Section 357: Assumption of Liabilities in Certain Exchanges

Start

351 or 361 Exchange

Did the taxpayer receive property which would be permitted to be received under section 351 or 361 without the recognition of gain if it were the sole consideration (such as shares of stock)?

Yes
Sec. 357(a)(1)

No
Sec. 357 does not apply to the transaction.

Liabilities Assumed

Did, as part of the consideration, another party to the exchange assume a liability of the taxpayer? See section 357(d) which provides special rules for determining which recourse and nonrecourse liabilities are treated as having been assumed.

Yes
Sec. 357(a)(2), (d), Perrachi v. Commr., 143 F.3d 487 (9th Cir. 1998), Lessinger v. Commr., 872 F.2d 519 (2d Cir. 1989)

No

Tax Avoidance Purpose

Taking into consideration the nature of the liability and the circumstances in the light of which the arrangement for the assumption was made, did it appear that the principal purpose of the taxpayer with respect to the assumption of the liability was to avoid Federal income tax on the exchange, or, if not such purpose, was not a bona fide business purpose? In any suit or proceeding where the burden is on the taxpayer to prove such assumption is not to be treated as money received by the taxpayer, such burden is not considered as sustained unless the taxpayer sustains such burden by the clear preponderance of the evidence.

Yes
Sec. 357(b), 351(b), 361(b), Reg. 1.357-1(c)

No

All Liabilities Are Boot

The total amount of the liabilities assumed in the exchange, and not merely a particular liability with regard to which the tax avoidance purpose existed is, for purposes of section 351 or 361 (as the case may be), considered as money received (i.e., “boot”) by the taxpayer on the exchange.

Sec. 357(c)(2)(B), Sec. 357(c)(3)(A)(i), Focht v. Commr., 68 T.C. 223 (1977)

Sec. 357(c)(3)(A)(ii)

No

Certain G Reorgs

Was the exchange pursuant to a plan of reorganization within the meaning of section 368(a)(1)(G) where no former shareholder of the transferor corporation receives any consideration for his stock?

Yes
Sec. 357(b)(1), (b)(2), (c)(2)(A), Reg. 1.357-1(c)

No

351 Exchange

Was there an exchange to which section 351 applies?

Yes
Sec. 357(c)(1)(A), (c)(3)(A)

No
Sec. 357(c)(2)(B)

Create or Increase Basis

Did the incurrence of the liability, in whole or in part, result in the creation of, or an increase in, the basis of any property?

No
Sec. 357(c)(3)(A)

Yes
Sec. 357(c)(3)(B)

Give Rise to Deduction

Was the liability assumed a liability the payment of which would give rise to a deduction?

Yes
Sec. 357(c)(3)(A)(i), Focht v. Commr., 68 T.C. 223 (1977)

No
Sec. 357(c)(3)(A)(ii)

Liabilities Exceed Basis

Did the sum of the amount of the liabilities assumed exceed the total of the adjusted basis of the property transferred pursuant to the exchange?

No
Sec. 357(c)(1)(B)

Yes
Sec. 357(c)(1), flush, Reg. 1.357-2

Gain Equals Excess Over Basis

The excess of the liabilities over the adjusted basis is considered as a gain from the sale or exchange of a capital asset or of property which is not a capital asset, as the case may be.

Sec. 357(c)(1), flush, Reg. 1.357-2

631 Exchange in D Reorg As Part of 355 Spin-Off

Was there an exchange to which section 361 applies by reason of a plan of reorganization within the meaning of section 368(a)(1)(D) with respect to which stock or securities of the corporation to which the assets are transferred are distributed in a transaction which qualifies under section 355?

No
Sec. 357(c)(1)(B)

Yes

Liabilities Assumed Not Boot

The assumption of the liability is not treated as money or other property (i.e., it is not “boot”), and the assumption of the liability will not prevent the exchange from being within the provisions of section 351 or 361, as the case may be.

Sec. 357(a)

Disclaimer

This flowchart has been extensively reviewed to be as complete and accurate as possible. However, due to the complexity of these rules, this flowchart undoubtedly includes errors and omissions. You should consult a tax professional for individual advice regarding your own situation. This flowchart is not updated for changes in the tax laws and should not be relied upon for any purpose whatsoever.