Tax-Free Like-Kind Exchanges

Reviewed by Erik M. Jensen*

Tax-Free like-Kind Exchanges, by Bradley T. Borden (2008, Civic Research Institute)

I've referred to Bradley T. Borden as the legal academy's "Mr. 1031"—a title Borden isn't necessarily happy with because he doesn't want to be typecast—but I've done it because others did so before me. The designation is certainly not intended to be negative. (I think it would be cool to be Mr. 1031.) Borden is Mr. 1031 because his knowledge of section 1031 like-kind exchanges is extraordinary. His new book, *Tax-Free Like-Kind Exchanges*, proves that point.

Borden has been teaching at the Washburn University School of Law since 2004, but like-kind-exchange aficionados shouldn't hold his academic connections against him. Some professors really do know something about the practice of law, and Borden is one of them. Before Washburn, Borden had extensive practice experience and has maintained strong connections with the real world of law practice. He's the incoming chair[1] of the Sales, Exchanges, and Basis Committee of the American Bar Association Section of Taxation—the committee with primary jurisdiction over section 1031—and he has spoken at innumerable meetings of both tax practitioners and academics.

He's written up a storm too. The new book is his second treatise on like-kind exchanges in less than two years,[2] and it goes along with his dozens of articles in the area. In short, Borden has lived and breathed like-kind exchanges (as unhealthy as that might seem) from both practical and theoretical perspectives.

Trying to summarize *Tax-Free Like-Kind Exchanges* is like trying to write a one-sentence description of *War and Peace*. Well, there was a lot of war, and some peace, and Natasha, Andrei, Pierre, General Kutuzov, Napoleon, and many others were very busy. *Tax-Free Like-Kind Exchanges* is about, well, like-kind exchanges; and it too is very busy. It's as complete a presentation of section 1031 and related subjects as one could hope for; it's a one-volume tour de force.[3] It ranges from nuts-and-bolts stuff, like how to complete Form 8824,[4] to grand theoretical issues in the area, and it hits everything else in between. If there's an issue involving like-kind exchanges, it almost certainly is dealt with in this book.

After discussion of the basics in the first three chapters, there is detailed (and I do mean detailed) discussion in the next seven chapters of various sorts of 1031 transactions, including deferred exchanges, reverse exchanges, improvements exchanges, exchanges and proximate business restructurings (you know, like dropping replacement property down into a partnership), exchanges of tenancy-in-common interests (a really hot topic the past few years), multiple-property exchanges, mixed-use-property exchanges, exchange programs, and—I suppose this isn't really a "transaction"—section 1031 and estate planning. Each of those subjects receives a chapter of its own.

Borden guides the discussion with myriad diagrams to illustrate the transactions under discussion. The book will be useful to like-kind-exchange novices. In particular, any novice would be crazy not to read Chapter 1, a wonderful introduction to the history, structure, and practice of section 1031.[5] But the book, especially the transaction-specific discussions, will be valuable to seasoned practitioners as well (and to those who are no longer novices but not yet well-seasoned enough to be old salts). Appendices and an accompanying diskette provide a rich source of basic documents for the relevant transactions.

Tax-Free Like-Kind Exchanges makes things as clear as can be, but nothing is oversimplified. (As J. Robert Oppenheimer put it, in a quite different—and more explosive—context, "I can make it clearer; I can't make it simpler."[6]) As a result, the book is not going to answer all of your questions definitively; the law is full of ambiguity. When authority is cloudy or commentators are divided, Borden lets you know. He provides his views as well, but doesn't pretend that the sun is shining if it isn't. For example, he notes the "overcast" issue of improvements—when real estate improvements are exchanged for land or land and improvements—and he explains why, under regulations and rulings, there really shouldn't be any doubt about the applicable legal principles. But he doesn't ignore the fact that others disagree. If some serious commentators see imminent thunderstorms, the well-informed practitioner should receive the full forecast.

I won't pretend to have read every word of *Tax-Free Like-Kind Exchanges*. This is a reference work, not something to be devoured from start to finish. I'm delighted that there are texts explaining the results of "asymmetrical depreciation exchanges"—for example, if the relinquished and replacement properties have different recovery periods even though they are of like kind, how should the basis of the replacement property be recovered?[7] But I don't want to focus on that sort of thing until the need arises. You read *Tax-Free Like-Kind Exchanges* as necessary, when a question like that comes up or when you come across an apparently insuperable problem. With Borden's help, the only problems that will remain insuperable are those that are really insuperable.

I referred above to the first few chapters as dealing with the "basics," but that's a bit misleading. Those chapters do deal with things like the treatment of boot, computation of basis, and other fundamental aspects of section 1031—things I would consider basic. But one of the many valuable attributes of this book is the effort Borden devotes to questions with implications that go far beyond section 1031, such as, what constitutes the practice of law, whether a qualified intermediary might be treated as practicing law, and why that might matter. Similarly, Borden's discussion of the reporting standards for like-kind exchanges—what return positions a taxpayer can reasonably take—raises issues that are certainly not limited to the section 1031 context.

And while most practitioners have no reason to be interested in the history of section 1031—at least not the events of decades ago—there are odd folks (like me) who find that sort of thing interesting. I was particularly intrigued by Borden's description of how today's section 1031 might have been different if some basic interpretive issues had been resolved differently in the 1920s.

When what later became section 1031 was in its infancy, a 1924 colloquy on the House floor between the then House Ways and Means Committee Chair William Green and the "little flower," Fiorello LaGuardia, came to stand for the proposition that the receipt of cash on the disposition of an asset, even if reinvested immediately in like-kind property, would defeat nonrecognition. In response to LaGuardia's question whether it is "necessary to exchange property" to get the benefit of section 1031[8], Green first noted that "if the property is reduced to cash and there is a gain, of course it will be taxed." Then, after LaGuardia asked about the reinvestment of proceeds in property of like kind, Green responded, "That would not make any difference." Section 1031 is not a rollover provision, as we all now know, whether or not that makes theoretical sense.[9]

Borden interestingly notes, however, that Green's comments could have been interpreted differently. If Green had been understood to mean that section 1031 requires a swap, the section might have come to be limited to two-party exchanges. Had that been the case, section 1031's scope would have been dramatically narrower than is the case today. Indeed, it's likely that like-kind exchange practice wouldn't exist as a speciality, this book wouldn't have been written, and therefore—sadly—you wouldn't be reading this review.[10]

It's also interesting to be reminded of a time when nonspecialist lawmakers—and on the issue of like-kind exchanges, LaGuardia was surely that—could participate in a discussion of technical tax provisions without seeming like buffoons.[11] Not today.

Are there downsides to this book? Oh, I suppose. As I suggested earlier, unless you have very peculiar tastes, this book won't work on the bedside table, except as a paperweight. A potboiler it's not. If you're looking for a mystery or thriller centered on like-kind exchanges (*Dial 1031 for Murder!*), this isn't it.[12]

I also think *Tax-Free Like-Kind Exchanges* could have used a few more section 1031 jokes. Here's a possibility for future editions: The regular patrons of the Like-Kind Saloon in Dodge City wear distinctive boots, and everyone knows everyone else's style of footwear. One day two cowboys swagger in, one in sock feet and the other in Guccis. The ever-vigilant Marshal Dillon stops flirting with Miss Kitty long enough to say, "Sock Feet, you look vaguely familiar, but I don't remember your name." And to the other guy he remarks, "I've never seen boots like yours before, dude." "I'm Gus Gain, Matt, remember?" says cowpoke number one. And number two responds, "Name's Luke Loss." "Oh yeah," replies Matt. "I should have known that in the Like-Kind I wouldn't recognize Gain without boots, and I wouldn't recognize Loss at all."

Not too good? Well, at least it's a start, and I'm sure Borden would welcome your suggestions for the next edition of *Tax-Free Like-Kind Exchanges*, or perhaps for the *Like-Kind Exchange Jokebook*.

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[1]He's outgoing as well.

[2]The first was Bradley T. Borden, *Tax-Free Swaps: Using Section 1031 Like-Kind Exchanges to Preserve Investment Net Worth* (DNA Press LLC 2007).

[3]Unlike the Tour de France, no blood doping is involved.

[4]Even there, to be sure, a great deal of sophistication is required.

[5]Novices might also look at Borden, *supra* note 2, which is specifically directed toward "anyone interested in developing a working knowledge of section 1031." *Id.* at iv.

[6]*Quoted in* Kai Bird and Martin J. Sherwin, *American Prometheus* 84 (Knopf 2005).

[7]If the exchange is "symmetrical"—recovery periods and recovery methods the same—the taxpayer will simply continue taking cost recovery deductions using the same method, and over the same remaining period, that would have applied for the relinquished properties.

[8]I know that wasn't the section number then. (In fact, there was no Internal Revenue Code at all.) It's just easier to refer to section 1031 for these purposes.

[9]Commentators have occasionally suggested that section 1031 might be converted to a rollover provision; *see, e.g.*, Staff of Joint Committee on Taxation, *Study of the Overall State of the Federal Tax System and Recommendations for Simplification, Pursuant to Section 8022(3)(B) of the Internal Revenue Code of 1986*, Vol. II, at 300-303 (JCS-3-01) (2001), but section 1031, in its current form, is clearly not such a provision.

[10]To be sure, Congress could have provided explicitly for today's exotic section 1031 transactions, but I'm skeptical that it would have done so if it were starting from scratch. Deferred exchanges and other esoterica began as riffs on the old statute and became blessed through practice and judicial decisions, not because the original statute required that result.

[11]LaGuardia didn't get things quite right, however. His question to Green was whether there would be gain recognized in the reinvestment situation, "assuming there is *greater value* in the property acquired" (quoted at pp. 1-7) (emphasis added). LaGuardia had the same problem understanding *basis* that many law students and some D.C. Circuit judges have. It's not necessary to receive more in value than the value given up to have to recognize gain. Receiving more in value than basis will do it. *See Murphy v. IRS,* 460 F.3d 79 (D.C. Cir. 2006), *Doc 2006-15916*, *2006 TNT 163-6* (implying that value-for-value exchanges aren't taxable).

[12]Contemplating potboilers made me wonder. Did Mitchell McDeere, the hero of John Grisham's *The Firm*, do like-kind exchanges? If so, and if he'd stayed in practice, would Mitch have bought *Tax-Free Like-Kind Exchanges*? I'd like to think so. (Who can forget the great scene in the movie version of *The Firm* in which Mitch is attending a continuing legal education conference and the speaker is droning on about "substantial economic effect" under section 704(b)? That scene would have been even more effective if the session had been about section 1031.)