Partnership Profits Share for Services: An Aggregate Exegesis of Revenue Procedure 93-27 (Part 2)

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PARTNERSHIP PROFITS SHARE FOR SERVICES: AN AGGREGATE EXEGESIS OF REVENUE PROCEDURE 93-27
(Part 2)

by John Lee

III. The Need for an Aggregate Approach 2

This article proposes two alternative roads to implementing an aggregate solution to the partnership for services conundrum. The functional approach, more fitted to judicial resolution, is to handle (a) the exchange of partner-capacity services for a profit share subject to the risk of the venture under the Culbertson

"common law partner relation," (b) the classic *Diamond* transitory partner with a substance-over-form rule or step-transaction rule, and (c) a sale of the partnership interest in circumstances that would result in ordinary income in a sale of a proprietorship by a proprietor with the "substitution for ordinary income" doctrine of *Hort* and *P.G. Lake.* In fact, the Service and the courts (by and large under the 1939 code) have already hiked along the "common-law concept of the partnership relation" and the "substitution for ordinary income" trails many times, fortunately leaving blazing along the way. My proposed definitional "tainted freestanding intangible" approach, more suited to legislative regulations, would treat the value created by such services (or the promise of future partner-capacity services) as a built-in gain intangible. This idea was inspired in part by *United States v. Stafford* and in part by *Wolfsean Land and Cattle v. Commissioner.* Thus, as in *Stafford*, a transfer of such an intangible to the partnership in return for a profits interest subject to the risks of the venture would come under section 721's nonrecognition umbrella.

How should sales by the now-happy service partner of her profits share be handled? Simple. "Taint" the transferred intangible with ordinary income status in the transferee partnership's "hands" for five years under section 724 with the premises that (1) a "hypothetical" sale of such value with a zero basis by the service provider at the time of "contribution" would have yielded ordinary income since the value arose from the service provider's efforts and not market forces, and (2) such potential ordinary income must be "specially" allocated under post-1984 section 704(c) to the service provider upon any *partnership* sale of the property benefited by the services (as ordinary income for at least five years after creation of the value under section 724(c)). What if, as is more likely, the contributing partner sells her profits share (along with her capital account credited with the tainted intangible) within five years? Such a sale would yield ordinary income to the extent of the value of the freestanding intangible at the time of contribution due to the interplay of sections 704(c), 724, and 751(a). This "tainted built-in-gain intangible" solution works easiest with past services rendered by a partner to be (where the potential for conversion of ordinary income into capital gains probably is the greatest). But the same approach can be applied to past services rendered

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264For common law partner relationship, see notes 13-30 supra, and accompanying text. The Fifth Circuit catalogued the pre-1954 code entity-aggregate sale of a partnership interest by nonparticipating partners out of which grew the notion that the Lake substitution for ordinary income doctrine overrode the separate entity approach, very much like section 751 under the 1954 and 1986 codes. *Sherlock v. Commissioner,* 294 F.2d 863, 865-66 (5th Cir. 1961) (portion of partnership interest attributable to undistributed ordinary income taxed as such), cert. denied, 369 U.S. 802 (1962). The dissent saw this hybrid rule as a "sugar-coated version of the now-rejected aggregate theory." 294 F.2d at 867. Entity-levying decisions drew a distinction between partnership income already earned but not distributed as in *Sherlock* and true unrealized receivables such as billed but not collected fees and work-in-progress. See, e.g., *Berry v. United States,* 267 F.2d 298, 301 (6th Cir. 1959) (distinguished assignment of income cases); *United States v. Donoho,* 275 F.2d 489 (8th Cir. 1960). But authorities in the opposing camp while adopting an entity approach as to sales of partnership interests in general applied Lake's substitution for ordinary income to unrealized receivables including work-in-progress. *Tunnell v. United States,* 259 F.2d 916, 918 (3rd Cir. 1958); accord, *United States v. Snow,* 223 F.2d 103, 108 (9th Cir.) (accrued ordinary income), cert. denied, 350 U.S. 831 (1955); *Fischer v. Commissioner,* 209 F.2d 513 (6th Cir.), cert. denied, 347 U.S. 1014 (1954); *Spicer v. Commissioner,* 26 T.C. 91, 61-62 (1956) (unrecorded accounts receivable and work-in-progress). I now see that *Hale v. Commissioner,* T.C. Memo 1965-274, was not a sport, only the last partnership spiritual descendant of these 1939 code substitution of ordinary income line of authorities (only *Hort* and *P.G. Lake* were cited by the Tax Court in this context.).
to the partnership prior to formally becoming a partner and to future services rendered after becoming a partner, with a couple of additional steps. First, treat the service renderer’s promise to render services without compensation other than the profit share as itself a “tainted” zero-basis intangible in the hands of the partnership specially allocated to the service renderer/partner. Performance of the “promised” services by the partner converts, in a nonrealization event, the partnership’s promise/intangible into the intangible created by the performance of such services, which continues to be held by the partnership with an exchange basis and taint. The tainted intangible approach is consistent with, and arguably even mandated by, an aggregate approach because character of gain turns on the partner’s activities.

A. Pre-Formation Services

Under the emerging approach of section 707(a)(2), the question is twofold: Were the services of the sort that would be performed by a partner within her capacity as a partner? If so, was the form of payment a “distributive share” or a more risk-free payment? Under this analysis, in most cases, the service provider would be a partner performing services within the scope of partner activity and the “payment” would constitute a section 702 distributive share, followed by distribution. As further discussed below, from an aggregate policy perspective as well, when the service provider “materially participates,” the partnership should be treated as an aggregate to yield as close an approximation to “direct taxation as a propriettress” as possible.

1. Stafford: Freestanding intangible created by pre-formation services. The leading decision considering “past services” embodied in intangible property transferred to a partnership for a profits share is Stafford v. United States. There, the services partner, in addition to obtaining favorable financing (all that the services partner had provided in Diamond), obtained a ground lease from the lender who owned the property on which a motel was to be built adjacent to its offices, raised equity capital from limited partners, formed a limited partnership, and served as general partner. The Eleventh Circuit held in Stafford that the value created by the promoter, here a letter of intent to provide financing, constituted property and hence came within section 721. Thus, Stafford seemingly undercuts the Diamond principle that a profits interest received for services constitutes a taxable transaction (when the profits interest can be valued) by creating an exception for past services.

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Mark IV Pictures, Inc. v. Commissioner narrowly compartmentalized a transfer of services and related property created by such or similar services (for a capital interest) into a transfer of property encompassed by section 721 and a taxable transfer of services for an interest. Judge Gibson, the author of the opinion, had participated in the three-judge panel that had decided Campbell in the Eighth Circuit the prior year, but did not write the opinion there. The opinion in Mark IV reads Campbell most narrowly:

Under 26 U.S.C. section 721, no income is recognized when a taxpayer exchanges property for a partnership interest. However, when a taxpayer exchanges services for a partnership interest, he must include the fair market value of the interest in gross income under 26 U.S.C. section 61(a) (1988). See Campbell v. Commissioner, 943 F.2d 815, 821-23 (8th Cir. 1991). Similarly, when a taxpayer contributes both property and services to a partnership in exchange for a partnership interest, the taxpayer is entitled to exclude from gross income only that portion of the interest which was exchanged for property. United States v. Stafford, 727 F.2d 1043, 1055 (11th Cir. 1984). This narrow (and I believe incorrect) reading of Campbell highlights the perils of case law resolution of this area: conflicting decisions and attendant uncertainty. We need either a landmark decision clearly articulating policies and theories for the area or administrative rules doing the same or, for the present, drawing more lines than Revenue Procedure 93-27, which is a very good first step.

An underlying policy in the context of a profits share received for services is prevention of a service renderer

270See note 43 supra and accompanying text.
271269 F.2d 1045 (11th Cir. 1984). GCM 37193 (July 13, 1977) seemingly approved of an analysis with the retrospective allocation to a service partner close to that advocated in text.
272In the proposed revenue ruling a performed discovery, promotion, and preliminary contact work prior to the formation of the partnership. However, he transferred to the partnership all the rights and benefits attributable to that work. The fact that he performed the services prior to formation of the partnership might conceivably raise a question whether his transfer to the partnership consisted of property rather than services. As discussed above, however, this question should not be relevant in determining the application of Code section 707(a). What is relevant for purposes of that section is whether the transfer is in substance a contribution to the partnership.

273Contrast Mark IV, 969 F.2d at 673: (failure to show “guaranteed payments” covered value of services; therefore, transfer of intangible for interest also may have covered in part services.)
274See note 265 supra.
275Mark IV, 969 F.2d at 669 (8th Cir. 1992).
from converting service-created value into capital gain.276 Stafford, unlike Diamond, would appear to be contrary to this policy,277 in that the profits share received tax-free could be sold after the requisite holding period arguably resulting in capital gains. Actually, the more likely judicial result would be ordinary income under the "substitution of ordinary" income doctrine. This doctrine is closely related to substance over form, assignment of income, and hence the aggregate approach, as the Service and very late 1939 code cases involving sales of partnership interests, litigated, however, after enactment of the 1954 code (and section 751) recognized.278 This same underlying avoidance of distortion of income policy was at work in Hale v. Commissioner,279 a pre-Diamond services case, where the Tax Court denied capital gains to the sale of a profits interest on the grounds that it was merely a future income carve-out, pursuant to P.G. Lake, Inc. v. Commissioner.280 Many practitioner commentators have called for ordinary income lock-in when a services partner receives a profits interest as a concomitant to the transitory ownership of a profits interest as indicat-

276 Lane, supra note 8, at 252-58.
277 1991 L.A. Bar Report, supra note 5 ("We also note that a rule providing for the taxability of the capital interest partner invites avoidance by partners who will contribute self-constructed property, often of dubious real economic value, to a partnership in exchange for a partnership interest. For example, in real estate partnerships, developers frequently contribute overvalued business plans, drawings, plans and specifications, and loan commitments."); see also 1991 New York City Bar Report, supra note 45 ("Does this [Stafford] mean that Mr. Diamond would have been better advised to agree with his prospective partner that he would be entitled to a partnership interest if he were to obtain a letter of intent and contribute it to the partnership? It appears that this may well be the case, but such a superficial distinction does not seem to warrant such a significantly different tax result.").
278 See notes 263 and 264 supra.
279 24 T.C.M. 1497 (1965). Tunnell v. United States, 259 F.2d 916, 918 (3rd Cir. 1958), also applied P.G. Lake under the 1939 code to treat the part of the gain from the sale of a partnership interest attributable to accounts receivable.
281 "Section 721 should be amended to provide that, where a partnership interest is received principally for services and taxation is deferred, a partner's distributive share and his gain from sale of his partnership interest should be recharacterized as ordinary income in all events. Section 741 should be amended accordingly." 1991 L.A. Bar Report, supra note 5. Other back-up amendments were suggested.
Section 721 should be amended to provide a special anti-abuse rule to tax a service partner on the receipt of cash or other property in excess of his net cumulative distributive share of partnership income. A partner then should not be nontaxable on his subsequent distributive share of partnership income to the extent that income has been accelerated under the immediately previous sentence. Conforming amendments should be made to Section 733 to provide that a partner's tax (Footnote 281 continued in next column.)

2. Tainted specially allocated built-in gain intangible. A services-created-intangible approach to profit shares for services (Stafford) standing by itself undercuts both Diamond and, ultimately, Rev. Proc. 93-27 in most cases. The Deficit Reduction Act of 1984 amendments to the partnership provisions (coupled with section 707(a)(2)) inspire a technical approach that reconciles Stafford with the underlying policy of prevention of conversion of income, while at the same time providing a mechanism for taxation of the service partner at the more appropriate time, namely disposition of the partnership profits interest or a disposition by the partnership of the underlying value created by the services partner. Under section 724, enacted by the 1984 act, if property transferred by the services partner would have yielded ordinary income if sold by her at the time of contribution, such value constitutes an "inventory" item as to the transferor partner,283 and hence an inventory item to the transferee partnership for the five-year period following its contribution. Consequently, a partnership sale of this value (within five years), as part of a sale of the project or property benefitted by the services rendered, will result in ordinary gain. Such built-in gain must be specially allocated to the transferor partner under section 704(c), due to the difference between its basis in the hands of the transferor partner carried over in section 723 to the partnership and its value at the time of the contribution. Section 724 taints such "inventory items" as to the partnership and partner for only five years. Similarly, if during this initial five-year period, the service partner sold her partnership profits interest, section 724 coupled with section 751(a) would equally result in ordinary income to the service partner. For this conceptual framework to work, the value created by the service partner should not be added to the basis of, say, a partnership section 1231 asset, but treated instead as a free-standing asset equivalent to a financial accounting deferred charge, yielding ordinary income upon sale.284

284 Basis in his partnership interest should not be decreased by the recharacterized distribution of cash, and it similarly should not be increased by the recharacterized subsequent distributive share of partnership income.
Id. The New York City Bar, in contrast, saw "no abuse in allowing a service partner to achieve capital gain in a risk venture. This is particularly true in the context of a partnership because partners are not required under the normal partnership tax rules to allocate risk gains proportionately to capital." 1991 New York City Bar Report, supra note 45.
281 Section 724(c)(1) cross refers to the definition of inventory item in section 751(d)(2), which includes any property whose sale would in effect generate ordinary income, literally "property other than an capital asset and other than property described in section 1231."
As to the critical premise that a hypothetical sale by a proprietary of such self-created value instead of contribution would have yielded ordinary income, the cases unfortunately split. Some jurisdictions allow extensive efforts by the taxpayer to still yield capital gain where only a single sale is involved, as in Commissioner v. Williams,285 where the taxpayer acquired an uncompleted vessel, but prior to construction contracted to sell it after construction had been completed. The Fifth Circuit agreed that the vessel was acquired for sale and that it was held for sale at the time it was sold. But, citing Thomas v. Commissioner,286 the court pointed out that such purpose did not necessarily mean that the property was sold while being held for the sale in the ordinary course of trade or business. “The purchase and sale of the vessel was a non-recurring speculative venture and the transactions of its acquisition and disposition did not constitute a trade or business of either Williams or the partnership”287 in which he was a partner and to which the boat was transferred for ultimate sale by the partnership. The Fifth Circuit has read Williams as turning on no intention to devote one’s self in the future to the activity.288

The narrow reading of Campbell in Mark IV highlights the perils of case law resolution of this area: conflicting decisions and attendant uncertainty.

Other cases have held that property acquired for the purpose of sale to a specific party pursuant to a preexisting arrangement constitutes property held for sale in the ordinary course of a trade or business.289 The recent, controversial Third Circuit opinion in Pleasant Summit Land indicates that where property is purchased subject to a preexisting contract of sale, its subsequent sale pursuant to such contract is not necessarily “in the ordinary course of business.”290 Other transactions look more to the overall business of the taxpayer and the efforts involved importing a more or less products-of-efforts approach. For purposes of this article, Bush v. Commissioner291 is most apposite. In Bush, development activities alone,292 by a taxpayer who previously had only rented out single- and multifamily housing,293 gave rise to ordinary income upon the taxpayer’s sale to the developer who actually constructed a high-rise apartment for sale to the tenant. The Tax Court in Bush saw its role as determining whether the gain was attributable to (a) business activity by the taxpayer, or (b) investment appreciation and market fluctuations occurring irrespective of any conduct by the taxpayer. The Tax Court concluded that the taxpayer’s activities in the development of the project were sufficient in themselves to constitute carrying on a business and the taxpayer’s efforts were not merely improvements in an attempt to dispose of holdings advantageously in an orderly business-like manner. “When considered in light of all the factors, the substantiality and value of petitioners’ development activities in relation to the original cost of the interests involved and their individual fair market values is convincing evidence. . . . The gain did not result from appreciation over a long period of time, nor may the gain be attributed to short-term market fluctuations. Rather, the gain is solely attributable to development activities of petitioners, their agents and their associates.”294 Finally, look at what the taxpayer sold: Two parcels of land, options to purchase adjoining property, a letter of intent from the University of Tennessee to purchase the property after a high-rise apartment had been built thereon and on adjoining property, architectural plans, and building permits.295 Apart from the parcels of land actually owned by the taxpayer, these intangibles are the paradigm for the tainted freestanding intangible asset model.

285256 F.2d 152, 155 (5th Cir. 1958).
286254 F.2d 233, 236 (5th Cir. 1958).
287256 F.2d at 155.
288Reese v. Commissioner, 615 F.2d 226, 230 (5th Cir. 1980) (Taxpayer, a corporate executive, financed and served as general contractor for construction of plant, which was to be sold to such corporation upon completion. Taxpayer had never before carried out such activities and after getting in trouble with the first project and having to sell it to a developer to complete undoubtedly never again would be so involved. “[A] single transaction ordinarily will not constitute a trade or business when the taxpayer enters into the transaction with no expectation of continuing in the field of endeavor.”).
289See Nielsen v. United States, 333 F.2d 615 (6th Cir. 1964) (acquisition of stock by brokerage house pursuant to a written purchase order by a third party specifically negated any possible intent on the behalf of brokerage house to purchase stock as its own capital asset); DeMars v. United States, 71-1 U.S.T.C. Para. 9288, 27 A.F.T.R.2d 71-925 (S.D. Ind. 1968) (taxpayer’s sole purpose in erecting a warehouse was to sell it pursuant to a contract already made; held any profit realized on the contract is compensatory and, hence, ordinary income).

290863 F.2d 263 (3rd Cir. 1988), cert. denied.
29136 T.C.M. 340 (1977), aff’d, 610 F.2d 426 (6th Cir. 1979).
292These activities giving rise to trade or business status consisted of “obtaining a letter of intent from the University of Tennessee to purchase the property after a high-rise apartment had been built thereon and on adjoining property, obtaining options to purchase the adjoining property, purchase of a parcel of adjoining property, employment of architects, obtaining building permits, consultations and negotiations with the party that ultimately purchased the entire package that included these parcels, who in turn was to build the apartment and sell it to the University, and activities of taxpayers in aid of their purchaser in closing the transaction with the University of Tennessee.” 610 F.2d at 427-28.
293The taxpayer acquired several parcels of adjacent real property as rental property and then approached the University of Tennessee with a proposal to construct a 320-unit apartment house for lease to the university. In the course of negotiations prior to the commencement of construction, it became clear that the university would purchase the property rather than lease it.
29436 T.C.M. at 350.
295The taxpayer also was compensated by the purchaser/developer for negotiations with the university to bring it into the deal.
A prime advantage of this model is that it requires no implementing legislation. Profit share for services lies in the area of the staff 1984 and 1986-87 "restate-
ments" of partnership taxation prepared by the JCT staff, and thus, there is unlikely to be any push for Congress to revisit the area. Commentators now need
to do their job, if the Service is to go to the next step.

B. Services for an Existing Partnership

The Eleventh Circuit in *Stafford* was careful to point out that the ownership rights in the letter of intent to provide financing for construction at favorable terms lay with the service partner and not with the partner-
ship:

If the partnership owned the letter of intent, Stafford could not be said to have contributed that letter because it was not his to give. Thus, Stafford would not be eligible for nonrecognition under section 721 on his receipt of the third partnership shares [Stafford bought two other partnership shares for cash]. A detailed examination of the record and the application of the legal principles set forth in *James* leads us to conclude that Stafford owned the letter of intent and it was his property to contribute to the investment vehicle of his choice.296

The Service, at least at one time, may have been receptive to this distinction, observing that a taxpayer’s perfor-
mance of “services prior to formation of the partnership might conceivably raise a question whether his transfer to the partnership consisted of property rather than services.”297

*Stafford* relied on a section 351 decision, *James v. Commissioner*,298 where a taxpayer providing services entered into a contract with the capital providers whereby the service provider agreed to secure necessary legal and architectural work and arrange for a financing of a rental apartment project on the capital supplier’s land. Upon completion of the project, the landowners would transfer their land to a corporation, which would then issue stock both to the landowner and to the service provider. The stock issued to the service provider was purportedly received in ex-
change for a loan commitment for the financing of the project. The loan commitment ran in favor of the corporation because the lenders’ regulations permitted commitments only to corporations and not to individuals. In the corporate context, section 351(d) and predecessor provisions clearly state that “services” do not constitute property for purposes of section 351, which also requires a property transfer. However, the explicit statutory exclusion of “services” from the term “property” under the 1954 and 1986 codes apparently achieved the same result as

pre-1954 case law.299 And the Tax Court, in *Diamond*, pointed to the pre-1954 code history of the predecessor to section 351, where case law without any specific statutory authority had established that “services” did not constitute “property” for purposes of the predecessor of section 351.300

In the corporate context, section 351(d) and predecessor provisions clearly state that “services” do not constitute property for purposes of section 351, which also requires a property transfer.

Under a policy analysis and a close reading of the legislative history of both provisions, the similarity between sections 721 and 351 in this context disappears.301 The tax policy reason for not classifying services as property for section 351 purposes is that, other-
wise, the service provider can convert his services into a stock interest in the corporation, which then could be sold at capital gains rates, due to the entity approach to sales of stock interests in C or S corporations.302 The collapsible corporation provisions only infrequently retard this conversion of the services into capital gains.303 On the other hand, as discussed above, sections 704(c), 724, and 751 produce the proper character and timing; ordinary income to the service partner, but only upon a disposition by the partnership of the value created by him or upon a disposition of the partnership interest (during the five-year taint period of section 724). Therefore, on a policy basis, past services for the partnership generally should be treated the same as past services on the service provider’s own behalf transferred to the partnership.

The model of treating the value created by the service provider as a freestanding intangible, i.e., property, exchanged for a profit share requires modification (1) where future services are to be provided, and (2) perhaps where the partnership already owned the development rights as to which the service provider renders further services. In the first case, modification is necessary because the value or intangible to be created by the future services is not yet in existence when the services provider receives his profit share. The solution is to treat the service partner as contrib-

296 *722 F.2d* at 1049.
297 See GCM 37193 (July 13, 1977), p. 8, see also pp 21-2; cf. *Tech. Adv. Mem.* 8047005 (July 24, 1980) (pooling of capital doctrine may apply to services performed prior to the reservoir of capital coming into being).
uting to the partnership upon entry his promise to perform future services on behalf of the partnership for no compensation beyond allocations and distributions as to the profits share received in exchange for the promise. This promise is itself treated as a free-standing intangible. Such intangible also would have a "carryover" zero basis under section 723 in the hands of the partnership. Even more surely than in the case of the Stafford-like intangible created by services, the built-in gain in the promise (the difference between the fair market value of the service less the zero basis) at the time of contribution will constitute a tainted "inventory" item as to the contributing partner. Any built-in gain in such promise would be specially allocable under section 704(c) to the service partner and tainted as to him for five years under section 724. Such an intangible is similar to the section 707 regulation's deemed promise by the partnership in a disguised sale to distribute to the contributing partner cash or property contributed by another property. In most cases, the "promised" services will have been rendered prior to any sale by the service provider of the profits share or the sale by the partnership of the property to be benefitted. By analogy to the "conversion of rights" authorities, the service partner's later performance of his promise by rendition of the services should not constitute a realization event. And by analogy, or under, section 724(d)(3), the intangible created by the services also should be tainted.

The Fifth Circuit in Stafford distinguished a service partner's developmental activities resulting in a mortgage commitment from a situation where the partnership already owned the development rights. However, the tainted freestanding intangible model can be applied here as well. The services performed should be treated as creating a freestanding intangible apart from the developmental rights much like in Wolfson Land and Cattle, where the Tax Court treated the costs of draglining irrigation ditches every 10 years as creating a freestanding amortizable apart from the irrigation ditches themselves.

C. Clear Reflection of Income

Ideally, I would prefer to treat admission of a service partner as a common-law entry into the partnership outside section 721. Then, I would determine if the partnership itself holds the project primarily for sale determined at the partnership level, looking of course at the partner-capacity services of all the partners. Less cleanly, "substitution for ordinary income" a la Hale could be used. The major problem with such a standards approach is that the courts mostly likely would conflict for some time, even in the same circuit. Compare Campbell II with Mark IV. Such a standards approach is more suited to courts than to an administrative agency, unless the standards are implemented through many, many rules. I think, therefore, a better administrative solution would follow the lines of the specially allocated tainted freestanding intangible approach.


305 If proprietress sold her promise to render services, clearly the sale would constitute substitution for ordinary income under the P.G. Lake doctrine.

306 The partner to be usually has little or no basis and the fair market value of the promise is the discounted present value of services to be rendered for no charge. Built-in-gain thus is present.

307 Cf. Rev. Rul. 90-7, 1990-1 C.B. 153 (exchange of certificatess in an investment trust for proportionate share of stock owned by such trust does not result in realization of gain or loss because holder is in essentially the same position as before); Rev. Rul. 72-265, 1972-1 C.B. 222 ("The conclusion that no gain or loss is realized upon the conversion of a corporate debenture into stock of the obligor corporation was initially stated in Article 1563 of the Treasury Regulations 45 (1920 edition) under the Revenue Act of 1918. This rule remains applicable except where provisions of the Code specifically require that gain be recognized."); Rev. Rul. 72-348, 1972-2 C.B. 97 (conversions of convertible bonds to stock is purely a readjustment of the obligor's capital structure that does not result in either a deductible loss or a taxable gain); Rev. Rul. 57-535, 1957-2 C.B. 513 (conversion pursuant to its terms of nonmarketable Treasury note into marketable Treasury note does not result in realization; "a transformation of the bonds pursuant to a right contained therein rather than a disposition thereof occurs and, accordingly, there is then, for federal income tax purposes, no real exchange or other closed transaction resulting in a realization of gain or loss. The notes in his hands take his gain or loss basis of the bonds, for determining gain or loss upon subsequent sale of other disposition of the notes. In substance and effect, he continued to own the same property, its form being changed pursuant to a right embodied in it when he acquired it. Com-

(Footnote 307 continued in next column.)

pare GCM 18436, C.B. 1937-1, 101, which applied the rule that, where an owner of a bond exercises the right provided in the bond of having the bond converted into stock of the obligor corporation, such transaction does not result in realization of profit or loss, the transaction not being closed for purposes of income taxation until disposition of the stock."); Rev. Rul. 72-319, 1972-1 C.B. 224 (exchange of voting trust certificate for underlying common stock constituted transfer of all rights except voting in exchange for all rights including voting free of the trust qualified under section 1036 as an exchange of common stock for common stock under an economic substance approach). See Liquid Carbonic Corp. v. Comm'r, 34 B.T.A. 1191 (1936). Still another analogy is modifications of contract rights. In Silverstein v. United States, 419 F.2d 999, 1002 (7th Cir. 1969), the appellate court held that in economic substance an exchange of a right to receive fixed annual payments for life from a trust for a right to receive the same amount on the same terms paid instead by a museum did not constitute a "disposition" under section 1001. A similar economic substance analysis was used by Commissioner v. Olmstead Inc. Life Agency, 304 F.2d 16, 21-22 (8th Cir. 1962), to hold that cancellation of a contract to receive commissions in consideration of receiving a specified monthly annuity running 15 years did not constitute a sale or other disposition under section 1001. ["The new contract merely provided for a different rate or manner of payment whereby the insurance company could discharge its liability under the agency contract." Olmstead, at 22.

D. Nonpartner Capacity Transactions

1. Rendition of services in nonpartner capacity. Prior to the 1984 amendments to section 707(a), the focus was on whether the rendition of services (or transfers of property or capital) was in a partner capacity. The Tax Court, in *Pratt v. Commissioner*, held that general partners receiving fees equal to 5 percent of partnership gross receipts for performing ongoing managerial services for the partnership were receiving neither section 707(a) payments (because the management fees were received for services performed within the normal scope of the partners’ duties) nor section 707(c) payments to a partner (since the fees were computed as percentage of gross income and hence measured by partnership “income” and section 707(c) payments are determined without regard to partnership income). Since the payments came under neither section 707(a) nor 707(c), the Tax Court held that sections 704 and 702(b) applied to the allocation and section 731 applied to the accompanying distribution. The Fifth Circuit affirmed the Tax Court as to its treatment of the management fees, i.e., treatment as an allocation and distribution, but solely on the “partner capacity” ground as to the section 707(a) issue, because the section 707(c) holding was not appealed. The Fifth Circuit, in *Pratt*, focused on the “scope of the partnership”:

It is perfectly clear that the contract creating the partnership, which provided for the percentage payments to the general partners for their management efforts was made with them *qua* partners. Furthermore, it is equally clear that the duties to be performed were activities for which the partnership was created in the first place, i.e., the management of the shopping centers. Bearing in mind, that the general statutory policy for treating partnerships for tax purposes contemplated that the income of a partnership would flow through to the individual partners, it is not difficult to envision the purpose of Congress when it created an exception to this general rule to limit the excepted activities to those specifically outlined. In doing so, Congress determined that in order for the partnership to deal with one of its partners as an “outsider” the transaction dealt with must be something outside the scope of the partnership. If, on the other hand, the activities constituting the “transaction” were activities which the partnership itself was engaged in, compensation for such transaction must be treated merely as a rearrangement between the partners of their distributive shares in the partnership income. The Service follows *Pratt* in holding that the partnership agreement is controlling as to the meaning of “partner capacity” services. Such services need not be recurring or continual. If the services are not provided in a partnership capacity, then section 707(a) applies calling for separate entity/payment treatment. Some in the Service have suggested the following analysis in determining partner capacity services:

When dealing with a fact situation such as that in *Pratt*, the first step should be to consider whether the partner is acting other than in his capacity as a partner. This will determine whether subsection (a) or (c) of section 707 applies.

As mentioned previously, the ALI proposal for section 707 consisted only of what is now, in substance, subsection (a). Under the ALI proposal, a fixed salary paid to a partner by a partnership for services rendered other than in his capacity as a partner would have been treated under the entity approach. We believe that Congress added subsection (c) to apply the entity approach in certain situations not covered by subsection (a), namely, when a partner receives a guaranteed payment in his capacity as a partner. Thus, in order to determine whether to apply subsection (a) or (c), it is first necessary to analyze whether a partner acted in his capacity as a partner under subsection (a).

We realize that it will not always be easy to decide whether services are rendered in a partner’s capacity as a partner. The approach of your proposed ruling is to look at all of the surrounding facts to determine whether the partner, in substance, is acting other than in the capacity of a partner. On the facts presented in the ruling, we think it clear that the investment advisor is not acting as a partner. Were it not for the investment advisor’s small interest in profits and losses, it would not be a partner at all but merely a third-party dealing with the partnership. We think it equally clear that the taxpayers in *Pratt* were acting as partners and not as third-parties. Unfortunately, however, we can point to no one fact in either case that dictates the result reached.

We previously considered this problem in GCM 37193, ***, I-430-75 (July 13, 1977), and al-

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3064 T.C. 203 (1975), aff’d, 550 F.2d 1023 (6th Cir. 1977); see generally Widener, supra note 262.

31The Service disagrees that gross income allocations can (easily) meet the section 707(c) standard of “determined without regard to the income of the partnership.” Rev. Rul. 81-300, 1981-2 C.B. 143, 144, considered in GCM 38607 (Aug. 29, 1979) (statute refers to net income: watered down in public ruling). Its position on partner-capacity services appears less clear. See Rev. Rul. 81-301, 1981-2 C.B. 144, 145 (investment adviser performed similar services for outsiders for a fee and could be removed by limited with 60 days notice, pays own expenses and is not liable to other partners for losses); GCM 37193 (July 13, 1977) (turns on whether services “contributed” to partnership under classic debt-equity rules; not required to be recurring), pp. 8-9; Tech. Adv. Mem. 8642003 (June 30, 1986), p. 21.

31*Pratt*, 550 F.2d at 1026.


33See GCM 37193, supra.
though we arrived at no precise rule for distinguishing between subsections (a) and (c), we suggested as an analysis that the test is whether the services in question are being contributed to the partnership. If they are, subsection (c) will control. On the other hand, if the partner is not contributing services but is acting as any other third-party, subsection (a) will control. As we recognized in GCM 37193, this approach gives the partners substantial freedom in deciding which section will control. The purpose underlying section 707, however, was to establish that partners could deal with their partnerships as third parties, and presumably partners have always had the freedom to decide what capital or services should be donated to their partnerships. Thus, we are not overly concerned with the fact that partners are afforded some freedom to decide the way in which they will deal with their partnerships.

Furthermore,

[in determining whether a transfer of money or property to a partnership constitutes a contribution, as distinguished from a sale, exchange, loan or rental transaction, the same criteria used in connection with corporate debt-equity questions are to be applied. . . . The regulations state that if a transfer of property by a partner to a partnership results in the receipt by the partner of money or other consideration, including a promissory obligation fixed in amount and time for payment, the transaction will be treated as a sale or exchange under Code section 707 rather than a contribution under Code section 721. Treas. Reg. section 1.721-1(a). By analogy these criteria should also be applied in determining whether the performance of services for a partnership constitutes a 'sale or exchange' of such services or a contribution.

In the proposed ruling A receives no consideration for his services other than a share of partnership profits. Although many factors must be considered in determining whether a particular transaction constitutes a contribution, the fact that a transferor of property or renderer of services receives only a right to share in profits should generally be given more weight than the other factors considered.

I have suggested above that a "contribution"/corporate debt-equity analysis may be too limited. Among other things, such corporate debt-equity analysis turns more on risk of payment, which in the partnership context speaks more to entrepreneurial risk as to payment.818 While some corporate debt-equity precedents turn on whether "essential operating assets" are transferred, often this factor seems more of a backstop to debt-equity ratio.819 The better approach would be to pursue the thought in some Service rulings on whether the services are within the scope of the agreement, usual for the particular business, and perhaps usual for that particular partnership.820 I suspect that this area will need more rulings before the principles can be articulated.

2. Payment subject to entrepreneurial risk. As the tax sheltered taxpayer's preferred tax posture shifted from "guaranteed payments" for such management services to "distributive share," the Service too flip-flopped, as recounted above. In Revenue Ruling 81-300,821 the Internal Revenue Service disagreed with the Tax Court's conclusion in Pratt that the payments were not section 707(c) "guaranteed payments," since they were measured by gross income. The Service reasoned that on the Pratt facts, the gross income requirement did not come within the section 707(c) test that the payment be determined without regard to the partnership's income. "It is the position of the Internal Revenue Service that in Pratt the management fees were guaranteed payments under Section 707(c) of the Code. On the facts presented, the payments were not disguised distributions of partnership net income, but were compensation for services payable without regard to partnership income."822 At the same time, in Revenue Ruling 81-301,823 the Service buttressed Pratt's section 707(a) analysis by seemingly limiting the predecessor to section 707(a)(1)'s nonpartner capacity transactions to those where the partner's services for the partnership in question were substantially the same as services it rendered as an independent contractor or as an agent for others.824 Furthermore, the investment advisor was not personally liable for partnership losses incurred in investments made pursuant to its services or advice, paid its own expenses in rendering advice (including office expenses and personnel expenses), and could be removed by a majority vote of the other partners.

835GCM 37193 (July 13, 1977). See also Tech. Adv. Mem. 8642003 (June 30, 1986) ("In general, transactions between partners and partnerships fall into one of three classes of transactions for federal income tax purposes. These three categories are: (1) transactions with a partner other than in his capacity as a partner, (2) guaranteed payments to a partner for the use of capital or for services rendered in his capacity as a partner, and (3) all other payments to a partner in his capacity as a partner. Section 707(a) of the Code is applicable to the first category of transactions. Section 707(c) of the Code is applicable to the second category of transactions. Section 702, 703, 704 and 731 of the Code [and common-law Culbertson nonrealization admission] are applicable to the third category of transactions.")
Congress wisely concluded in 1984 that Revenue Ruling 81-300 was insufficient to channel partnership payments to partners for services that would not be currently deductible, if paid to third parties, into section 707(c) classification and, accordingly, in the Deficit Reduction Act of 1984, enacted section 707(a)(2)(A), which authorizes regulations (as yet not proposed) treating a transaction as a section 707(a)(1) nonpartner capacity transaction (and hence subject to the "origin-of-the-claim" test, but not to the special accrual rules of section 707(c) if (1) the rendition of the services or transfer of property by the partner, and (2) a related direct or indirect partnership allocation viewed together with the distribution are "properly" so characterized.\textsuperscript{323} Congress sketched six nonexclusive factors for "determining whether the partner is receiving the putative allocation and distribution in his capacity as a partner."\textsuperscript{324} The first, and generally most important, factor is whether the partner's allocation-\textit{cum}-distribution is subject to significant entrepreneurial risk to the recipient partner as to the amount and fact of payment.\textsuperscript{325} The second factor is transitory partner status, which suggests that a payment constitutes a fee in return for property.\textsuperscript{326} Short-term, gross income allocations would be particularly suspect here, due to (1) the reduced risk, (2) the transitory nature of the relationship, and (3) the proximity in time to the performance of the services (the latter two elements also constitute negative criteria considered by Congress).\textsuperscript{327}

\textbf{‘Structured discretion’ serves good public policy when rulemaking by the agency is routinely, if not commonly, sought by the taxpayer.}

In summary, to determine the proper characterization of the payment, a two-step analysis often is necessary. The first question is whether the services were performed or property, etc., was transferred in the partner’s capacity as a partner. If not, section 707(a)(1) would apply if the service provider or property transferor were otherwise a partner. On the other hand, even if the services/property were provided/transferred in the service provider/transferor’s capacity as a partner, the payment can take on a nonpartner characteristic, i.e., section 707(c) status as a guaranteed payment or section 707(a)(2)(A) equivalent of a "fee," if the payment terms manifested sufficient nonpartner characteristics as to certainty of payment. As to this latter question, new section 707(a)(2)(A) often, if not always, should be determinative.

\textsuperscript{323}Section 707(a)(2)(A).
\textsuperscript{324}S. Print. No. 169, \textit{supra} note 32, at 226.
\textsuperscript{325}\textit{Id.} at 227.
\textsuperscript{327}\textit{Id.}

IV. An Administrative Law Perspective

From the beginning of modern federal tax statutes,\textsuperscript{328} theoreticians, including, in the late 1950s and early 1960s, Harvard Law Professors Brown and Surrey,\textsuperscript{329} have debated the advantages of generalized tax statutes, i.e., standards, versus detailed or rule-oriented tax statutes. The recent majority of students of taxation follow the Surrey school of a more or less generalized tax statute implemented and amplified, however, through undisputably detailed Treasury regulations, in large part due to the greater flexibility in amending regulations than statutes in light of developing administrative and judicial experience under the statute.\textsuperscript{330} Professor Davis agrees that the best policy usually is "to legislate broad frameworks for administrative policy-making."\textsuperscript{331} Detailed regulations promulgated by an administrative agency, here Treasury and the Service, increase the principled discretion of the agency as a decisionmaker, according to Professor Davis's landmark book \textit{Discretionary Justice — A Preliminary Inquiry} and subsequent administrative law scholarship.\textsuperscript{332} I believe such "structured discr-

\textsuperscript{328}The debate had begun as early as the 1920s. \textit{Compare} Hearings on H. R. 8245 before the Sen. Comm. on Finance, 67th Cong. 1st Sess. 5 (1921) (Statement of Dr. Adams) (drafting goal of "a rather simple tax law that the average man can understand"), \textit{with} Hearings on H. R. 6715 before the Sen. Comm. on Finance, 68th Cong, 1st Sess. 7, 57 (1924) (Statement of A. W. Gregg, Special Ass’t to Treasury) ("[C]omplexity comes primarily from a complicated policy," including reorganizations. "[T]he bill will cover a given case definitely and certainly. Under the existing law there are hundreds of cases where nobody knows the effect of the transaction upon the tax. This law is definite enough so that the taxpayers will be able to tell the effect of a given transaction..."") \textit{Gregory} arose from this very statute and the Board of Tax Appeals took Gregg at his word. The Second Circuit trumped the board's statutory literalism with the business purpose standard.

\textsuperscript{329}Brown, "An Approach to Subchapter C," \textit{3 Tax Revision Compendium} 1619, 1619-20 (1960) (detailed tax statutes lead to deficiencies and anomalies appearing that require even more intricate elaborations of pattern; fundamental source is attempt to eliminate the necessity for responsible administration); Surrey, "Complexity and the Internal Revenue Code: The Problem of the Management of Tax Detail," \textit{34 Law & Contemp. Probs.} 673, 695-702, 703-07 (debate between generalized and particularized tax statutes; concludes ideal is generalized statute with detailed regulations). Interestingly, the Tax Reform Act of 1969, which was Surrey's brainchild, \textit{see} Lee, \textit{supra} note 79, at 132 n. 346, rarely took this tack (section 385 constitutes a conspicuous exception).


\textsuperscript{331}See Davis, \textit{supra} note 10, at 38.

\textsuperscript{332}Davis, \textit{Discretionary Justice, A Preliminary Inquiry}, at 103 (LSU Press 1969); \textit{see also} Mashaw, \textit{Bureaucratic Justice, Managing Social Disability Claims}, at 103-22 (Yale Univ. Press 1983).
tion” serves good public policy when rulemaking by the agency (as in the form of IRS private letter rulings) is routinely, if not commonly, sought by the taxpayer. Administrative law scholars believe that agencies, through structured discretion, e.g., issuing regulations (rulemaking) setting forth specific factors to be used in balancing tests implementing the desired standards and policies, can implement standards effectively while maintaining the bureaucrat’s discretionary judgement in application. They believe that such detailed rules channeling agency exercise of discretion can develop from first considering one concrete problem at a time, announcing the hypothetical cases as rulings and refraining from generalizing; then fashioning generalized principles or standards from this experience; and finally formulating regulations to implement the standard in the form of structured discretion.333

Some commentators call for legislation on the grounds that current case law has preempted sound regulatory authority.334 A comparison of Campbell II with Mark IV highlights the preemption problem. However, having acted in 1984 and having largely taken the revenue out of the area with the passive activity loss rules in 1986, Congress is not likely to heed such calls. A landmark decision dealing with aggregate and distortion of character of income policies might end the confusion; an administrative remedy is more likely. Remember the reserved section 707 legislative regulations section for disguised services: Do we have to wait for the Service to attack the problem piece-by-piece building up to legislative regulations? I have attempted to show that the Service already has had vast ruling experience in common law entry into a partnership and fair ruling experience with the “substitution for ordinary income” if the route of standards is chosen to resolve the profit share for services issue. Conversely, if a rule-oriented tainted freestanding intangible approach is chosen, then fewer rulings are needed. In either case, the Service could soon issue draft discussion proposals calling for comments if it wishes to address the issue from a subchapter K perspective in legislative section 707 regulations. If it just wished to resolve premature sales of a profit share in year 1 after close of the tax year/or in year 2, then simple tax accounting modifications to Revenue Procedure 93-27 are in order.

Appendix: Aggregate vs. Entity

The best commentary for purposes of the aggregate-entity debate in the context of a profits share for services are the “Partnership Tax Colloquium” in 47 Tax Law Review; the seminal Lane, “Sol Diamond, The Tax Court Upsets the Service Partner,” 46 So. Cal. L. Rev. 239 (1973) (first in my notebooks on this issue and which I appreciated a lot more after studying the legislative history of the partnership tax provisions of the Deficit Reduction Act of 1984); and others who have studied that history, particularly Hortenstine & Ford, “Receipt of a Partnership Interest for Services: A Controversy That Will Not Die,” 65 Taxes 880 (1987). Friedman, “Partnership Securities,” 1 Fla. Tax Rev. No. 9 (1993), electronically reproduced at 93 TNT 226-166 (Nov. 3, 1993), carefully probes aggregate and entity approaches to partnership “securities” received for cash and received for services. Cowan, “Receipt of an Interest in Partnership Profits in Consideration for Services: the Diamond Case,” 27 Tax L. Rev. 161 (1972), set the terms of the debate among practitioners for the last two decades. I have war stories about drafting some of his suggestions. Lane appears to have influenced the commitment of the American Law Institute, Federal Income Tax Project Subchapter K Proposals xii, 5-7, 523-32 (1984) to the aggregate approach (which they call the “conduit approach”) and surely the latter’s standard of how a partner, my “hypothetical proprietress,” would be taxed “if he carried on a hypothetical separate business.” ld. at 524. And the ALI Partnership Proposals in turn seem to me to have strongly influenced Professor Cunningham’s thought.

For a general charting of the sea of aggregate-entity authorities, see Fellows, “Partnership Taxation: Confusion in Section 702(b),” 32 Tax L. Rev. 67 (1976). For my thoughts at the time, please follow Professor Fellows’s cites. ld. at 68 n. 6, 74 nn. 33 and 34, 75 n. 38, 86 n. 63, and 89 n. 78. She also roadmaps Wolfman’s classic “Level for Determining Character of Partnership Income — Entity v. Conduit Principle in Partnership Taxation,” 19 N.Y.U. Inst. 287 (1961), which is where I started. Professor Fellows’ eye was good — the level of profit motive in a partnership theme that she followed in Lee, “Section 183,” supra note 15, was contemporaneously convincing as well to the IRS Chief Counsel in launching the initial attack against “abusive tax shelters.” GCM 36577 (Feb. 26, 1976). And the IRS ultimately convinced the courts of the correctness of my conclusion that profit motive should be determined at the partnership level. Brannen v. Commissioner, 722 F.2d 695, 703-04 (11th Cir. 1984). But by that time, having left the partnership area in practice, I had forgotten what I had worked out and erroneously thought “another time they should have listened to me.” I now see the reason for entity-level computation of profit motive is that this motive is an essential attribute of “reporting” that is done at the entity level. Also, for a recent sketch of a broad range of aggregate-entity partnership issues, see Schnee, “The Future of Partnership Taxation,” 50 Wash. & Lee L. Rev. 517, 523-27 (1993).

The thoughts of some in the Service on aggregate-entity under the 1954 and hence 1986 code may be seen in GCM 35709 (Mar. 6, 1974), considering Rev. Rul. 75-113 (Basye evidences that partnerships are considered entities primarily for purposes of computing the income, and hence the tax, owed by the partners. Basye teaches that for purposes of calculating partnership income, “the partnership is regarded as an independently recognizable entity apart from its partners. Once its income is ascertained and reported, its existence may be disregarded...410 U.S. at 448. “In our opinion, this...is a tacit assumption that in all other respects, with the exception of that described below,
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the partnership is considered an aggregate of its partners. The one exception is, of course, when a partner is dealing with his partnership [i.e., Section 707]. Such transaction could not be given effect if the separate existence of the two were not recognized. In the instant case, however, we are concerned with a transaction between the partners qua partnership and an unrelated third party rather than a transaction between a partner and his partnership.” See also GCM 37540 (May 18, 1978) (“Despite the characterization of a partnership interest as a capital asset under section 741, we believe that the exception for section 751 assets upon the sale or exchange of an interest in a partnership, evidences an intent to look beyond the partnership interest to the underlying assets when warranted in a given situation. By treating the stock received in exchange for a partner’s interest in the partnership attributable to ‘section 751 assets,’ to the extent those assets are not described in section 1223(1), a partner, in accord with congressional intention, is put on almost the same footing as an individual proprietor in a transfer of his interest in the business.”), reconsidering Rev. Rul. 70-239; Priv. Let. Rul. 60057490A (May 17, 1960). Cf. IRS as to election out. Priv. Let. Rul. 9214011 (Dec. 26, 1991). The Supreme Court in United States v. Basye, 410 U.S. 441, 448 n.8 (1973) quoted the Solicitor General as to the aggregate-entity conflict “it seems odd that we should still be discussing such things in 1972,” and employed the assignment of income doctrine that other authorities have equated with the aggregate approach.

For the seminal placing of the aggregate-entity issue in the broader context of the spectrum of business entities, see Eustice, “Subchapter S Corporations and Partnerships: A Search for the Pass Through Paradigm (Some Preliminary Proposals),” 39 Tax L. Rev. 345, 346-47 (1984); see also id. at 353-55, 381-89 and 433 Appendix B, for analysis of subchapters K and S differences along the aggregate-entity fault line. As I pointed out in Lee, “Entity Classification,” supra note 79 at 57, 59 n.8 (1988), Professor Eustice’s passsthrough models were first the basis of Treasury’s testimony in 1986 on passsthrough entities and then incorporated in bits and pieces in S. Rep. No. 313, 99th Cong., 2d Sess. 783-86 (1986) setting forth the legislative history of REMICs, sections 860A-E. In my article, I elaborated on the passsthrough and separate entity models based largely on the active-passive owner and active-passive business or investment factors articulated in the 1986 legislative history to the Passive Activity Loss Limitations. Id. at 88-95. I also testified on these models to Congress in the 1987 Master Limited Partnership Hearings. Hearings on Master Limited Partnerships before the House Ways and Means Subcommittee on Select Revenue Measures, 100th Cong., 1st Sess. 340-41, 345, 351 (1987) (“If substantially all of them [the owners] are not involved in the entity’s management or operations, no functional basis for an aggregate approach exists; policy thus calls for an entity approach.... [T]he hallmark of pass through [treatment] as to such [investment] entities is that the income of the activity be passive. Here [PTP’s] we are concerned with active income/passive investor.”). Professor Rudnick accurately describes my aggregate active owner/active business pass-through business approach as “in a populist vein.” Rudnick, “Who Should Pay the Corporate Tax in a Flat Tax World?,” 39 Case W. Res. L. Rev. 965, 1158 n.60 (1989). By an incredible coincidence, Professor Snoe reinvented the wheel here, proposing exactly the same model (“Under the proposed model, if members significantly participate in the operations of a business, they should be taxed directly. On the other hand, taxation of the business as a separate entity is appropriate if the members do not materially participate in the business as activity either as managers or laborers. The model distinguishes between organizations engaged in active trades or businesses from organizations engaged in passive investments”), examining the same tax entities, and even jumpciting Professor Rudnick at precisely the section (“Misuse of Material Participation Standard”) she directed at my article and testimony (which she extensively cited), but he failed to acknowledge my article or testimony (or indeed the 1987 Master Limited Partnership Hearings at all) despite their clear relevance and otherwise exemplary research of scholarship and hearings. Snoe, “Entity Classification under the Internal Revenue Code: A Proposal to Replace the Resemblance Model,” 15 J. of Corp’n L. 647, 649 (1990).