PARTNERSHIPS, S CORPORATIONS & LLCS

Structuring Joint Ventures Between Private Equity and Athletes or Entertainers

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Section 721 *should govern the contribution to a partnership, of an exclusive, worldwide right to use a celebrity's name and likeness, even though such rights are limited in duration.*

To understand the importance of marketing, one needs to look no further than Augusta, Jordan Spieth, and Under Armour. In January 2015, Under Armour signed Spieth to a ten-year endorsement deal. Only four months later, he won the Masters in Augusta, Georgia. By some estimates, Spieth was wearing 16 Under Armour logos on his clothes in the final round. Regardless of the number of logos, Spieth's victory at Augusta was a win for both Spieth and Under Armour. Just like Under Armour, businesses often try to capitalize on the appeal of celebrity by engaging notable figures to promote their products or services. While there are many mechanisms through which a business may secure such an endorsement, this article addresses the seemingly confusing federal income tax rules surrounding the transfer of the exclusive right to use a celebrity's name and likeness for a limited time, in exchange for a partnership interest.

In the hypothetical transaction discussed in this article, a domestic private equity fund owns a controlling interest in a domestic partnership that manufactures and sells golf clubs. To increase sales of its golf clubs, the partnership is seeking to obtain an endorsement from a professional golfer (Golfer), who is a tax resident of the United States. As part of the endorsement deal, the Golfer will transfer the right to use her name and likeness to the partnership, in exchange for a partnership interest. Under the terms of the agreement between the Golfer and the partnership, the partnership has the exclusive, worldwide right to use the Golfer's name and likeness to promote the sale of golf clubs, manufactured by the partnership, for a period of five years (name and likeness rights). At the end of the five year period, the partnership will no longer have the right to use the Golfer's name and likeness and the Golfer will retain her partnership interest. Under the terms of the agreement, the Golfer is not required to provide any services to the partnership, such as appearing at marketing events or using the partnership's golf club in any golf tournaments. The partnership simply has the right to use the Golfer's name and likeness as part of marketing campaigns, such as billboard spots, radio ads, and the like.

The obvious issue under this set of facts is whether the Golfer has entered into a tax-free exchange governed by **Section 721** or whether the Golfer has, in fact, licensed her name and likeness rights to the partnership for a period of five years.

As a reminder, **Section 721** provides that no gain or loss is recognized by a partnership or any of its partners in the case of a contribution of property to the partnership in exchange for an interest in such partnership. In determining whether the contribution of intellectual property to a partnership is a tax-free transfer under **Section 721** , the Service and courts often focus on whether property is "exchanged" for an interest in the partnership (Exchange Requirement) and whether a partner made a contribution of "property" to the partnership (Property Requirement). Each of these requirements is discussed in more detail below.

THE EXCHANGE REQUIREMENT-PRE-*DU PONT*

As a starting point, neither the Code nor the Regulations define the term "exchange" for purposes of **Section 721** . The Supreme Court has held that when a term is not defined by statute, such word should be given its ordinary meaning (plain meaning rule). **1** At least one court has applied this approach defining "exchange" for purposes of **Section 721** as "a mutual or reciprocal transfer of one thing for another," an extremely broad definition to be sure. **2** While the plain meaning rule appears to provide a broad definition of the term "exchange," the courts and Service have wrestled with the Exchange Requirement for the past 50 years.

Much of the published guidance in this area discusses the term "exchange" as used in **Section 351** , which provides that "no gain or loss shall be recognized if property is transferred to a corporation by one or more persons solely in *exchange* for stock in such corporation and immediately after the *exchange* such person or persons are in control (as defined in **Section 368(c)**) of the corporation." **3** This article discusses the authority examining the Exchange Requirement in both the **Section 351** and **721** contexts because the Service and courts agree that the term "exchange," as used in **Section 351** , is applicable in determining whether property was "exchanged" for purposes of **Section 721** .

For example, in FSA 1998-481, 10/7/98, the Service provided:

> Contributions of property to a partnership in exchange for a partnership interest therein are governed specifically by **Section 721** . There are no precise, consistent definitions for the terms "contribution," "property," and "exchange" included in **Section 721(a)** . **Section 351** is analogous to **Section 721** because **Section 351** addresses property transfers to corporations in exchange for stock in such corporations. **Section 351** is not, however, the Subchapter C mirror image of **Section 721** because **Section 351** only governs transfers by "controlling" shareholders. See [Sections] 351(a), (c), and 368(c). Exchanges involving "noncontrolling" shareholders are governed by **Sections 118** and **1032** . Section 1491, however, covers all transfers to foreign corporations and is not limited to transfers that constitute **Section 351** exchanges. **Section 721** , by contrast, governs all exchanges of property for a partnership interest. Notwithstanding these differences, we believe that the standards for an exchange of property for purposes of **Sections 721** and **351** are similar. **4**

Prior to *Du Pont* (discussed in greater detail below), **5** the Service took a hard-lined stance on the scope of intellectual property rights that must be transferred in order for such transfer to qualify as an "exchange" under **Section 351** (and correlatively as an "exchange" under **Section 721**). For example, in **Rev. Rul. 71-564, 1971-2 CB 179** , the Service held that a grant of patent rights to a corporation would constitute a transfer of property for purposes of **Section 351** , only if the transfer would be treated as a sale or exchange and not a license of property. The Service took similar positions in **Rev. Rul. 64-56, 1964-1 CB 133** (transfer of know-how) and **Rev. Rul. 69-156, 1969-1 CB 101** (transfer of a patent). In each of these rulings, the Service held that a transfer of intellectual property would qualify as an exchange for purposes of **Section 351** only if there was a "transfer of all substantial rights" in the property. Ostensibly, the Service wanted to prevent a transfer from qualifying for tax-free treatment under **Section 351** , when in substance the transfer was a license of property. However, the Service's position was put to the test in *E.I. Du Pont de Nemours Co.* **31 AFTR 2d 73-614** , 200 Ct Cl 391, 471 F2d 1211, 73-1 USTC ¶9183 (Ct. Cl., 1973), when the Court of Claims thoroughly rejected the "sale or exchange" requirement with respect to transfers under **Section 351** .

DU PONT

In 1959, E.I. Du Pont de Nemours Co (Du Pont U.S.), a domestic corporation, owned French patents for urea herbicides, which it manufactured in the United States and exported to France. French law, however, required that French-patented items be manufactured in France within three years of the issuance of the patent, or the owner of the patent was required to grant a license to a French producer. To avoid this outcome, Du Pont U.S. organized a wholly-owned French subsidiary, Du Pont de Nemours (France) S.A. (Du Pont France), to manufacture the herbicide in France. Du Pont US granted Du Pont France a royalty-free, non-exclusive license to make, use, and sell urea herbicides under the French patents, and Du Pont U.S. gave up its right to assert patent infringement against Du Pont France's products for the duration of the license, which was for the remaining life of the patents. In exchange for this grant, and in lieu of royalties, Du Pont U.S. received stock in Du Pont France, valued at $411,500.

The Service argued that the transfer did not qualify as an "exchange" under the reasoning set forth in **Rev. Rul. 69-156** , i.e., that the grant of patent rights to a corporation will constitute a transfer of property within the meaning of **Section 351** only if the grant of these rights constitutes a sale or exchange of property rather than a license. However, for the reasons discussed below, the court held that "sale or exchange" treatment was irrelevant for purposes of determining whether a transfer qualified as an "exchange" for purposes of **Section 351** .

First, the court noted that Congress did not use identical wording in **Section 351** and the capital gains provisions of the Code. Specifically, **Section 351** speaks of "property," not of "capital assets," and the Government conceded that **Section 351** can apply to property that is not a capital asset. **6** Similarly, the capital gains part of the Code uses "sale or exchange" of an asset, while **Section 351** is phrased in terms of property "transferred in exchange." The bare words of the statutes did not compel, or even favor, their parallel application, as might be the case if they were worded identically.

Second, **Section 351** and the capital gains provisions have different purposes. In order to qualify for the lower capital gains tax rates, there must be complete divestiture of the taxpayer's interest in property of a particular nature, i.e., capital assets. **Section 351** , on the other hand, is not concerned with situations involving true severance of control and true flow of gain, but rather with instances that Congress considered as revealing illusory or artificial relinquishment of control and illusory or artificial gain.

Third, the term "exchange" should have its ordinary meanings. Citing several cases, the court held that it is appropriate, if the words permit, to treat such words independently and to let the application of each be governed by its own separate purpose. **7**

Fourth, allowing the transfer of the non-exclusive license to qualify as an exchange for purposes of **Section 351** did not violate the purpose of **Section 351** . The government asserted that applying **Section 351** to this type of transaction would open up the gate to improper tax avoidance by allowing the conversion of ordinary income into capital gain. The court held, however, that the Service has officially determined under **Section 367** that such is not the case, and that **Section 367** is adequate protection when the transfer is to a foreign corporation. If the transaction is wholly domestic, there are other principles, such as those relating to the assignment of income, step transactions, and the Service's power to allocate income, that have been (and no doubt will continue to be) used by the Service and the courts if an attempt is made to employ **Section 351** for an improper purpose. **8**

In *Du Pont*, the court eliminated the "sale or exchange" requirement in a transfer of intellectual property in a **Section 351** exchange, and after Du Pont, the Service appeared to back down on its position that a transfer of intellectual property must qualify as a "sale or exchange" and not a license in order to qualify as an "exchange" for purposes of **Section 351** .

THE EXCHANGE REQUIREMENT-POST-*DU PONT*

Immediately following *Du Pont*, the Service appeared to reject its prior position requiring a "sale or exchange". For example, in a general counsel memorandum ssued on 11/16/76, **9** three years after *Du Pont*, the Service provided a thorough analysis of that decision and concluded that "we believe the Court of Claims responded persuasively to each of the Government's arguments in determining Code **Section 351** has no sale or exchange requirement." Similarly, in **GCM 37178** , 6/24/77, the Service held that "it is now the Service's position that the concept 'transfer in exchange' in Code [Section] 351 is not tied to and does not have the same scope as the concept 'sale or exchange' under the capital gains provisions. Thus, it is no longer the Service's position that Code [Section] 351 requires the transfer of all substantial rights in a transaction that would constitute a sale or exchange for purposes of determining gain or loss."

However, in 1983, the Service issued a Revenue Procedure that appeared to backtrack on its newfound position. In **Rev. Proc. 83-59, 1983-2 CB 575** , the Service required "substantially all" of the intangible property to be transferred (i.e., sale or exchange treatment) to receive a ruling under **Section 351** . Specifically, **Rev. Proc. 83-59** sets forth (among other things) certain representations that must be included in a request for a ruling under **Section 351** . The representations "function to insure that specific statutory and judicial requirements, and administrative ruling guidelines, are satisfied" and "if a representation cannot be submitted, an explanation must be given." The Revenue Procedure requires the taxpayer to represent (1) with respect to patents, that the transferor will transfer all substantial rights in such patents or patent applications within the meaning of **Section 351 of the Code** , and (2) with respect to franchises, trademarks, or trade names, that the transferor will not retain any significant power, right, or continuing interest, within the meaning of **Section 1253(b)** , in the franchises, trademarks or trade names being transferred. It is important to note, however, that the Service took this *solely* for purposes of obtaining a ruling as to whether a transfer qualified for tax-free treatment under **Section 351** , and did not necessarily take the position that a transfer of less than substantially all of the rights in intellectual property could not qualify as an "exchange" for purposes of **Section 351** .

After the Revenue Procedure, the Service again acquiesced to the reasoning in Du Pont. In FSA 1998-481, the Service provided:

> Under all the circumstances of this case, we believe that, in light of Du Pont, Stafford, and the rationale adopted by the courts therein, a court would be very likely to conclude that the transfer of a non-exclusive license and the related technology in the present case should qualify for nonrecognition under **Section 721** . Accordingly, we

> recommend accepting the taxpayer's characterization as a contribution to the partnership pursuant to **Section 721(a)** .

Similarly, in **Ltr. Rul. 199915040** , the Service again appeared to accept the holding in *Du Pont.* In that ruling, the Service held that the transfer of a 40-year ground lease on half of a strip mall contributed to a partnership by a partner (which owned the underlying real property) was an *exchange* for purposes of **Section 721** , even though the partner entered into an identical 40-year ground lease with the partnership on the remaining one-half of the strip mall. The Service held that the transfer of the leasehold interest in that case was within the statutory requirement of **Section 721** for a contribution of property *in exchange* for an interest in the partnership. It is interesting to note that the partner contributed a 40-year ground lease in half of the strip mall the partner owned and simultaneously leased the remaining half interest to the same partnership. The Service treated the contribution of the 40-year ground lease to the partnership as a transfer subject to **Section 721** , while simultaneous respecting the actual lease of the remaining half interest in the property to the same partnership. Thus, the Service essentially allowed the partner to elect in, or elect out of, the **Section 721** regime.

After *Du Pont*, Congress agreed with the court that the term "exchange," as used in **Section 351** , does not require a transfer of substantially all of the rights in intellectual property in order for such transfer to qualify as an "exchange" for purposes of **Section 351** . In 1999, Congress proposed the "Du Pont Rule." The Du Pont Rule was contained within the President's fiscal year 2000 budget proposal prepared by the Staff of the Joint Committee on Taxation (2000 Budget). While the 2000 Budget (which included the Du Pont Rule) was vetoed by the President, proposing the Du Pont rule provides some evidence that Congress did not intend for **Section 351** to require a "sale or exchange" of intellectual property in order for such transfer to be afforded tax-free treatment. **10**

In the 2000 Budget, Congress provided a description of the then present law and outlined the difference between the Service's and the court's interpretation of the Exchange Requirement.

> Generally, no gain or loss is recognized if one or more persons transfer property to a corporation solely in exchange for stock in the corporation and, immediately after the exchange such person or persons are in control of the corporation. Similarly, no gain or loss is recognized in the case of a contribution of property in exchange for a partnership interest. Neither the Internal Revenue Code nor the regulations provide the meaning of the requirement that a person "transfer property" in exchange for stock (or a partnership interest). The Internal Revenue Service interprets the requirement consistent with the "sale or other disposition of property" language in the context of a taxable disposition of property. Thus, a transfer of less than "all substantial rights" to use property will not qualify as a tax-free exchange and stock received will be treated as payments for the use of property rather than for the property itself. These amounts are characterized as ordinary income. However, the Claims Court has rejected the Service's position and held that the transfer of a non-exclusive license to use a patent

> (or any transfer of "something of value") could be a "transfer" of "property" for purposes of the nonrecognition provision. See E.I. DuPont de Nemours & Co. v. U.S., 471 F.2d 1211 (Ct. Cl. 1973).

Congress then described the proposed rule, which would essentially make the Exchange Requirement elective.

> The transfer of an interest in intangible property consisting of less than all of the substantial rights of the transferor in the property would be treated as a transfer of property for purposes of the nonrecognition provisions regarding transfers of property to controlled corporations and partnerships. Consistent reporting by the transferor and transferee would be required. Further, the Administration proposes that, in the case of a transfer of less than all of the substantial rights, the transferor must allocate the basis of the intangible between the retained rights and the transferred rights based upon respective fair market values. The proposal would not apply to transactions that are properly structured as licenses of intangibles. No inference is intended as to the treatment of these or similar transactions prior to the effective date.

Congress also espoused the reasoning for the proposed rule change.

> The Administration proposal is directed at the potential "whipsaw" that could arise under present law. For example, some taxpayers apparently take the position they may rely on case law permitting transfer of less than all rights in intangible property to be treated as a transfer of property, but do not allocate basis between the rights transferred and the rights retained (the particular case in question did not address that issue). Also, the transferor and transferee might take inconsistent positions regarding whether the transfer qualified at all as a transfer of property under **Section 351** . For example, the transferor might take the position that the transfer qualified as a transfer of property (resulting in no gain to the transferor) while the transferee might take the position that the transfer failed to qualify, resulting in "sale" treatment and a basis step-up to the transferee.
>
> The proposal would generally remove much of the uncertainty regarding whether transfers of less than all intangible rights can qualify as a transfer of property. The proposal would also require basis allocation, thus clarifying the appropriate results when "contribution" treatment is provided. The requirement of valuation of rights retained and transferred, however, arguably may add complexity.
>
> The proposal would apparently allow some amount of electivity, since taxpayers would still be permitted to "properly structure" a transfer of less than all rights as a license

rather than a contribution or property with basis allocation. However, the proposal would require consistent treatment by transferor and transferee. It is unclear how the proposal would enforce this requirement. Disputes could also arise regarding whether a transfer had been "properly structured" as a license or instead is a transfer of property subject to the provision.

THE EXCHANGE REQUIREMENT -CONCLUSION

Prior to *Du Pont*, the Service took the position that the Exchange Requirement was satisfied only if a transfer of intellectual property would ordinarily constitute a sale or exchange, and not a license. However, in *Du Pont*, the Court of Claims rejected the Service's position and held that the term "exchange" does not, in fact, require a transfer that would ordinarily constitute a sale or exchange. After *Du Pont*, the Service published guidance that acquiesced to the court's holding and appeared to revert back to its original position only in a Revenue Procedure related to obtaining a ruling under **Section 351** . However, requiring "sale or exchange" treatment for purposes of a ruling under **Section 351** does not preclude the possibility that a transfer may still meet the Exchange Requirement, if less than substantially all the rights with respect to intellectual property are transferred to a partnership. Congress went a step further in the 2000 Budget by proposing legislation that would, with respect to the Exchange Requirement, essentially allow a taxpayer to elect in, or elect out of, the **Section 721** regime. Thus, it would appear that the term "exchange" for purposes of **Section 721** should have its ordinary meaning, i.e., "a mutual or reciprocal transfer of one thing for another." **11**

Applying this principle to the hypothetical transaction, the grant of the exclusive, worldwide right to use the Golfer's name and likeness for a period five years, in exchange for a partnership interest, should satisfy the Exchange Requirement. As noted above, the term "exchange," as used in **Section 721** , should not require a transfer of substantially all of the rights in intellectual property, and thus any mutual or reciprocal transfer of one thing for another should satisfy the Exchange Requirement. Here, the Golfer and partnership made a mutual transfer of one thing (i.e., the exclusive right to use the Golfer's name and likeness) for another (i.e., the partnership interest). Accordingly, the hypothetical transaction should satisfy the Exchange Requirement.

However, the transfer of the Golfer's name and likeness rights must still satisfy the Property Requirement.

THE PROPERTY REQUIREMENT-EXCLUSIVE LICENSE

In the hypothetical transaction, the Golfer transferred the exclusive, worldwide right to use her name and likeness to promote the sale of golf clubs manufactured by the partnership, for a period of five years. First, it must be determined whether an exclusive worldwide right to use the Golfer's name and likeness is *property* for purposes of **Section 721** . If so, it must next be determined whether the limited duration of the property precludes the name and likeness rights from satisfying the Property Requirement.

The Property and Exchange Requirements have certain similarities. Neither the Code nor the Regulations define the term "property" or "exchange" for purposes of **Section 721** , and both terms generally have the same meaning as such terms are used in **Section 351** . **12** However, unlike the Exchange Requirement, the courts have a long history of defining the term "property" for purposes of **Section 351** .

The courts generally define the term "property" broadly to encompass "whatever may be transferred." **13** However, as discussed below, the definition is not without its limitations. Congress, the Service, and the courts all agree that the term "property," as used in **Section 721** , includes intangible property. For example, Congress acknowledged that intangible property may be transferred to a partnership under **Section 721** when it enacted **Section 721(d)** , which specifically grants regulatory authority to the Service to treat intangible property transferred to a partnership as sold to the partnership. Congress would have no reason to enact such legislation if intangible property was not "property" for purposes of **Section 721** . **14** Similarly, the Service acknowledged that intangible property may be transferred to a partnership under **Section 721** when it enacted **Reg. 1.197-2(g)(2)(ii)** , which provides that if a **Section 197** intangible is transferred in any transaction described in **Section 721** , the transfer is disregarded in determining whether the intangible is an amortizable **Section 197** intangible. By issuing regulations under **Section 197** that apply to certain intangibles transferred in a **Section 721** exchange, the Service acknowledged that intangibles may be "property" for purposes of **Section 721** . **15** The courts have also held that intangible property is "property" for purposes of **Sections 721** and **351** . For example, in *Stafford*, **53 AFTR 2d 84-986** , 727 F2d 1043, 84-1 USTC ¶9316 (CA-11, 1984), the court concluded that a letter of intent encompassed a sufficient bundle of rights to constitute "property" within the meaning of **Section 721** . Likewise, in *Du Pont*, the court held that a nonexclusive license was "property" for purposes of **Section 351** .

It is also a well-settled position of law that the right to use a taxpayer's name and likeness is intangible property. For example, in *Goosen*, **136 TC 547** (2011), both the taxpayer and Service agreed that endorsement fees under an off-course endorsement agreement constituted royalty income. In *Goosen*, the taxpayer entered into endorsement agreements that allowed the sponsor to use the athlete's name and likeness to advertise and promote the sponsor's products for a specified period. Certain agreements required the taxpayer to wear or use their products during golf tournaments, while other agreements did not have this requirement (such other agreements, the "off-course endorsement agreements"). The Taxpayer and the Service agreed that the endorsement fees under the off-course endorsement agreements constituted royalty income (and thus the right to use the name and likeness of the golfer was intellectual property), and the issue was not litigated. **16**

The courts have also held that the *exclusive* right to use intangible property is "property" for purposes of **Section 351** . In *Claude Neon Lights, Inc.*, **35 BTA 424** (1937), the court held that a transfer of an exclusive right to use a patent in a specified territory was "property" for purposes of the predecessor to **Section 351** . In *Neon Lights*, the taxpayer granted the exclusive right to use the neon patents in specified territories to a number of corporations in exchange for stock of such corporations. The court held that the grants were assignments and consequently "property susceptible of exchange within the meaning of the taxing statutes."

In the hypothetical transaction, not considering the limited duration of the property rights, the exclusive, worldwide right to use the Golfer's name and likeness to promote the sale of the partnership's golf clubs should be "property" for purposes of **Section 721** . It is clear from the authority discussed above that intangible property may be "property" for purposes of **Section 721** , and under the Goosen line of cases, a taxpayer's name and likeness rights are generally considered intangible property. In addition, *Neon Lights* makes clear that an exclusive right to use intangible property is also "property" for purposes of **Section 721** .

Notwithstanding the above, it must still be determined whether the limited duration of the Golfer's name and likeness rights precludes the intangible property from satisfying the Property Requirement.

THE PROPERTY REQUIREMENT-LIMITED DURATION LICENSE

In the hypothetical transaction, the Golfer transferred the exclusive, worldwide right to use her name and likeness for a period of five years, which is less than the useful life of such rights. Thus, it must be determined whether property with a "length of time carve-out" satisfies the Property Requirement.

The courts and Service have each allowed "carved-out" property to satisfy the Property Requirement. For example, in *Du Pont*, the court held that a non-exclusive right to use a patent (a carve-out of the exclusive right) was *property* for purposes of **Section 351** . First, the court cited several cases holding that patents and exclusive licenses of patents were "property" for purposes of **Section 351** . **17** Next, citing several more cases, the court noted that the term "property" has a "broad reach." **18** Finally, the court explained its broad interpretation of the term "property" as used in **Section 351** , and why such term includes a non-exclusive license:

> Du Pont handed over something of value and received stock in return; in normal understanding there was a mutual exchange. The rights under the patents, they were perpetual, irrevocable, and quite substantial in value. Taxpayer surrendered its right to assert infringement against the subsidiary even though it retained the right to prevent others from operating under the patent. The subsidiary could proceed without fear of an infringement suit. One chunk of rights was permanently severed from the main property-the patent. In common understanding, this segment can easily be considered "property" transferred, although it was not a full cross section of the patent. Nothing in the legislative purpose of **Section 351** counsels a narrower reading. Congress, as we have said, wished to free taxpayers from immediate tax where they remained in control of valuable items, even though the taxpayer made some intra-business rearrangements, and to postpone the tax until complete disposition to an outsider. That objective fits this case exactly; *Du Pont* remains in control, and there has not as yet

> been a disposition to an outsider. Under the theory of the section, there is no reason for tax at this time.

Similarly, in *H.B. Zachry Co.*, **49 TC 73** (1967), the court held that a carved out oil payment was "property" for purposes of **Section 351** , even though the right lapsed after the holder received $650,000 in payments. The carved-out oil payment was payable out of one-eighth of the interest that the contributing partner had in several oil and gas properties. The assignment was to remain in effect until the partnership received $650,000. The Service argued that the carved-out oil payment did not constitute "property" within the meaning of **Section 351** because it was an assignment of a pure income right. However, the court held that the carved out oil payment was "property" for purposes of **Section 351** because even if the oil payment was a "pure income right," it had present value and was an interest in land. In this case, the $650,000 in payments out of the one-eighth property interest was less than the total revenues to be generated by the one-eighth interest. As such, the court implicitly held that a property right, limited in duration (i.e., up to, but not in excess of, the $650,000 of the income produced by the one-eighth interest) may qualify as "property" for purposes of **Section 351** .

The Service agrees that a transfer of a partial interest in property can qualify as "property" for purposes of **Section 721** . In **Ltr. Rul. 8301001** , the Service held that a mineral rights interest in a reserve was "property" for purposes of **Section 721** , even though the contributed property constituted only a portion of the mineral rights owned by the contributing partner. The mineral rights interest granted the partnership the irrevocable right to extract, from a larger mineral right, a certain number of short tons of the mineral. The rights represented only a portion of the short tons estimated to be recoverable from the area. The Service, in conclusory fashion, held that, pursuant to **Section 721** , no gain or loss would be recognized upon the contribution of the mineral rights interest.

The Service has also ruled that a transfer of property for less than its remaining useful life can qualify as "property" for purposes of **Section 721** . In **Ltr. Rul. 8225069** , 3/24/82, the Service held that the contribution of the right to use land owned by the contributing partner was property for purposes of **Section 721** , even though the right to use the land was for a period of time less than the useful life of the land. In that ruling, the partner owned a fee interest in real estate in the downtown area of a large city. The partner contributed a 74-year lease in the land to a partnership in exchange for a partnership interest. The Service held that, assuming that the long-term leasehold interest is binding and legally enforceable and that the contributing partner performs no services for the partnership in exchange for its partnership interest, the contribution of the long-term interest to the partnership will be a contribution of "property" in exchange for a partnership interest under **Section 721** .

THE PROPERTY REQUIREMENT-EXCEPTIONS

While the term "property," as used in **Section 721** is broad, it is not without its limitations. For example, the courts have held that the term does not include certain intangible property created by personal services and does not include property with no value. While neither exception should apply to the Golfer's name and likeness rights, a short description is provided below.

First, the term "property" generally includes intangible property created by personal services, unless such property was created by the transferor specifically for the transferee in accordance with the transferee's specific instructions. For example, in *Gilson*, **TC Memo 1984-447** , PH TCM ¶84447, 48 CCH TCM 922 , an independent contractor who contracted with manufacturers to produce patentable industrial designs was found to be a seller of patentable property, not services, because he was not an employee of the manufacturers. Alternatively, in **Rev. Rul. 64-56, 1964 CB 133** , the Service held that when an asset has been developed specifically for a transferee, the stock received in exchange for such asset may be treated as payment for services rendered. Similarly, if patentable (or copyrightable) intangible property was created by the transferor under a "contract of employment," the transferor is generally treated as receiving compensation for services. **19**

The courts have also held that the term property does not include property that has no value. In *Santa Monica Pictures, LLC,* **TC Memo 2005-104** , RIA TC Memo ¶2005-104, 89 CCH TCM 1157 , the court held that a contribution of worthless debt was not a contribution of "property" for purposes of **Section 721** . Similarly, in *Meyer*, **46 AFTR 192** , 129 Ct Cl 214, 121 F Supp 898, 54-2 USTC ¶9437 (Ct. Cl., 1954), the court held that **Section 351** did not apply to a transfer of stock in a wholly owned insolvent corporation. In at least one case, however, the courts have held that the transfer of worthless property could qualify as "property" for purposes of **Section 351** . Specifically, in *Abbrecht*, **TC Memo 1987-199** , PH TCM ¶87199, 53 CCH TCM 611 , the court held that **Section 351** applied to debt exchanged for stock, although the value of the debt was not shown to have a fair market value greater than zero.

The Golfer's name and likeness rights should not meet the exceptions to the term "property" espoused by the courts and the Service. First, the Golfer's name and likeness rights were not created by the transferor specifically for the transferee. Thus, under *Gilson*, the partnership interest should not be treated as exchanged for services. Second, the Golfer's name and likeness rights have substantial value and thus should not be omitted from the definition of property under *Santa Monica Pictures* and *Meyer.*

THE PROPERTY REQUIREMENT-CONCLUSION

Based on the authorities discussed above, the Golfer's name and likeness rights should qualify as "property" for purposes of **Section 721** . As a starting point, the term "property" has a "broad reach," **20** and generally encompasses "whatever may be transferred". **21** Under the reasoning set forth in *Goosen* and *Neon Lights*, the exclusive, worldwide right to use the Golfer's name and likeness rights (not taking into account the limited duration of such rights) should be treated as *property* for purposes of **Section 721** .

As noted above, the Service and courts have each determined that property with a "length of time carve-out" may constitute "property" for purposes of **Sections 351** and **721** . For example, in *H.B. Zachry Co.*, **22** the court held that a carved out oil payment was "property" for purposes of **Section 351** , even though the right lapsed after the holder of the right received $650,000 in payments. Essentially, the interest was limited to the time it would take the one-eighth oil interest to produce the $650,000, notwithstanding the fact that the oil interest would continue to produce income after the $650,000 was paid to the partnership. Similarly, in **Ltr. Rul. 8225069** , the Service held that the contribution of the right to use land owned by the contributing partner was property for purposes of **Section 721** , even though the lease was for a period that was less than the useful life of the land. **23**

In the hypothetical transaction, the Golfer transferred the exclusive, worldwide right to use her name and likeness for a period of five years. Similar to the carved out oil payment in *H.B. Zachry Co.* and the land lease in **Ltr. Rul. 8225069** , the property right was granted for less than the entire useful life of such property. Under the same reasoning as *H.B. Zachry Co.* and Ltr. Rul. 82225069, the Golfer's name and likeness right should qualify as "property" for purposes of **Section 721** .

Accordingly, the Golfer's name and likeness rights (as described in the hypothetical) should qualify as "property" for purposes of **Section 721** .

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See *Brown*, **15 AFTR 2d 790** , 380 US 563, 14 L Ed 2d 75, 65-1 USTC ¶9375, 1965-2 CB 282 (1965); *Hanover Bank*, **9 AFTR 2d 1492** , 369 US 672, 8 L Ed 2d 187, 62-1 USTC ¶9487, 1962-1 CB 321 (1962); *Lang*, **12 AFTR 45** , 289 US 109, 77 L Ed 1066, 3 USTC ¶1088, 1933-1 CB 171 (1933); and *Old Colony R. Co.*, **10 AFTR 786** , 284 US 552, 76 L Ed 484, 3 USTC ¶880, 1932-1 CB 274 (1932).

2

Stafford, **53 AFTR 2d 84-986** , 727 F2d 1043, 84-1 USTC ¶9316 (CA-11, 1984).

3

Section 351(a) .

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See also **Ltr. Rul. 8225069** .

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E.I. Du Pont de Nemours & Co., **31 AFTR 2d 73-614** , 200 Ct Cl 391, 471 F2d 1211, 73-1 USTC ¶9183 (Ct. Cl., 1973).

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See generally *Connolly Tool & Engineering Co.*, **TC Memo 1964-202** , PH TCM ¶64202, 23 CCH TCM 1222 ; *P.A. Birren & Son*, **26 AFTR 197** , 116 F2d 718, 40-2 USTC ¶9826 (CA-7, 1940); *Halliburton*, **16 AFTR 368** , 78 F2d 265, 35-2 USTC ¶9431 (CA-9, 1935).

7

See generally, *Duncan*, **9 TC 468** (1947); *H. B. Zachry Co.*, **49 TC 73** (1967); Trenton Cotton Oil Co., **33**

AFTR 610 , 147 F2d 33, 45-1 USTC ¶9163 (CA-6,. 1945).

8

See *Rooney*, **10 AFTR 2d 5110** , 305 F2d 681, 62-2 USTC ¶9598 (CA-9, 1962); *Jacobs*, **47 AFTR 1445** , 224 F2d 412, 55-2 USTC ¶9555 (CA-9, 1955); and *Brown*, **25 AFTR 992** , 115 F2d 337, 40-2 USTC ¶9579, 40-2 USTC ¶9736 (CA-2, 1940).

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GCM 36922 , 11/16/76.

10

Description of revenue provisions contained in the President's fiscal year 2000 budget proposal prepared by the Staff of the Joint Committee on Taxation (2/22/99).

11

Stafford, *supra* note 2.

12

See FSA 1998-481; **Ltr. Rul. 8117210** ; *Stafford*, *supra* note 2.

13

See *H.B. Zachry Co.*, *supra* note 7; *In re Chrome Plate, Inc*., **45 AFTR 2d 80-1241** , 614 F2d 990, 80-1 USTC ¶9332 (CA-5, 1990); *Hempt Bros, Inc.*, **31 AFTR 2d 73-1302** , 354 F Supp 1172, 73-1 USTC ¶9458 (DC Pa, 1973)..

14

Similarly, in **Section 367(d)(3)** Congress provided that the "Secretary may provide by regulations that the rules of [**Section 367(d)(2)**] also apply to the transfer of intangible property by a United States person to a partnership in circumstances consistent with the purposes of this subsection." Since Congress enacted legislation authorizing the Service to treat intangibles transferred to a partnership as sold, Congress recognizes that intangibles may be transferred to a partnership in a transaction that qualifies under **Section 721** . While Congress granted the Service the authority to issue regulations under **Sections 721** and **367** , the Service has not issued any guidance under the authority granted in **Sections 721(d)** and **367(d)(3)** .

15

Similarly, in several Revenue Rulings the Service has ruled that intangible property, such as a corporate name, goodwill, trade secrets, patents, and know-how, qualify as property for purposes of **Section 351** , the corollary to **Section 721** in the corporate context. See **Rev. Rul. 79-288, 1979-2 CB 139** ; **Rev. Rul. 71-564, 1971-2 CB 179** ; **Rev. Rul. 69-156, 1969-1 CB 101** ; **Rev. Proc. 69-19, 1969-2 CB 301** .

16

See also *Garcia*, **140 TC 141** (2013); *Kramer*, **80 TC 768** (1983).

17

See generally *Claude Neon Lights*, **35 BTA 424** (1937); *Fawick*, **27 AFTR 2d 71-381** , 436 F2d 655, 71-1 USTC ¶9147 (CA-6, 1971).

18

See *Gillette Motor Transp., Inc.*, **5 AFTR 2d 1770** , 364 US 130, 4 L Ed 2d 1617, 60-2 USTC ¶9556, 1960-2 CB 466 (1960); *Parmelee Transp. Co.*, **16 AFTR 2d 5744** , 173 Ct Cl 139, 351 F2d 619, 65-2 USTC ¶9683 (Ct. Cl. 1965); *H.B. Zachry Co.*, *supra* note 7; *Halliburton*, *supra* note 6.

19

See generally *Downs* , **49 TC 533** (1968); *Blum*, **11 TC 101** (1948); *Gilson*, **TC Memo 1984-447** , PH TCM ¶84447, 48 CCH TCM 922 .

20

Rev. Rul. 64-56, 1964 CB 133 .

21

See *E.I. Du Pont de Nemours & Co.*, *supra* note 5.

22

See *supra* note 7;

23

While the Service could argue that the lease term was so long that, in essence, the transfer was for the entire useful life of the property, **Ltr. Rul. 8225069** does not necessarily stand for the proposition that transferring the right to use property for a period that is less than the useful life of such property fails to meet the Property Requirement. The ruling speaks only to the limited nature of guidance provided by the Service in this area.