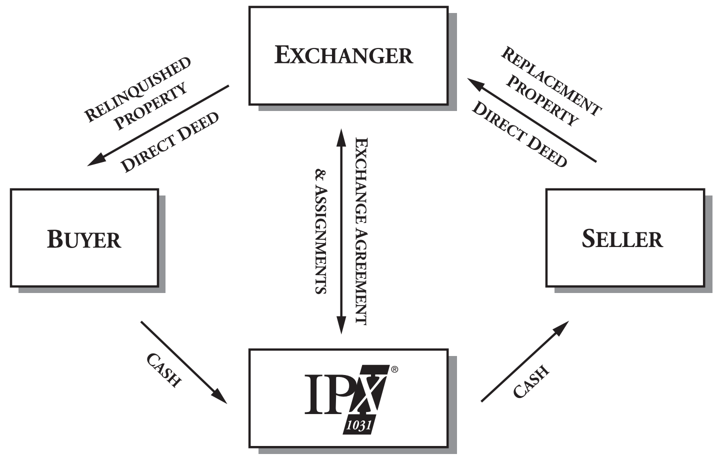
The Simultaneous Exchange

In a simultaneous (also called concurrent) exchange, the old ("relinquished") property and the new ("replacement") property are transferred concurrently. Investors performing such an exchange without the benefit of a Qualified Intermediary may risk losing the tax deferred status of the transaction, especially if there are three parties involved.

Simultaneous Exchange with Intermediary



The Tax Court in *Keith K. Klein v. Commissioner,* 66 T.C.M. 1115 (1993), has determined one simultaneous three party exchange as a fully taxable sale. Mr. Klein's closing escrow instructions simply assigned his rights to the proceeds from the sale of his property directly to the second closing for the purchase of his replacement property. The Tax Court stated that Mr. Klein had unrestricted control over, and thus the receipt of the funds in his transaction. Klein argued that the provision in his earnest money agreement stated that the buyer would cooperate in structuring a tax deferred exchange. He felt that the funds in escrow were already assigned to the seller of the replacement property and thus he had no control over the funds. The Court indicated that the cooperation clause would not control the constructive receipt issue. **Unwary investors who do not utilize a Qualified Intermediary may be surprised to discover their transaction does not qualify for tax deferral.**

The use of a Qualified Intermediary involves the insertion of a fourth party who transfers ownership to the proper entities and insulates the exchanger from constructive receipt issues on the proceeds. The Qualified Intermediary becomes the accommodating party, thus protecting the Exchanger, buyer and seller. Although the Qualified Intermediary does not hold any proceeds in a simultaneous exchange, they function in the important capacity of creating a reciprocal trade; since they receive the relinquished property and acquire the replacement property for the exchange. The Qualified Intermediary also **controls** the flow of the exchange funds.

The Qualified Intermediary provides the following important services:

- Shields parties (Exchanger, buyer and seller) from certain liabilities;
- Ensures the preservation of safe harbor treatment under the 1991 Treasury Regulations;
- Provides a paper trail validating the flow and structure of the transaction; and
- Reduces the agent and closing officer's liability for the exchange structure.