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# Like-Kind Exchange Corner

## *Malulani* and the Entrenchment of Mechanical Analysis of Related-Party Exchange Rules

By Bradley T. Borden

At some point, taxpayers need to get wise to the fact that the IRS and courts do not particularly like related-party exchanges. Stated differently, every time a court considers whether a related-party exchange qualifies for nonrecognition under Code Sec. 1031, it rules against the taxpayer. Of course, the IRS most likely selectively chooses easy cases to challenge. Nonetheless, the IRS's record in challenging them is perfect. Since the IRS published Rev. Rul. 2002-83,[1] taxpayers have lost three related-party exchange cases[2] and have not won a single case.[3] In each of those cases, the taxpayer transferred property through a qualified intermediary to an unrelated buyer and acquired replacement property from a related party.[4] *Malulani* now adds a fourth loss to the taxpayer column in this area,[5] but the taxpayer has appealed the Tax Court's decision,[6] so perhaps a taxpayer victory is in the works (but keep expectations in check). With the four cases, the jurisprudence of Code Sec. 1031(f)(4) begins to come into focus.

The *Malulani* decision is not surprising when examined in the context of the three prior decisions. The first loss for taxpayers came in *Teruya Brothers, Ltd.*[7] In that case, the related party recognized gain on the sale to the exchanger, but it had net operating losses that absorbed the recognized gain. As a result, the exchanger and related party were better off doing the exchange than they would have been if the exchanger merely sold its property. The Tax Court and Ninth Circuit ruled that Code Sec. 1031(f)(4) precluded Code Sec. 1031 nonrecognition. The taxpayers also lost in *Ocmulgee Fields, Inc.*[8] The related party in that case recognized gain on the sale of property to the exchanger, but the gain the related party recognized was less than the amount of gain the exchanger would have recognized on the sale of its relinquished property to a third party. The Tax Court and Eleventh Circuit both ruled that Code Sec. 1031(f)(4) precluded the exchanger from deferring gain under Code Sec. 1031. In *North Central Rental & Leasing, LLC*,[9] the North Dakota Circuit Court and the Eighth Circuit denied Code Sec. 1031 nonrecognition to an exchanger who acquired replacement property from a related equipment dealer, which recognized little or no gain on the transfer.[10] Now, in *Malulani*, the Tax Court has ruled in a memorandum opinion that an exchanger who acquired replacement property from a related party that

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had NOLs does not qualify for nonrecognition under Code Sec. 1031. As the fourth straight loss for taxpayers, this decision has a definitive tone to it. For instance, the Tax Court's issuance of a memorandum opinion this time suggests that the court believes the case does not raise significant legal issues.[11] Even though the taxpayer will appeal the decision, based upon the facts stated in the opinion, it does not face very favorable odds of winning.

Code Sec. 1031(f) governs related-party exchanges. That section has three principal parts that inform the analysis of the *Malulani* decision. First, Code Sec. 1031(f)(1) disallows nonrecognition of gain or loss on direct exchanges between related parties, if one of the parties transfers an exchange property within two years after the exchange. Second, Code Sec. 1031(f)(4) applies the disallowance principles in Code Sec. 1031(f)(1) to any exchange that is part of a transaction structured to avoid Code Sec. 1031(f)(1). Third, Code Sec. 1031(f)(2)(C) provides a nonavoidance exception to Code Sec. (f)(1) and (f)(4), which applies if an exchanger can show that neither the related-party exchange nor the subsequent disposition of exchange property had as one of its principal purposes the avoidance of federal income tax.

In *Malulani*, the taxpayer, MBL Maryland, Inc. (MBL), transferred relinquished property on January 10, 2007, to an unrelated party as part of an exchange facilitated by a qualified intermediary (QI). Brokers presented numerous properties to MBL before the January 10 transfer and up until the expiration of the 45-day identification period.[12] None of those properties were owned by a person related to MBL. When MBL identified three replacement properties, all three were owned by MIL, a party related to MBL. On July 3, 2007, MBL acquired replacement property from MIL (the related party) through the qualified intermediary. The court based its denial of Code Sec. 1031 nonrecognition on the gain realized by both MBL and the related party, so those numbers are important. MBL sold the relinquished property through the qualified intermediary for $4,631,275 (net of closing costs) and had a $2,743,235 basis in the property at the time. Thus, it realized $1,888,040 of gain on the transfer. The related party sold the replacement property to MBL for $5.52 million and had a $2,392,996 basis in the property at the time of the sale. The related party recognized gain of $3,127,004, but it had NOLs that offset the gain. It ended up paying $44,774 of alternative minimum tax (AMT) because NOL could only offset 90 percent of its gain for purposes of the AMT. The court ruled that Code Sec. 1031(f)(4) applied to MBL's QI-facilitated exchange and required MBL to recognize the $1,888,040 of gain.

The Tax Court compared the actual aggregate tax liability of the transaction of MBL and the related party ("actual tax liability") to the hypothetical tax liability of a direct sale by MBL of the relinquished property ("hypothetical tax liability") to determine that Code Sec. 1031(f)(4) applies. The Tax Court attributed the source of the actual-hypothetical comparison to both *Ocmulgee Fields* and *Teruya Brothers*.[13] Under this test, if the actual tax liability is significantly less than the hypothetical tax liability, the Tax Court infers that the exchanger structured the transaction for tax avoidance purposes.[14]

To apply the actual-hypothetical comparison, the court had to determine the hypothetical tax liability. MBL had $748,273 of NOL in 2007. Because it claimed nonrecognition on the sale of the relinquished property, it carried that NOL back to 2005 and reduced its tax liability for that year. Had MBL recognized the $1,888,040 of gain in 2007, its $748,273 of NOL would have offset a portion of that gain, and it would not have carried the NOL back to 2005. Consequently, it would have paid $387,494 of tax in 2007 and an additional $264,171 of tax in 2005 as a result of the loss of the NOL carryback. Thus, the total tax under MBL's hypothetical sale of the property would have been $651,665, which is significantly more than the $44,774 that MBL and the related party actually paid (*see* Table 1). Consequently, the Tax Court held Code Sec. 1031(f)(4) applied, and denied MBL's Code Sec. 1031 nonrecognition.

**TABLE 1. COMPARISON OF AGGREGATE ACTUAL TAX PAID TO HYPOTHETICAL TAX LIABILITY**

| | MBL | Related Party | Actual Total | Hypothetical |
|---|---|---|---|---|
| AR | $4,631,275 | $5,520,000 | | $4,631,275 |
| AB | $2,743,235 | $2,393,996 | | $2,743,235 |
| Gain | $1,888,040 | $3,127,004 | | $1,888,040 |
| NOL Offset | $0 | >$3,127,004 | | $748,273 |
| Taxable Gain | $0 | $0 | | $1,139,767 |
| Tax on Sale | $0 | $44,774 (AMT) | | $387,494 |
| NOL Carryback | $748,273 | NA | | $0 |
| 2005 Tax | $0 | NA | | $264,171 |
| Total Tax | $0 | $44,774 | $44,774 | $651,665 |

By reducing the analysis to a simple comparison of actual tax liability and the hypothetical tax liability, the Tax Court found that MBL obtained substantial economic benefit as a result of the structure. The Tax Court concluded that the

related parties cashed out of the investment in the relinquished property almost tax free. It relied upon a technical reading of Code Sec. 1031(f) and "hard" mathematical analysis to reach its conclusion, and it denied Code Sec. 1031 nonrecognition to the exchanger.[15]

After the court determined the transaction was subject to Code Sec. 1031(f)(4), the exchanger's hope to obtain nonrecognition rested upon its ability to show that the transaction lacked the requisite tax-avoidance motive. The legislative history of Code Sec. 1031(f)(2)(C) appears to limit the nonavoidance defense to (1) omnibus exchanges of undivided interests in multiple properties that allow the co-owners to exchange to separately owned properties,[16] (2) subsequent dispositions of the exchange properties in nonrecognition transactions and (3) transactions that do not involve basis shifting.[17] Neither of the first two items applied to the *Malulani* facts. Thus, MBL was left to rely upon an unconvincing basis-shifting argument and two "soft" arguments that do not appear to relate to the items listed in the legislative history.

First, MBL argued that the transaction lacked tax-avoidance purpose because it was not an exchange of low-basis property for high-basis property, which appears to reference the legislative history that expressed concern about basis shifting.[18] The Tax Court apparently was unimpressed with the argument that the related party recognized more gain than MBL realized ($3,127,004 for the related party versus $1,888,040 for MBL). Instead, it found that "[n]et tax savings achieved through use of the related party's NOLs may demonstrate the presence of tax-avoidance purpose notwithstanding a lack of basis shifting." Thus, the question of basis-shifting was subsumed by the actual-hypothetical comparison in the court's analysis.

Second, MBL argued that the QI-facilitated exchange was not structured to avoid the purposes of Code Sec. 1031(f)(1) because it was not part of a "prearranged plan," a term used in the legislative history to describe a transaction that does not qualify for Code Sec. 1031 nonrecognition.[19] Citing *Ocmulgee Fields*, the court rejected that argument, stating that "the presence or absence of a prearranged plan to use property from a related person to complete a like-kind exchange is not dispositive of a violation of section 1031(f)(4)."

Third, the court disposed of the argument that the exchanger lacked tax-avoidance motive because it might have been unaware of the related party's tax situation. Relegating the discussion to a footnote (indicating the esteem with which it held the argument), the court found that testimony of MBL's CEO lacked credibility because the CEO was a person with direct knowledge of the related party's situation.[20] It therefore disregarded the argument.

The courts' reluctance to accept soft analyses of Code Sec. 1031(f) is understandable. First, neither the plain language of the statute nor the legislative history provide room for soft analysis. Second, courts apparently realize that if they accept soft analysis, the bottom could fall out of Code Sec. 1031(f). By accepting soft analysis once, courts would provide a blueprint to taxpayers for avoiding Code Sec. 1031(f). For instance, if the court accepted the exchanger's claim that it was ignorant of the related party's tax situation, exchangers would attempt to plan related-party exchanges in such a way that they could make a plausible-deniability argument. Exchangers who had completed a related-party exchange would seek to develop evidence and testimony to support plausible-deniability claims. Courts would become mired in factual development of facts that are too soft to accurately establish. Courts clearly realize that exchangers and their advisors are clever enough to present evidence to support soft arguments. At a minimum, exchangers would be able to use soft arguments to confuse the issues and could eventually eviscerate Code Sec. 1031(f). Thus, courts' rejection of soft arguments is reasonable from both technical and policy grounds.

*Since the IRS published Rev. Rul. 2002-83, taxpayers have lost three related-party exchange cases and have not won a single case.*

The court's rejection of MBL's soft arguments most likely puts the lid on other soft arguments. For instance, courts most likely would not be receptive to other non-tax-avoidance arguments, such as an assertion that the acquisition of the replacement property from a related party was a fall-back alternative.[21] The mechanics of Code Sec. 1031(f) do not explicitly provide any leeway for arguing that the court should consider the attenuation of a relationship that comes within the technical definition of related party. A technical reading of the law appears to impose constructive knowledge on the exchanger of the related party's tax situation. Exchangers who argue for an exception to the mechanical application of the rules would be asking for an unprecedented ruling. To this point, such arguments have been nothing more than hesitant speculation of commentators.[22] The mechanical analytical framework imposes significant challenges for taxpayers who wish to avoid Code Sec. 1031(f)(4) or make Code

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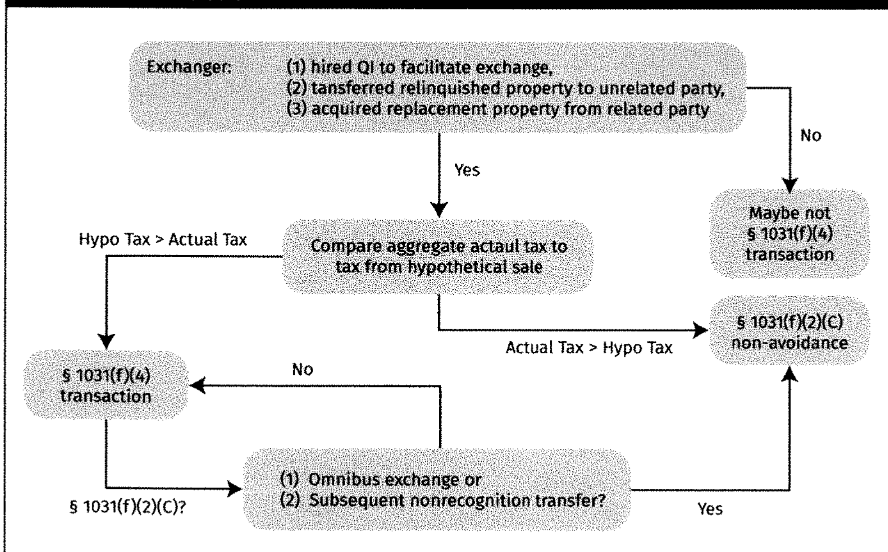
Sec. 1031(f)(2)(C) arguments in the face of unfavorable mathematical evidence.

The mechanical analytical framework of Code Sec. 1031(f)(4), as it applies to the type of transaction in *Malulani*, appears to boil down to a few steps to determine whether the transaction can qualify for Code Sec. 1031 nonrecognition (*see* Chart 1). The analysis begins with the court asking whether the exchanger has transferred relinquished property to an unrelated party and received replacement property from a related party as part of a QI-facilitated exchange. If the answer to that question is yes, courts then compare the actual tax liability to the hypothetical tax liability. If the hypothetical tax liability is significantly greater than the actual tax liability, courts find that the transaction comes within Code Sec. 1031(f)(4) and disallow nonrecognition, subject to the nonavoidance exception. Courts appear to reject soft arguments regarding nonavoidance claims. The exchange could defend the structure by showing it lacked a tax-avoidance motive because the exchange was part of an omnibus exchange, which would require showing that it transferred undivided interests in some properties in exchange for undivided interests in another property that gave it a fee interest in the other property. A subsequent transfer would generally only be relevant in direct exchanges, so its application to a QI-facilitated exchange is questionable. Because the *Malulani* court's actual-hypothetical comparison subsumes basis-shifting, the exchanger would have to show that the actual tax liability is greater than the hypothetical tax liability to make a convincing nonavoidance defense under the third listed item in the legislative history.

CHART 1. EMERGING MECHANICAL ANALYTICAL FRAMEWORK OF CODE SEC. 1031(F)(4) QI-FACILITATED EXCHANGES




If the actual tax paid is greater than the hypothetical tax liability, an exchanger would have to be able to demonstrate that the actual tax paid does not represent the actual tax liability. It might be able to demonstrate that in certain situations, such as when the related party's recognized gain consumed an NOL that might otherwise offset income in another year.[23] Assume for instance that MBL had argued that because the related party consumed the NOL in 2007 it was unable to carry it forward to 2008. In 2007, it anticipated that as a result of consuming the NOL in 2007, it would have $3,127,004 of taxable income in 2008,[24] which it otherwise could have offset with the NOL.[25] MBL might argue that it should be able to take into account the tax it anticipated paying in 2008 in computing the actual tax liability. The computation of that amount must include the amount of anticipated tax, discounted to present value. If MBL were to use the opportunity cost of capital to determine the discount rate of the future tax, it should also adjust the amount by the probability that it will pay the tax in 2008.[26] Such adjustments would provide MBL with the actual tax cost of exchanging with the related party. That actual tax cost would include the tax paid in the year of exchange and the expected cost of any taxes to be paid in the future as a result of the present consumption of the NOL. The following formula states the actual tax cost of doing the exchange:

$$T = T_C + P\left(\frac{T_F}{(1+r)^n}\right)$$

Where

$T$ = total aggregate actual tax

$T$ = aggregate tax paid currently

$T$ = tax paid in future as a result of consuming the NOL currently

$P$ = probability of paying the tax at designated future date

$r$ = opportunity cost of capital

$n$ = number years until the related party will pay the tax

To avoid the Tax Court's inference that the transaction is a Code Sec. 1031(f)(4) exchange, the actual tax cost would have to be not significantly less than the $651,655 tax on the hypothetical sale. The current tax was $44,774, so the expected cost of the consumed NOL would have to be $606,881 for the two actual to

equal the hypothetical. If the related party would have $3,127,004 of taxable income in 2008, as a result of consuming the NOL in 2007, its tax liability would be $1,094,451 ($3,127,004 × 35%). If the related party's opportunity cost of capital is 3.5 percent, the present value, unadjusted for the probability of paying the tax, would be $1,057,441. For the expected cost of that amount to equal $606,881, the probability of paying it would have to be about 58 percent ($1,057,441 × 58% = $613,316). Thus, to make a convincing argument that the actual tax liability was greater than the hypothetical tax liability, MBL would have to show that in 2007, the probability of paying tax as a result of consuming the NOL in 2008 was at least about 58 percent. That would require showing that the probability of the related party having taxable income of at least $3,021,260 in 2008 was at least about 58 percent in 2007.

The computation becomes more complicated if the related party would expect to recognize the effects of the consumed NOL over a number of years. In such situations, the exchanger would have to determine the amount of tax to be paid in the future years as a result of the current consumption of the NOL and the probability of paying such amounts in the specific years. Computing the probability of paying tax in a future year as a result of the present consumption of an NOL would require complex estimates of the conditional probability of paying an amount of tax in a future give year as a result of the current consumption.[27] The expected cost of the future payment of the tax would be the sum of the present value of tax paid in each future year as a result of the current consumption of the NOL multiplied by the probability of paying the tax in that future year. The formula for that computation would be something like this:

$$T = T_C + \sum P \left( \frac{T_F}{(1 + r)^n} \right)$$

Because courts infer the transaction is designed to avoid the related-party rules if actual tax liability is greater than the hypothetical tax liability, the exchanger presumably would have to demonstrate that the expected cost of consuming the NOL currently is greater than the difference between the actual tax paid and the hypothetical tax. Consider the challenges that the exchanger would face in attempting to demonstrate that. The IRS would challenge the exchanger's tax treatment of the exchange and a court would consider it several years after the exchanger predicts when the consumed NOL would otherwise offset future income. In *Malulani*, for instance, the court issued its opinion in 2016 for a 2007 exchange. The court could have required MBL to present at least nine years of information about the related party's tax situation, if MBL were to argue that the probability in 2007 of it paying tax later was high as a result of the consumed NOL. If the related party continued to have losses following the year of the exchange, the court might have disregarded any prior estimates of the expected cost that included payment in any of the years that had since elapsed, in which the related party may have reported losses. The *Malulani* decision leaves unanswered whether courts might rely exclusively on the results from the year of the exchange to do the actual-hypothetical comparison.[28]

*The Malulani decision leaves unanswered whether courts might rely exclusively on the results from the year of the exchange to do the actual-hypothetical comparison.*

The Tax Court's reliance on only hard analysis in *Malulani* solidifies Code Sec. 1031(f)(4) jurisprudence. Based on the published opinions, the actual-hypothetical analysis is now part of the law, and it is a handy tool to use to determine whether QI-facilitated related-party exchanges appear structured to avoid the purposes of Code Sec. 1031(f) and therefore do not qualify for Code Sec. 1031 nonrecognition. Taxpayers must be prepared to present hard arguments to defend against such rulings; their soft arguments do not appear to be sustainable. Perhaps, future cases will add more insight into the factors that affect the computation of the actual tax liability, such as the effect of the current consumption of NOLs. For exchanges that are similar to the facts in *Malulani*, however, the law otherwise appears to be well settled. Taxpayers should anticipate that the courts will continue to apply the actual-hypothetical comparison and disallow nonrecognition if the actual tax liability is significantly less than the hypothetical tax liability. With the growing body of law disallowing nonrecognition, the IRS would not be blamed for seeking to impose penalties on such transactions in the future.

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## ENDNOTES

[1] Rev. Rul. 2002-83, 2002-83 CB 927.

[2] *See North Central Rental & Leasing, LLC*, CA-8, 2015-1 USTC ¶50,217, 779 F3d 738, *aff'g* 112 AFTR2d 2013-7045 (D. ND 2013); *Ocmulgee Fields, Inc.*, CA-11, 2010-2 USTC ¶50,565, 613 F3d 1360, *aff'g* 132 TC 105, Dec. 57,777 (2009); *Teruya Bros., Ltd. & Subs.*, CA-9, 2009-2 USTC ¶50,624, 580 F3d 1038, *aff'g* 124 TC 45, Dec. 55,924 (2005).

[3] Prior to the enactment of Code Sec. 1031(f), a taxpayer did win a related-party exchange case. *See Fredericks*, 67 TCM 2005, Dec. 49,629(M), TC Memo. 1994-27 (1994). The rationale in the case could still theoretically apply to related-party exchanges, but apparently, no court has yet found similar facts to which they might apply the rationale. Kelly E. Alton, Bradley T. Borden & Alan S. Lederman, *Are Related-Party Acquisitions in Anticipation of Exchange Technically and Theoretically Valid?* 120 J. TAX'N 52 (Feb. 2014). *But see North Central Rental & Leasing, LLC*, CA-8, 2015-1 USTC ¶50,217, 779 F3d 738.

[4] Over the same period, the IRS privately blessed related-party exchanges where the related party acquired the exchanger's relinquished property with cash, and the exchanger acquired replacement property from an unrelated party. *See, e.g.*, LTR 2010-27-036 (Mar. 20, 2010); LTR 2007-09-026 (Nov. 28, 2006); LTR 2007-12-013 (Nov. 20, 2006); LTR 2007-28-008 (Apr. 12, 2007).

[5] *The Malulani Group, Ltd. & Subsidiary*, 112 TCM 530, Dec. 60,737(M), TC Memo. 2016-209.

[6] *See* United States Tax Court, *Docket Inquiry for Docket No. 018128-12*, available online at *www.ustaxcourt.gov/USTCDockInq/DocketDisplay.aspx?DocketNo=12018128* (last visited Feb. 28, 2017) (showing that the taxpayer filed with the Tax Court a notice of appeal to the Ninth Circuit Court of Appeals on Dec. 20, 2016).

[7] *See also* Kelly E. Alton, Bradley T. Borden & Alan S. Lederman, *Related-Party Like-Kind Exchanges*, 115 TAX NOTES 467 (Apr. 30, 2007) (discussing the *Teruya Brothers* decision).

[8] *See also* Kelly E. Alton, Bradley T. Borden & Alan S. Lederman, *Related Party Like-Kind Exchanges: Teruya Brothers and Beyond*, 111 J. TAX'N 324 (Dec. 2009) (discussing the *Ocmulgee Fields* decision).

[9] *North Central Rental & Leasing, LLC*, CA-8, 2015-1 USTC ¶50,217, 779 F3d 738.

[10] A column by the author in an earlier issue of this JOURNAL discussed the *North Central* decision. *See* Bradley T. Borden, *North Central and the Expansion of Code Sec. 1031(f) Related-Party Exchange Rules*, J. PASSTHROUGH ENTITIES, May–June 2015, at 19. *See also* Bradley T. Borden & Alan S. Lederman, *Section 1031 Exchanges: Death of a Related-Party Exchange—Did " Butler" Do it?* 75 DAILY TAX REP. J-1 (Apr. 20, 2015); Alton, Borden & Lederman, *supra* note 3.

[11] *See* United States Tax Court, *Taxpayer Information: After Trial*, ("Generally, a Memorandum Opinion is issued in a regular case that does not involve a novel legal issue. A Memorandum Opinion addresses cases where the law is settled or factually driven. A Memorandum Opinion can be cited as legal authority, and the decision can be appealed."), available online at *www.ustaxcourt.gov/taxpayer_info_after.htm* (last visited Mar. 17, 2017).

[12] *See* Code Sec. 1031(a)(3).

[13] *Citing Ocmulgee Fields, Inc.*, 132 TC 105 at 118–120; *Teruya Bros. Ltd. & Subs.*, 124 TC 124 at 55.

[14] The *Malulani* decision does not establish a threshold for "significantly less." The $651,665 hypothetical tax liability was 14.56 times greater than the $44,774 actual tax liability. The actual tax liability was about $610,000 less than the hypothetical tax liability, so it was about 93 percent less than the hypothetical tax liability. Perhaps, a (significantly or substantially) smaller spread in absolute terms or in percentage terms would provide the exchanger an opportunity to argue that Code Sec. 1031(f)(4) should not apply, even though actual tax liability is less than, but not significantly less than, the hypothetical tax liability. The decision leaves open what might constitute a significant difference between the actual and hypothetical tax liability.

[15] The column uses "hard" and "soft" to distinguish between analyses and arguments that rely upon objective technical quantitative facts (hard analysis) and those that that rely upon subject aspects of the parties' behavior and knowledge based upon testimony or documentation (soft analysis).

[16] *See, e.g.*, Rev. Rul. 73-476, 1973-2 CB 300, Bradley T. Borden, TAX-FREE LIKE-KIND EXCHANGES, at ¶ 3.2[2][e] (2d ed. 2015).

[17] *See* S. Rep. No. 56, 101st Cong., 1st Sess. 151 (1989).

[18] *Id.*

[19] *See* H.R. Rep. 101-247, 101st Cong. 2d Sess. 1339 (1990) at 1340.

[20] *See Malulani*, fn. 8.

[21] *See* Alton, Borden & Lederman, *supra* note 8, at 489–490.

[22] *See, e.g.*, Alton, Borden & Lederman, *supra* note 8, at 488–489 (mentioning attenuation as a potential argument, but hedging it by recognizing that courts apply the definition of related party mechanically).

[23] *See Malulani*, fn. 6 (recognizing that the *Teruya Brothers* court left open the theoretical possibility of using the tax price of consuming an NOL in the year of the exchange, *see Teruya Brothers, Ltd.*, 580 F3d at 1047, fn. 12, *citing* Alton, Borden & Lederman, *supra* note 7).

[24] The parties subject to tax in *Malulani* were corporations, so their income was subject to the same rates, regardless of its character. Thus, the NOL would offset the taxable income subject to the same rate regardless of the year to which it applied. For some taxpayers, an NOL that does not offset gain from the disposition of property could offset the income tax at a higher rate in a different year.

[25] Taxpayers might also be able to show the effect of otherwise carrying the NOL back, as the IRS did in computing MBL's hypothetical tax liability.

[26] Otherwise, the discount rate may account for the probability of making the payment. The discount rate would be inversely related to the probability of paying the tax—as the probability of paying the tax goes down, the probability-adjusted discount rate would go up. Instead of trying to compute that relationship, taxpayers may be better served by using their opportunity cost of capital and separately determining the probability of paying tax in a particular year as a result of consuming the NOL in the year of the exchange.

[27] *See, e.g.*, Bradley T. Borden, Joseph Binder, Ethan Blinder & Louis Incatasciato, *A Model for Measuring the Expected Value of Assuming Tax-Partnership Liability*, 7 Brook. J. CORP., FIN. & COMM. L. 361, 398–424 (2013).

[28] *See Malulani*, fn. 6 (observing that the exchanger failed to provide evidence of what effect the consumed NOL might otherwise have had on subsequent years and that the courts in the prior cases focused only on the tax benefits in the year of disposition of the relinquished property, but, as noted above, the *Teruya Brothers* court left open the theoretical possibility of using the tax price of consuming the NOL in the year of the exchange).