact that a person made a good or bad bargain and changed from one approved use to another does not affect the classification of land. In one case, a person held undeveloped land for investment, and operated a golf course and clubhouse business at another location.\textsuperscript{200} Both parcels were exchanged for land subject to long-term condominium leases

\textsuperscript{190} Commissioner v. Crichton, 122 F.2d 181, 182 (5th Cir. 1941).
\textsuperscript{191} Id.
\textsuperscript{192} E.g., Rev. Rul. 68-331, 1968-1 C.B. 352; LTR 8135048 (June 3, 1981).
\textsuperscript{193} Action on Decision CC: 1979-86 (May 16, 1979).
\textsuperscript{194} Rev. Rul. 57-450, 1957-2 C.B. 137.
\textsuperscript{197} Biscayne Trust Co. v. Commissioner, 18 B.T.A. 1015, 1021 (1930), acq., IX-2 C.B. 6 (1930).
\textsuperscript{198} Id.
\textsuperscript{199} Id.
and the leases themselves. IRS argued the properties were unalike because the leases provided a stream of income. In a 1978 opinion which was officially reported, the Tax Court observed that dissimilarities in capacities for profitable use were not factors for discussion and concluded that the properties were like kind. While considering the decision, the IRS observed that land is land regardless of apparent differences, and promptly announced agreement with the decision.  

Ownership Interests

Property is a broad term which covers things capable of ownership and interests which the law will protect. A person who exchanges land is not entitled to like kind treatment unless he has an adequate relationship to each property. The existence and extent of an ownership interest are state law questions. Most decisions are preoccupied with the time during which an interest may continue. In one case, a person gave up an oil payment and received a ranch. After the transferee had received a fixed sum of money, his interest would expire and the right to receive payments would revert to the person. Like kind treatment was denied because one interest was permanent and the other was temporary.

Temporary and permanent interests are distinguished by their potential duration. For example, the life expectancy of an owner is not a factor to be considered unless it affects the continuation of an interest. In one ruling, a widow exchanged remainder interests with her children. The IRS indicated life expectancy was not relevant and concluded that the items of land were like kind. Under the regulations, a leasehold of a fee is equivalent to a fee interest if the leasehold has at least thirty years to run. The term of the lease includes all renewal periods. The thirty year rule has been extended to other interests. A life estate is a permanent interest if the actuarial expectancy of the measuring life is at least thirty years.

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202. 2 F. POLLOCK & F. MAITLAND, supra note 87, at 167-68.
203. E.g., Magneson v. Commissioner, 753 F.2d 1490, 1495-98 (9th Cir. 1985).
205. Id.
207. Treas. Reg. § 1.1031-1(c) (1967).
tax valuation ruling holds that an illness which is expected to be fatal in a few months is grounds for disregarding the life expectancy tables.\textsuperscript{209}

Results are not clear in cases in which potential duration is uncertain. If an interest will not end at a determinable time, actual duration does not seem relevant. A perpetual interest in a finite item appears to be a permanent interest if the interest might continue forever, or might continue for thirty years. In one ruling, a person gave up land and received a perpetual water right.\textsuperscript{210} In another, a person gave up land and received an oil lease which would continue until the oil deposit was exhausted.\textsuperscript{211} The IRS held the interests were like kind in both instances. Neither ruling suggested how long the interest might actually continue.\textsuperscript{212} Suppose, for example, that the most optimistic estimate indicated commercial oil production could not be feasible for more than twenty years. Estimates of recoverable minerals are not sufficiently reliable to be accepted as a reasonable measure of life expectancy.\textsuperscript{213} Because oil production might continue for thirty years, the leasehold presumably is a permanent interest.

Similar considerations apply to other forms of ownership. Fee interests such as tenancy in common or remainder are permanent because they may continue forever.\textsuperscript{214} The interest of a tenant by the entities or joint tenant may expire by its terms. The interest of a person ends at his death if he is survived by another tenant. On the other hand, the interest of a person who survives the other tenants becomes permanent. The third possibility is termination of a tenancy by destruction of one or more of the unities which converts the interest of each owner to a permanent interest. A destruction of unities may occur at any time while a tenancy is in existence.\textsuperscript{215}

A few cases suggest that factors other than time may be relevant. One case compared the rights of a tenant in common to those of a tenant in partnership. In a 1985 opinion, the Ninth Circuit observed that the question is whether a significant change in investment or control occurred, and concluded that the properties were like kind.\textsuperscript{216}

The form the interest takes is not relevant. A fee simple absolute

\textsuperscript{211} Rev. Rul. 68-331, 1968-1 C.B. 352.
\textsuperscript{212} See supra notes 210-11.
\textsuperscript{216} Magneson v. Commissioner, 753 F.2d 1490, 1495-98 (9th Cir. 1985).
is like kind to a tenancy in common, joint tenancy, tenancy by the
entireties, reversion, remainder, life estate, mineral lease, overriding
royalty, royalty, unitization agreement, working interest, easement,
right of way, and long-term leasehold.\textsuperscript{217} When a binding sales con-
tact exists, the seller is deemed the owner of the right to be paid
and the purchaser is treated as the owner of the land. In the case of
options, equitable conversion occurs when the holder signals accept-
ance of his option.\textsuperscript{218} In a 1977 memorandum opinion, the Tax Court
found that an interest in a trust was like kind to a fee interest under
the circumstances.\textsuperscript{219} Other authorities suggest that an interest in a
trust may be equivalent to land.\textsuperscript{220} In a 1983 opinion which was re-
viewed, the Tax Court concluded that a general partnership interest
was like kind to a fee simple interest in land. The decision was af-
irmed by the Ninth Circuit.\textsuperscript{221}

\textbf{Buildings}

An existing building which is permanently attached to land is real
property. Unimproved land is like kind to land which is improved
with a building, and one building is like kind to another building.\textsuperscript{222}

\textsuperscript{217} Rev. Rul. 73-476, 1973-2 C.B. 300; Rev. Rul. 79-44, 1979-1 C.B. 265 (ten-
ancy in common for fee simple absolute); Rev. Rul. 68-331, 1968-1 C.B. 352 (lease of oil
in place for fee interest); LTR 8135048 (June 3, 1981) (overriding royalty for fee simple
absolute); LTR 8237017 (June 11, 1982) (working interest for overriding royalty); Rev.
Rul. 68-186, 1968-1 C.B. 354 (working interest for interest in unitization agreement);
Rev. Rul. 71-549, 1972-2 C.B. 472 (easement and right-of-way for fee simple absolute);
Rev. Rul. 55-749, 1955-2 C.B. 295 (fee simple absolute for water right); Treas. Reg. §
trust for fee simple absolute), \textit{clarified}, Rev. Rul. 72-601, 1972-2 C.B. 467, \textit{distin-
Red River Lumber Co. v. United States, 139 F. Supp. 148 (Ct. Cl. 1956) (parties agreed
a variety of interests were like kind to fee simple absolute).

\textsuperscript{218} See generally 2 \textsc{American Law of Property} §§ 11.22-23, 11.17, 11.81 (A.
Casner ed. 1952); \textit{id.} §§ 3.82-3.84; see also Starker v. United States, 602 F.2d 1341,
1351-52 (9th Cir. 1979); Hayden v. United States, 50 A.F.T.R.2d 5570 (D. Wyo. 1981).

\textit{See infra} text accompanying notes 283-88.


\textsuperscript{220} See Rev. Rul. 70-511 1970-2 C.B. 166; DiFoggio v. United States, 484 F.
Supp. 233, 236-37 (N.D. Ill. 1979); Rev. Rul. 77-459, 1977-2 C.B. 239; Rev. Rul. 76-
generally Kivall, \textit{Can a Beneficial Interest in an Illinois Land Trust Qualify for Tax-
Free Exchange Treatment?} 71 Ill. B.J. 178 (1982); Fowler & Wyndels, \textit{How Use of a
Trust Enhances the Section 1031 Nonsimultaneous Real Estate Exchange}, 53 J. Tax’N
22 (1980).

\textsuperscript{221} Magneson v. Commissioner, 81 T.C. 767 (1983), \textit{aff’d}, 753 F.2d 1490 (9th
Cir. 1985).

\textsuperscript{222} Treas. Reg. § 1.1031(a)-1(e)(2) (1967). \textit{See supra} text accompanying note
An item which otherwise would be a movable is deemed land if it is part of a building or is a fixture.223 One ruling involved a water plant and an apartment complex. The IRS observed that each building was a fee interest in real property, and concluded they were like kind.224

If a building was constructed as part of an exchange transaction, the IRS may argue the building was not land. Accepted principles of property law classify a building as land if the building is permanently attached to land.225 Typical decisions are concerned only with the ultimate result. Hence if a person starts off with land and winds up with another item of land, intermediate stages of the transaction are disregarded.226 A series of rulings involve people who owned two parcels of land. The proceeds of an involuntary conversion are used to improve the remaining parcel. In one ruling a person gave up land for a building, storm drain, water system, and road. The IRS found that land did not have the same nature or character as the improvements and held the properties were not like kind.227 Some courts accept the IRS position,228 and others do not.229 The IRS position should be rejected because it is contrary to accepted property law and like kind principles.230

Several letters suggest what the IRS will accept when a building is to be constructed. The individual doing the construction work should have an ownership interest in the land. In one letter a person conveyed a long-term leasehold to facilitate the exchange. After construction was complete, the person received the leasehold and building for land. The IRS observed that a fee interest can be acquired solely for the purpose of making an exchange and held that the properties were like kind.231 Although cash may be used to adjust construction costs to an agreed figure, one letter used a cash adjustment clause as a reason to suppose the other party might have been

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223. LTR 8008113 (Nov. 29, 1979).
228. See, e.g., Bloomington Coca-Cola Bottling Co. v. Commissioner, 189 F.2d 14 (7th Cir. 1951).
230. See generally Ronce, Land and Improvements Are Definitely Not "Like Kind" (Are They?), 61 TAXES 382 (1983).
231. LTR 8304022 (Oct. 22, 1982); see also LTR 7823035 (Mar. 9, 1978).
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an agent for the person.\textsuperscript{232}

Other Improvements

An improvement which is permanently attached to land is real property. Unimproved land is like kind to land which is improved, and one improvement is like kind to another improvement.\textsuperscript{233} One ruling concluded that city railroad track and facilities were not like kind to replacement track and facilities located on a bypass around the city. The IRS may have based the finding on elimination of numerous street crossings. A case involved facts which did not appear to be materially different from those set forth in the ruling. In a 1980 opinion which was reviewed, the Tax Court observed that the ruling did not elaborate a legal basis for the finding and concluded that the properties were like kind.\textsuperscript{234} Another case concludes that a fishery and agricultural improvements such as plowing, seeding and fertilizing are the like kind to roadway, storm drainage and water systems for an industrial park.\textsuperscript{235}

Leases

The IRS has not come to grips with the treatment of leases. A leasehold is personal property under state law.\textsuperscript{236} Since 1924 the regulations have concluded that a lease of a fee with at least thirty years to run is like kind to land.\textsuperscript{237} The thirty year requirement is the means for determining whether the relationship of a tenant to land is similar to that of a fee owner. The regulations have never mentioned short-term leases. The IRS and the courts have concluded that a short-term lease is not like kind to a fee interest in land.\textsuperscript{238}

\textsuperscript{232} LTR 8304022 (Oct. 22, 1982); LTR 8110028 (Dec. 9, 1980); LTR 7929092 (Apr. 23, 1978); LTR 7823025 (Mar. 9, 1978); LTR 7821083 (Feb. 27, 1978).
\textsuperscript{233} Treas. Reg. § 1.1031(a)-1(b) (1967).
\textsuperscript{235} Davis v. United States, 411 F. Supp. 964 (D. Hawaii 1976), aff'd on another issue, 589 F.2d 466 (9th Cir. 1979).
\textsuperscript{236} E.g., 2 F. POLLOCK & F. MAITLAND, supra note 202, at 115-17.
Judicial and administrative decisions which equate land and short-term leases under the involuntary conversion statute cast a long shadow over the like kind treatment of short-term leases. 239

The treatment of leases depends on several factors. Giving up land for a long-term lease may be a like kind exchange. 240 A landlord who gives up a long-term lease and receives land from the tenant, however, has not made a like kind exchange. The receipt of land is deemed an advance payment of rent. 241 If the transaction is not between landlord and tenant, however, it may be a like kind exchange. 242 In one letter, a landlord conveyed land to his tenant for the lease and a sublease. Since the tenant did not deal with his subtenant, the IRS concluded that the tenant made a like kind exchange. 243 The IRS presumably felt a payment to the tenant could be rent only if it was made by the subtenant.

Long-term leases may be like kind. Apparently, a long-term lease is not like kind to a short-term lease, and land is not like kind to a short-term lease. 244 A landlord who gives up a short-term lease for a short-term lease from his tenant has not made a like kind exchange. The receipt of a short-term lease is deemed an advance payment of rent. If the transaction is not between landlord and tenant, however, it may be a like kind exchange. 245

Sale and Leaseback

The treatment of sale and leaseback transactions is suspect. With one exception, every case involving a long-term lease has concluded that the transaction was a sale. 246 Cases in which there was a short-term leaseback have concluded there was an exchange of properties which were not like kind. 247 In one case, the IRS argued that a ten year lease continued an investment in land. 248 In a 1975 opinion which was officially reported, the Tax Court concluded that a realized loss was deductible. 249

(1959).

239. See supra text accompanying notes 166-71.


243. LTR 7932069 (May 11, 1979); see also LTR 8323006 (Feb. 28, 1983). See generally 2 B. BITTKER, supra note 38, ¶ 51.10.1.

244. See supra text accompanying note 206-07.


246. See Crowley, Milner & Co. v. Commissioner, 689 F.2d 635 (6th Cir. 1982).

247. See supra text accompanying note 168.


249. Id.
Results suggest the existence of several problems. Short-term leaseback decisions are an indication that short-term leases should be like kind to land.250 One can only speculate about why the Treasury has not changed the regulations. When the lease is like kind to land, there are two issues. Concluding that a sale and leaseback is a sale is questionable. A loss is not deductible unless the transaction is complete. A mere change in the rights to property does not seem to be sufficient completion.251 One commentator suggests sale and leaseback transactions have a hollow sound when tapped.252

Timber

Growing trees are part of land, bare land is like kind to land with growing trees, and land with growing trees is like kind to other land with growing trees.253 The classification of timber is not affected by differences in quantity, quality, age, and species of the timber.254

The common law usually classified a right to take timber as an interest in land.255 The classification of timber rights is uncertain. In one case, a person exchanged land for the right to cut and remove timber.256 In a 1953 opinion which was officially reported, the Tax Court reviewed Oregon decisions and concluded that the rights were movables. That construction of the Oregon decisions is suspect.257 Under current law most states treat a right to take timber as a contract for the sale of a movable.258

A timber right for at least thirty years presumably would be like kind to a fee.259 If a person who owns land disposes of the right to remove timber, he usually is entitled to capital gain treatment because of his actual or deemed investment purpose.260 The treatment of unharvested crops suggests that the capital gain purpose would be

250. See supra text accompanying notes 166-71.
251. E.g., Reporter Publishing Co. v. Commissioner, 201 F.2d 743 (10th Cir.),
cert. denied, 345 U.S. 993 (1953); Rev. Rul. 84-145, 1984-2 C.B. 188.
252. Del Cotto, Sale and Leaseback: A Hollow Sound When Tapped?, 37 Tax L.
254. Id. See generally Davenport, Exchanges of Timber Interests Under Section
256. Oregon Lumber Co. v. Commissioner, 20 T.C. 192, 195-97 (1953), acq.,
257. Id.
259. See supra text accompanying note 246.
260. E.g., Kirby Lumber Co. v. Phinney, 412 F.2d 598 (5th Cir. 1969); Rev. Rul.
applied in a like kind context. Thus, if a person retains land and exchanges a timber right which is land or deemed land for other land, the properties are like kind. Short-term timber rights are like kind. Long-term and short-term timber rights presumably are unalike.

Minerals

Oil, gas, and other minerals in place are part of the land. Land is like kind to a fee simple interest in minerals. In one case, a person gave up a hotel for oil, gas, and other minerals. In a 1940 opinion which was officially reported, the Board observed that land is land regardless of differences and concluded the properties were like kind. The IRS promptly announced disagreement with the decision. The Fifth Circuit observed there is no distinction between land items “however dissimilar they may be in location, in attributes, and in capacities for profitable use.” Hence investment details are irrelevant. Eleven years after it was affirmed, the IRS withdrew the disagreement and published agreement with the decision. Since then the IRS has regularly approved exchanging mineral interests for other sorts of land such as ranches.

The classification of mineral rights is uncertain. One ruling observes that state law is not a consideration in classifying property and suggests that all oil and gas rights are land. The state law classification of mineral rights is not consistent, and the ruling would be reasonable if a desire for uniform results was the stated explanation. Mineral leases and leasehold interests such as oil payments, overriding royalties, royalties, and working interests are classified as

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264. See supra text accompanying notes 237-45.
266. Id.
267. Id.
268. Id.
270. See supra note 188. Apparently the IRS does not distinguish between types of mineral rights for this purpose. E.g., Rev. Rul. 68-186, 1968-1 C.B. 354 (working interest for overriding royalty); See generally 1A W. SUMMERS, LAW OF OIL & GAS §§ 214, 216 (1981).
A person must give up and receive interests of an adequate duration. A typical mineral lease is for a fixed period plus the life of production. Because the term of an ordinary lease includes renewal periods, the length of a mineral lease presumably is the entire time during which it may continue. An interest which might continue for thirty years is deemed to be for thirty years. Thus, a lease which will continue until production ceases is a long-term interest. With the exception of oil payments, a person who exchanges long-term leasehold interests is given the same treatment as a person who gives up a long-term lease for land. Giving up or receiving an overriding royalty for land or a working interest may be a like kind exchange. Apparently an oil payment can never be like kind because it is not deemed to be an investment. Giving up or receiving a long-term interest for a short-term interest is not a like kind exchange. The Treasury and the IRS feel that the differences in the ownership interests preclude like kind treatment. That conclusion is suspect. With the exception of oil payments, short-term interests are apparently always like kind.

A person must give up an interest which is not disguised income. If a landlord gives up a long-term lease and receives land from his tenant, the landlord has not made a like kind exchange. The land is deemed an advance payment of rent. In one case, a person received a ranch for a temporary oil payment. The parties estimated the transfer would continue for about three years and the reversion occurred after about three years. In an opinion which was officially reported, the Tax Court observed that both interests were land, and

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272. Appleman, supra note 271, at 275-76.
273. See supra text accompanying notes 209-19.
274. LTR 8135048 (June 3, 1985); LTR 8237017 (June 11, 1982).
276. See supra text accompanying notes 166-171.
concluded that temporary and permanent interests were unalike. The Supreme Court found that assignment of income was another reason for the result. Two authors observe that "whenever a method is discovered whereby the conversion of ordinary business income into capital gain is coupled with retention of the business itself, the Internal Revenue Service will ultimately succeed in changing the law." 

**Land Contracts and Options**

The presence of a contract or option concerning land is typically disregarded. For instance, one ruling involved a person who created an option to sell or exchange his land. When the option was exercised, the other party satisfied his obligation by conveying land to the person. The IRS disregarded the option and concluded the transaction was a like kind exchange of land items. Hence most decisions are based on the end result.

In a textbook exchange, two people deliver their properties to each other at one time. Neat transactions are infrequent, however, because it is unusual that two people want to exchange properties. Diagramming some multiparty exchanges is challenging. One commentator suggests that a recent transaction was sufficiently complex so that the Tax Court and Fifth Circuit may not have fully realized the significance of some of their holdings.

In some situations, a contract or option is relevant. A transaction is not an exchange to a person unless he receives an adequate interest in property. In one case, a person gave up land and received a contract to purchase land from individuals who were not parties to the exchange transaction. Assignment of the contract transferred various rights and duties to the person. For example, he received the right of possession subject to certain restrictions. A substantial part of the sale proceeds were invested and a fixed income was payable under a life estate retained by one of the sellers. If any restriction was not satisfied, the agreement gave the sellers the right to elect to void the contract. Legal title was to have passed to the person at the

280. Id.
281. Id.
286. Starker v. United States, 602 F.2d 1341, 1351-52 (9th Cir. 1979); LTR 7503250330A (Mar. 25, 1975).

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end of the life estate. The court observed that the rights received by
the person were at least as great as those provided by a long-term
leasehold, and concluded that the contract rights were like kind to
land. The person also must give up an adequate interest in prop-
erty. Another case involved exercise of an option to purchase con-
tained in a lease. In a 1973 opinion which was officially reported,
the Tax Court observed that the leasehold was annihilated by
merger when the person received the fee. Because destruction by
merger was not an adequate giving up of property, there was no
exchange.

Land for Partnership Interest

Partnership interests are excluded property only if a person ex-
changes an interest in one partnership for an interest in another
partnership. Hence two interests in a single partnership may be
like kind, and a partnership interest may be like kind to another sort
of property.

The form of ownership interest is usually not relevant. It is not
clear whether land is like kind to a general interest in a real estate
partnership. In one case, a person's apartment and nursing home
buildings were involuntarily converted. After attempting to
purchase a replacement, he decided construction was the best way to
acquire an acceptable investment. Because his experience in develop-
ing and operating a shopping center was inadequate, he took title
under a deed which appeared to make him a tenant in common with
an individual who had substantial experience with shopping centers.
In a 1976 memorandum opinion, the Tax Court reviewed the terms
of the deed and other agreements and found that the person owned
an interest in a real estate partnership. Because state law classi-
fied an interest in a partnership as personal property, the court con-

287. Id. Compare Carlton v. United States, 385 F.2d 238 (5th Cir. 1967).
288. Molbreak v. Commissioner, 61 T.C. 382, 391 (1973), aff'd per curiam, 509
F.2d 616 (7th Cir. 1975).
289. Id.
290. Id.
98.
292. See infra text accompanying note 481.
293. See generally supra note 217.
294. M.H.S. Co. v. Commissioner, 45 T.C.M. (P-H) 721, 724 (1976), aff'd per
curiam, 575 F.2d 1177 (6th Cir. 1978).
295. Id.
cluded the properties were unalike. In a per curiam opinion, the Sixth Circuit agreed.\footnote{Id.}

It is easy to sympathize with the person. He did his best to put himself in the position he was in before the conversion, and his attorney advised him that the replacement qualified for nonrecognition. Several considerations support a conclusion that the decision is wrong. The character of land is not altered by divided ownership. Hence a fee simple absolute is like kind to interests such as a tenancy in common or a life estate.\footnote{Rev. Rul. 72-601, 1972-2 C.B. 467; Rev. Rul. 79-44, 1979-1 C.B. 265.} Movables have been classified as like kind to land when it has suited the whim of the Treasury, the IRS, or the courts. Thus, the usual distinction between personal property and land has been ignored in situations involving a lease of a fee with at least thirty years to run, an oil and gas lease, and furniture and equipment.\footnote{Treas. Reg. § 1.1031(a)-1(c) (1975); Rev. Rul. 68-331, 1968-1 C.B. 352; Pappas v. Commissioner, 78 T.C. 1078, 1088 (1982).} The explanation for these results seem to be that the relationship between chattels and land was great enough so it was more appropriate to treat the movables as like kind to land.

A real estate partnership typically creates a substantial relationship with land. A general partner usually is entitled to a voice in the management of land, a share of the proceeds from disposition of land, and part of the loss or profit from land operations.\footnote{Treas. Reg. § 1.1031(a)-1(c) (1975); Rev. Rul. 68-331, 1968-1 C.B. 352; Pappas v. Commissioner, 78 T.C. 1078, 1088 (1982).} The interest of a partner usually is classified as a tenancy by partnership.\footnote{See generally 2 AMERICAN LAW OF PROPERTY § 6.8-6.9 (A. Casner ed. 1952); 3 id. § 12.79; 4 id. § 18.45.} The goal of a lease is to give the tenant a right of possession. Since other aspects of a lease seem irrelevant, it is the possessory right which the Treasury uses to equate a long-term lease of a fee to a fee interest. A life estate may result when a person has a right of direct enjoyment by using the land itself, or when his right is to receive income flowing from use by another. Possession in the form of a right to receive a cash income may be like kind to land.\footnote{See Magneson v. Commissioner, 753 F.2d 1490, 1495-98 (9th Cir. 1985).} A partner has the right to income produced by permitting the partnership to use what amounts to the partner's interest in land. Objections may be based on the differences between the position of a tenant and that of a partner. Comparing the features of a typical long-term lease of a fee to a typical real estate partnership agreement leads to the conclusion that the position of a tenant is further removed from land than is the interest of a general partner. The only positive aspect of the decision is adherence to the general rule announced by the Trea-
sury. Considering the treatment of other property, following the general rule is faint praise.

Another decision concludes that a partnership interest can be like kind to land. In a planned series of transactions, a person gave up a fee simple for a tenancy in common. The tenancy was immediately exchanged for a general interest in a real estate partnership. In a 1983 opinion which was reviewed, the Tax Court observed that a partnership interest could be like kind to land and concluded that the transaction qualified for like kind treatment. While a tenancy in common is freely alienable, specific partnership property is not. Because like kind treatment is not available unless a person intends to retain the replacement property, the primary concern is operations. The Ninth Circuit observed that possession and control as a general partner were of the same nature as possession and control as a tenant in common and concluded that the interests were like kind.

**Congressional Attitude**

Congressional goals, such as reducing uncertainty, identify a system where a reasonably astute person usually can determine tax consequences in advance of an exchange. Planning requires rules or standards which can be applied with at least a reasonable degree of confidence. Since Congress did not suggest general criterion for applying the statute, the task was delegated to the Treasury.

**Treasury Attitude**

Consideration of investment details seems precluded by the like kind regulation. The 1921 version observed: “the fact that . . . real estate . . . is improved or unimproved makes no real difference . . .” Subsequent editions introduced examples which apply the principal. The Treasury has not continued strict adherence to the principal. The 1934 general nonrecognition regulation calls for comparing investments in like kind cases. Because Congress has disapproved comparison of investments for like kind purposes, it is inap-

302. Magneson v. Commissioner, 753 F.2d 1490, 1495-98 (9th Cir. 1985).
303. Id.
304. Id.
306. See supra text accompanying notes 79-80.
307. See supra text accompanying note 159.
propriate to apply the strict construction regulation in like kind situations.\textsuperscript{308}

**IRS Attitude**

With occasional digressions, the IRS approach to real property transactions has been reasonably balanced. One index lists over 150 letter rulings issued between 1954 and 1986.\textsuperscript{309} Most involved land, and a large percentage conclude that the proposal involved an exchange of like kind properties.\textsuperscript{310} Many more transactions have proceeded without advance assurance from the IRS.\textsuperscript{311} Hence most proposed land transactions can be completed expeditiously with at least reasonable certainty that the properties are like kind.

The IRS application of the real property standard is not completely predictable. Although the standard seemed beyond debate, the IRS litigated a case where a city house was compared to undeveloped land in a mangrove swamp, and another involving improved city land and a ranch.\textsuperscript{312} After losing, the IRS seemed to quit litigating similar cases, and the facts of these cases were adopted by the regulations starting in 1934.\textsuperscript{313}

Applying the real property standard to an exchange of hotel for oil, gas and other minerals in the ground was too much for the IRS to swallow. In a 1941 opinion the Fifth Circuit observed that the standard does not distinguish "between parcels of real property, however dissimilar they may be in location, in attributes and in capacities for profitable use."\textsuperscript{314} The IRS has cited that standard with approval on several occasions, so one might assume it has been accepted by the IRS.\textsuperscript{315} Recent developments suggest that the IRS has not accepted the standard. A 1978 Tax Court opinion rejects similar IRS arguments.\textsuperscript{316} Caution strongly suggests an advance ruling. A situation which seems to require an advance IRS determination does not appear to satisfy the congressional goal of reducing uncertainty.

\begin{footnotesize}
\textsuperscript{308} See supra text accompanying note 173.
\textsuperscript{309} Available Dec. 18, 1986, on LEXIS, Fedtax library, PR file.
\textsuperscript{310} Id.
\textsuperscript{311} Id.
\textsuperscript{313} Treas. Reg. 86, art. 112(b)(1)-1 (1934), \textit{reprinted in} 140 \textbf{INTERNAL REVENUE ACTS OF 1909-1950}.
\textsuperscript{314} Commissioner v. Crichton, 122 F.2d 181, 182 (5th Cir. 1941).
\textsuperscript{315} \textit{E.g.}, Rev. Rul. 68-331, 1968-1 C.B. 352.
\end{footnotesize}
Judicial Attitude

The courts have brushed aside arguments based on apparent differences. In one case, a person held undeveloped land for investment, and operated a golf course and clubhouse business at another location. Both parcels were exchanged for land subject to long-term condominium leases. The IRS argued that the properties were unalike because the leases provided a steady stream of income.\textsuperscript{317} In a 1978 opinion which was officially reported, the Tax Court observed that the statute “was not intended to draw any distinction between parcels of real property however dissimilar they may be in location, in attributes and in capacities for profitable use.”\textsuperscript{318} While considering the decision, the IRS observed that land is land regardless of apparent differences. The IRS promptly announced agreement with the decision.\textsuperscript{319}

**MOVABLES**

**Introduction**

The compatibility of movables depends on the purpose of the inquiry. In an action for breach of a movables contract, equity will on rare occasions conclude that the property is unique.\textsuperscript{320} Movables are sometimes deemed comparable where value is the issue for purposes such as property taxation and theft losses. Relevancy is the criterion for determining the admissibility of evidence supporting an attempted comparison. The value of a Chevette has no apparent relevance to the value of Hitler’s 1938 supercharged Mercedes. If evidence is admitted, the question is the weight to be given to the evidence.\textsuperscript{321} The number of factors which have been considered may exceed the imagination of mankind.\textsuperscript{322} Comparing items for like kind purposes may be the opposite extreme. There is evidence which suggests that each movable is like kind to every other movable.\textsuperscript{323}

The intent of Congress is not clear. The goals expressed by Congress and the Treasury included reducing uncertainty and encouraging business adjustments.\textsuperscript{324} During 1921 Finance Committee hear-

\textsuperscript{317} Koch, 71 T.C. at 66.  
\textsuperscript{318} Id. at 68.  
\textsuperscript{319} Id.  
\textsuperscript{320} 15A Corbin on Contracts § 1146 (1964).  
\textsuperscript{321} 2 J. Wigmore, supra note 176, § 462.  
\textsuperscript{322} E.g., 1 J. Bonbright, Valuation of Property 294-318 (3d ed. 1937).  
\textsuperscript{323} See supra text accompanying notes 66-69, 145-46.  
\textsuperscript{324} See supra text accompanying note 8.
ings, Adams was asked for examples of qualified properties. He felt stocks were like kind to stocks, and bonds were like kind to bonds.\(^\text{325}\) The regulation under the 1921 Act clearly indicated that arguable differences in stocks, or in bonds, have no bearing on whether they are like kind.\(^\text{326}\) Congress and the Treasury have not offered reasonably specific guidance for the treatment of movables generally. Hence there is room for speculation about the standard for applying the statute to movables.

**State Law**

State law typically is used to determine whether property is land or a movable. A movable is deemed land if it constitutes a fixture under state law.\(^\text{327}\) Decisions reflecting a tendancy to disregard state law are mentioned in the material on land.\(^\text{328}\) In a 1982 opinion which was officially reported, the Tax Court concluded that furniture and equipment were like kind to land.\(^\text{329}\) Indiscriminate treatment of state law classification does not satisfy the congressional goal of reducing uncertainty.

**Physical Properties**

Property is a generic term which covers items subject to ownership and interests the law will protect.\(^\text{330}\) Assuming adequate ownership interests,\(^\text{331}\) the question is whether the items are sufficiently alike to constitute like kind properties. Attention has focused on factors such as size, shape, location, use potential, income producing ability, resale prospects, evaluation methods, and markets. For instance, a ruling on gold coins concludes that size and shape are not relevant.\(^\text{332}\) Considerations such as the potential for use, and markets, should be rejected because they call for comparing investments.\(^\text{333}\) Hence any attempt to compare or contrast items requires a different approach.

**Trade-Ins**

In the 1920s, the IRS seemed unaware of the like kind statute or uncertain of whether it applied to trade-ins. A ruling which applied the statute to trade-ins was revoked, and most of the early decisions

\(^{325}\) See supra text accompanying note 49.


\(^{327}\) LTR 8312014 (Dec. 15, 1982).

\(^{328}\) See supra text accompanying notes 185-89.

\(^{329}\) Pappas v. Commissioner, 78 T.C. 1078, 1080, 1088 (1982).

\(^{330}\) See supra text accompanying note 202.

\(^{331}\) See supra text accompanying notes 202-20.


\(^{333}\) See supra text accompanying notes 155-73. One letter concludes that market-ability is irrelevant. LTR 8202101 (Oct. 16, 1981).
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did not mention the statute. A case which marks the turning point involved a person who gave up a printing press and cash for a new printing press. In a 1930 opinion which was officially reported, the Board observed that the transaction was a like kind exchange and concluded that gain was not recognized. The IRS promptly announced agreement with the decision and reinstated the trade-in ruling. Since then the statute has regularly been applied to trade-ins.

An exchange of used property for new property usually does not create a serious classification issue. In one case, a surgeon exchanged a 36-foot Chris Craft yacht for a 41-foot Hatteras yacht. In a 1975 memorandum opinion, the Tax Court found the primary purpose was business entertainment of other physicians and concluded the properties were like kind.

Use Test

The Tax Court, the IRS, and the Treasury have not come to grips with the classification issue. A motor vehicle clause was added to the regulations in 1934. A used truck is equated to a new truck, and a used passenger automobile is equated to a new passenger automobile. For like kind purposes, there is no difference between passenger automobiles and trucks. Hence Hitler’s 1938 supercharged Mercedes is like kind to a moving truck. The motor vehicle clause appears to include a use condition. While the language might be an expression of general like kind requirements, that explanation is unsatisfactory because land examples did not include similar language.

The IRS does not feel that use is the sole criterion. In a 1972 ruling, a person gave up residential rental property and received a farm and farm machinery. The IRS observed that “the fact that the assets in the aggregate comprise a business or an integrated eco-

334. See supra text accompanying notes 82, 114-26.
336. Id.
337. Id.
339. Id.
341. See supra text accompanying notes 93-97.
342. See supra text accompanying notes 82-83.
onomic investment does not result in treating the exchange as a disposition of a single piece of property."  

It would appear that IRS did not reject use as a criterion. The IRS concluded that an exchange must satisfy both a use test and a like kind test which compares physical properties. The IRS found the machinery failed the like kind test because land and movables were dissimilar properties.

Business movables may be a class of property. In a 1978 letter, a person gave up banking equipment, furniture, fixtures, and equipment, for banking equipment, furniture, fixtures and equipment. The IRS did not mention the physical properties test. The letter observed that both groups of properties were held for investment or business use and concluded that like kind treatment was available. Hence use seemed to be the sole criterion for comparison.

Several IRS decisions are vague because movables are not adequately identified. In a 1957 ruling, two operating telephone companies exchanged all of their assets, which included land and movables. The IRS found like kind treatment was available because there was "an exchange of the assets of one such business for identical assets of another such business . . . ." The telephone ruling was applied by a 1961 telephone letter and a 1967 letter on electricity generation and distribution businesses. A 1968 ruling involved a number of people who agreed to unitize production from several oil wells. Under a related agreement, they exchanged interests in production equipment. The IRS did not offer an explanation for the conclusion that the equipment items were like kind.

The no explanation procedure was applied by a 1985 ruling on television broadcasting business.

The Tax Court has a comparable approach to groups of business movables. A 1945 memorandum opinion involved a construction and excavation business which used equipment such as tractors, bulldozers, scrapers, sacrificers, and compressors. The court observed that "[i]t is a general practice in the contracting industry to obtain spe-

344. Id.
348. Id.
350. Id.
352. LTR 6711025580A (Nov. 2, 1967).
354. Id.
cial equipment needed for a particular job by trading [unneeded] equipment," and concluded that the properties were like kind.\textsuperscript{357} No explanation was offered for the failure to identify the sorts of equipment items involved in each exchange. The group approach may have been applied in cases dealing with banking assets, cattle, printing presses, and starch for unspecified assets.\textsuperscript{358}

The Tax Court has gone further than the IRS. In one case, a person gave up his interest in an apartment building for an interest in a hotel and hotel furniture and equipment.\textsuperscript{359} In a 1982 opinion which was officially reported, the court concluded that the movables were like kind to the building.\textsuperscript{360} Feudal law placed farms and farm movables in the same class because the movables had a close relationship to land.\textsuperscript{361} The only apparent way to equate hotel movables and an apartment building is to find that the movables are deemed land because of their use in the hotel business. Hence the twentieth century has been launched into the era of feudal law.

Use is not an appropriate criterion. The 1921 regulation suggested a like kind test which compared physical properties and a use test.\textsuperscript{362} Uncertainty culminated in a 1924 request by the Treasury to repeal the use test. Congress agreed that use was not a fair basis for taxation, and repealed the use test.\textsuperscript{363} Since 1924 the sole criterion is the like kind test which compares physical properties.\textsuperscript{364}

\textit{Continuity of Investment}

The current regulation follows the 1921 approach. Hence business movables must satisfy both a use test and a physical property test.\textsuperscript{365} In the case of investment properties, the regulation merely requires

\begin{itemize}
  \item \textsuperscript{357} \textit{Id.} at 170.
  \item \textsuperscript{359} Pappas v. Commissioner, 78 T.C. 1077, 1080, 1088 (1972).
  \item \textsuperscript{360} \textit{Id.} \textit{See} Magnuson v. Commissioner, 753 F.2d 1490 (9th Cir. 1985).
  \item \textsuperscript{362} Treas. Reg. 62, art. 1566(a) (1921), \textit{reprinted in} 136 \textit{INTERNAL REVENUE ACTS} of 1909-1950.
  \item \textsuperscript{363} \textit{See supra} note 173 and accompanying text.
  \item \textsuperscript{364} \textit{Id.}
  \item \textsuperscript{365} \textit{See supra} text accompanying note 80.
\end{itemize}
that both items be held for investment. Although business and investment are supposed to be interchangeable, several decisions reach a contrary result.

The continuity doctrine has been applied to collectible coins. The initial reaction was that the transactions qualified for like kind treatment. A 1976 ruling compares noncurrency Mexican gold pesos and noncurrency Austrian gold coronas. The IRS observed that both were bullion coins and concluded they were like kind. Nevertheless, in a 1979 ruling which involved United States gold coins and South African Krugerrand gold coins, the analysis began with a reference to the legislative history of the different sex statute. Krugerrands were valued for their gold content while the United States coins were valued for numismatic desirability. The IRS found investment in a gold market is different from investment in a collectables market and concluded that the coins were unalike. One author observed that the "ruling fails to state which type is masculine, and which feminine."

The doctrine has also been applied to precious metals. Letters issued in 1980 and 1981 compare gold and silver bullion. Both cited the 1976 and 1979 coins rulings and concluded the properties were like kind. Early in 1982 attention was directed to the difference between the markets for gold and silver. That apparently caused the IRS to have a change of heart. In a 1982 ruling which compared gold and silver bullion the IRS observed that gold is an investment in itself while silver typically is valued as an industrial commodity, and concluded that the properties were unalike.

Currency status is another approach to distinguishing investments. One case compares United States double eagle gold coins and Swiss francs. In a 1981 opinion which was officially reported, the Tax Court observed that the francs were an investment in the Swiss national economy, while the coins were valued for numismatic desirability and concluded that the properties were unalike. The Ninth

366. Treas. Reg. § 1.1031(a)-(c) (3) (1967).
369. Id.
372. Id.
375. Id.
Circuit relied on the different sex statute as evidence of a congres-
sional desire for the treatment of movables in general and affirmed
the decision.\textsuperscript{376} There is no evidence to support the suggestion that
Congress intended that land and movables should be treated
differently.

Results in metal and money cases illustrate the sort of uncertainty
Congress wanted to avoid.\textsuperscript{377} Comparing investments created
problems which prompted the Treasury to ask for a change. The
Treasury concluded that comparing investments was not a fair basis
for making decisions. Congress agreed that comparing investments
was unfair and concluded that all investments would be deemed
identical for like kind purposes.\textsuperscript{378}

\textit{Like Kind Test}

Distinctions based on use or investment are improper. Compari-
sions are to be based on features of the physical properties. The ques-
tion is which aspects are relevant? Approaches based on attributes

\begin{table}
\begin{tabular}{|l|l|c|c|l|}
\hline
\textbf{Items} & \textbf{Metals} & \textbf{Like Kind} & \textbf{Year} & \textbf{Citation} \\
\hline
Foreign coin for foreign coin & Both unknown & Yes & 1975 & LTR 7507220610A \\
Foreign coin for U.S. coin & Unknown for silver & Yes & 1975 & LTR 77030708518A \\
& Both gold & No & 1979 & \\
& Both gold & Yes & 1982 & LTR 8202101 (Oct. 16, 1982) \\
& Both gold & Yes & 1982 & Rev. Rul. 82-96, 1982-1 C.B. 113 \\
Bullion for bullion & Silver for gold & Yes & 1980 & LTR 8020107 (Feb. 25, 1980) \\
& Silver for gold & No & 1982 & Rev. Rul. 82-166, 1982-2 C.B. 190 \\
\hline
\end{tabular}
\end{table}

376. \textit{Id.}  
377. In tabular form, the results in metal and money case are:

such as size and shape have been rejected.\textsuperscript{379} Rejection seems appropriate since size and shape have no apparent bearing on whether properties are like kind.\textsuperscript{380} Other considerations such as methods of evaluation and markets should also be rejected, because they are not pertinent to classification.

Congress intended to create a broad class or classes of property. The legislative histories do not contain a direct statement about the scope of each class. An inference may be drawn from the general goals expressed by Congress. The principal goal was to reduce uncertainty.\textsuperscript{381} By making land a single class, the Treasury created a system which is reasonably certain. With a few exceptions, items which seem alike are like kind. No one knows which movables may be like kind at a given moment. For example, is a business use passenger automobile like kind to a passenger automobile held for investment? The very fact that there is question indicates uncertainty. Decisions involving business movables, precious metals, and collectible coins suggest that it would be very easy for the IRS to conclude that the automobiles were unalike.\textsuperscript{382}

The only approach which appears to reduce uncertainty is to make movables a single class of property. It is not possible to make a reasonably educated guess about whether properties are alike because the Treasury and the IRS have carefully avoided reliable suggestions about general approaches to classifying movables. There is no apparent way to distinguish between passenger automobiles. Hence Hitler’s 1938 supercharged Mercedes should be like kind to a Chevette, even though they have little in common when viewed from a use or investment viewpoint. The fact that the Chevette is put to a business use while the Mercedes is held for investment is not relevant.\textsuperscript{383} If like kind exchanges are permitted, why should it matter that a person gave up a gold coin for silver bullion, a book, painting, or passenger automobile? When use and investment are disregarded, the only apparent way to distinguish movables is by arbitrary classification. The 1921 regulation concluded that stocks and bonds were unalike.\textsuperscript{384} The distinction presumably was based on the differences in the rights typically created by those forms of property. The conclusion was rejected in every case because the courts felt the classes

\begin{itemize}
\item \textsuperscript{379} See e.g., Rev. Rul. 76-214, 1976-1 C.B. 218.
\item \textsuperscript{380} See, e.g., Treas. Reg. § 1.1031(a)-1(b) (1967); Commissioner v. Crichton, 42 B.T.A. 490 (1940), nonacq., 1940-2 C.B. 10, nonacq. withdrawn and acq. substituted, 1952-1 C.B. 12, aff’d, 122 F.2d 181, 182 (5th Cir. 1941).
\item \textsuperscript{381} See supra text accompanying note 8.
\item \textsuperscript{382} See supra text accompanying notes 339-46. See Levine & Glioklich, supra note 370, at 297-98.
\item \textsuperscript{383} Treas. Reg. § 1.1031(a)-1(a) (1967).
\item \textsuperscript{384} Treas. Reg. 62, art. 1566(a) (1921), reprinted in 136 Internal Revenue Acts of 1909-1950.
\end{itemize}
were inappropriately narrow. In one case, the Second Circuit concluded that personal property was a single class of property for like kind purposes.\textsuperscript{385}

\textbf{Metals and Money}

Administrative and judicial decisions have been discussed.\textsuperscript{386} The results which appear to be proper are illustrated by the following material. Precious metals are like kind. Hence gold is like kind to silver.\textsuperscript{387} Precious metals are like kind to other metals. Thus, gold is like kind to iron. Noncurrency coins are like kind if both are bullion coins made of the same metal. One ruling involves coins issued by other countries, and two letters deal with foreign and United States coins.\textsuperscript{388} United States coins would be like kind under the same conditions. Noncurrency foreign or United States coins are like kind to bullion if both involve the same metal.\textsuperscript{389} A noncurrency bullion coin of silver is like kind to a noncurrency bullion coin of gold or some other metal, or to bullion of silver or another metal.\textsuperscript{390}

Noncurrency numismatic coins are like kind. Hence foreign coins and United States coins may be like kind.\textsuperscript{391} Numismatic and bullion coins are like kind.\textsuperscript{392} Noncurrency paper monies are like kind. Hence foreign paper money items and United States paper money items may be like kind. There is no reason to distinguish between noncurrency money items. Thus, paper money items are like kind to numismatic or bullion coins.

Currency money items are like kind.\textsuperscript{393} There is no apparent reason to distinguish between foreign money items which have no bullion or numismatic value. Hence foreign paper or coin money items are like kind to each other or to United States paper or coin money items. There is no apparent grounds to differentiate between currency and noncurrency money items. Thus, foreign coin or paper

\textsuperscript{385} See supra text accompanying notes 74.
\textsuperscript{386} See supra text accompanying notes 365-78.
\textsuperscript{389} Rev. Rul. 82-96, 1982-1 C.B. 113.
\textsuperscript{390} See supra note 387 and accompanying text.
\textsuperscript{391} See LTR 7507220610A (July 22, 1975).
\textsuperscript{393} United States money which has no value other than as currency could be an investment because of the potential for gain on foreign exchange markets.
money items are like kind to each other or to United States coin or paper money items.\textsuperscript{394}

\textit{Livestock}

Congress was concerned with farming tax shelters in 1969, and considered various ways to deal with them. The House report identified several problems including advice given by promoters of cattle feeding shelters. Some promoters told their customers that male calves could be like kind exchanged for female calves.\textsuperscript{395} Because male calves are typically sold, they usually do not qualify for like kind treatment because they are held primarily for sale. The House did not recommend legislation because it felt existing law was adequate. The House did suggest that the IRS should publish its position. The Senate, however, preferred a stronger response to the problem.\textsuperscript{396}

Livestock of the same sex may be like kind. In a 1978 memorandum opinion, the Tax Court concluded that half blood heifers were like kind to three-quarter blood heifers.\textsuperscript{397} Livestock of different sexes are deemed held primarily for sale. A 1971 letter compares a quarter horse stallion to a quarter horse gelding.\textsuperscript{398} The IRS observed that a gelded horse could never be used for breeding and concluded that the properties were not alike.\textsuperscript{399}

\textit{Congressional Attitude}

Use and investment criterion were to be applied in comparing properties under the 1921 Act. Both were rejected in 1924. Congress explained that the tests did not provide a fair basis for taxation because they were uncertain. Since that view has not changed, comparison of uses or investments is improper.

\textit{Treasury Attitude}

The 1921 regulation did not deal directly with movables. The Treasury used lots of words which seemed to describe like kind

\textsuperscript{399} LTR 7110050290A (Oct. 5, 1971). See supra text accompanying notes 340-64.
properties. Standing by themselves, the words were useless. Examples provided a degree of meaning where a transaction involved land, stocks, or bonds. Movables were not covered until a motor vehicle clause was added in 1934. The motor vehicle example is so bland that it has not been seriously challenged in fifty-two years.

One can only speculate about why the Treasury has not added more examples for movables. Perhaps movables are not sufficiently important to warrant the Treasury’s time. Another possibility is that the Treasury was unwilling to sanction some exchanges which would have been approved by a general standard similar to the one which was created for land. Rejection of the attempt to distinguish between debt and equity suggests that the courts would not accept narrow classifications for movables. The possibility of rejection presumably diminished the chance that the Treasury would issue general standards for movables.

One factor is lack of an established system for classifying movables. The common law was typically concerned with ownership of interests in property, or injury to property. If property or an interest was injured, the usual remedies were money damages or specific performance. Since there is no established system for comparing movables, classification looks more like a question of philosophy. Perhaps the Treasury felt the IRS and the courts would be able to deal effectively with a philosophical question. Even with sixty-five years of experience, results suggest they are not equal to the task. The Treasury also did not seem to have a handle on the problem when it suggested improper use and investment tests in 1934. Those suggestions have not been modified.

**IRS Attitude**

The IRS is not likely to take steps toward establishing a broad policy for movables. The IRS typically avoids any appearance of making general policy, especially where the Treasury has declined to act. The IRS seems to dislike broad policy because it reduces the number of options which may be available in adversary situations. In the case of land, the IRS had to be confronted several times with

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401. See supra notes 75-91 and accompanying text.

402. See supra notes 91-96 and accompanying text.

403. See supra note 173 and accompanying text.
Treasury policy. Because there is no general policy for movables, the IRS has expanded the use and investment approaches suggested by the Treasury. Success in obtaining ad hoc decisions is another factor indicating that the IRS is unlikely to propose general standards for movables.

Since one cannot be sure what the IRS may do from one minute to the next, an advance ruling seems indispensable. A fluid situation where an advance determination appears indispensable does not satisfy the congressional goal of reducing uncertainty.

Judicial Attitude

Land opinions normally have brushed aside arguments based on details and have followed the letter and spirit of the Treasury standard. On the other hand, personal property decisions vacillate from liberal to conservative without paying lip service to classification based on physical characteristics. Perhaps the most permissive result in a 1982 officially reported Tax Court opinion, which found that land was like kind to furniture and equipment. The conclusion did not seem to be an accident since the court stated the issue at one point and offered discussion at another. Precedential value is uncertain because the opinion failed to identify the exact ground for the result. Among the possibilities are use of the business chattel rule to equate movables and land, and disapproval of the general distinction between land and personal property. The conclusion that stocks are like kind to bonds is not far behind. In a 1929 opinion which was reviewed, the Board rejected arguments based on accepted differences between debt and equity. On appeal, the Second Circuit concluded that personal property is a single class of property. Although the Second Circuit suggested a general classification for personal property, the decision has not been cited in connection with other sorts of personal property.

A series of decisions involve equity interests in real estate partnerships. In officially reported opinions between 1972 and 1982, the Tax Court concluded that general partnership interests may be like

404. See supra text accompanying notes 190-200.
405. See supra text accompanying notes 305-08.
406. See supra id.
407. See supra text accompanying notes 312-17.
410. Id.
412. Greene, 42 F.2d at 853-54.
Although the parallel to the stock and bond cases is inescapable, they are not discussed or cited in the partnership opinions. The first decision suggested a detailed comparison of general partnership interests, and a comparison was made in a subsequent case. Nevertheless, there has been no suggestion of what factors might be considered.

A 1981 officially reported Tax Court opinion is at the opposite end of the spectrum. The conclusion that Swiss francs and United States gold coins were unlike was affirmed by the Ninth Circuit. The result was based on differences in investment. Since Congress concluded that investment differences is not a ground for comparing properties, there is no acceptable justification for the result. Several decisions are not far removed from the extreme. In a 1972 opinion which was reviewed, the Tax Court concluded that general and limited partnership interests were unlike. The court found the properties were unlike because of the differences in rights. Failure to discuss or cite the stock and bond decisions leaves the impression that the case was not carefully considered. Other decisions appear to apply a use test to business movable situations. Congress has decided that use is not a ground for comparing properties. Because no other explanation is offered, those cases are suspect.

INTANGIBLES

Introduction

The compatibility of intangibles depends on the purpose of the inquiry. In an action for breach of a contract to sell an intangible, equity may conclude that the property is unique. Intangibles are sometimes deemed comparable where value is the issue for purposes such as patent infringement or loss of services. Relevancy is the criterion for determining the admissibility of evidence supporting an attempted comparison. If evidence is admitted, the question is the

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417. See supra text accompanying note 11.
weight to be given to the evidence. The number of factors which have been considered may exceed the imagination of mankind. Comparing items for like kind purposes may be the opposite extreme. There is evidence which suggests that each intangible is like kind to every other intangible.

The intent of Congress is not clear. The goals expressed by Congress and the Treasury included reducing uncertainty and encouraging business adjustments. During the 1921 Finance Committee hearings, Adams was asked for examples of qualified properties. He felt stocks were like kind to stocks, and bonds were like kind to bonds. The regulation under the 1921 Act clearly indicated that arguable differences in stocks, or in bonds, had no bearing on whether they were like kind. Since 1924 the regulations have equated land to a leasehold of a fee with at least thirty years to run. Congress and the Treasury have not offered reasonably specific guidance for the treatment of intangibles generally. Hence there is room for speculation about the standard for applying the statute to intangibles.

**State Law**

The effect of state law is not clear. State law identifies property subject to ownership and the extent of ownership interests. There are several approaches to classifying intangibles as land or movable. Some authorities follow state law, others misconstrue it, a third type offers excuses for not applying it, and another group ignores it. A series of approaches to state law does not satisfy the congressional goal of reducing uncertainty.

**Land Test**

Intangibles may be deemed land. Although some authorities pay lip service to it, state law is not a generally accepted criterion. The question is whether there is an adequate relationship between the

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418. 2 J. WIGMORE, supra note 176, § 462.
419. See supra text accompanying note 322.
420. See supra text accompanying notes 69, 145-46.
421. See supra text accompanying note 8.
422. See supra text accompanying note 49.
426. See supra text accompanying notes 185-89.
intangible and a physical property which is land. Since 1924 the regulations have concluded that land is like kind to a leasehold of a fee with at least thirty years to run.\textsuperscript{428}

The thirty year possession test is equivalent to the standard for land. Differences in location, attributes, and capacity for profitable use have no bearing on whether land items are like kind. Differences between the rights of a fee owner and those of a tenant are ignored. All renewal periods count in computing the period of a leasehold. Suppose a lease is for a term of twenty years, and permits two renewals of five years each. The lease is deemed to be for thirty years since its terms permit it to continue for that period.\textsuperscript{429}

Circumstances surrounding the term of the lease are not relevant. Hence the fact that a renewal option might be allowed to lapse does not affect the term of the lease. In one case, the parties to a ten year lease were related. The IRS argued the relationship was the equivalent of a renewal clause. In a 1975 opinion which was officially reported, the Tax Court refused to consider matters which did not appear on the face of the lease and concluded that the lease was not like kind to land.\textsuperscript{430} When the period is not certain, probability is a factor. A life estate satisfies the thirty year test if an actuarial table concludes that the measuring life expectancy is thirty years. If the period is not reasonably certain, then the thirty year test is applied to the longest period for which the interest might continue. The typical oil and gas lease is for a fixed period plus the length of commercial production. Attempting to predict the length of commercial production is very speculative. The IRS appears to assume that leases with commercial production clauses will satisfy the thirty year test.\textsuperscript{431}

The thirty year possession test has been applied to several intangibles. They include an ordinary lease, a life estate, an easement and right-of-way, a right to purchase land, various mineral interests, a timber contract, and a water right.\textsuperscript{432} Two cases compare land and

\textsuperscript{428} See supra note 86 and accompanying text; see also Treas. Reg. § 1.1031(a)-1(c)(2) (1967).


\textsuperscript{430} Capri, Inc. v. Commissioner, 65 T.C. 162, 181-82 (1975).

\textsuperscript{431} See supra text accompanying notes 204-13.

an interest in a real estate partnership. In a 1976 memorandum opinion, the Tax Court observed that a partnership interest was personality under state law, and concluded that the properties were unalike.\textsuperscript{433} The Sixth Circuit agreed in a per curiam opinion.\textsuperscript{434} In a 1983 opinion which was reviewed, the Tax Court observed that general partnership rights were similar to those of fee ownership and concluded that the properties were like kind.\textsuperscript{435} The Ninth Circuit agreed.\textsuperscript{436}

The thirty year possession test creates a second class of land. The like kind regulations do not mention short-term leases, and a series of officially reported Tax Court decisions have concluded they are not like kind to land. Judicial and administrative decisions which equate land and short-term leases under the involuntary conversion statute cast a long shadow over the like kind results.\textsuperscript{437} Under the thirty year test, a life estate for less than thirty years is not like kind to a fee interest.\textsuperscript{438} In one ruling, a person gave up a short-term lease for a short-term lease.\textsuperscript{439} The IRS observed there was no difference in the leases and concluded they were like kind.\textsuperscript{440} Another person gave up timber rights for six years and thirty-six months, and received a timber right for ten years. In a 1978 memorandum opinion, the Tax Court concluded the properties were like kind.\textsuperscript{441}

\section*{Movables Test}

Intangibles may be deemed movables. State law presumably is not a factor in determining whether an intangible will be treated as a movable.\textsuperscript{442} The question is whether there is an adequate relationship between the intangible and a physical property which is a movable. A 1964 letter compares whiskey warehouse receipts. One receipt was for barrels of four year old bourbon whiskey, and the other was for newly distilled whiskey.\textsuperscript{443} The IRS observed that the "receipts re-
present the whiskey and the transfer of the receipts represent constructive or symbolic delivery of the whiskey," and concluded the properties were like kind.444

Privileges

The right to use an advantage is given the same treatment as other possessory rights. The holder of a television network franchise is entitled to several things, including the right to use network programming. Presumably the rights and duties of holders of a franchise vary somewhat from one network to another, and a given franchise may be different from others issued by the same network. One case compares an exclusive ABC affiliation to a primary CBS affiliation and a secondary ABC affiliation.445 In a 1978 opinion a court of claims trial judge concluded that the properties were like kind.446 A 1978 letter concludes that federal savings and loan charters are like kind.447

Television network franchises give the holders rights to restrict the use of network programming by other persons. Legal monopolies supply similar rights. Thus a 1984 letter concludes that trade names are like kind.448 Owners of copyrights, patents, and trademarks are entitled to similar privileges. Hence a common-law copyright is like kind to a statutory copyright and a patent on a wheelbarrow is like kind to a patent on an atomic bomb. A patent on an atomic bomb is like kind to a television network franchise.

The privilege concept has been applied to memberships in commercial exchange organizations. In one case, a person conveyed five chamber of commerce memberships.449 Later on the same day, the transferee conveyed five like memberships to the person. Each of the transfers were made on the books of the exchanges. In a 1927 opinion which was officially reported, the Board concluded the properties were like kind.450 In a 1945 opinion which was officially reported, the

444. Id.
446. Id.
448. LTR 8453034 (Sept. 28, 1984).
450. Id.
Tax Court concluded that stock exchange seats were like kind.\textsuperscript{451}

\textbf{Goods}

The right to sell goods is given the same treatment as other possessory rights. The holder of a milk production contract has the right to force the buyer to purchase his goods. Hence he can insist that the purchaser take possession and he may have a right to repossess if the purchaser defaults. A 1972 letter compares milk production contracts which are regulated by statute.\textsuperscript{452} A modification of the statute enlarged the existing rights of dairymen. The IRS concluded that the new contracts were like kind to the old contracts.\textsuperscript{453}

A right to buy goods should be given the same treatment. A person who buys goods typically has the right to insist that the other party deliver the goods.\textsuperscript{454} A contract presumably could prevent the seller from disposing of the goods to another person, which might be tantamount to forcing the seller to perform under the contract. Differences in remedies do not appear to be a grounds for distinguishing contracts. A contract to purchase an automobile is like kind to a contract to purchase corn futures.

\textbf{Services}

The right to purchase services is given the same treatment as other possessory rights. A player contract gives a team the right to the services of an athlete, and to prevent him from working for another team.\textsuperscript{455} A 1967 ruling concludes that major league baseball player contracts are like kind,\textsuperscript{456} and a 1971 ruling reaches the same conclusion for professional football player contracts.\textsuperscript{457} A person who sells a business frequently will agree to provide future services under similar conditions. A noncompetition covenant merely provides an additional remedy in the event of breach. Hence there is no apparent reason to distinguish between contracts which include a noncompetition covenant and those which do not. A right to receive the services of an athlete is like kind to a right to receive the services of an artist.\textsuperscript{458}

The right to sell services should be given the same treatment. A person who sells services typically has only the right to insist that the

\textsuperscript{451} Horne v. Commissioner, 5 T.C. 250 (1945).
\textsuperscript{452} LTR 7204240570A (Apr. 24, 1972).
\textsuperscript{453} Id.
\textsuperscript{454} See supra text accompanying notes 443.
\textsuperscript{458} See supra text accompanying notes 66-69.
other party accept the service.\textsuperscript{469} A contract presumably could prevent the buyer from purchasing similar services, which might be tantamount to forcing the buyer to accept services under the contract. Differences in remedies do not appear to be grounds for distinguishing contracts. A right to sell the services of an athlete is like kind to a right to sell the services of an artist.\textsuperscript{460}

\textit{Partnership Interests}

An interest in a partnership is given the same treatment as other possessory rights.\textsuperscript{461} An interest in a partnership may be like kind to another interest in the same partnership. Three tests are applied in comparing interests.\textsuperscript{462} One is the nature of the interest. General partnership interests may be like kind and limited partnership interests may be like kind. The Tax Court and the Ninth Circuit have concluded that a general partnership interest is not like kind to a limited partnership interest.\textsuperscript{463} The conclusion is suspect.\textsuperscript{464} The partnership interests must relate to the same type of business, and the same type of underlying assets. In a 1963 opinion, a district court concluded that an interest in a tavern partnership was like kind to an interest in an auto supply partnership.\textsuperscript{465} The difference in businesses apparently would be fatal under current criteria.\textsuperscript{466} There is no apparent reason to distinguish a tavern business and an auto supply business.

\textit{Excluded Property}

Various debt and equity interests cannot be like kind property. In 1921 the Treasury and Congress expressed doubt about the like kind status of securities. The 1921 House Bill permitted holding for productive use in trade or business or for investment. The Senate deleted the investment clause to prevent securities abuse. The Confer-
ence Report does not explain why the investment clause was restored to the bill.\textsuperscript{467} The statute created a windfall for people who had invested in securities. Practically before the 1921 Act had been signed into law, brokerage houses started soliciting business. A person who wanted merely to modify his portfolio, or to obtain cash, could do so by an exchange. The practice of obtaining tax-free cash as part of an exchange of securities would have been stopped by the boot rule which was added by the 1923 Act. Congress went further by disqualifying various sorts of paper from like kind status.

The original 1923 bill deleted the investment clause. When it was advised of the probable consequences, the Treasury prepared a proposal which continued the general investment clause and added various investment securities to the list of excluded property. The Committee of the Whole House accepted the Treasury approach and the Senate agreed. Because most securities are held for investment, the reason for disqualifying them is not clear. One possibility is overkill of the boot problem. Another is that securities are not a type of investment for which Congress intended to provide an exemption. The extent to which the reorganization rules may have affected like kind policy is unknown.\textsuperscript{468}

The paper clause covers two classes of undertakings. First, promises to pay money are included as a backstop for the boot rule. Suppose a person receives cash from a nonrecourse loan for which he pledges property as security, and later exchanges the property subject to the debt. If the exchange is tax free, the result would be the same as if he had received cash as part of the exchange. Although the debt clause covers any obligation which creates a debtor-creditor relationship, the outer limits of the provision are uncertain. A 1975 letter suggests money may be indebtedness if the issuing government promises to redeem it for a stated amount.\textsuperscript{469}

The second class of paper is securities. The scope of the securities provision is not clear because the statutory language is very broad. Terms such as \textit{stocks} and \textit{bonds} seem to be limited to undertakings by corporations and corporate-type entities. Phrases like "other securities or evidences of indebtedness or interest,"\textsuperscript{470} include relation-


\textsuperscript{468} S. REP. No. 1113, 67th Cong., 4th Sess. 1 (1923), reprinted in 1939-1 (pt. 2) C.B. 845.

\textsuperscript{469} LTR 7507220610A (July 22, 1975). Money is not a debt. See e.g., F. MANN, \textit{The Legal Aspect of Money} 5-7 (3d ed. 1971); A. Nussbaum, \textit{Money in the Law: National and International} 139-43 (rev. ed. 1950).

\textsuperscript{470} The complete text of the paper clause is: "(B) stocks, bonds, or notes, (C) other securities or evidences of indebtedness or interest, (D) interest in a partnership, (E) certificates of trust or beneficial interests, or (F) choses in action." I.R.C. \textsection 1031(a)(2)(B-F) (1986). See Horne v. Commissioner, 5 T.C. 250 (1945); Jacobson v.
ships which have no connection with a corporation.

The IRS has not applied the securities clause consistently. A 1984 letter concluded that stock issued by a cooperative housing corporation was not excluded property. 471 The IRS has repeatedly argued that partnership interests are disqualified property because of language in the securities clause. In every case, the courts have found general partnership interests to be like kind. Without discussion, a 1963 district court opinion concludes that an interest in a tavern partnership was like kind to an interest in an automobile supply partnership. 472 In a 1972 case, the IRS did not argue the interests were unalike. 473 Instead it relied on the securities exclusion. In a reviewed opinion, the Tax Court concluded the properties were like kind. 474

The reaction to the 1972 Tax Court decision seemed to border on hysteria. The IRS prepared a blizzard of paper including an action on decision, two office memoranda, a general counsel's memorandum, and a revenue ruling. 475 Each document repeated the exclusion argument. Attacking the problem with lots of paper did not work. Three more cases were decided by the Tax Court. 476 Statements in the last opinion leave the impression that the court had grown tired of telling the IRS it was wrong. 477 The court observed that it was well established that general partnership interests could be like kind, and that excluded property arguments had been rejected several times. 478 The opinions also observe that partnership assets and business interests would be compared in order to prevent tax avoidance. The IRS's persistence and the somewhat equivocal approach of the Tax Court have encouraged the preparation of articles. 479

474. Id.
478. Id.
479. E.g., Brier, Like-Kind Exchanges of Partnership Interests: A Policy Oriented Approach, 38 TAX L. REV. 389 (1983). The article includes a nonexclusive list of other
Eventually the IRS prevailed. The last decision was rendered in 1982, and appeals were dismissed in 1983.\textsuperscript{480} Dismissal of an appeal probably would not be remarkable, except it seemed unlikely that the IRS would give up. Between the time the government’s notice of appeal was filed and the dismissal date, the IRS apparently decided it has little or no chance to prevail in court. The IRS was able to sell its arguments to Congress. On March 1, 1984, the Ways and Means Committee amended the 1984 bill with a proposal to add partnership interests to the list of excluded property.\textsuperscript{481} Although the House report suggested a similarity between excluded securities and partnership interests, the major concern was reducing tax avoidance.\textsuperscript{482} Congress felt the tax avoidance approach of the Tax Court might not be adequate to prevent abuse.

The change is equivocal for two reasons. The exclusion is intended to apply only to an exchange of interests in different partnerships. Thus, interests in the same partnership may be like kind. The change is not to be used as the basis for an inference as to the proper treatment of an exchange of interests in different partnerships under prior law.\textsuperscript{483} Thus, partnership decisions under prior law seem to have been accepted as the means for ascertaining whether interests in the same partnership are like kind.

One decision raises several questions.\textsuperscript{484} A person gave up fee simple title to land for an interest in a land trust. In a 1977 memorandum opinion, the Tax Court found that the trust interest was not excluded property and concluded that the properties were like kind.\textsuperscript{485} The statute of uses might be a ground for disregarding a trust. If a trustee has no duty other than holding title, the corpus is automatically conveyed to the beneficiary. Because the trustee did have an express duty to follow directions of the person and there was discussion of state law, one can only speculate about whether the statute of uses was a ground for the decision.\textsuperscript{486}

Grantor trust status is another possibility. If a trust is a grantor trust, an actual or deemed grantor is taxed as if the trust did not exist. Although the trust was a grantor trust, the court did not discuss the grantor trust rules. One can merely guess about whether the

\textsuperscript{480} Pappas v. Commissioner, 78 T.C. 1078 (1982).
\textsuperscript{482} Id.
\textsuperscript{483} Id.
\textsuperscript{484} Rutland v. Commissioner, 46 T.C.M. (P-H) 39 (1979).
\textsuperscript{485} Id.
\textsuperscript{486} 1 AMERICAN LAW OF PROPERTY §§ 1.27, 1.29 (A. Casner ed. 1952); 1 SCOTT ON TRUSTS §§ 67-69 (3d ed. 1967).
grantor trust rules were a ground for the result. The court found the trust was a mere nominee since the person had all the benefits and burdens of ownership. Hence the trust interest was deemed to be direct ownership of trust corpus.

IRS Attitude

The IRS has not come to grips with the treatment of intangibles. Several letters suggest an inability or unwillingness to identify the rules and make a reasonable application of the rules to the facts. A 1983 letter compared land to a grazing lease. The IRS mentioned some dictionary material. There was no reference to the tax authorities on the classification of leases, or the effect of renewal rights. Because the tenant had a right to renew every five years, tax authorities would treat the lease as like kind to land. Hence the conclusion that the properties were unalike is wrong.

Other authorities reflect a similar approach. A 1982 letter compared land to an interest in a real estate investment trust. The IRS observed that an interest in a trust was excluded property and concluded that properties were unalike. A 1984 letter compared land to stock issued by a cooperative housing corporation. The IRS concluded that the stock was like kind to land.

While letters are not precedent, they are acceptable evidence of administrative practice. An ad hoc decision-making process does not satisfy the congressional goal of reducing uncertainty.

CONCLUSION

A large percentage of the problems under the like kind statute are due to failure to give the system a reasonable chance. Congress could

489. LTR 8327003 (Mar. 17, 1983).
490. Id. See generally Uecker v. Commissioner, 81 T.C. 983 (1983), aff'd per curiam, 766 F.2d 909 (5th Cir. 1985).
491. Id.
492. LTR 8206109 (Nov. 12, 1981); see also LTR 6204185740A (Apr. 18, 1962).
493. LTR 8206109 (Nov. 12, 1981).
495. LTR 8445010 (July 30, 1984).
have provided a better explanation for the like kind standard. Enacting a general statute and asking an expert to prepare a program for applying it is a reasonable approach to legislation. Congress appears to have done everything the Treasury has asked for. The only point where the current statute might be defective is in the boot rules. Treating debt relief as a ground for recognition of gain is inconsistent with other provisions such as the reorganization rules. Because there is no apparent reason to require recognition, the like kind statute probably should be amended to conform to the other provisions.

The IRS seems to be in the next position. The IRS is a hybrid. Some of its functions require a balanced approach to administration of the statute. There is no excuse for issuing letters and rulings which misconstrue the law, or reach inconsistent results. Other IRS functions call for adversarial skills. Some IRS lawyers admit they will say almost anything to win a case. It is hard to criticize them for trying to do their job.

The courts appear to be in the third slot. Land decisions usually are not objectionable. Arguments based on investment details typically are brushed aside in favor of applying Treasury policy. Some decisions involving movables and intangibles create a different picture. These decisions leave the impression that the results were based on whim.

The Treasury has not made a reasonable attempt to perform its duty. The boot netting rules do not follow generally acceptable tax principles, nor do they appear to have a logical justification. The use and investment criteria are contrary to express congressional policy. The Treasury did issue a general standard for land in 1921. After sixty-five years, it is unlikely that the Treasury will voluntarily issue general standards for movables or intangibles. It appears the Treasury has failed to do its job for two categories of property. A general statute without standards for application does not satisfy the congressional goal of reducing uncertainty in tax planning.

The day when problems can be ignored with a reasonable expectation that they will quietly go away may be coming to an end.\footnote{497} Congress has expressed a degree of annoyance with lack of speedy action by the Treasury. The 1984 Act imposed what amounted to sanctions for failure to issue certain regulations by the end of 1984.\footnote{498} The Treasury met the deadline. The 1986 Act has similar deadlines for

\footnote{497. There is some possibility that the Treasury wrote its own death warrant. Compare a 1979 epitaph to actions by the Treasury between 1980 and 1983. B. BITTKER & J. EUSTICE, supra note 61, at 4-16; Withdrawal of Treasury Decision 7747 Relating to Debt and Equity, 48 Fed. Reg. 31,053 (1983).}

the issuance of regulations on several topics. Another approach is to haul an agency into court. In one case, a person sued the Environmental Protection Agency (EPA) for a failure to issue regulations. The court found the EPA had a duty to act, and gave the EPA sixty days to issue regulations. It was only after the court threatened a sentence for contempt that the EPA issued the regulations. A person should not have to resort to Congress or the judiciary in order to force an administrative agency to issue regulations.


