Entity Classification and Integration: Publicly Traded Partnerships, Personal Service Corporations and the Tax Legislative Process

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PROCESS

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I. INTRODUCTION

The first wave of revisions to the Internal Revenue Code of 1986
(“the 1986 Code”) has occurred, in the form of the tax provisions
of the Omnibus Budget Reconciliation Act of 1987 (“OBRA”). As
with the various revisions to the Internal Revenue Code of 1954,
politics continued to play an important role in determining which
reforms took place, but politics and policy resulted in the develop­
ment of revisions to the 1986 Code which broke with the tradi­
tional 1954 Code type of reform. The new breed of reform seems to
be at least partly based on the policy of using a deep structure
entity analysis1 to classify organizations for tax purposes and to
determine the tax treatment of the entity and its owners. The
study of OBRA’s provisions in the “classification” of publicly
traded partnerships (“PTPs”2) and application of the passive ac­
tivity loss (“PAL”3) rules to them, as well as the elimination of the
benefit of graduated corporate rates4 for personal service corpo­
tions (“PSCs”5), provides a framework for consideration of the
deep structure or tax policy of entity classification. The integration
of the entity with its owners, the comparison of structural tax revi­
sions under the 1954 and 1986 Codes, and the interplay of politics

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inafter OBRA].

2 In other words, determining the tax treatment of a given type of entity through consid­
erations of tax policy, not politics.

3 See I.R.C. § 7704(b) (definition of publicly traded partnership).

4 See I.R.C. § 469 (passive activity losses and credits limited).

5 See I.R.C. § 11(b), which provides graduated brackets for taxable corporate income:
15% of taxable income up to $50,000, 25% of taxable income from $50,000 to $75,000, and
34% of taxable income in excess of $75,000.

6 See I.R.C. § 448(d)(2).
and policy in OBRA are also well suited to deep structure analysis.

This article will begin with a brief overview of the past and present treatment of PTPs and PSCs and the various congressional and administrative applications (or non-applications) of a deep structure analysis in approaching classification and integration issues. A brief comparison of tax reform under the 1954 and 1986 Codes follows. The OBRA changes to the 1986 Code treatment of PTPs regarding classification and integration will then be discussed in greater detail in Section II. Deficiencies in these provisions as measured against a deep structure analysis ideal will be uncovered and alternatives are suggested which better meet this ideal. Section III follows with a similar discussion of the PAL provisions of OBRA. Section IV looks at the specific congressional rationales for the OBRA changes and whether deep structure analysis actually provided the basis for the changes, and Section V compares tax reform under the 1954 Code with that under the 1986 Code. The article then traces the influence of politics on the tax reform process and the halting development of a deep structure tax policy by various administrations and congressional committees in their drafting of actual legislation during the development of the 1954 and 1986 Codes. Next, the article shows that both policy and politics played roles in the passage of the 1986 Code and later OBRA reforms. These reforms came closer to meeting deep structure policy objectives than did reform under the 1954 Code, but fell short of the ideal, largely due to political influences.

A. PTPs and PSCs

Superficially, PTPs and PSCs have little in common other than a concentration of ownership among high income taxpayers and
Corporate Tax Liabilities to Individual Taxpayers, 41 Nat'l Tax J. 37, 50 (1988), with 45% held by institutions, Corporate Takeover Hearings, supra, at 313 (Securities and Exchange Commission Staff Report). Stock ownership in general has been concentrated in high income taxpayers for some time. See Hearings on Federal Tax Policy for Economic Growth and Stability before the Subcomm. on Tax Policy of the Joint Comm. on the Economic Report, 84th Cong., 1st Sess. 563 (1955) [hereinafter 1955 Tax Policy Hearings] (statement of Professor Lindner). This is particularly true in the case of closely-held corporations. See Hearings on H.R. 13511 (Revenue Act of 1978) Before the Senate Finance Comm., 95th Cong., 2d Sess. (Part I) 136 (1978) [hereinafter 1978 Senate Hearings] (statement of Secretary of the Treasury Blumenthal). The shift to institutional ownership is more recent. See Corporate Takeover Hearings, supra, at 313. Given the high median income of professionals, this pattern should be even stronger in the case of PSCs. The pattern of ownership of PTPs is more difficult to determine due to street names, but other than as to tax-exempt and foreign ownership, PTP ownership probably parallels that of publicly traded corporations. See Hearings on Master Limited Partnerships before the Subcomm. on Taxation and Debt Management of the Senate Finance Comm., 100th Cong., 1st Sess. 168, 172, 198 (1987) [hereinafter 1987 Senate MLP Hearings] (statements of Barry Miller and Lawrence Cohen).

The current Federal income tax treatment of different business entities ranges along a continuum. At one end of the continuum are entities, such as sole proprietorships and grantor trusts, whose separate existence is for most purposes ignored.

At the other end are entities, such as subchapter C corporations, that generally are treated as separate persons whose tax liabilities are in addition to and independent of those of their shareholders.

Between these two extremes are entities such as partnerships, trusts, S corporations, regulated investment companies, real estate investment trusts, and cooperatives, the taxation of which reflect both aggregate and separate entity principles.

Along the continuum, significant differences in tax treatment include, first, whether the income earned by the entity is taxed to the entity in full, only to the extent not distributed to the owners, or not at all; second, whether the entity's owners are taxed on distributed or undistributed income of the entity; third, whether losses incurred by the entity can be deducted currently by its owners, or only upon a disposition of their interests in the entity; and fourth, whether the timing or character of any income of the entity that is passed through to the owners is altered when passed through.


The author would further break down the tax entity continuum between the direct and double taxation extremes. Aggregate passthrough treatment is embodied in Subchapter K, the taxation of partnerships and partners. Under an ideal aggregate model the tax rules would treat the partnership as an entity only for reporting, collection and audit purposes, and would treat the partners otherwise as much as possible as direct owners. Subchapter K
and the original 1986 Code. The misplacement of PTPs as pass-through partnerships and PSCs as separate entities with graduated inside corporate rates lower than the owners’ outside marginal rates was due to a failure of deep structure analysis. Unfortunately, the common pattern of misplacement continued in the 1987 PSC and PTP changes, which resulted in ad hoc provisions which were also questionable in their technical aspects. Due to politics, these provisions touched only lightly upon the broad policy and revenue issues which needed to be addressed, and appear to be watered-down versions of broad proposals found in the more thorough 1984-85 tax reform studies.

B. Classification

Since the enactment of the 1954 Code, Congress, through its tax committees, and the various administrations, through the Department of the Treasury ("Treasury"), have periodically examined tax
entity classification.⁹ Viewing the alternatives as limited to either a

⁹ In 1960 Treasury promulgated extensive revisions to the classification regulations, Treas. Reg. § 301.7701-1-4), which had remained in essentially the same form since the 1934 Revenue Act revision approved by the Supreme Court in Morrissey v. Commissioner, 296 U.S. 344, 354-55 (1935). See Sexton & Osteen, Classification as a Partnership or as an Association Taxable as a Corporation, 24 Tulane Tax Inst. 95, 108-122 (1975). In response to a series of taxpayer victories in obtaining corporate tax treatment and, hence, retirement benefits for shareholder-employees then limited to employees, the best known of which is United States v. Kintner, 216 F.2d 418 (9th Cir. 1954), the Service and Treasury promulgated the Kintner regulations in 1960. The Kintner regulations sought to close the door on professional associations by effectively adopting state law form as to the establishment of legal relationships (no states authorized professional corporations at that time). See Treas. Reg. § 301.7701-1(c) (1960). The regulations also attempted to provide certainty by mechanizing the four corporate factors, see infra notes 113-116, and the resemblance test to a "more than test," giving the factors equal weight. See Treas. Reg. § 301.7701-2(a)(3) (1960). The bias toward partnership tax treatment for limited partnerships found in Treas. Reg. § 301.7701-2(b)-(e), and -3(b) (1960), did not arise from a slant against professional corporations, but instead constituted a blind adoption of the Board of Tax Appeals' (predecessor to the Tax Court) formalistic and ill-considered opinion in Glensco Textile Co. v. Commissioner, 46 B.T.A. 176 (1942). See Peel, Definition of a Partnership: New Suggestions on an Old Issue, 1979 Wis. L. Rev. 989, 991; Sexton & Osteen, supra, at 126-28, 131-32.

State legislators responded to the Kintner regulations challenge by authorizing professional corporations, prompting further anti-professional corporation amendments to the 1960 regulations in 1965. These amendments were subsequently rejected as blatantly discriminatory. See Kurzner v. United States, 413 F.2d 97, 111-112 (5th Cir. 1969); United States v. Empye, 406 F.2d 157, 170 (10th Cir. 1969). In 1970 the Service threw in the towel as to professional corporations, Rev. Rul. 70-101, 1970-1 C.B. 278, and in 1982 Congress affected parity and some rationality in the retirement plan area. See infra note 266.

"Once defeat was admitted in the professional area... the Treasury quickly focused its attention on the 'tax shelter' limited partnerships. Unfortunately (for the Treasury), the 1960 regulations, designed to make it easy to qualify as a partnership and difficult to achieve association status, stood as a bar at the threshold of the development of an approach to attack such partnerships." Sexton & Osteen, supra, at 137. Actually, the bothersome aspects apparently arose more from a quest for certainty and administrability, a theme consistently followed by Treasury. See infra note 117. Consequently, in 1977 the Commissioner issued proposed anti-tax shelter revisions to the association regulations which would have taxed many more limited partnerships as corporations. See Prop. Treas. Reg. § 301.7701-1(b), (c); 42 Fed. Reg. 1038-44 (Jan. 5, 1977); Note, Tax Classification of Limited Partnerships: The IRS Bombs the Tax Shelters, 52 N.Y.U. L. Rev. 408, 410 (1977) ("When the Department of Housing and Urban Development protested that the regulations would cripple its attempts to encourage private investment in low-income housing, the regulations were hastily withdrawn"); N.Y. Times, Jan. 7, 1977 at A-11. See Withdrawal of Notice of Proposed Rule Making, 42 Fed. Reg. 1489 (1977). Following withdrawal of the 1977 proposed reclassification amendments, the "Service subsequently indicated in Rev. Rul. 79-106, 1979-1 C.B. 448, that it would follow the Larson application of the existing regulations, without examining additional factors." Passthrough Entity Hearing Pamphlet, supra note 8, at n.7-8.

After this political failure, Treasury shifted to the legislative forum, with President Carter's 1978 Proposals for Tax Reductions and Reform recommending to Congress "that new limited partnerships with more than 15 limited partners be treated as corporations for
passthrough partnership or a separate entity taxable as a corporation, neither Congress nor Treasury reached a satisfactory resolution of the classification of large limited partnerships with inactive owners, nor did they seriously consider classification of close corporations in which the owners actively participate. These 1954 Code forays were not based on a deep structure classification analysis and no consistent principles were developed for placing organizations on the tax entity continuum. Rather, the classification revisions arose from backdoor administrative attacks, first on retirement plans for entrepreneurs and later on tax shelters for the

tax purposes; however, partnerships engaged primarily in housing activities will be excepted from this classification rule." Message from the President, Proposals For Tax Reductions and Reform, H.R. Doc. 283, 95th Cong., 2d Sess. 11 (1978) [hereinafter 1978 President's Proposals]. This provision, like many of President Carter's other substantive anti-shelter provisions, was politically unsuccessful. See infra note 344.

In 1983 the Senate Finance Committee Staff released a "Preliminary Staff Report on Subchapter C," which proposed that limited partnerships with publicly traded units "would generally be treated as associations taxable as corporations." Staff of Senate Finance Comm., 98th Cong., 1st Sess., The Reform and Simplification of the Income Taxation of Corporations 80 (Comm. Print 1983) [hereinafter Preliminary Subchapter C Report] (public trading was limited to trading on an established securities market). This provision, like most of the Staff's proposals, was based on an American Law Institute ("ALI") proposal. The Staff reclassification provision generated considerable political heat. See Reform of Corporate Taxation, Hearings Before the Senate Finance Comm., 98th Cong., 1st Sess. 7 (1983) [hereinafter Reform of Corporate Taxation Hearings] (statement of Chairman Dole). Not surprisingly, reclassification was omitted from the 1985 Final Report on Subchapter C, see Staff of Senate Finance Comm., 99th Cong., 1st Sess., The Subchapter C Revision Act of 1985, 72 (Comm. Print 1985), on the rationalization that the 1984 Treasury Proposals would classify all limited partnerships with more than 35 limited partnerships as corporations and would subsume the original publicly traded recommendation; so that further piecemeal classification provisions should await the fate of the pending Treasury Proposals. Nevertheless, the 1985 Staff Subchapter C proposal itself was doomed politically by the tax profession's opposition to its repeal of the General Utilities doctrine (General Utilities & Operating Co. v. Comm'r, 296 U.S. 200 (1935)), a core provision to Treasury. See Sheppard, General Utilities Repeal: Of Ostriches and Motherhood, 30 Tax Notes 491 (Feb. 10, 1986); Reform of Corporate Taxation Hearings, supra, at 9-10 (statement of Assistant Secretary of Treasury for Tax Policy Ronald Pearlman).

Ultimately the 1984 'Treasury Proposals' numerical reclassification of large limited partnerships (over 35 partners) as corporations, see 2 U.S. Dep't of Treasury, Tax Reform for Fairness, Simplicity, and Economic Growth—General Explanation 147 (1984) [hereinafter 1984 Treasury Proposals], was abandoned by the President in his tax proposals to Congress, The President's Tax Proposals to the Congress for Fairness, Growth and Simplicity (1985) [hereinafter 1985 President's Proposals]. See Passthrough Entity Hearing Pamphlet, supra note 8, at 17.

10 See supra note 8.

11 See supra note 9.
wealthy, which both proved to be politically unsuccessful.

In the summer of 1986, shortly after the Senate's passage of the Tax Reform Act of 1986 ("the 1986 Act"), Representative Rangel, chairman of the House Ways and Means Subcommittee on Select Revenue Measures, held hearings on passthrough entities. The result of the hearings was a new set of mortgage-backed securities provisions, including Real Estate Mortgage Investment Conduits ("REMICs"), as well as other conduit changes. In the summer of 1987, the subcommittee conducted hearings on master limited partnerships ("MLPs"), i.e., PTPs, which, together with Senate hearings conducted on the same topic and the earlier House pass-

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12 See supra note 9; Keyser, Publicly Traded Limited Partnerships: The Treasury Fights the Wrong War, 36 Inst. on Oil & Gas Inst. L. & Tax'n 1-1, 10-6 (1985).
13 See 1986 Senate Report, supra note 8.
14 See 1986 Passthrough Entity Hearings, supra note 8.
15 See I.R.C. §§ 562, 851-855, 4982, 7609 (RICs); §§ 856-859, 4981, 6697 (REITs); §§ 860A-860G, 1272, 6049, 7701 (mortgage backed securities).
16 Hearings on Tax Treatment of Master Limited Partnerships before the House Ways and Means Subcomm. on Select Revenue Measures, 100th Cong., 1st Sess. (1987) [hereinafter 1987 House MLP Hearings]. The term "master limited partnership" or MLP refers to the two-tier structure of many publicly-traded limited partnerships. See MLP Hearing Pamphlet, supra note 8, at 3-4. Such publicly traded parent limited partnership usually acts as a 99% limited partner of an operating limited partnership; such structure is intended to avoid state blue sky restrictions and having to amend the certificate of limited partnership in numerous states each time units of ownership are transferred. See Turlington & Beeson, Master Limited Partnerships: Current Issues, Techniques and Strategies, in Partnership Taxation 1988—An Advanced Program 211, 221, 227 n.16 (Practicing Law Institute 1988).

The four basic types of PTPs (formed through roll-up, roll-out, acquisition, and liquidation transactions) are as follows:

In a rollup transaction, existing limited partnerships are "rolled up" and consolidated into one larger partnership. In a rollup, the existing partnerships are treated as contributing their assets to the master limited partnership, in exchange for units of the master limited partnership, and then distributing the units to their partners in liquidation. The master limited partnership thereby owns the assets of the pre-existing partnership, and has as its unit holders the partners of the pre-existing partnerships.

MLP Hearing Pamphlet, supra note 8, at 24. The Joint Committee on Taxation Staff also defines a "roll-out" as a transaction in which a corporation exchanges assets for an interest in the PTP, typically a general partnership interest. See id. at 21. Limited partnership interests are then sold directly to the public by the PTP, sold by the corporate partner, or distributed to the corporation's shareholders. See id. In an acquisition transaction, the PTP is again managed by the corporate general partner, but the PTP purchases its operating assets from the corporation or a third party. See id. at 23. In a liquidation transaction, a corporation liquidates and the PTP acquires its assets. This transaction is less desirable after the 1986 Act's repeal of the General Utilities doctrine. See id. at 23-24; infra note 247.

17 See 1987 Senate MLP Hearings, supra note 7.
through hearings, spurred the 1987 OBRA PTP changes.\textsuperscript{18} These House and Senate hearings, which included the testimony of then Assistant Treasury Secretary for Tax Policy Roger Mentz, and the Joint Committee on Taxation staff pamphlets prepared for the hearings,\textsuperscript{19} contain the most thorough congressional and administrative examination of entity classification to date. Unfortunately, politics\textsuperscript{20} tended to obscure the Treasury’s and Joint Committee staff’s astute policy analysis,\textsuperscript{21} as was evident in the final legislation.\textsuperscript{22}

\textbf{C. Integration}

During the 1954 Code era, at roughly the same times as they carried on entity classification studies, the tax writing committees and Treasury also took up the corporate-shareholder integration

\textsuperscript{18} See infra notes 56-107 and accompanying text.
\textsuperscript{19} See MLP Hearing Pamphlet, supra note 8; Passthrough Entity Hearing Pamphlet, supra note 8.
\textsuperscript{20} Committee Chairman Rangel frequently reminded those appearing before the Subcommittee on Select Revenue Measures during the 1987 hearings on MLP’s that the Subcommittee was seeking a policy discussion. See 1987 House MLP Hearings, supra note 16, at 4, 7, 104-106, 205, 247, 291.
\textsuperscript{21} The 1986 Passthrough Entity Hearing Pamphlet, supra note 8, detailed the taxation of entities spread across the taxable entity continuum, later incorporated in part of the legislative history of the 1986 Code and OBRA, but more importantly it based classification of active business entities as to both corporations and partnerships on whether the entity acted separately from its owners. See id. at 14, 17. The 1987 MLP Hearing Pamphlet set forth details of the tax treatment on the “continuum” even more clearly and classified the subcategories of PTPs. See supra note 8. The 1987 Staff analysis is directed at the arguments for and against corporate classification, ultimately coming down in favor of corporate classification. See MLP Hearing Pamphlet, supra note 8, at 29-37; H.R. Rep. No. 391, 100th Cong., 1st Sess. 1065-67 (1987) [hereinafter 1987 House Report].
\textsuperscript{22} Thus, corporate PTPs are taxed more heavily than most publicly traded C corporations. See infra note 199 and accompanying text. Passthrough PTPs are treated as aggregates subject to Subchapter K. See infra note 283 and accompanying text. Close C corporations (other than PSCs) enjoy graduated Subchapter C rates on retained earnings lower than materially participating owners’ marginal rates. See infra note 33. Adherence to the Staff’s focus on control of the entity or its business would have avoided the legislated errors in the treatment of passthrough PTPs and close corporations. Only separation of the classification as separate entity or aggregate issue from the integration issue, of which the Staff did not conceive, could have avoided the corporate PTP treatment error. Finally, OBRA correctly applied separate entity treatment to passthrough PTP losses, with a complete separate basket approach. See infra notes 89, 295 and accompanying text. However, this separate basket approach reveals the policy defect in the general PAL passive gain/passive loss netting rule and results in economic inefficiency. See infra note 300 and accompanying text.

In 1978 Chairman Al Ullman took up the cry for “integration” after the Carter Administration abandoned it due to the big C corporations' dislike of dividend pay-out incentives. See Hearings on the President's 1978 Tax Reduction and Reform Proposals before the House Committee on Ways & Means, 95th Cong., 2d Sess. (Part 1) 94, 95, 102, 486-88 (statement of Secretary of the Treasury Blumenthal), (Part 9) 6144-51 (statement of Professor Graetz) (1978) [hereinafter 1978 House Hearings]; Minarik, How Tax Reform Came About, 37 Tax Notes 1359, 1363 (Dec. 28, 1987). Espousal of radical tax changes was thought risky by conventional wisdom ever since the late Chairman Ullman's espousal of a value added tax (“VAT”), which appeared to be the direct cause of his defeat in his next bid for reelection. See Birnbaum & Murray, supra, at 194-195; Minarik, supra, at 1366.

The Treasury Department undertook a study completed in 1984, 1984 Treasury Proposals, supra note 9, some of which eventually made its way into the Tax Reform Act of 1986. See Sunley, A Summing Up of the 1986 Act; What Happened to Comprehensive Income Taxation?, 34 Tax Notes 63 (Jan. 5, 1987). However, much of what Treasury recommended was not included in the 1986 Act. For example, the Treasury Proposals advocated more economically realistic depreciation schedules for assets and greater accounting for inflation in not only the figuring of tax brackets, but also depreciation, inventories, and capital gains. See id. at 64. Treasury also recommended permitting corporations to deduct fifty percent of dividends paid, see id.; neither recommendation was included in the 1986 Act. See id.
process, the administrations then in office simultaneously advocated a limited form of corporate-shareholder integration and treatment of large limited partnerships as regular C corporations, an apparent policy conflict noted by those seeking to preserve the status quo. The root of this conflict was a desire to encourage capital formation through new equity instead of retained earnings or debt investment, rather than deep structure policy, which un-

inafter Blueprints]. The Blueprints, the first edition of which was released late in the Ford administration, called for complete integration of corporate-shareholder taxation with "first-day" imputation as a corollary of a consumption tax and of elimination of the capital gains preference. See also Canellos, Corporate Tax Integration: By Design or by Default, 35 Tax Notes 999, 1001 (June 8, 1987).

President Carter's administration at one point supported both integration and treatment of limited partnerships with more than fifteen limited partners as corporations. See 1978 House Hearings, supra note 23, at 6151 (statement of Professor Graetz), 1978 President's Proposals, supra note 9, at 11 (President Carter's reclassification proposal). Similarly, Assistant Secretary Mentz advocated classification of master limited partnerships as corporations in the same administration that earlier had unsuccessfully supported corporate shareholder integration. See 1986 Passthrough Entity Hearings, supra note 8, at 10-11 (statement of Mentz).

Witnesses, particularly economists, frequently maintained throughout the three sets of Mills hearings on tax policy, see supra note 23, that the double tax structure encouraged financing from debt and retained earnings. Not surprisingly in the 1955 Tax Policy Hearings, supra note 23, at 507, 509, Chairman Mills of the Subcommittee on Tax Policy clearly articulated his interest in integration as producing more equity capital and thereby alleviating the necessity of as much debt financing. At the same time, members of the Subcommittee learned that C corporations were actually used by high income shareholder as inside tax shelters through deferred tax on retained earnings. See id. at 526 (statement of Rep. Curtis), 551 (Chairman Mills questioning Dr. Hall), 586 (statement of Dr. Hall). Indeed, in the 1959 Panel Discussions, Chairman Mills pointed out the 1954 Code dividend exclusion provision was enacted "not because of the theory of double taxation so much, nor the question of whether or not corporate [taxes] were shifted or not shifted as much as the thought that this treatment of dividend income might serve as an incentive to the investment in corporate shares." 1959 Panel Discussions, supra note 23, at 855. The same purpose motivated the 1978 Integration Proposals. See 1978 House Hearings, supra note 23, at 855 (colloquy between Secretary of the Treasury Blumenthal and Chairman Ullman with Ullman stating that "one of our great problems in business is over reliance on debt and under utilization of equity. I think your restoring investment in equity in this country is one of the goals we should try to achieve in order to revitalize our economy.") Similarly, the motivation of the 1984 Treasury Proposals' reduction of taxation of corporate earnings through a fifty percent dividends paid deduction was the encouragement of equity financing over debt financing on economic efficiency grounds. See 1984 Treasury Proposals, supra note 9, at 135; Hearings on Tax Aspects of Acquisitions and Mergers before the Subcomm. on Oversight and Subcomm. on Select Revenue Measures of the House Ways & Means Comm., 99th Cong., 1st Sess. 123 (1985) [hereinafter Acquisitions and Mergers Hearings] (statement of David Brockway,
doubtedly drove the 1954 and 1986 Code integration studies. This emphasis on capital formation was probably a cause of the lack of deep structure analysis in the classification area as well.

The desirability of close C corporation graduated rates, meant to encourage or subsidize capital formation in small businesses (even if only via increased retained earnings) was discussed in each integration debate. The graduated rates generated the economic inefficiencies of horizontal disparity as to businesses conducted in

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See 1955 Tax Policy Hearings, supra note 7, at 545-47, 551 (statement of Dr. Hall). Dr. Hall, a witness at the hearings, called for integration to put an end to close C corporation tax shelters and the conversion of low taxed retained earnings into capital gains or the date of death elimination of tax. See id. Other economists opposed integration because it would impose high outside rates on retained earnings or because a dividends paid deduction would tilt the playing field away from small close corporations. See id. at 554-556, 560, 562-564 (debate between Dr. Hall, Edwin Cohen, Committee Chairman Mills, and others). See also 1978 House Hearings, supra note 23, at (Part 6) 3516-33 (statement of Professor Gaffney advocating mandatory partnership passthrough of income, at least as to close C corporations, to eliminate inside shelter). The 1984 Treasury Proposals simultaneously advocated elimination of the graduated inside corporate brackets in favor of a flat 33% on net corporate income and the creation of a 50% dividends paid deduction to ameliorate double taxation. See 1984 Treasury Proposals, supra note 9, at 128-29, 136.

Treasury explained the theory of economic efficiency or neutrality as follows:

One of the primary advantages of a free market economy is its tendency to allocate economic resources to their most productive uses. For example, market forces lead business firms to produce what consumers want in ways that are relatively efficient and economical. Any tax inevitably discourages the type of activity that is taxed. An ideal tax system would, however, interfere with private decisions as little as possible. That is, it would not unnecessarily distort choices about how income is earned and how it is spent. It would not unduly favor leisure over work, or consumption over saving and investment. It would not needlessly cause business firms to modify their production techniques or their decisions on how to finance their activities. A neutral tax policy would not induce businesses to acquire other firms or to be acquired by them merely for tax considerations. It would not discourage risk-taking or the formation of new businesses. It would not discourage competition by granting special preferences only to one industry or one type of financial institution. In short, an ideal tax system would be as neutral as possible toward private decisions. Any deviation from this principle represents implicit endorsement of governmental intervention in the economy — an insidious form of industrial policy based on the belief that those responsible for tax policy can judge better than the marketplace what consumers want,
partnership form and vertical disparity as to wage earners in general, an example of the results of the failure to apply a deep structure analysis to the integration issue. Under the close C corporation graduated rates, the corporate-shareholder structure

how goods and services should be produced, and how business should be organized and financed.

Economic neutrality is furthered by a few simple rules of tax design. Perhaps most importantly, income from all sources should be taxed equally; otherwise, too many resources will be devoted to activities subject to the lowest taxes. For the same reason, tax liability should not depend on how income is spent. Uniform treatment of all sources and uses of income requires a comprehensive definition of income for tax purposes.

1984 Treasury Proposals, supra note 9, at 13.
The Joint Committee Staff succinctly explained the underlying economic theory:

The output of the economy depends not only in the size of the capital stock but also on its composition. In the absence of taxes, the operation of a competitive economy causes capital to flow to sectors where it is expected to earn the highest rate of return. This results in the allocation of investment that produces the largest amount of national income. However, if non-neutral taxes are imposed, potential output may be reduced because too much capital will tend to accumulate in lightly taxed sectors, and too little capital will be invested in highly taxed sectors. Thus, in evaluating the effects of tax reform on capital formation it is necessary to examine both the level and allocation of investment.


1953 House Hearings, supra note 23, at 3510 (statement of Jerry Godell). This constitutes the mirror image of the populist origins of the twentieth century income tax. See infra note 325 and accompanying text. "From the standpoint of fairness, not the slightest justification can be offered." Chirelstein, Back From the Dead: How President Reagan Saved the Income Tax, 14 Fla. St. U. L. Rev. 207, 211 (1986) (contrasting lower effective rate on investment income due to tax preferences with income from personal services). See also Yorio, supra note 30, at 401 n.49; infra note 43.
yielded less revenue on earnings than direct taxation would have\textsuperscript{33}, leaving the double tax system vulnerable to a “briar patch” argument\textsuperscript{34} used by defenders of the status quo. The real issue is not whether a “double” tax is collected, but whether Treasury will collect the equivalent of even a single tax.\textsuperscript{35}

President Carter's Treasury, as the defender of the fisc and hence the policy of vertical and horizontal equity,\textsuperscript{36} strongly opposed the inside shelter of the close C corporation.\textsuperscript{37} President Reagan's Treasury, however, abandoned this position sub silentio in the 1986 passthrough entity hearings, ostensibly to promote certainty and ease of administration by acquiescing in state law corporate form,\textsuperscript{38} but surely due in fact to political pressures (the lesson garnered from the political experience of the 1984 Treasury proposal which called for repeal of the inside graduated corporate

\textsuperscript{33} See Staff of Joint Comm. on Taxation, 99th Cong., 1st Sess., Tax Reform Proposals: Corporate Taxation 4-5 (Comm. Print 1985) [hereinafter Corporate Tax Reform Proposals].

\textsuperscript{34} The author's colleague Charles Koch, discussing the myth of double taxation, see supra note 29, insightfully dubbed double taxation as a “Brer Rabbit and the Briarpatch” argument. Corporate shareholders, like rabbits in a briarpatch, never thought that the double tax “thorns” of the 1954 Code “briarpatch” would pierce them. Defenders of the status quo wanted the inside shelter of corporate and shareholder level taxation even while they argue that a real double tax exists, and Committee members knowingly gave it to them. Here Doernberg & McChesney's “tax contracts” analysis appears apt. Doernberg and McChesney adopt the idea that tax legislation is a contract. “Status as a legislator confers on a senator or representative the legal authority to help or hurt private interests through taxation. In exchange for being helped or hurt, private interests will compensate legislators” with contributions to political campaigns, and even money for personal use. Doernberg & McChesney, On the Accelerating Rate and Decreasing Durability of Tax Reform, 71 Minn. L. Rev. 913, 914 (1987).

\textsuperscript{35} That this is the real issue was suggested by Professor Graetz at an American Association of Law Schools Tax Workshop Luncheon in 1985.

\textsuperscript{36} The authors of Showdown at Gucci Gulch paint the Treasury tax office prior to Assistant Secretary for Tax Policy Roger Mentz' tenure from 1986 to 1987 as by-and-large standing “somewhat above politics, promoting ‘good’ tax policy and opposing ‘bad’ tax policy.” Birnbaum & Murray, supra note 23, at 262. Be that as it may, Mentz himself prides himself on following politics and not tax ideals. See Sheppard & Rosen, An Interview With Assistant Secretary J. Roger Mentz, 36 Tax Notes 465, 469 (Aug. 13, 1987).

\textsuperscript{37} See 1978 Senate Hearings, supra note 7, at 136 (statement of Secretary of Treasury Blumenthal).

\textsuperscript{38} Assistant Secretary Mentz admitted that few close C corporations possessed any of the traditional corporate resemblance factors. See 1986 Passthrough Entity Hearings, supra note 8, at 19; infra note 120. However, he asserted that state law form, i.e., “objective” rules, was preferable to functional subjective classification, with the limited exception of publicly traded partnerships. See id. at 27-28.
brackets\textsuperscript{39}) rather than sober-minded policy considerations.

Corporate management's intransigence against full integration (due to fear of shareholder demands for distributions of earnings) has limited the integration debate over the past decade to dividend deduction or credit proposals.\textsuperscript{40} Such split-rate, partial integration proposals would have increased the vertical and horizontal inequities of the 1954 and 1986 Code treatment of corporations and shareholders.\textsuperscript{41} Not surprisingly, therefore, administration and congressional attempts over the last decade, as in the fashioning of the 1986 Code, to enact such partial integration proved unsuccessful as well.\textsuperscript{42} Consequently, the corporate two-tier tax system continues, violating horizontal and vertical equity, although less so after the 1986 Act's substantial increase of the corporate tax.\textsuperscript{43}

\textsuperscript{39} 1984 Treasury Proposals, supra note 9, at 128-29. Early in the formulation of the President's proposals, Treasury Secretary Baker met with the president of the National Federation of Independent Business, "who was disturbed by the elimination of lower tax rates for small businesses." Birnbaum & Murray, supra note 23, at 80.

\textsuperscript{40} See 1978 House Hearings, supra note 23, at 94, 102, 487 (statement of Secretary of the Treasury Blumenthal), 6148-50 (statement of Professor Graetz). Minarik describes the opposition to Carter's partial integration proposal as splitting the investment and business communities. The split was widened by the proposed repeal of capital gains and helped to doom the Carter Tax Proposals. See Minarik, supra note 23, at 1363; 131 Cong. Rec. H12,243 (daily ed. Dec. 17, 1987) (statement of Speaker O'Neill).

\textsuperscript{41} See 1978 House Hearings, supra note 23, at 3504, 6107 (statement of former Commissioner Sheldon Cohen).

\textsuperscript{42} See Leonard, A Pragmatic View of Corporate Integration, 35 Tax Notes 889, 894 (June 1, 1987); 1986 Passthrough Entity Hearings, supra note 8, at 25-26 (statement of Mentz). Then Assistant Secretary for Tax Policy Ronald Pearlman has stated, however, that in 1985 corporations were not opposed to dividend relief despite conventional wisdom; instead, opposition arose from revenue implications. See President's Proposals, supra note 8, at 126; Acquisitions and Mergers Hearings, supra note 27, at 222 (1985) (statement of Assistant Secretary of Treasury Ronald Pearlman).

\textsuperscript{43} One type of disparity is the horizontal and vertical disparity created by the lower rates that exist in a close C corporation compared to the shareholder's higher marginal bracket. See supra note 32 and accompanying text. The disparity as to large C corporations is more complex. Historically, the maximum large C corporation bracket has been considerably lower than the maximum outside individual bracket (e.g., 52% corporate versus 91% individual in 1954 and 48% corporate versus 70% individual as to other than "earned income" in 1980 prior to ERTA), but ERTA narrowed the rate gap to 46% corporate vs. 50% individual. The 1986 Code actually increased the maximum corporate rate (34%) above the nominal maximum individual rate (28%), but not by much for most high income taxpayers, i.e., 34% vs. phantom 33%. However, this may not be the correct comparison. The large C corporate effective rate (21% of economic income prior to the Tax Reform Act of 1986 and 26% after the Act, see infra note 195 and accompanying text) is lower than the maximum individual marginal rate (28% or 33%) but not lower than the 19% to 22% of economic income effective rate for high income ("high income" includes two groupings of income
The dominant pattern of tax reform under the 1954 Code was elimination of inflation-driven bracket creep through tax cuts and tax expenditures, with specific treatment of usually extreme tax abuses which nevertheless left basic tax expenditures in place. With the prospective (1985) wholesale elimination of bracket creep by the Economic Recovery Tax Act of 1981 ("ERTA") looming ahead, the congressional budget and tax committees became the facilitators if not the driving force behind the substantial revenue increases enacted in 1982 and 1984, during which time the ERTA rate cuts and indexing remained in effect. The 1986 Act provided an individual tax cut offset by an equivalent corporate sector tax increase (probably adding needed progressivity to the Code).
and by indirect means substantially broadened the individual income tax base (through changes often concentrated on high income taxpayers)\textsuperscript{73} and the corporate minimum tax base.\textsuperscript{74} \textsc{OBRA}, as its name indicates, was also driven by the budget reconciliation process and provided further base broadening with a number of rela-

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\textsuperscript{73} See Future Implications of the 1986 Act Hearings, supra note 49, at 5 (statement of Robert McIntyre); Kiefer, supra note 49, at 1192; Ott, The Impact of the 1986 Tax Reform Act on Progressivity, 33 Tax Notes 1223, 1226 (Dec. 29, 1986); Sunley, supra note 23, at 63 ("while corporate tax incidence is always controversial, if one assumes that the increase in corporate taxes is borne by stockholders or owners of capital generally, the 1986 Act increases the overall progressivity of the Federal income taxes"). The model on incidence Sunley apparently uses is set forth in more detail in Ballentine, The Short-Run Distribution Effect of Tax Reform, 31 Tax Notes 1035, 1038-39 (June 9, 1986).


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\textsuperscript{75} See Future Implications of the 1986 Act Hearings, supra note 49, at 15 (statement of Robert McIntyre); Kiefer, supra note 49, at 1192; Ott, The Impact of the 1986 Tax Reform Act on Progressivity, 33 Tax Notes 1223, 1226 (Dec. 29, 1986); Sunley, supra note 23, at 63 ("while corporate tax incidence is always controversial, if one assumes that the increase in corporate taxes is borne by stockholders or owners of capital generally, the 1986 Act increases the overall progressivity of the Federal income taxes"). The model on incidence Sunley apparently uses is set forth in more detail in Ballentine, The Short-Run Distribution Effect of Tax Reform, 31 Tax Notes 1035, 1038-39 (June 9, 1986).

tively small revenue raising items, largely drawn from prior Joint Committee and Treasury studies. OBRA maintained the 1986 Act rate cuts and structural changes as to capital gains and PALs. Despite the base broadening, Ways and Means Committee Chairman Rostenkowski has said that he expects a major revenue increase will be needed in 1989 and recently stated that he would "strongly resist" changes to the 1986 Code, presumably meaning, e.g., a return to the capital gains preference and higher rates of pre-1986 law. Such a statement may also signal that further base broadening, following the pattern of 1982, 1984 and 1987, may occur.

II. OBRA CHANGES TO TAXATION OF PTPS AND PSCs

A. Classification of PTPs

1. Treatment as a Corporation

New section 7704(a) treats a PTP as a corporation for federal income tax purposes. On the first day of such treatment, a PTP

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65 See Teuber, Ways and Means Democrats Approve $6.3 Billion in Revenue Raisers, Will Complete Action This Week, 37 Tax Notes 119, 121 (Oct. 12, 1987) [hereinafter Teuber, Ways and Means]; Teuber, GOP Maneuvering Cuts Ways and Means Markup Short, 37 Tax Notes 6-8 (Oct. 5, 1987). The author counts thirty-two income and estate and gift revenue increase provisions, including extension of effective date provisions.

66 Senator Bentsen, Chairman of the Senate Finance Committee, was outwardly more receptive to looking at "leftovers" from the 1984 Treasury Proposals, supra note 9, and the 1985 President's Proposals, supra note 9, than were the House Democrats. See Teuber, Finance to Look at Treasury I and Treasury II for Revenue, 37 Tax Notes 9 (Oct. 5, 1987) (Sen. Bentsen states he will look to Treasury proposals for raising revenue); Teuber, Ways and Means, supra note 53, at 120 (Rep. Rostenkowski reports House Democrats reject the Treasury Proposals).


68 I.R.C. § 7704(a) (1987). The effective date contains a ten year grandfather provision for PTPs existing on December 17, 1987. See OBRA § 10211(c)(1)(B). Then Assistant Secretary Mentz predicted this grandfather clause and so argued for immediate PTP action, as it was better a grandfather now than later. See 1987 Senate MLP Hearings, supra note 7, at 51 (statement of Mentz); 1987 House MLP Hearings, supra note 16, at 11, 35-36, 40 (statement...
is deemed to transfer all of its partnership assets (subject to any partnership liabilities) to a newly formed corporation in exchange for its stock, which the PTP then distributes to its partners in liquidation.¹⁷

"Publicly traded" means that the partnership’s interests are traded on an established securities market or readily traded on a secondary market or substantial equivalent.²⁸ An “established securities market” includes an over-the-counter market as well as a national securities exchange.²⁹ The secondary market test encompasses partnership interests where the owners are “readily able to buy, sell or exchange their partnership interests in a manner that is comparable, economically, to trading on an established securities market.”³⁰ The litmus test is the presence of a willing market maker, but occasional accommodation transfers or buy-sell transactions do not usually constitute a secondary market or its equivalent.³¹ Congress deliberately left the interstices gray so as to discourage aggressive taxpayer arguments which have traditionally sought to take advantage of provisions which were once more


²⁸See I.R.C. § 7704(b).


³⁰1987 Conference Report, supra note 59, at 948. Then Assistant Secretary of Treasury Mentz had suggested that it would be necessary to go beyond registration on a stock exchange to include situations “where there is a market made by one or more investment bankers so that you have, in effect, the same degree of shareholder liquidity as in a publicly held corporation.” 1987 Senate MLP Hearings, supra note 7, at 52. The Conference report went beyond the question of whether a market had been made, and focused on the market characteristics of certainty and liquidity and whether they were present. See Sheppard, The Poker Game: Defining “Publicly Traded Partnership”, 39 Tax Notes 22 (April 4, 1988).

³¹1987 Conference Report, supra note 59, at 948. Exercises of put or call rights, however, may give rise to such “ready tradeability.” See id.
2. Passive Business Passthrough Exception

If 90% or more of a PTP's gross income consists of qualifying "passive-type income," statutory corporate classification does not attach under section 7704(a) and (c). The "passive-type" income concept is familiar in the contexts of corporations receiving special treatment (e.g., personal holding companies or "PHCs" and pass-through separate entity S corporations) as well as conduit separate entities (including RICs and REITs). Section 7704(d) uses

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62 Sheppard, supra note 60, at 22-24. For an discussion of publicly "offered" limited partnerships, "trading desks," and NAPEX (National Partnership Exchange) and public trading, see id. Sheppard correctly points out that § 7704(b)'s standard of readily traded on the substantial equivalent of a secondary market was intended as a "back stop," not as a widening of the reclassification net to catch large publicly offered and traded limited partnerships. See id. at 22. But she raises the interesting question whether in fact some common public offering practices, such as trading desks, listing on NAPEX or certain redemptions and resales, may functionally constitute public trading. If so, this question might be more appropriately addressed by Congress and not the drafters of regulations.

63 I.R.C. § 7704(c)(2), (a).

64 See I.R.C. § 543.


66 See I.R.C. § 851(b)(2). A "regulated investment company" ("RIC") or mutual fund is a domestic corporation meeting the Investment Company Act of 1940 registration requirements in that it derives at least 90% of its ordinary income from passive investment income, has a diversified portfolio, and distributes at least 90% of its net income to shareholders. 1986 Bluebook, supra note 51, at 375.

A RIC generally is subject to the regular corporate tax, but receives a deduction for dividends paid to its shareholders. Thus, a RIC is treated, in essence, as a conduit for Federal income tax purposes. A RIC does not receive a deduction with respect to dividends paid unless the distribution is pro rata with respect to other shares of the same class (sec. 562(c)).

67 See I.R.C. § 856(c)(2).

In general, a real estate investment trust ("REIT") is an entity that receives most of its income from passive real estate related investments and that receives conduit treatment for income that is distributed to shareholders. If an entity meets the qualifications for REIT status, the portion of its income that is distributed to the investors each year generally is taxed to the investors without being subjected to a tax at the REIT level; the REIT is subject to a corporate tax only on the income that it retains and on certain income from property that qualifies as foreclosure property. . . .

In order to qualify as a REIT and thereby receive conduit treatment, an entity
a rationalized PHC-type model in defining passive-type income as interest, dividends and the true targets, real property rents and income from mineral or natural resource development, and gains from assets used in such activities. However, PTP passive-type income is not coextensive with PHC or any other passive income scheme, e.g., the Code's PAL or Subchapter S provisions.

Congress in effect made the REIT rules non-exclusive, with certain REIT-type income qualifying for passthrough PTP treatment. A Treasury representative and a witness for the apartment rental industry who testified at the master limited partnership hearings demonstrated that the existing REIT provisions were more restrictive than the PTP format as to control, management, distribution requirements and reinvestment of certain gains. But

must satisfy four tests on a year-by-year basis; organizational structure, source of income, nature of assets, and distribution of income. These tests are intended to allow conduit treatment in circumstances in which a corporate tax otherwise would be imposed, only if there really is a pooling of investment arrangement that is evidenced by its organizational structure, if its investments are basically in real estate assets, and if its income is passive income from real estate investment, as contrasted with income from the operation of business involving real estate. In addition, substantially all of the entity's income must be passed through to its shareholders on a current basis.

1986 Senate Report, supra note 8, at 769. REITs also may passthrough long-term capital gain through a "capital gain dividend." See id. at 770.

See generally 1987 Senate MLP Hearings, supra note 7, at 73-74 (statement of Mentz); 1986 Passthrough Entity Hearings, supra note 8, at 31 (statement of Mentz); 1987 House Report, supra note 21, at 1068. Assistant Secretary Mentz' explanation for the Administration's review of the PTP issue in 1987 after having supported the Treasury position in 1986 was its concern about "the effects that changes in classification of MLPs would have on activities traditionally conducted in partnership form." 1987 Senate MLP Hearings, supra note 7, at 48, 55 (statement of Mentz). See also Sheppard, No More, No More: Finance Subcommittee Ponders Entity Classification, 36 Tax Notes 360, 361 (July 27, 1987).

See I.R.C. § 7704(d)(1)(C), (E), (F). The odd inclusion for fertilizer as a "natural resource" probably arose from a recent acquisition PTP in that field. See 1987 Senate MLP Hearings, supra note 7, at 89.

See generally 1987 House Report, supra note 21, at 1069.

See I.R.C. § 7704(c)(2), (d)(3).

See 1987 House MLP Hearings, supra note 16, at 353-55 (statement of Lewis Sandler of the National Apartment Association) (listing substantive differences between REITs and real estate PTPs focusing on management and distribution requirements and reinvestment restrictions), 73 (statement of Herbert Lerner of the American Institute of Certified Public Accountants), 316, 320 (statement of Myles Tanenbaum of EQK Partners). See also Passthrough Entity Hearing Pamphlet, supra note 8, at 11; and 1987 Senate MLP Hearings, supra note 7, at 47 (statement of Mentz). The Tax Reform Act of 1986 liberalized many existing REIT rules, see 1986 Bluebook, supra note 51, at 390, while tightening other REIT and other conduit entity rules, especially deferral of mutual fund income. See id. at 376-82.
new section 7704(c)(3) denied the continued passive business pass-through exception to nearly every PTP which could qualify as a RIC or mutual fund (except for a PTP selling, for example, commodities or commodities futures)\textsuperscript{78} so as not "to alter the requirements for conduit tax treatment . . . applicable to regulated investment companies";\textsuperscript{74} and the legislative history extends this proscription to REMICs.\textsuperscript{75} However, any policy distinction between REITs and RICs or REMICs appears tenuous.

Rules similar to those of REITs apply to incidental rentals of personal property in connection with a rental of real property.\textsuperscript{76} Rent contingent on income or profits of a non-real estate activity usually does not qualify for pass-through treatment, due to the greater degree of downside risk and upside potential for economic gain.\textsuperscript{77} This is an important new distinction, focusing not on the activities of the enterprise, the traditional criterion for passive or active business status,\textsuperscript{78} but on a risk or economic analysis of the return on investment.

The legislative history carefully points out that meeting the passive income tests does not imply that entities generating such income are presumed to be partnerships.\textsuperscript{79} While this seemingly opens the door for regulatory or judicial reclassification of such

Nevertheless, REITs were not popular to real estate operators due to inflexibility and market perception. See 1987 Senate MLP Hearings, supra note 7, at 134 (statements of Cohen and Sandler). See generally id. at 198-99 (statements of Cohen and Chapoton); Sheppard, Sleeping Dogs: Publicly Traded Limited Partnerships Come of Age, 34 Tax Notes 1254, 1255 (Mar. 30, 1987).

\textsuperscript{77} The new provision does not apply to PTPs selling commodities or commodities futures. See I.R.C. § 7704(c)(3).

\textsuperscript{78} 1987 House Report, supra note 21, at 1068.

\textsuperscript{79} See id. at 1068.

\textsuperscript{78} See I.R.C. § 7704(d)(3).

\textsuperscript{77} See 1987 House Report, supra note 21, at 1068-69.

\textsuperscript{78} Amounts based on gross income earned in connection with a non-real estate related activity such as a fast food operation are not treated as passive-type income. Interest or rent (or other amounts) contingent on profits involves a greater degree of risk, and also a greater potential for economic gain, than fixed (or even a market-indexed) rate of interest or rent, and thus is more properly regarded as from an underlying active business activity. Passive-type rental income also does not include income from rental or leasing of personal property.


\textsuperscript{79} See 1987 House Report, supra note 20, at 1068.
passthrough PTPs as corporations, reflections on policy and study of the past indicate that both Treasury and the courts should and will be reluctant to effectuate what Congress has failed to do.\textsuperscript{80}

Congress provided relatively generous rules for inadvertent failure to meet the 90% passive-type income floor. If the IRS determines the failure was inadvertent, the partnership takes steps within a reasonable time (one year, except to the extent the regulations provide otherwise\textsuperscript{81}), and the partnership and each unit holder during the failure period agree to make “adjustments,”\textsuperscript{82} the partnership will be treated as meeting the 90% floor during the failure period.\textsuperscript{83}

B. PTPs and PAL Provisions

1. Active Business PTPs

The legislative history explains that income from PTPs classified as corporations generally is treated as dividend or “portfolio income,”\textsuperscript{84} which passive activity losses may not offset.\textsuperscript{85} According to a recent House report, “regardless of whether such income is characterized as income or gain (e.g., depending on whether it represents a distribution of earnings and profits under section 301),

\textsuperscript{80} See, e.g., Achiro v. Commissioner, 77 T.C. 881, 884-95 and n.17 (1981) (court notes that Congress is aware of disparate treatment of self-employed individuals and corporate shareholder-employees and has not chosen to change the situation through legislation); 1987 Senate MLP Hearings, supra note 7, at 46 (statement of Mentz).

\textsuperscript{81} See infra note 83 and accompanying text.

\textsuperscript{82} The nature of the adjustments is not described in new section 7704(e), only that the adjustments will be made “as required by the Secretary.” I.R.C. § 7704(e).

\textsuperscript{83} See id. See also 1987 Conference Report, supra note 59, at 944.

\textsuperscript{84} According to one commentator,

Portfolio income includes, as a general rule, the following types of income derived directly or indirectly through a pass-through entity:

(1) Income from interest, dividends, annuities and royalties not derived in the ordinary course of a trade or business.

(2) Gain attributable to the disposition of property producing income of a type described in (1), above.

(3) Gain attributable to the disposition of property held for investment (other than an interest in a passive activity).


income from such entities is properly treated as portfolio income for purposes of the passive loss rule." Presumably such owner-level realization of portfolio income is triggered by actual distributions and not by the mere presence of a "distributive share" without distribution, which is the partnership rule. Entity-level losses from such a corporate PTP are not passed through to shareholders but instead are carried back and forward under the NOL rules.

2. **Complete Separate Basket Treatment for Passthrough PTPs**

   New section 469(k)(1) mandates complete "separate basket" application of the passive loss rules to each passthrough publicly traded partnership. In essence, this PAL passthrough PTP rule results in losses from a passthrough PTP being offsettable against income from that PTP only. Moreover, passive losses inside a passthrough PTP cannot offset its own inside portfolio income. (This theme runs throughout the PAL provisions. Finally, positive income from a passthrough PTP is treated as portfolio income.

   The intended overall result is that net losses and credits of a partner from each publicly traded partnership be suspended at the partner level, carried forward (not back) and netted against income, other than the partnership's portfolio income, from (or tax liability attributable to) that publicly traded partnership, and that suspended losses are allowed upon a complete disposition of the partner's interest in the partnership. [And a partner's distributive share of a passthrough PTP's income cannot soak up, i.e., be offset by, passive activity losses.]

   The drafters of the House PAL-PTP provision reasoned that while a non-passthrough PTP would be treated as a corporation for all purposes, including the PAL rules, with any distributions treated as portfolio income and its losses not passing through,

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*See 1987 House Report, supra note 21, at 1071.
*See I.R.C. § 702 (rules for accounting for partnership income).
*See I.R.C. § 172 (net operating losses).
*See 1987 House Report, supra note 21, at 1074.
*See 1986 Senate Report, supra note 8, at 728-30.
*See 1987 House Report, supra note 21, at 1071, 1073.
*See 1987 House Report, supra note 21, at 1074.
*See id. at 1071.
PTPs not treated as corporations or passsthrough PTPs could maintain (absent regulatory recharacterization of their income as “portfolio income” (i.e., as not passive activity gain) under original section 469(k)) that their income constituted “passive income,” thus soaking up PALs. The House separate basket PAL rule was designed to forestall both use of income from a passsthrough PTP to soak up PAL losses and generation of PAL losses by a passsthrough PTP. Treatment of other PTPs as corporations and their income as portfolio income achieves roughly the same result. The same result will occur at the owner level as to income from passsthrough and separate entity PTPs only if the owners’ distributive share of taxable income from a passsthrough PTP and actual (cash flow) distributions from a corporate PTP can be made to coincide. The inside loss regimes for active and passive activity PTPs, however, may vary substantially, creating horizontal disparities, at least as to non-portfolio income activities.

Whether the passthrough-PAL-suspension-of-losses model or the model incorporating limited NOL carryback and carryover, with no direct offset against disposition of gain, applies to corporate PTPs is hard to judge, based on the statutory language and legislative history. The 1987 conference report flatly states that it follows the Senate amendment of the House bill (with modifications not here relevant), but the Senate amendment did not treat any PTPs as corporations. Hence, the conference PAL-PTP rule ended up encompassing all PTPs, not just passsthrough (i.e., passive-type income) PTPs. Finally, new section 469(k)(1) speaks only of publicly traded partnerships, without further limitation as to passsthrough PTPs. (The House provision was similarly worded.) If the PAL-PTP rule encompassed all PTPs, the PAL-PTP inside portfolio income passive loss separate basket rule literally—but not logically—would apply under section 469(k) inside to a corporate

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**See id. at 1072. While testimony at the 1987 House MLP Hearings implied this stance, see 1987 House MLP Hearings, supra note 16, at 366 (statement of Jeffrey Rosenthal on behalf of the National Association of Realtors and Real Estate Securities and Syndication Institution), the legislative history to the 1986 Code suggests otherwise. See 1986 Senate Report, supra note 8, at 730 (example of roll-out MLP distributed by C corporation); 1986 Bluebook, supra note 51, at 234; 1986 Passsthrough Entity Hearings, supra note 8, at 12-13 (statement of Mentz).**

**See 1987 Conference Report, supra note 59, at 952.**

PTP. But this reading would produce conflicts between the envisioned individualized suspension of PAL-PTP losses\(^{98}\) and corporate-NOL rules.\(^{99}\) Obviously a technical correction is in order.

The final OBRA provision\(^{100}\) excepted from the passthrough PTP separate PAL basket the $25,000 (deduction equivalent) per natural partner offset under the then-existing PAL rules for rental real estate losses (with a waiver for low-income housing of an otherwise applicable "active participation" requirement).\(^{101}\) According to the 1987 conference report, "a partner in a publicly traded partnership may utilize his share of partnership low income housing credits and rehabilitation credits against tax liability attributable to non-partnership income to the extent of his unused $25,000 (deduction equivalent) allowance."\(^{102}\)

3. Definitional Conflict

The new PAL passthrough PTP provision contains a more fundamental technical flaw which is possibly fatal. Section 469(c) provides the definition of the centerpiece of the PAL regime: "passive activity," which it defines as "any activity . . . (A) which involves the conduct of any trade or business, and (B) in which the taxpayer does not materially participate."\(^{103}\) PAL was thus aimed at active business/passive owner combinations. In contrast, passthrough PTP provisions were targeted at passive activity/passive owner combinations. The 1986 Senate legislative history focuses almost exclusively on "material participation" or passivity of ownership, with no amplification of the first part of the definition: "conduct of a trade or business." Historically a passive operation, such as net leasing of real estate or mere collection of income, did not

\(^{98}\) See supra note 93.

\(^{99}\) See I.R.C. § 172(b).

\(^{100}\) See I.R.C. § 469(i)(1), (6)(B) and (k)(1) (last sentence).

\(^{101}\) See I.R.C. § 469(i)(1), (2), and (6)(B).

\(^{102}\) 1987 Conference Report, supra note 59, at 952. This carve-out for low income housing and rehabilitation credits was strongly supported by Ways and Means Subcommittee Chairman Rangel. See Hearings on Tax Shelters, Accounting Abuses, and Corporate and Securities Reforms before the House Comm. on Ways and Means, 98th Cong., 2d Sess. 28 (1984) [hereinafter Tax Shelter Hearings] (exchange between Rep. Rangel and Assistant Secretary for Tax Policy John Chapoton); Matthews, Treasury Opposes Expansion of Low-Income Housing Credit, 38 Tax Notes 1014 (Mar. 7, 1988).

\(^{103}\) See I.R.C. § 469(c).
attain trade or business status, but mere investment status. The 1986 Code provides an ad hoc regulatory remedy, which encompasses most rental real estate, for this conceptual defect. Section 469(c)(6) authorizes regulations which are to include in the term “trade or business” any activity in connection with the section 212 production of income. But the legislative history indicates that a narrow reading of section 469(c)(6) is in order, such that activities generating more than portfolio income but not rising to trade or business status are considered passive activities. The result is that while Congress intended that section 469 apply separately to items attributable to a pass-through PTP, the section read literally would not apply at all to losses from a pass-through PTP if 90% of its gross income is derived from interest or dividends, i.e., portfolio income, since the generation of such income does not constitute a “passive activity.” Thus losses from an interest or dividend earning pass-through PTP appear not to be subject to any PAL rules. Note that real estate and natural resource income pass-through PTPs would appear to be ideal candidates for treatment as section 212 activities in connection with a trade or business. On the other hand, income from an interest-dividend income PTP would constitute portfolio income not offsettable by losses from a passive activity. Again, a technical correction is in order, preferably by statute rather than regulation.

C. Personal Service Corporations

The new PSC inside tax rate rule is starkly simple: PSCs are not eligible for section 11(b)(1) graduated inside corporate rates and instead are subject to a flat rate of 34%. Congress failed to provide any special one-time disincorporation relief, as it did in 1982.

104 See supra note 78; infra note 107.
105 In drafting section 469 in the Tax Reform Act of 1986, Congress included any rental activity in the term passive activity regardless of whether the owner materially participated. See 1986 Senate Report, supra note 7, at 720.
107 While certainly passive at the owner level, generating such portfolio income cannot satisfy the “activity portion;” it constitutes neither a trade or business nor a covered section 212 activity greater than mere collection of portfolio income. See Lee, supra note 78, at 109-11.
in connection with the enactment of legislative parity in retirement plans.109 The apparent expectation is that most, if not all, PSCs will elect S corporation status.110

III. DEEP STRUCTURE CLASSIFICATION, INTEGRATION AND PASSIVE LOSS POLICY

A. Classification

Historically, both the courts and Treasury regulations classified entities as separate, i.e., as "associations" taxable as corporations,111 on the basis of the Morrissey112 "corporate resemblance" factors: (1) continuity of the entity's life,113 (2) centralized manage-
(3) limited liability of the owners, and (4) free transfer-

apparently, and not in the partnership as an entity.” 46 B.T.A. at 185.

The early professional corporation cases went the opposite way, finding continuity by agreement despite dissolution under local law. See Pelton v. Commissioner, 82 F.2d 473 (7th Cir. 1936); United States v. Kintner, 216 F.2d 418 (9th Cir. 1954). Not surprisingly, the current Kintner regulations adopt a technical dissolution without regard to contingent continuity life test. See Treas. Reg. § 301.7701-2(b)(3). The Tax Court majority in Larson, 66 T.C. at 175, suggested administrative substitution of a “termination of the business” standard encompassing the life of the enterprise. The 1977 Service proposals did so, fleshing out that standard. See Prop. Treas. Reg. § 301.7701-2(d)(2), 42 Fed. Reg. 1041 (1977). First, a majority interest would have had the power to prevent interruption of business operations despite a local law dissolution due to change in status or identity of one or more members, if in such event that interest could preclude liquidation and withdrawal of capital, and withdrawal of capital would significantly impair the continuation of the business. See id. § 2(d)(2)(i). (Under examples the withdrawal of forty percent would impair but twenty percent would not. See id.) Secondly, following the advanced letter ruling requirements of the early 1970s, Rev. Proc. 72-13, 1972-1 C.B. 735; 75-16, 1975-1 C.B. 676, while overturning this aspect of the Court of Claims decision in Zuckman v. United States, 524 F.2d 729 (Ct. Cl. 1975), the 1977 proposals would have found continuity of life where the only general members were corporations controlled by one or more of the limited members. See Prop. Treas. Reg. § 301.7701-2(d)(ii), 42 Fed. Reg. 1041 (1977).

The 1977 proposals basically would have adopted the Kintner regulations’ focus on representative capacity, but would have restored the disjunctive insubstantial interest or removable standards. See Prop. Treas. Reg. § 301.7701-2(d)(c). Here too the Kintner regulations following the formalistic Glensder Textile approach distinguish centralized control in the general partner of a limited partnership from corporate centralized control subject to the control of shareholders so long as the general partner owns a “meaningful” or substantial proprietary interest and is not removable by the limited partners. If the general partner fails either test under Glensder Textile or both under the Kintner regulations, the general partner’s management was in a “representative capacity,” a corporate characteristic. See id.; 46 B.T.A. at 185.

The 1977 proposals would have adopted the Kintner regulations’ focus on representative capacity, but would have restored the disjunctive insubstantial interest or removable standards. See Prop. Treas. Reg. § 301.7701-2(d). The better reading of the Kintner regulations required both insubstantial assets and control by the limited partners. The Tax Court in Larson did not address the appropriateness of these regulations. The Court of Claims in Zuckman went further, as Glensder Textile had inti-

Note, Tax Classification of Limited Partnerships, 90 Harv. L. Rev. 745, 752 (1977) [hereinafter Tax Classification] (footnotes omitted).
ability of ownership interests.\textsuperscript{118} Tax administrators have sought to

mated, and applied a "Catch-22" logic against the Commissioner. If the general partner had
an insubstantial interest or acted only as a dummy general partner, then the limited part-
ners in effect controlled the partnership and would be liable as generals under local law. See
524 F.2d at 738. Thus the corporate limited liability factor would never be present in a
limited partnership. In this context, the Service established minimum net worth floors and
maximum cross-ownership of general limited partnership interest ceilings for advanced rul-
ing purposes. See Rev. Proc. 72-13, 1972-1 C.B. 735, 74-17, 1974-1 C.B. 438. See generally
Tax Classification, supra note 114, at 754-55.

The 1977 proposals and various commentators would base limited liability upon a com-
parison of the interests subject to personal liability and those not, looking at practical liabil-
on the Taxation of Partners, 75 Geo. L.J. 423, 459-61 (1986). Thus in most traditional tax
shelter limited partnerships, limited liability would be present. Some commentators would
make limited liability determinative of corporate status unless the general partners hold at
least a fifty percent interest in capital and losses and profits. See Postlewaite, Dutton &
Maggette, supra, at 461. The inappropriateness of liability alone as determining separate
title or corporate status is implied in the legislative history of the Tax Reform Act of 1986.
See 1986 Senate Report, supra note 8, at 717 (discussing material participation and liability
as factors for PAL rule).

\textsuperscript{118} See Treas. Reg. § 301.7701-2(e). Both Glensder Textile, 46 B.T.A. at 184, and the
Kinnter regulations adopted a mechanical, unrealistic approach focusing on whether the
limited partner had the right to assign all of his or her rights without the consent of others,
thereby making the assignee the "substitute limited partner" versus the more limited power
to assign profits, distributions and tax losses—surely all that the limited partner really
cared about anyway. Earlier, Glensder Textile went even further to discount the right to
transfer all partnership rights, and characterized that right as analogous to a corporate as-
pect, since no such transfers were in fact contemplated. See 46 B.T.A. at 186.

The 1977 proposals adopted the more practical approach of focusing on assignability of
rights to share in profits and return of capital. See Prop. Treas. Reg. § 301.7701-2(g)(2), 42
Fed. Reg. at 1042 (1977). This is consistent with the case law under which an assignee part-
ner, although not substituted, constitutes a partner for tax purposes. See Evans v. Commis-
ioner, 447 F.2d 547 (7th Cir. 1971). Thus transferability of interest, a purported corporate
factor, would generally be considered present.

As early as 1975, the Joint Committee Staff proposed, as part of an anti-tax shelter cam-
paign, corporate treatment for any partnership with membership units registered as a public
offering with the Securities and Exchange Commission. See Staff of Joint Comm. on Taxa-
The House Ways and Means Committee failed to act on this and a similar 1978 proposal.
See Peel, supra note 9, at 1004. President Carter's 1978 tax proposals then advocated a
numerical ceiling on the number of limited partners, roughly corresponding to the then S
corporation ceiling on number of shareholders as a determinant for corporate treatment. See
supra note 9. In 1983, the Senate Finance Committee Staff, following an earlier draft of the
ALI Federal Income Tax Project, Subchapter K 383, 392 (1984), proposed that limited part-
nerships with partnership interests publicly traded on an established securities market be
treated as corporations. See Preliminary Subchapter C Report, supra note 9, at 80. This
proposal generated more political interest than any other provision. See Reform of Corpo-
rate Taxation Hearings, supra note 9, at 7-8 (remarks of Chairman Dole). Treasury opposed
the proposal this time principally because classification went beyond the scope of Sub-
quantify the degree of resemblance that requires corporate treatment. However, the Joint Committee staff believes, correctly, that the presence of these factors only overlaps the passive/active participation-by-owners dichotomy which supports separate entity treatment. Interestingly, most large limited partnerships manifest chapter C simplification. See id. at 11 (statement of Assistant Secretary for Tax Policy Ronald Pearlman). However, it set the standard for later study.

Questions such as how a type of organization should be taxed, whether a so-called C-corporation, an S-corporation or as a partnership or, for that matter, as a real estate investment trust or a regulated investment company, require, we believe, an analysis of all of those classification situations. We suspect that if that analysis were undertaken, we would not agree to base tax classification on the degree of marketability of an organization’s equity interests.

Id. at 11 (statement of Ronald Pearlman).

Prior to the Kintner regulations, the Service for ruling purposes held that an organization would not be treated as an “association” if any one of the four essential characteristics—(1) associates, (2), objective to carry on a business and divide its profits, (3) centralized management, and (4) continuity of life—were not present. See I.T. 3930, 1948-2 C.B. 126; Rev. Rul. 57-341, 1957-2 C.B. 884; Rev. Rul. 57-607, 1957-2 C.B. 887; I.T. 3948, 1949-1 C.B. 161; Rev. Rul. 54-484, 1954-2 C.B. 242. The Kintner regulations, in order to provide certainty and weight the balance against corporate status, according to some, made corporate treatment turn on the presence of three or more of the four corporate resemblance factors. Thus this “thumb upon the scales,” Larson, 66 T.C. at 185, contrary to conventional wisdom, was not designed to stop corporate tax treatment for professionals, but instead was intended to provide certainty and liberalization of the prior Service requirement of four out of four corporate requirements (which varied from the Kintner listing). See supra note 113 for a discussion of Larson.

The 1977 proposed amendments adopted the Morrissey resemblance test, specifically abandoning the Kintner three-out-of-four factors to be a corporation in favor of a preponderance test. Thus, the proposed amendments illustrated “how classification [was] determined when an organization resembles a corporation with respect to two of the four characteristics but not with respect to the other two.” Notice of Proposed Regulations, 42 Fed. Reg. 1039 (1977). The examples set forth in the proposed regulations made use of a sophisticated weighting system such as called for in Larson. See Prop. Treas. Reg. § 301.7701-2(h), 42 Fed. Reg. at 1042-44 (1977); supra note 113.

The 1977 proposals would have classified most tax shelter limited partnerships as associations and, therefore, are much broader than the OBRA PTP provisions. This article argues that the broader approach is more appropriate than narrow publicly traded factor. However, the fundamental defect in the four factor resemblance approach is that the factors only indirectly reflect the underlying policy: limitation of aggregate pass through to owners who materially participate.

The Joint Committee Staff and commentators have come to recognize that whether an entity should be treated as a separate taxable unit should turn on the relationship between the individual and its owners. “In particular, to the extent that an entity is viewed as acting separately from its owners, rather than merely as their agent or alter ego, an argument can be made that it should be treated as a separate taxable unit.” Passthrough Entity Hearing Pamphlet, supra note 8, at 13. See Sheppard, Walk This Way, 35 Tax Notes 86, 87 (April 6, 1987); Faber, Entity-Level Taxation: Drawing the Line, 35 Tax Notes 413 (Apr. 27, 1987).
all four characteristics, whereas most close corporations possess none, hence the misplacement of both on the tax entity

The underlying policy question is whether the owners are the parties that actually earn the income of the entity in a realistic and substantial economic sense. This determination should turn in large part on whether the owner is active in management. See Passthrough Entity Hearing Pamphlet, supra note 8, at 14-15. The 1977 proposed amendments themselves identify the core of the partnership as this aggregate characteristic.

A partnership is usually characterized by the partners' personal identification with the partnership, their personal participation in its decision-making, and their personal responsibility for its obligation.

Prop. Treas. Reg. § 301.7701-2(a)(2), 42 Fed. Reg. at 1040 (1977), withdrawn, 42 Fed. Reg. 1489 (1977). The basic problem is that a limited partnership generally does not have this participation characteristic, and the four factors are not directly tied into this policy of basing corporate treatment on participation.

See Passthrough Entity Hearing Pamphlet, supra note 8, at 16-17; 1986 Passthrough Entity Hearing, supra note 8, at 19, 28 (statement of Mentz); 1987 Senate MLP Hearings, supra note 7, at 50 (statement of Mentz). For industry counterarguments, see 1987 Senate MLP Hearings, supra note 7, at 110-11 (statement of Lewis Sandler) (large limited partnerships do not possess continuity of life and limited liability). Others have pointed to the functional differences between large limited partnerships and corporations in cash-flow yield and in the diversity of the enterprise. See id. at 89, 167-68 (statements of James Moffett and Barry Miller). Such traditional uses of the partnership are by and large covered by the passthrough PTP exception, but the more recent trend to active, continuing business partnerships requiring reinvestment, see Sheppard, supra note 72, at 1255, will generally result in such partnerships not passing the 90% passive-type income or natural resource development requirement.

See 1986 Passthrough Entity Hearings, supra note 8, at 19, 28 (statement of Mentz), 43, 51 (statements of McKee and Kuller). First, notwithstanding the perpetual continuity of a corporate charter, when an active principal dies, the business will terminate or be sold unless management succession has been or can be soon arranged. See generally Kessler & Yorio, Choosing the Appropriate Form for the Small Business, 1 Corp. L. Rev. 291, 298 (1978). In close C corporations with very narrowly held stock, key shareholders are also often members of the board of directors and/or key officers—a pattern of overlapping positions reaching its extreme usually in sole shareholder operations where complete identity between the board, officers and owners commonly exists. Thus, centralized management is non-existent in most close corporations. Similarly, limited liability is often a chimera for close C corporations. Significant third party creditors (except perhaps in real estate ventures) usually require guarantees by principal shareholders and their spouses. See 1986 Passthrough Entity Hearing, supra note 8, at 19 (statement of Mentz); The Subchapter S Revision Act of 1982: Hearings on H.R. 6055 before the Subcomm. on Select Revenue Measures of the House Ways and Means Comm., 97th Cong., 2d Sess. 263 (1982) [hereinafter Subchapter S Revision Hearings] (statement of Chairman Stark); Kessler & Richmond, Has Congress Made the C Corporation Obsolete for the Small Business?, 7 Corp. L. Rev. 293, 294 (1984). Furthermore, an active shareholder may be personally liable for his/her own torts in the scope of his/her employment and possibly in the supervision of others. See Kessler & Yorio, supra, at 302-04. The assets of the corporate business itself, always subject to the entity's liabilities, are often the principal asset of the entrepreneur. Close corporations also miss the mark as far as free transferability is concerned, as there is a real problem in finding any secondary market at all for minority close C corporation stock. A buy-sell option
continuum.\textsuperscript{121}

Currently the only policy-based, functional entity classification distinction is between an aggregate approach, which treats an entity as a collection of its owners banded together for profit and treats the owners as if they owned proportionate shares of the entity's assets,\textsuperscript{122} and a separate entity approach under which owners have an interest only in the entity and not in its assets.\textsuperscript{123} A separate entity approach does not necessarily mandate a double taxation regime. Integration of a separate entity's income (or loss) with its owners' income turns on other policies.\textsuperscript{124} Under a deep structure analysis, the aggregate approach treats the owner of an interest in an entity as an entrepreneur owning a portion of the entity's assets and earning a portion of its income, all apart from the entity which in turn serves only as a mere collection, reporting and audit device.\textsuperscript{125} Current Subchapter K, which deals with taxation of partnerships, roughly reflects this distinction,\textsuperscript{126} but allows a part-

\textsuperscript{121} See supra note 8 and accompanying text. More significantly, PTPs are not functionally aggregates and PSCs are not functionally separate entities.


\textsuperscript{123} Most commentators have focused on the owner's interest in the business as to character of income. See Wolfman, supra note 122, at 288; Fellows, supra note 122, at 79.

\textsuperscript{124} See infra notes 176-189 and accompanying text.


\textsuperscript{126} Subchapter K is generally described as manifesting a hybrid or mix of "entity" and "aggregate" features, see Bennet v. Commissioner, 79 T.C. 470, 479 (1982), (citing I W. McKee, W. Nelson & R. Whitmire, Federal Taxation of Partnerships and Partners \textsuperscript{1} 1.102 (1977)); J. Crane & A. Bromberg, Law of Partnership 16-29 (1968), with the relative emphasis shifting according to the prevailing legal thought at the time. See Canellos, supra note 24, at 1098. However, the legislative history and background of Subchapter K, as well as the better reasoned decisions, establish that the aggregate core predominates. See supra note 125. The mandatory entity features are properly and largely limited to determining and reporting income and more recently, audit. See 1954 Code Senate Report, supra note 123, at 93. See infra note 127.
nership to elect entity treatment for some purposes. This election feature is intended to simplify transactions for large businesses.\(^\text{127}\)

The aggregate approach rests on a view of a partnership for tax purposes as a collection of individuals banded together for a profit. See Weidner, Pratt and Deductions for Payments to Partners, 12 Real Prop. Prob. & Tr. J. 811, 812 (1977); H.R. Rep. No. 2543, 83d Cong., 2d Sess. 59 (1954); Holiday Village Shopping Center, 5 Cl. Ct. at 571 (1984); 1953 House Hearings, supra note 31, at 1369 (statement of Mark Johnson for the American Bar Association, Section of Taxation); 1978 House Hearings, supra note 23, at 277 (statement of Treasury representative). Functionally, the aggregate approach endeavors to tax a partner "in the same manner as if there were no partnership." H.R. Rep. No. 2543, 83d Cong., 2d Sess. 58 (1954) [hereinafter 1954 Code Conference Report]. See 1954 Code Senate Report, supra note 125, at 93. Aggregate passthrough taxation is the functional equivalent of direct or single taxation of the owner-partner, according him or her "the same tax consequences which would be accorded an individual entrepreneur." 1954 Code Senate Report, supra note 125, at 99. The aggregate approach essentially treats the partnership form of doing business as no more than a recordkeeping or accounting convenience. See 1954 Code House Report, supra, at 65; 1953 House Hearings, supra note 31, at 1370, 1378 (statement of Mark Johnson); 1959 Advisory Group Hearings, supra note 23, at 20 (statement of Willis) (use of aggregate approach to determine character "is carrying through the basic concept of the partnership, that it is in a very substantial sense an aggregate of individuals and we are taxing income back to them and we use the partnership merely as a pooling source of information"), 27.

The drafters of the 1954 ALI draft revision of the tax treatment of partnerships and partners explained that the "basic pattern" of the draft was "to treat the partnership as a conduit through which the individual partners are regarded as receiving the income computed by the partnership as if they had earned it individually." Jackson, Johnson, Surrey & Warren, A Proposed Revision of the Federal Income Tax Treatment of Partnerships and Partners—American Law Institute Draft, 9 Tax L. Rev. 109, 113-14 (1954) [hereinafter ALI Partnership Proposals]. The rationale of this aggregate approach in the 1954 Code, however, was not based on policy so much as "on the assumption that this approach most nearly conforms to the understandings of the parties of the usual small business." Id. at 113; 1953 House Hearings, supra note 31, at 1370 (statement of Mark Johnson for the American Bar Association, Section of Taxation). However, later administrative developments centered on the participation policy basis for the aggregate approach. The Service's aborted 1977 proposed revision of the entity classification regulations, which would have classified most limited partnerships as associations taxable as corporations reveals the policy basis for aggregate passthrough taxation. See supra note 118. After this unsuccessful attempt to deny the limited partnership vehicle to tax shelters, the next administration shifted in 1978 to a legislative proposal to treat a limited partnership with more than fifteen limited partners as a corporation tax purposes. See 1978 House Hearings, supra note 23, at 11. The stated purpose of the 1978 proposals was to end the use of syndicated partnerships as tax shelter vehicles, see id., but the Treasury explanation also looked to the aggregate policy underlying current Subchapter K. Treasury pointed out that the Code treatment of "a partnership largely as an aggregate of individuals" was intended to offer flexibility, "and to preserve some degree of individuality, for the members of small partnerships." Id. at 277. Treasury believed that large syndicated partnerships with many passive investors, however, complicated the law and were both unnecessary and inappropriate. See id.

\(^{127}\) Although the 1954 ALI partnership proposals generally treated partners "as co-owners
of the partnership property, . . . in the interest of flexibility . . . a series of elective rules based upon the entity theory [were] provided to take care of those partnerships which have had numerous partners or a complex variety of assets." ALI Partnership Proposals, supra note 126, at 113. In presenting these views to the House Ways and Means Committee, Mark Johnson, testifying on behalf of the American Bar Association's similar proposal, argued that all of the rules, whether entity or aggregate based, should be tied together in a single, coordinated pattern affording predictability. Establishment of some set of clearly-defined rules was more important than developing any one particular set of rules, entity or aggregate. See 1953 House Hearings, supra note 31, at 1369-71 (statement of Johnson and colloquy with Representative Mason); Rabkin & Johnson, The Partnership Under the Federal Tax Law, 55 Harv. L. Rev. 909, 949 (1942).

Against this background, the House, while generally following the ALI proposals, by-and-large chose the entity approach in the interest of simplification of the partnership provisions as to transfers of interests, pro rata allocations of built-in gains and losses, distributions of property, self-dealing, and in part retirement payments with limited elective aggregate features, generally affecting all partners, and an ordinary income partial aggregate override as to transfers of partnership interests and certain distributions. See 1954 Code House Report, supra note 125, at 67.

In Hearings on the Internal Revenue Code of 1954 before the Senate Finance Committee, testimony by the ABA representatives criticized the various entity theory choices of the House Bill and recommended enactment of a provision "setting forth a general rule as to whether the aggregate or entity theory of partnerships is to be applied in areas not specifically covered by statutory provisions." Hearings on H.R. 8300 (the Internal Revenue Code of 1954) before the Senate Finance Comm. Part 1, 83d Cong., 2d Sess. 459 (1954) [hereinafter 1954 Senate Code Hearings] (Report of ABA Section of Taxation). See also ALI Partnership Proposals, supra note 126, at 170. The ABA also recommended that as to many of the areas where the House chose an entity approach, it ought to instead follow the ABA and ALI Draft and provide entity-aggregate elections. See 1954 Senate Code Hearings, supra, at 460-70. The Senate Bill and ultimately the Conference Bill responded to these requests, and while in many instances the bills adopted the House's entity rules for simplicity, they also provided elections for "use of the so-called aggregate rule." 1954 Code Senate Report, supra note 125, at 90. The Senate and the Conference bills followed more of an aggregate approach as to contributions and distributions. See id. at 93, 97, 95-96, 98-99. See generally Jackson, Johnson, Surrey, Tenen & Warren, The Internal Revenue Code of 1954: Partnerships, 54 Colum. L. Rev. 1183 (1954) [hereinafter The Code of 1954: Partnerships]. Furthermore, the 1954 Code Conference Report states that while the 1954 Code uses an "entity" approach in section 707 transactions, "[n]o inference is intended, however, that a partnership is to be considered as a separate entity for the purpose of applying other provisions of the internal revenue laws if the concept of the partnership as a collection of individuals is more appropriate for such provisions." 1954 Code Conference Report, supra note 126, at 59. The Conference Report also provides an illustration contained in the ABA Section of Taxation Report to the Senate Finance Committee. Compare 1954 Senate Code Hearings, supra, at 459.

In summary, the 1954 ABA and ALI proposals generally adopted the aggregate approach as the standard approach, particularly for small businesses, but allowed an elective entity approach as to certain transactions for simplicity with large businesses in mind. See The Code of 1954: Partnerships, supra, at 112-13; 1953 House Hearings, supra note 31, at 1369-71 (statement of Mark Johnson for the ABA). Carrying simplicity further, the House bill further would have applied an entity approach particularly as to shifts in interests allocations and inside adjustments arising from and in-kind distributions. Subchapter K as en-
but is based upon unsound policy considerations. Subchapter S instead (ostensibly for the sake of simplicity, but more likely to encourage C to S corporation conversions) provides a pass-through separate entity approach, which hardly produces simplicity in actual operation and often creates inequities or business planning hardships. These more subtle horizontal non-pass-

acted by-and-large returned to the ABA-ALI model in this context, but reversed the elections so that the entity approach was the standard with an elective aggregate approach. In essence Subchapter K still follows an aggregate approach.

The premise of the 1954 ALI-ABA drafts was that Treasury was merely an arbitrator or stakeholder as to such partnership tax policy issues under the rationale that either the entity or the aggregate approach would in the long run produce about the same amount of taxes, because the only question was which partner was to be taxed and when. See 1953 House Hearings, supra note 31, at 1369-70 (statement of Mark Johnson). The time value of money and low tax high income taxpayers proved this premise erroneous. Indeed, thirty years later, the 1984 partnership tax revisions largely reversed the various tax consequences of this premise.

Chairman Mills in 1959 Hearings on Subchapter K viewed the Subchapter S entity approach as to characterization of income passthrough as a simplification for the convenience of small taxpayers. See 1959 Advisory Group Hearings, supra note 23, at 13; S. Rep. No. 1983, 85th Cong., 2d Sess. 88 (1958), reprinted in 1958-3 C.B. 1009 (modified entity approach as to passthrough of income, i.e., ordinary income to shareholder except for capital gains “adopted so that this provision can operate in as simple a manner as possible”).

See Compendium, supra note 23, at 1742. The overwhelming majority of the first S Corporation elections were by taxpayers which had previously reported as C corporations. See 1959 Panel Discussions, supra note 23, at 92 (statements of Karl Price and Chairman Mills), probably reflecting the paradigm 1954 Code tax life cycle of a corporation beginning with an S election during the initial loss stage. See Compendium, supra note 23, at 1726, 1741 (statement of Driscoll); Carlin, Partnership v. Corporation; Non-Tax Shelter Business Enterprise, 34 N.Y.U. Inst. on Fed. Tax’n 741, 749-51 (1977); Kanter, To Elect or Not Elect Subchapter S—That is a Question, 60 Taxes 882, 917 (1982); Kessler & Yorio, supra note 120; O’Connor, Selection in the Form of Business or Professional Organization: A Need for Clairvoyance, 56 Taxes 880, 884-85 (1978). Once the profit stage is reached, the S election is then terminated and the organization operates as a C corporation to accumulate earnings taxed at lower graduated corporate rates. See Compendium, supra note 23, at 1686-87, 1726 (statements of Janin and Caplin); Dial, When to Put Real Estate in a Corporation—Tax Considerations, 32 S.C. L. Rev. 319, 328-29 (1980); Mullaney & Blau, An Analytic Comparison of Partnerships and S Corporations as Vehicles for Leveraged Investments, 59 J. Tax. 142, 148-49 (1983); O’Connor, supra, at 885. But see Kessler & Richmond, supra note 120. Finally, S status is again elected, generally at least five years after termination, see I.R.C. § 1362(g), when accumulated earnings or unreasonable compensation problems arise. See Compendium, supra note 23, at 1741 (statement of Nicholson); Starr, S Corporation: Is It the Right Choice?, 43 N.Y.U. Inst. on Fed. Tax’n 5-1, 5-36 (1985). In short, deep policy had not yet prevailed.

See Coven & Hess, The Subchapter S Revision Act: An Analysis and Appraisal, 50 Tenn. L. Rev. 569, 622-31, 647-57, 666-70, 694-94, 702-06 (1983) (discussions of income determination and character of income; allocations of income; entity level debt and loss pass-through; cash distributions; owner retirements; and distributions of appreciated property);
through disparities between Subchapters K and S create traps for the unwary and tax planning opportunities for the aware, which is bad, if lucrative, tax policy.

At the deep structure level, the hallmark of an entrepreneurial situation requiring aggregate passthrough treatment is the interest-holder’s active, or “material,” participation in the business.

Coven, Subchapter S Distributions and Pseudo Distributions: Proposals for Revising the Defective Blend of Entity and Conduit Concepts, 42 Tax L. Rev. 381 (1987); Eustice, supra note 8, at 353-54, 362-67, 372-78, 381-94, 396-400, 404-10, 433 (discussions of aggregate vs. entity overview, capital structure limitations; income character limitations; entity level treatment; ordinary distributions; liquidating distributions and sales; inside asset basis adjustments; conversions of status and form; outside basis for loss; extraordinary distributions; sales of owner interests; comparison of Subchapters C, S and K).


Unfortunately, the approximately 20-year history of subchapter S attests to many traps for those not extremely familiar with its provisions. The traps most often fallen into involve: (1) unintentional violation of the continuing eligibility rules (particularly the restriction on passive investment income), resulting in retroactive terminations of elections; (2) the making of taxable distributions which were intended to be tax free distributions of previously taxed income; and (3) a shareholder having an insufficient basis to absorb his share of the corporation’s loss, resulting in the permanent disallowance of that part of the loss.

The 20-year history of subchapter S also indicates that knowledgeable taxpayers and tax counsel have derived some unintended benefits from the subchapter S provisions. Examples of these benefits include the deferral of income resulting from the selection of a taxable year for the corporation which is different from that of the majority of its shareholders and the use of the retroactive termination provisions of subchapter S to prevent the passthrough of a substantial amount of income to the shareholders.

The Staff has reviewed subchapter S from the perspective of simplifying its operation (particularly in the area of distributions), removing both the traps for the unwary and the few unintended tax avoidance benefits, and eliminating (where practical) some of the unwarranted differences in tax consequences under the partnership and subchapter S provisions.

Staff S Recommendations, supra, at 8 (footnote omitted).

See supra note 12; supra note 125; Passthrough Entity Hearing Pamphlet, supra note 8, at 14-15, 17 (criterion for separate entity treatment whether owners have full control over process of earning income or over use and disposition of amounts earned by the entity); cf. 1986 Senate Report, supra note 7, at 717.
and perhaps, in a small enough venture, his acting as the financier.\(^\text{135}\) Basing aggregate passthrough treatment on a reasonable numerical ceiling on the number of owners or size of the enterprise instead would achieve rough justice and would be infinitely easier to administer.\(^\text{136}\)

Measured against this conceptual framework, the pre-OBRA tax treatment of both PTPs and most close C and S corporations was wrong. Prior law, inappropriately relying on state law classification,\(^\text{137}\) largely treated PTPs (whose limited partner owners do not materially participate) as aggregates, creating some administrative difficulties,\(^\text{138}\) but far greater tax policy conflicts. Under a deep

\(^{135}\) The United States Supreme Court in Commissioner v. Tower, 327 U.S. 280, 286 (1946), stated that a partnership is created "when persons join together their money, goods, labor or skill for the purpose of carrying on a trade, profession or business and when there is community of interest in the profits and losses." Id. (footnote omitted). See also Commissioner v. Culbertson, 337 U.S. 733, 740 (1949) (quoted definition in Tower constitutes application of standard definition of income "—the gain derived from capital, from labor, or both combined—to a particular form of business organization") Id. (footnote omitted).

\(^{136}\) The Department of Treasury in 1978 supported a numerical reclassification rule with an aggregate analysis. See 1978 House Hearings, supra note 23, at 277. A material participation standard would be very difficult to apply according to a witness at the House MLP hearings. See House MLP Hearings, supra note 16, at 357-58 (statement of Lewis Sandler). The detail presented in the first wave of PAL regulations suggests that a numerical test would be far easier to administer. See Prop. Treas. Reg. § 1.469-1T - 11T, 53 Fed. Reg. 5686-5732 (1988). Alternatively, a size test of earnings or assets would also be easier to administer. Professor Ginsburg opposes both an active business criterion and a numerical test. See 1986 Passthrough Entity Hearings, supra note 8, at 72 (statement of Prof. Ginsburg).

\(^{137}\) See supra notes 38, 120.

\(^{138}\) The ALI 1984 Subchapter K study lists some of the administrative problems with taxing publicly traded corporations under a system like Subchapter K. See ALI, Federal Income Tax Project, Subchapter K, Proposals of the American Law Institute on the Taxation of Partners 384 n.39 (1984) (The ALI study derived this list of problems from McLure, Must Corporate Income be Taxed Twice? 154-66 (1979)). But procedural amendments authorizing entity-level audits of passthrough entities, nominee reporting and computer software programs have answered most of these objections, or so industry spokespersons claim. See 1987 House MLP Hearings, supra note 16, at 38 (statement of Mentz) (computer software), 75-76 (statement of John Neafsey of Sun Company, Inc.), 217 (statement of John Jones, Chairman of ABA Section of Taxation) (fungibility of units traded), 205-209 (statement of James Lovett of Coopers & Lybrand) (nominee reporting and computer software); 1987 Senate MLP Hearings, supra note 7, at 53 (statement of Mentz), 134-35 (statement of John Neafsey of Sun Company, Inc.), 217 (statement of an American Institute of Certified Public Accountants representative as to "simplifying assumptions"); Keyser, supra note 12, at 10-3; McKee, Master Limited Partnerships, 45 N.Y.U. Inst. on Fed. Tax'n (Part I) 23-1, 23-14-15 (1987). The reality seems to be that most problems arose from the termination rule of section 708, I.R.C. § 708, and attendant revaluation of capital accounts under Treasury Regulation 1.704-1(b)(2)(iv)(e), and the meshing of inside basis adjustments under I.R.C. §§ 742, 755, upon transfers of partnership interest with the marketing goal that
structure analysis, PTPs and similar large, limited partnerships should be treated as separate entities if most of their owners do not materially participate.139

Conversely, prior law, relying equally on form,140 incorrectly treated a small, usually close C corporation in which most of the owners materially participated as a separate tax entity (with a

all interests be fungible, that is, that they carry the same "inside" basis adjustment. See 1987 Senate MLP Hearings, supra note 7, at 181 (statement of Richard Cohen); Marich & McKee, Sections 704(c) and 743(b): The Shortcomings of Existing Regulations and the Problems of Publicly Traded Partnerships, 41 Tax L. Rev. 627 (1986). Committee Chairman Rangel did not believe that administration of MLP's was the major problem. See 1987 House MLP Hearings, supra note 16, at 247.

Ironically, the drafters of the 1954 Code probably assumed that large entities would choose the entity approach here for simplicity. See supra note 127. Certainly Treasury is correct that the aggregate treatment found in some Subchapter K provisions is inappropriate as a matter of tax policy where the owners do not materially participate. See 1978 House Hearings, supra note 23, at 277 (Treasury explanation of Carter Administration Proposals).

See supra note 134 and accompanying text.

See supra note 134 and accompanying text.

The Kintner classification regulations define unincorporated organizations treated as "associations taxable as corporations," as distinguished from partnerships, limited partnerships or trusts. Implicit in this approach and the reliance upon local law for establishing legal relationships is that "the artificial entity usually known as a corporation," is treated as a corporation for tax purposes. Treas. Reg. § 301.7701-1(c). Thus, state law corporate form is respected as long as the "corporation" was formed or used for a business purpose. See 1986 Passthrough Entity Hearings, supra note 8, at 28 (statement of Mentz); Strong v. Commissioner, 66 T.C. 12 (1976), aff'd, 553 F.2d 94 (2d Cir. 1977). While functionally close corporations are indistinguishable from sole proprietorships or partnerships depending on the number of shareholder-employees, courts refuse to look at substance, probably reasoning that since "incorporation" and the legal entity are all matters of form, see Keller v. Commissioner, 77 T.C. 1014, 1024, 1031 and n.20 (1981), aff'd, 723 F.2d 58 (10th Cir. 1983), changes should be made by the legislature.

The Supreme Court recently allowed the owners (a limited partnership) of a "nominee" corporation (holding the title and signing the mortgage) to treat property titled in the nominee corporation's name as owned by the shareholder who might enjoy its tax losses, "when the fact that the corporation is acting as agent for its shareholders with respect to a particular asset is set forth in a written agreement at the time the asset is acquired, the corporation functions as agent and not principal with respect to the asset for all purposes, and the corporation is held out as the agent and not principal in all dealings with third parties relating to the asset." Commissioner v. Bollinger, 108 S.Ct. 1173, 1179 (1988). A more direct and forthright approach would have been to disregard the nominee corporation for tax purposes due to the shareholder's control. That, of course, would have overturned sub rosa Moline Properties v. Commissioner, 319 U.S. 436 (1943), as well as National Carbide Corp. v. Commissioner, 336 U.S. 422 (1949). As it is, the Court has given renewed life to a legal fiction of agency in this context that the taxpayer may use. But cf. Spector v. Commissioner, 641 F.2d 376 (5th Cir. 1981) (while Commissioner may challenge and look through the chosen form of a transaction as lacking economic reality, taxpayer may not do the same, absent a showing of unjust results).
lower inside tax rate on its retained earnings).\footnote{For criticism of this result, see 1987 House MLP Hearings, supra note 16 at 341, 346-347 (statement of John Lee); 1978 Senate Hearings, supra note 7, at 136 (statement of Blumenthal); 1978 House Hearings, supra note 23, at 3517-19 (statement of Dr. Gaffney), 6240-42 (statement of Rep. Mikva); 1959 Panel Discussions, supra note 23, at 854-55, 860-61 (statement of Paul Ziffren); Passthrough Entity Hearing Pamphlet, supra note 8, at 17; Corporate Tax Reform Proposals, supra note 33, at 4; 1984 Treasury Proposals, supra note 9, at 128-29. The final result in OBRA was the repeal of the inside graduated brackets for PSCs only.}

Considerations of horizontal and vertical equity, as well as economic efficiency, mandate that both a close C and an S corporation in which most of the owners materially participate be treated as an aggregate of its owners as to income and losses.\footnote{See supra note 30; McLure, infra note 165, at 535.} Deep structure analysis also requires an aggregate approach as to ownership shifts, liabilities, contributions and distributions.\footnote{In the context of close corporations most commentators have focused only on the separate taxation issue. See, e.g., Passthrough Entity Hearing Pamphlet, supra note 8, at 17. However, in the 1987 House MLP Hearings, the author argued that aggregate passthrough should apply to close corporations whose owners materially participate. See 1987 House MLP Hearings, supra note 16, at 343-350. And Subchapter S in its still-born 1954 Senate version simply applied subchapter K, 1954 Code Senate Report, supra note 125, at 119, 123, as some continue to advocate. See 1986 Passthrough Entity Hearings, supra note 8, at 95 (statement of John Pennell).} In both cases, the current entity passthrough approach has not yielded the anticipated simplicity and should be discarded for S corporations.

Although the OBRA PTP and PSC provisions suffer from frequent technical\footnote{See supra notes 98-99, 105-107, and infra notes 189-198 and accompanying text.} and occasional conceptual deficiencies,\footnote{See infra notes 280-283 and accompanying text.} they are fundamentally aimed at the proper target of tax treatment on the basis of a deep structure analysis of organizational form. The problem lies not in the aim, then, but in the scope: the provisions are too restricted in that they fail to treat large limited partnerships consistently with PTPs and inequitably tax corporate PTPs and their owners more heavily than large C corporations and their shareholders combined, creating schedular horizontal distortions in both cases. Moreover, large limited partnerships and passthrough PTPs inappropriately retain aggregate Subchapter K treatment, causing administrative and policy problems; and the corporate tax treatment of actively participating owners in non-professional close corporations continues to contravene deep structure ideals.
B. Integration

1. PTPs and Large Limited Partnerships: Corporate Sector Tax

The bulk of the debate concerning classification of large limited partnerships has failed to separate the issues of classification and integration.\(^\text{146}\) As shown above, separate entity treatment is appropriate where most of the owners are passive, as in most large limited partnerships. However, such a separate entity should not necessarily be taxed as a separate taxpayer and its owners then taxed on distributions or other realizations of entity level profits. Where a passive-owner entity’s “business” is passive, the Code traditionally has afforded conduit separate entity treatment as to income, but not losses.\(^\text{147}\) OBRA in its exception from corporate treatment of PTPs of activities generating 90% passive income loosely reflects this policy,\(^\text{148}\) but errs in permitting continued aggregate treatment.\(^\text{149}\)

The more difficult integration issue concerns a large active business with inactive owners. Treatment of an entity not formally organized as a corporation as an “association,” thereby triggering two-tier corporate taxation, historically has turned on the Morrissey corporate resemblance factors.\(^\text{150}\) But these same factors would

\(^{146}\) See, e.g., Passthrough Entity Hearing Pamphlet, supra note 8, at 17; Sheppard, supra note 118, at 86; Faber, supra note 118, at 413.

\(^{147}\) Integration as to RICs and REITs is obtained through an entity-level dividends paid deduction with a limited passthrough of capital gains character at the owner level. See I.R.C. §§ 852(b)(2)(D), 857(b)(2)(B). Retained earnings are taxed at the entity level. See I.R.C. §§ 852(b), 857(b); Passthrough Entity Hearings Pamphlet, supra note 8, at 10-12, 18. These conduit entities do not pass through losses. See supra notes 7, 66-67. The Senate REMIC provision similarly employed a limited entity conduit with conventional dividends-paid deduction integration of income only. See 1986 Senate Report, supra note 7, at 796. In many ways the Senate REMIC provision appears the ideal conduit separate entity with its prescribed accounting period and method, a 100% penalty prohibited transaction provision, mandatory distribution of cash flow, and partnership-like carryover basis tax-free liquidation provisions. See id. at 794-800. The Conference instead provided that a “REMIC is not treated as a separate tax entity. Rather the income of the REMIC is allocated to, and taken into account by, the holders of the interests therein. . . .” 1986 Bluebook, supra note 51, at 412, 417. Possibly its rationale was that the existing conduit entity models of RICs and REITs were overly detailed and inflexible. See 1987 Senate MLP Hearings, supra note 7, at 199 (statement of John Chapoton).

\(^{148}\) See 1987 House Report, supra note 21, at 1066; supra notes 63-70 and accompanying text.

\(^{149}\) See infra notes 280-283 and accompanying text.

\(^{150}\) See supra notes 112-117 and accompanying text.
apply to most if not all large limited partnerships. The advantages afforded by the *Morrisey* corporate characteristics were once thought justification enough for the corporate income tax. The argument that the privilege of the corporate franchise\(^\text{181}\) is the reason for the imposition of a corporate tax is no longer suggested as the policy basis for corporate taxation, save in an attenuated fashion.\(^\text{182}\) In fact, commentators historically have had difficulty in

\(^{181}\) See Staff of Joint Comm. on the Economic Report, 84th Cong., 1st Sess., The Federal Revenue System: Facts and Problems 75-76 (1956) [hereinafter Federal Revenue System]. The proper role of the corporate income tax in the Federal revenue system has long been the subject of dispute among students of taxation. It is argued by some that the sole basis for taxing corporations is the benefit derived from the privilege of doing business in the corporate form. Exponents of this view hold that the corporate tax should properly be regarded as a franchise tax which should be imposed at rates far more modest than those in effect in recent years. Others maintain that the position of corporate enterprise in the national economy requires a more intensive use of corporate income taxation, particularly with a view to reaching monopoly profits. Between these two extremes, a widely held view is that because incorporated business controls the use of a substantial portion of the economy's resources, corporate profits are necessarily an important subject of income taxation. According to this view, corporate income-tax policy should be based on broad economic objectives such as smoothing out fluctuations in the level of economic activity and improving income distribution in order to maintain a steady rate of economic growth.

Id. See also Corporate Tax Reform Proposals, supra note 33, at 17-20; 1978 House Hearings, supra note 23, at 3419 (statement of Ernest Christian).

\(^{182}\) See Canellos, supra note 24, at 1000 ("Under the classic view, the increase in economic power represented by earnings of corporations (particularly public companies) can be considered an appropriate base for corporate taxation."); supra note 151. The author has always favored, at least for pedagogical rhetoric, the argument that publicly traded C corporations should be separately taxed because they disproportionately benefit from our overseas military and economic presence necessary for their penetration of markets abroad. Cf., Kies, supra note 51, at 188 n.42. A more balanced presentation is offered by the Joint Committee Staff:

Advocates of the two-tier tax generally argue that the corporate tax not only is a source of revenue that might not easily be replaced if the corporate tax were eliminated either directly or indirectly, but also is a tax imposed on an appropriate income base. Imposing a separate corporate income tax is supported by those who view corporations as vehicles for accumulating capital that are entities distinct from the individuals who contributed the capital and who enjoy limited liability with respect to the corporation's obligations and activities.

In many cases, corporations are viewed as not being effectively controlled by shareholders but rather by the corporate officers and directors. It is argued that it is appropriate to treat the earnings on accumulations of capital in such circumstances as a proper base of taxation. In contrast, certain corporations that may be considered as directly controlled by shareholders are permitted to elect treatment under subchapter S, which permits the S corporation to avoid being taxed as a separate entity.

Corporate Tax Reform Proposals, supra note 33, at 17 (footnotes omitted).
finding any benefit associated with the corporate tax.\textsuperscript{163} (When first imposing a separate corporate income tax in 1909, Congress provided no principled analysis as to the tax policy basis for imposing the tax,\textsuperscript{164} perhaps because the tax was initially de minimis.\textsuperscript{165})

Preservation of the integrity of taxing individuals at progressive rates of tax is often offered as a policy basis for the corporate tax.\textsuperscript{166} Obviously this could not have been the original congressional intent since there was no individual income tax when the

\textsuperscript{163} See supra note 152; Federal Revenue System, supra note 151, at 75; McLure, Integration of the Personal and Corporate Taxes: The Missing Element in Recent Tax Reform Proposals, 88 Harv. L. Rev. 532, 536 (1975). As Representative Noah Mason stated in the 1953 House General Revenue Revision Hearings,

When individual income taxes were down very low, we seemed at that time—and that was years ago—to favor the partnerships and proprietorships and encouraged them. They only became corporations in order to get rid of their personal liability, and so forth, and were willing to pay a little something for that privilege. But now the thing [i.e., the inside tax shelter] is reversed and it is working the other way.

1953 House Hearings, supra note 31, at 1368.

\textsuperscript{164} Clark, The Morphogenesis of Subchapter C: An Essay in Statutory Evolution and Reform, 87 Yale L. J. 90, 97 and n.20 (1977). The Supreme Court, however, analyzed the 1909 excise tax as a tax on the privilege of conducting a business in the corporate form with the benefits of continuity, limited liability, centralized management, etc. See Flint v. Stone Tracy Co., 220 U.S. 107, 161-162 (1911).

\textsuperscript{166} See Clark, supra note 154. The tax rate was one percent of net income in excess of $5,000. Payne-Aldrich Tariff Act of 1909, Ch. 6, § 38, 36 Stat. 11, 112.

Historically, no doubt, the first rather nominal corporate income taxes were motivated by a combination of the desire to raise revenue and the realistic perception of corporations as legal entities which, independent of their shareholders, bought and sold, generated large amounts of revenue and income, and reported the results. It is no accident that corporate taxes began to appear just as industrial corporations first began to occupy major independent roles in the economy. The legalistic theory of a privilege or franchise tax would not justify the present 48 percent tax, which is out of proportion to the benefit conferred. On the other hand, the demand for tax revenues has continued to increase through wars and growth in the size of government, and today corporations are larger, account for a substantial portion of the national income, and in many cases are so widely held that few shareholders have more than a minute percentage of ownership.


\textsuperscript{166} See 1978 House Hearings, supra note 23, at 3420 (statement of Ernest Christian); Graetz, Introduction to the Edwin S. Cohen Tax Symposium: An Overview of Business Taxation, 5 Va. Tax Rev. 577, 583-84 (1986) [hereinafter Cohen Symposium]; Corporate Taxation Reform Proposals, supra note 33, at 17-18; Birnbaum & Murray, supra note 23, at 59 (architects of 1984 Treasury Proposals believed that as an ideal, the corporate rate should not be much lower than maximum individual rate to avoid use of corporations for inside shelter).
modern corporate income tax was first imposed. Furthermore, a far more efficient means of backstopping the individual rates would have been a mandatory passthrough of the entity’s income whether or not distributed. Indeed, as long as the maximum individual rate was considerably higher than the maximum corporate rate (until 1981), many high-bracket taxpayers actually used closely held and publicly traded C corporations as inside tax shelters. As one student of taxation pointed out, use of corporations in such circumstances to retain earnings rendered “[t]he high rates that our tax laws now have for individuals . . . simply a facade.” While for the lower bracket individual taxpayer the burden of double taxation is far greater, so that a C corporation does not serve as an inside tax shelter for him, the reality is that the typical lower bracket taxpayer does not own corporate stock.

Commentators have also rationalized the inside corporate tax as a tax on the “deferral value” of not taxing the shareholders on the entity’s earnings until distributed or realized through a capital transaction. Given widespread deferral and realization through

167 See Clark, supra note 154, at 97 and n.23. Indeed, in the early years in this century when the federal corporate and individual tax rates were equal, the Revenue Acts in effect provided for a shareholder-level partial dividend exclusion from the “normal” tax, recognizing that such income had already been taxed at the corporate level at the “normal rate.” See Holland, Stockholder Differential Taxation and Tax Relief, Compendium, supra note 23, at 1551, 1552.

168 Economists opposed full-integration because corporate sector income would then be taxed at excessive individual rates. See 1955 Tax Policy Hearings, supra note 7, at 554-55 (colloquy Drs. Hall and Lindner), 565 (statement of Dr. Adelman). The answer was to lower the artificially high and easily avoided individual rates. See id. at 521, 554-55 (statement of Harry Rudnick). Additionally, full integration would entail repeal or at least modification of the capital gains preference. See 1978 House Hearings, supra note 23, at 94 (statement of Blumenthal), 6144-45, 6152 (statement of Professor Graetz). Unfortunately, when all these preconditions occurred in the Tax Reform Act of 1986, the historic opportunity for complete integration (with a corporate sector imputed schedular income tax bearing the estimated corporate sector tax plus an allowance for estimated owner-level realization to be collected at the entity level) was lost, possibly because Senator Bill Bradley had not included integration in his proposals in part due to difficulty of explanations to Congressmen and voters. See Minarik, supra note 40, at 1365.

169 See generally supra note 141.

166 See 1958 Mills Hearings (Part 3) supra note 23, at 3443 (statement of Paul Ziffren).

170 See 1978 House Hearings, supra note 23, at 6079 (statement of Martin Feldstein).

171 See id. at 6106-07 (statement of Sheldon Cohen); supra note 7.

capital transactions (historically afforded preferential treat-
ment),\textsuperscript{164} either the inside corporate level tax, or perhaps more log-
ically the outside shareholder level tax, could be so rationalized. But if, as has historically been the case, the combined effective inside and discounted outside tax rates are less than the effective rate of current direct taxation at the owner level (full integra-
tion)\textsuperscript{165} would yield,\textsuperscript{166} full passthrough would be more effective.\footnote{164 Sales and certain redemptions, see I.R.C. § 302(b), and liquidations, see I.R.C. § 331, treated as sales or exchanges and which generated capital gain, except to the extent the collapsible corporation rules of I.R.C. § 341 applied, were taxed at varying preferential rates prior to enactment of the 1986 Code.\textsuperscript{165} Full integration refers to elimination of the two-tier corporate and shareholder tax by taxation of shareholders alone on both distributed and undistributed corporate earnings. Under this approach, a corporation's undistributed earnings would be deemed to have been distributed to and reinvested by the shareholders each year. Tax could be collected at the corporate level, in effect using the corporation as a withholding agent for the shareholders, or tax could be collected solely at the shareholder level without withholding. Shareholders would be subject to income tax on the allocated earnings and would adjust their basis in their shares accordingly. Corporate Tax Reform Proposals, supra note 33, at 14. See generally, McLure, Integration of the Personal and Corporate Taxes: The Missing Element in Recent Tax Reform Proposals, 88 Harv. L. Rev. 532, 549-50 (1975) (refers to such allocation method as the "partnership method").\textsuperscript{166} In contrast "partial integration" methods focus on two-tier relief only for dividends paid and generally only with respect to corporate earnings that have been taxed at the corporate level. The proposed methods by which to effect partial integration are the dividend-received exclusion, the dividend-received credit, and the dividend-paid deduction. See id. at 552-554; 1978 House Hearings, supra note 23, at 3432-63 (statement of Ernest Christian), 6152 (statement of Professor Graetz).\textsuperscript{167} See supra notes 33-35 and accompanying text.\textsuperscript{168} 1978 House Hearings, supra note 23, at 3419 (statement of Ernest Christian).\textsuperscript{169} See 1986 Passthrough Entity Hearings, supra note 8, at 41 (statement of McKee); Sheppard, Corporate Tax Integration, the Proper Way to Eliminate the Corporate Tax, 27 Tax Notes 637, 639-40, 647 n.15 (May 6, 1985); Smith, Tax Treatment of Dividends, Compendium, supra note 23, at 1543-54.\textsuperscript{168} See supra note 8, at 41 (statement of McKee).\textsuperscript{169} In 1984, 3,170,743 corporate returns reported a total of $257,054,060 in taxable income; during the House Ways and Means Committee hearings on the President's 1978 tax program, a witness stated that "the need for tax revenues is the only reason for the [then] 48-percent nonintegrated tax on corporations."\textsuperscript{167} In other words, politics, not policy, supported and supports the corporate tax. A refrain in the commentary is that the corporate tax is an easy source of revenue because it is "hidden," i.e., its incidence is unclear.\textsuperscript{168} Because over 60% of taxable corporate income is earned by one-tenth of 1% of active corporations,\textsuperscript{169} large C corporations are thought by popu-
lists to be an easy source of revenue.\textsuperscript{170} This aspect of corporate
taxation was articulated by a witness at Congressman Mills' 1959
tax revisions hearings as "corporations do not vote,"\textsuperscript{171} and Con­
gressman Byrnes added that this aspect "adds to the ease of
collection."\textsuperscript{172}

These arguments historically appear to be variants of the pre-
1986 double taxation "briarpatch" argument.\textsuperscript{173} Like a rabbit in a
briarpatch, a shareholder of both a publicly and closely held corpo­
rated had always believed that the double tax "thorns" of the
1954 Code "briarpatch" would never prick him. The inside corpo­
rate tax was less than direct taxation and outside realization was
usually in the form of long-deferred capital gains, of de minimis
present value impact.\textsuperscript{174} If this argument is correct, the apparent
true aim of the separate entity tax regime appears to have been to
afford a tax subsidy to corporate sector income and entrepreneurs
for capital formation, while preserving the facade of progressive in­
dividual taxation.\textsuperscript{175}

\begin{itemize}
\item 3,663 returns (each with $250,000,000 or more in assets) reported a total of $158,875,836 in
taxable income. Dep't of Treasury, Source Book Statistics of Income, Active Corporation
\item \textsuperscript{170} "Some also contend that given the distribution of ownership of corporate equity, the
two-tier tax adds to the progressivity of the income tax system, and that relief from the two­
tier tax would disproportionately benefit wealthy taxpayers." Corporate Tax Reform Prop­
osals, supra note 33, at 18. See 1978 House Hearings supra note 23, at 3504 (statement of
Sheldon Cohen), 6119-20 (statement of Hickman). This thought lies at the core of this arti­
cle's horizontal-schedular equity model. Treasury described the public and political support
for a corporate income tax as follows:
Corporations, and large corporations in particular, are widely viewed as separate enti­
ties that should contribute, through tax payments, to the cost of government. It is
noteworthy as well that prior integration proposals have not received strong support
from the corporate sector. Many corporate managers may prefer either reduced in­
come tax rates on all corporate earnings or increased tax preferences for investment
over dividend relief or other methods of integration. Some may also be concerned
that integration in the form of dividend relief would force larger distributions of
corporate income and thus reduce the capital available to corporations for reinvestment.
1986 Passthrough Entity Hearings, supra note 8, at 26 (statement of Mentz). Mentz also
pointed out the revenue costs of integration. See id. at 25-26.
\item 1959 Panel Discussion, supra note 23, at 871.
\item \textsuperscript{171} Id.
\item \textsuperscript{172} See supra note 34.
\item \textsuperscript{173} See 1978 House Hearings, supra note 23, at 6155 (statement of Professor Graetz).
\item \textsuperscript{174} While corporations do not vote, they and their unionized employees often do contrib­
ute to political action committees, which may help explain why the rabbits escaped the
thorns until 1986. See supra note 160. For populist criticism of this situation, see Future
Implications of 1986 Act Hearings, supra note 49, at 15 (statement of Robert S. McIntyre,
Although not the double tax it purports to be, the actual anticipated large C corporate sector tax of 25% of economic income, plus the tax on owner-level realizations, can be justified as a rough surrogate for the policy ideal of full integration in a truly progressive income tax system. Let us make the unprovable assumption that corporate taxes are borne in the short run by shareholders, albeit possibly in the long run by owners of capital in general. We know that ownership of publicly held C corporations is concentrated in upper income individuals and tax-exempt entities, predominantly qualified retirement plans, which also are

Director of Federal Tax Policy, Citizens for Tax Justice); Sheppard, supra note 168, at 637, 646. Using a “tax contract” analysis, see supra note 34, it can be argued that corporate management, small businessmen and union members participating in qualified plans would have the most to gain in maintaining the corporate tax status quo and hence could be expected to contribute heavily to members of Congress on the tax writing committees.


78 See 1986 Passthrough Entity Hearings, supra note 8, at 41 (statement of William McKee); Future Implications of 1986 Act Hearings, supra note 49, at 15, 72 (statement of Robert McIntyre); Corporate Tax Reform Proposals, supra note 33, at 21; Ballentine, Where Is the Income Tax Rationale for the Shift to Higher Corporate Rates?, 30 Tax Notes 443, 445-46 (Feb. 3, 1986); Kies, supra note 51, at 184. A survey of the literature and Hearings leads to the conclusion that those in favor of vertical equity assume that the corporate tax is borne by the owners or capital in general long-term. See, e.g., Cohen Symposium, supra note 156, at 579; Sunley, supra note 23, at 63. (For an exposition of the economic theory that the corporate sector tax in the long run is borne by capital in general—by lowering the return on non-corporate investments—see Warren, The Relation and Integration of Individual and Corporate Income Taxes, 94 Harv. L. Rev. 719, 725 (1981)). But a largely Democratic Congress was not willing to count such income taxes as imputed to high income owners for purposes of “distributional acceptability.” See 1986 Passthrough Entity Hearings, supra note 8, at 41 (statement of William McKee); Feldstein, supra note 7, at 37. Conversely, those favoring the status quo argue that the incidence is unknown. See 1986 Passthrough Entity Hearings, supra note 8, at 41 (statement of William McKee); Cohen Symposium, supra note 156, at 589 (statement of Dr. Charls Walker).

79 From a populist schedular income point of view, it should make little difference whether the corporate tax is borne by shareholders or capitalists in general. Both groups are not taxed in a sufficiently progressive manner, see Sunley, supra note 23, at 63, and are ultimately the same people. See Concentration of Wealth, supra note 7, at 24.

80 See Concentration of Wealth, supra note 7, at 24 (top half of one percent of owners of income own 46.5% of personally held corporate stock; next half of one percent own 13.5% and next nine percent own 29.3%).

81 See supra note 7.
largely the owners of capital in general. As a practical matter, such individuals' income from noncorporate sources is not taxed at very progressive effective rates (about 22% of economic income), thus violating vertical equity. And if the individuals earned the corporate sector income directly, due to the preferences and leverage discussed below, any tax on such income would arise only under the individual minimum tax regime. As to large C corporation stock held by tax-exempt shareholders, e.g., retirement plans, less than half the work force is covered by qualified retirement plans, so that additional tax benefits there too violate horizontal equity. Consequently, separate entity taxation as to large active businesses with inactive owners yields rough justice, if this income is attributed to the owners, by partially offsetting the lack of vertical or horizontal equity in the existing system. In short, the corporate sector tax can be justified as effecting in a "schedular fashion" the horizontal and vertical equity principle that all large active business/passive owner income should be treated equally.

As a matter of tax policy, both large limited partnerships and PTPs conducting an active business should be treated as separate entities, and such entities should proportionately carry the corpo-
rate sector tax burden. However, OBRA's straight imposition of the current large C corporation double tax regime on PTPs itself violates such horizontal schedular equity. In large C corporations, classic "double taxation" under the regular income tax regime is virtually non-existent (as Treasury and others have repeatedly pointed out to Congress) due to the cumulative effect of leverage, preferences and low rates of earnings distributions, with shareholder realizations arising more frequently through capital transactions such as sales (possibly after basis step-up due to the prior owner's death). Consequently, the true large C corporation inside tax often is the alternate minimum tax, with an effective

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188 See authorities cited in supra note 188.
189 See 1986 Passthrough Entity Hearings, supra note 8, at 22 (statement of Mentz). Corporations taxed under Subchapter C typically operate in a manner that postpones or avoids double taxation of their income. Thus, double taxation encourages corporations to retain rather than distribute income, so as to defer the second level of tax and give shareholders the opportunity to realize such income through a sale of stock, gain on which is generally taxed at favorable rates. In addition, double taxation encourages corporations to raise new capital through the issuance of debt, interest payments on which are deductible, rather than through the issuance of stock, dividend payments on which are not deductible. Similarly, closely held corporations are encouraged to distribute income to their owners in the form of deductible salary or rental payments. Although current law attempts to restrict avoidance or postponements of the double tax on corporate income (for example, through the collapsible corporation provisions, the personal holding company tax, and the accumulated earnings tax, rules characterizing debt as equity, and rules limiting the deduction of unreasonable compensation), the double tax is, in practice, to some extent mitigated.

Id. See also 1987 Senate MLP Hearings, supra note 7 at 63 (statement of Lawrence Cohen); 1986 Passthrough Entity Hearings, supra note 8, at 67-68 (statement of Professor Ginsburg); 1978 House Hearings, supra note 23, at 3517, 3521-24 (statement of Dennis Gaffney); Lewis, A Proposed Treatment for Corporate Distributions and Sales in Liquidation, Compendium, supra note 23, at 1643.


192 See Acquisitions and Mergers Hearings, supra note 27, at 191 (statement of Ronald Pearlman); Mergers & Acquisitions Hearing Pamphlet, supra note 191, at 5; see 1984 Treasury Proposals, supra note 9, at 156, 162.

193 See Acquisitions and Mergers Hearings, supra note 27, at 191-92, 205-06 (statement of Ronald Pearlman); Corporate Tax Reform Proposals, supra note 33, at 20.

194 By substantially broadening the laundry list of tax preferences and adding 50% of corporate book income over taxable income as a preference, the Tax Reform Act of 1986 defined a comprehensive income base under the minimum tax regime, for the first time approaching the measurement of economic income. See 1986 Bluebook, supra note 51, at 433-34.
rate for large C corporations in general of 25% of economic income. Moreover, estimates of outside shareholder level realizations through dividends range from 7% to 50%. By and large, PTPs with active businesses differ substantially from large C corporations as to at least two of these factors, both of which contribute to the immunity of large C corporations from double taxation: PTPs have lower leverage rates and higher rates of distribution than do large C corporations. These differences result in a sub-

The 1986 Act elevates the minimum tax from a backstop for the regular tax to an integral part of the tax system. The old add-on minimum tax for corporations is replaced with a new alternative tax. The expanded list of tax preferences includes 50 percent of the difference between pre-tax book income and minimum taxable income.

With the advent of the book income preference, the corporate income tax can be viewed as involving three tax systems, with three different depreciation rules and three different tax rates. Specifically, there is a regular tax with ACRS depreciation and a 34 percent tax rate. There is a regular minimum tax with non-incentive depreciation and a 20 percent tax rate. There is a third tax on excess book income with book income depreciation and a 10 percent tax rate.

Sunley, supra note 23, at 65.

While no data seems available as to the number of corporations now paying taxes under the alternate minimum tax ("AMT") rather than the regular tax regime, commentators using computer simulations have concluded that the AMT under the 1986 Senate bill (largely followed by the Conference, see 1986 Conference Report, supra note 106, at II-263-II-283) has its greatest impact on young, growing, capital intensive corporations. See Lucke, Eisenach & Dildine, The Senate Alternate Minimum Tax: Does it Snare only the Tax "Abuser"?, 32 Tax Notes 681 (Aug. 18, 1986); Harter, How Tax Reform Would Affect Companies with Different Growth and Profitability Characteristics, 31 Tax Notes 297, 300 (Apr. 21, 1986).

See Teuber, Study Finds That Some Profitable Firms Will Escape Taxation Under Reform, 33 Tax Notes 893 (Dec. 8, 1986) (thousand largest corporations had average effective rate of 20.91 percent of economic income in 1985; under 1986 rules the average effective rate would have been 25.6%).

See 1987 Senate MLP Hearings, supra note 7, at 76 (Table 1 of Treasury statement assumes that 93% of the retained corporate equity is taxed as a capital gain and 7% as a dividend). Based on Treasury statistics of corporate earnings and dividend income, an amount equal to 50% of current corporate taxable earnings has been annually distributed. See id. at 226 (based on 1985 Statistical Abstract of the United States); Lewis, A Proposal for Corporate Distributions and Sales in Liquidation, Compendium, supra note 23, at 1643. The latter approach fails to account for erosion of the corporate base.


See id. at 70, 90, 135, 138, 168, 197, 213. Cash flow appears greater than taxable income (13 to 15% vs. 2.4% return on investment). See id. at 89, 79. Undoubtedly, this difference reflects heavy use of tax preferences by PTPs, as should be expected in that many of the PTPs are in the natural resource business. See id. at 77. Oil and gas PTPs show a 1.4% taxable income return while real estate and timber MLP's show a 5.8% return. See id. at 79. From this yield orientation, commentators and Congress concluded that the PTP structure favored mature businesses with a steady cash flow. See id. at 36. However, in 1987, Treasury
stastically greater incidence of double taxation and higher effective rates when the tax burdens on the owners and the entity are combined.199

Thus, true horizontal schedular equity would call for taxation of PTP limited partners and limited partners in other large limited partnerships conducting active businesses at a rate equal to the anticipated large C corporate rate (25% of economic income) plus the anticipated tax on outside large C corporation shareholder realizations of such income. A roughly equivalent and nicely symmetrical rate might be 28% of entity-level net economic income or perhaps of the corporate alternate minimum tax base, which also neatly solves the historical integration problem of preferences.200 Owner withdrawals of this income would not trigger a second tax

argued that a more recent trend was for PTPs to distribute only amounts equal to unit holder-level taxes or entity-level tax savings (PTP and owners as contrasted with C corporation tax). See id. at 68-69.

199 1987 Senate MLP Hearings, supra note 7, at 114 (statement of Lawrence Cohen) (describing tax burden of master limited partnership as equivalent to double taxation of corporations).

200 See 1978 House Hearings, supra note 23, at 6145, 6148-49, 6161-63 (statement of Professor Graetz). The Joint Committee Staff raises the following issues as to whether to pass through preferences:

If the purpose for granting relief from the two-tier tax is to eliminate corporate level tax entirely and to treat corporate income as earned directly by shareholders, it could be argued that all preference items of a corporation should be attributed directly to its shareholders, regardless of whether they are individuals or other corporations.

On the other hand, relief from the two-tier tax may be considered simply an effort to eliminate the burden of any existing corporate level tax, at least so long as funds remain in corporate solution. Although most preference items are available both to corporations and individuals, it may be argued the effect of various preferences in the Code is largely to reduce corporate taxes. For example, even though the investment credit and ACRS are available to both corporations and individuals, these provisions benefit corporations in overwhelming proportions. Under this view, it would be inappropriate to permit provisions that reduce corporate income taxes to reduce the income taxes of a corporation's individual shareholders as well. Nevertheless, it may be considered appropriate to assure that the benefit of a preference item is continued so long as the related income remains in corporate solution (even though distributed to a corporate shareholder that has made a portfolio investment and is otherwise unrelated to the distributing corporation).

Corporate Tax Reform Proposals, supra note 33, at 27 n.42. Implicitly this distinction underlies the PAL provisions generally inapplicable to corporations. The essence of the 28% alternative minimum tax rate for corporations was apparent to industry lobbyists who opposed the proposed model when presented at the 1987 House master limited partnership hearings. See 1987 House MLP Hearings, supra note 16, at 361-62 (statement of Jeffrey Rosenthal of the National Association of Realtors and the Real Estate Securities and Syndication Institute).
under this model, and losses would not pass through. Of course, if this worked for active business PTPs, the model could then be extended to large C corporations with no revenue loss.201

2. Small C Corporations: Inside Tax Shelter

The integration debate usually has focused on double taxation as a violation of horizontal equity and especially as encouraging debt over equity financing.202 The reality too often under the 1954 Code, occasionally as to large C corporations203 and usually as to small, and hence close C corporations,204 was that double taxation provided an inside tax shelter. Under such a tax shelter, the owners and the C corporation, in the aggregate, using well-publicized tax planning techniques,205 paid less income taxation than the owner would have paid in direct taxation under full integration. This inside shelter was thought by some to continue under the 1986 Code, at least as to small C corporations.206 "The shelter may, however, be subject to substantial transactional tax costs, which create most of the complexity in tax practice as to small businesses.207 Moreover, the second, outside tax on shareholder realiza-

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201 Id. at 342, 351 (statement of author).
202 See supra notes 23 and 29 and accompanying text.
203 See authorities cited in supra note 141. The highest marginal individual rate under the original 1954 Code was 91% on taxable income in excess of $300,000, see Int. Rev. Code of 1954 § 1(a), while the maximum corporate rate was 52%. Id. § 11(b) and (c).
204 See 1978 House Hearings, supra note 23, at 6155 (statement of Professor Graetz).
205 See supra note 130.
207 For example, balancing income from a business venture between compensation to principal and retained taxable income not exceeding the lowest corporate graduated rate brackets generates the problem of "unreasonable compensation" not deductible by the corporation under § 162 of the Code. Retention of corporate earnings to obtain the lower inside tax rate, rather than payment to shareholders which triggers true double taxation, poses "accumulated earnings tax" problems, see Watkins & Jacobs, Closely Held Businesses: Tax Planning After ERTA, Tax Adviser 516 (1982); Hearings on Tax Shelters, Accounting Abuses, and Corporate and Securities Reform Before the House Comm. on Ways and Means, 98th Cong., 2d Sess. 156 (1984) (statement of Professor Ginsburg). Retention of earnings inside the corporation to carry on a personal investment program causes personal holding company tax problems as well. See Corporate Tax Reform Proposals, supra note 33, at 4. Furthermore, particularly in service organizations, splitting personal service income between the C corporation and the shareholder-employee gives rise to intense problems re-
tions often proved mythical. Only a small portion of corporate earnings was intentionally distributed as dividends and shareholder realization of built-in gain or retained earnings was more commonly affected through sales (or perhaps redemptions or liquidations in a close C corporation context). Such capital transaction realizations yielded no revenue if carried out by the owner's estate or heirs after a date-of-death income tax-free step up to fair market value. This sort of use of the corporate entity to produce less tax liability than would be owed in direct taxation of the owner violates sound tax policy, particularly where the owner actively participates. Horizontal equity and economic efficiency are violated because the same source income earned by a sole proprietor or partner would be taxed at a higher rate. Additionally, since the owners of close C corporations are higher income taxpayers than the owners of C corporation stock in general (themselves a high income class), vertical equity is violated as well. Again, the true issue is not whether there is double taxation, but whether there will be even one full tax collected at least once.

PSCs constitute the most glaring abuse of graduated inside rates, since most owners of PSCs actively participate in the business. Indeed, stock ownership is usually restricted to those licensed to practice the profession. But wherever the owners materially participate, the abuse occurs, whether by corner druggist, grocer,
small manufacturer or builder, as the 1984 Treasury proposals recognized.\textsuperscript{216} Yet OBRA's denial of graduated rates to PSCs alone is too narrow and generates only a fraction of the revenues that would arise from repeal of the graduated corporate rates for small C corporations in general.\textsuperscript{217}


The deep structure policy supporting many of the PAL rules is a corollary of basic classification policy. If an owner does not actively or materially participate in the management or operations of an entity, the entity should be taxed as separate.\textsuperscript{218} Losses of a separate entity should not immediately flow or pass through to its owners; rather, an owner should realize and recognize any decline in value of his interest in a separate entity only upon disposition of such interest or its becoming worthless.\textsuperscript{219} This has long been the case as to shareholders and C corporations,\textsuperscript{220} as well as to investors in passive income, separate conduit entities such as REITs and RICs.\textsuperscript{221}

Deep structure analysis demonstrates that aiming the PAL provisions at passive owners of active businesses was too narrow as a matter of policy. And, indeed, Congress gave Treasury in the 1986 Code the authority to bring within the PAL provisions a passive activity that does not rise to "trade or business" status,\textsuperscript{222} so long as the activity does not produce "portfolio income."\textsuperscript{223} But the netting among different passive activities contravenes this deep structure policy.

In addition to tax policy reasons, Congress also based the 1986 Code PAL provisions on political considerations. Preservation of

\begin{footnotesize}
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\item[\textsuperscript{216}] See 1984 Treasury Proposals, supra note 9, at 128-29.
\item[\textsuperscript{217}] The denial of graduated rates for personal service corporations is expected to increase revenues by $75 million in 1988, $125 million in 1989 and $140 million in 1990. See 1987 Senate Report, supra note 97, at 219. The author estimated at the 1987 House MLP Hearings that the range of revenue in denial of graduated brackets for all close C corporations with profits would be $1 to $5 billion a year. See 1987 House MLP Hearings, supra note 16, at 34 (statement of author).
\item[\textsuperscript{218}] See supra notes 142-143 and accompanying text.
\item[\textsuperscript{219}] See 1986 Senate Report, supra note 7, at 717.
\item[\textsuperscript{220}] See I.R.C. § 165(g); 1986 Senate Report, supra note 7, at 717.
\item[\textsuperscript{221}] See supra notes 66 and 67.
\item[\textsuperscript{222}] I.R.C. § 469(c)(6)(B).
\item[\textsuperscript{223}] 1986 Conference Report (vol. II), supra note 106, at 138.
\end{itemize}
\end{footnotesize}
the corporate sector tax base was not the goal here, since most pas­sive-type income enterprises traditionally have chosen the partner­ship form. Congress' focus instead was on curbing expansion of
tax shelters. Thus, Congress' most obvious concern was stem­ming loss of faith in the federal income tax system due to wide­spread awareness of tax shelter abuses. The public apparently per­ceived that high-income individuals were using tax shelters to reduce or even eliminate the current incidence of taxation on their portfolio income and salaries. But more importantly,
a provision significantly limiting the use of tax shelter losses [was] unavoidable if substantial rate reductions [were] to be provided to high-income taxpayers without disproportionately reducing the share of total liability under the individual income tax that [was] borne by high-income taxpayers as a group.

This policy would dictate complete separate basket treatment for each PAL activity or at least each entity conducting the activity. Thus, the passthrough PTP separate-basket PAL rule is correct as a matter of policy, but the general PAL netting rule is incorrect, with the end result of horizontal inequity turning solely on the fact of public trading. The political reality which better effected policy considerations in 1987 than in 1986 was that the revenue generated
by the PTP changes was provided primarily in the PAL provisions.\footnote{228}

IV. \textbf{Congressional Rationales for OBRA Changes and Critique}

A. \textit{PTPs: A Classification Issue}

1. \textit{Reclassification of Active Business PTPs}

Congress based its classification of active business PTPs as C or regular corporations on preservation of the "corporate sector tax base"\footnote{229} and two horizontal equity arguments: functional resemblance to corporations,\footnote{230} and practical availability only to mature cash flow ventures, as contrasted with start-up or capital intensive ventures, which had created an unlevel playing field\footnote{231} (i.e., horizontal disparity or "economic inefficiency"\footnote{232}).

\footnote{228} See 1987 Senate MLP Hearings, supra note 7, at 78 (statement of Mentz). Industry witnesses heavily emphasized this fact. Id. at 157 n.5. Treasury's response was that it was concerned about future erosion. Id. at 47 (testimony of Mentz); id. at 179 (statement of Richard Cohen).

The real estate and natural resources lobbies had acquiesced in the idea of PAL portfolio income treatment of PTP income from such sources by the time of the 1987 MLP hearings. See 1987 Senate MLP Hearings, supra note 7, at 177, 304. But see id. at 219, 272-73.

\footnote{229} 1987 House Report, supra note 21, at 1065; 1987 Senate MLP Hearings, supra note 7, at 72-73 (statement of Mentz).

\footnote{230} 1987 House Report, supra note 21, at 1066.

Publicly traded partnerships resemble publicly traded corporations in their business functions and in the way their interests are marketed, and limited partners as a practical matter resemble corporate shareholders in that they have limited liability, may freely transfer their interests, generally do not participate in management, and expect continuity of life of the entity for the duration of the conduct of its business enterprise.

\footnote{231} 1987 House Report, supra note 21 at 1066.

\footnote{232} The "overriding objective" of the 1984 Treasury proposals as to reform of capital and business income was "to subject real economic income from all sources to the same tax treatment." 1 U.S. Dept. of Treasury, Tax Reform for Fairness, Simplicity, and Economic Growth—Overview xii (1984) [hereinafter Overview of 1984 Treasury Proposals].

Implementation of the reforms proposed by the Treasury Department would cause improved reallocations of economic resources. The lower tax rates made possible by base-broadening and the more realistic rules for the measurement of income and calculation of tax liabilities will increase the attractiveness of industries that suffer under the weight of the current unfair and distortionary tax regime. Both established industries and new "high-tech" industries will benefit from tax reform. But the ultimate beneficiaries will be the American public. No longer will the nation's scarce economic resources—its land, its labor, its capital, and its inventive genius—be allo-
a. Corporate Sector Tax Base

The 1986 Act constituted a marked and important transition in the tax system, instead of by market forces. The result will be more productive investment, greater opportunities for employment, more useful output, and faster economic growth.

Id. See also id. at 13.

The Overview then described the erosion of the tax base during the 1954 Code by tax preferences, which required high, progressive rates and which resulted in diminished saving and investment:

The lack of a comprehensive income tax base has two obvious and important adverse effects on the ability of the marketplace to allocate capital and labor to their most productive uses. First, the smaller the tax base, the higher tax rates must be to raise a given amount of revenue. High tax rates discourage saving and investment, stifle work effort, retard invention and innovation, encourage unproductive investment in tax shelters, and needlessly reduce the Nation's standard of living and growth rate.

Second, tax-preferred activities are favored relative to others, and tax law, rather than the market, becomes the primary force in determining how economic resources are used. Over the years, the tax system has come to exert a pervasive influence on the behavior of private decision-makers. The resulting tax-induced distortions in the use of labor and capital and in consumer choices have severe costs in terms of lower productivity, lost production, and reduced consumer satisfaction.

The existing taxation of capital and business income is particularly non-neutral. It favors capital-intensive industries over others, such as services. The tax system favors industries that are unusually dependent on equipment over those—such as wholesale and retail trade—that rely more heavily on other forms of capital, including inventories and structures. High technology companies are put at a particular disadvantage. Since they do not require large capital investments that benefit from preferential tax treatment they bear the full brunt of high tax rates. A tax system that interferes less with market forces in the determination of what business should produce—and how—would be more conducive to productive investment and economic growth.

Id. at 4-5.

The 1984 Treasury Proposals consistently applied the ideal of economic efficiency in analyzing 1954 Code tax preferences. For example, the proposals argued that a host of taxpayer favorites hindered economic efficiency: tax-free fringe benefits and deductible business travel and entertainment expenses encourage consumption, 1984 Treasury Proposals, supra note 9, at 21, 23, 29, 33, 36, 82 and 87-88; double taxation of C corporations and deductibility of interest encourage financing by retained earnings and debt and increase the cost of capital, id. at 135; low or negative effective tax rates from 1954 Code capital recovery (ACRS and ITC) schemes distort investment decisions in a variety of ways, id. at 156, 173-74; the capital gains tax preference distorts investment decisions by providing a potentially lower effective tax rate on asset appreciation (including retained corporate earnings) than on current earnings from dividends or interest, id. at 180; failure of tax accounting and tax treatment of indebtedness rules to accurately account for inflation produces a host of economic inefficiencies, see id. at 190, 193-94; lack of uniform capitalization rules encourages self-construction and gives own-use producers and tax shelters with multi-period costs a competitive advantage, id. at 205-06, 210; various rules give financial institutions low rates, id. at 219, 253, 256 and 259; and rapid amortization results in distortions. Id. at 227, 241 and 305-09.

For a critical view of the supposed increase in economic efficiency of the 1986 Code as
from the traditional 1954 Code tax reform process to the less tax preference- and leverage-driven 1986 Code tax reform process, at least for the near term. Tax reform in the 1970s and the first half of the 1980s consisted primarily of disbursing unlegislated revenue increases, which resulted from inflation-driven bracket creep, in the form of individual tax cuts and increased availability of tax preferences.\textsuperscript{233} The 1986 Act retained the traditional individual tax cut feature (without any substantial increase in tax expenditures), but was funded by a seemingly equivalent increase in the large C corporate sector tax burden.\textsuperscript{234} Thus, according to Assistant Secretary Mentz, the goal of preserving the corporate tax base rested on the 1986 Act's attempt to balance individual rate reduction by an equal and "substantial increase in revenues from the corporate sector."\textsuperscript{235} In reality, the erosion of the corporate sector tax base, which accelerated during the decade prior to the 1986 Act, would not have occurred through post-1986 "disincorporation" of large C corporations.\textsuperscript{236} Instead such erosion would have occurred over the

\textsuperscript{233} See Leonard, supra note 47, at 971 (tax expenditures rose from 50\% of total income tax revenues in 1974 to over 100\% in 1986); Verdier, The Prospects for Tax Stability, 38 Tax Notes 171, 172 (April 13, 1987).

\textsuperscript{234} The individual side estimated tax cuts total $122 billion dollars over the 5 year window period (1986-90) while the corporate side increase over the same period is estimated to be $120 billion. Sunley, supra note 23, at 63. However, a substantial part of the corporate side changes are accounting period changes accelerating income from the out years (beyond 1990), and hence could be said to reduce corporate side taxable income then. See Kiefer, The Progressivity Effects of the Finance Committee Tax Reform Bill, 31 Tax Notes 1031, 1034 (June 9, 1986).

Moreover, the large C corporations undoubtedly have the greatest access to tax planning. Already, preliminary data indicate that for the federal fiscal year ending September 30, 1987, the corporate sector tax receipts were $21 billion below projections ($84 billion vs. $105 billion). See Business as Usual: Under New Tax Law, Corporations Still Find Ways to Reduce Rates, Wall Street J., June 2, 1988, at 1, col. 6 and at 12, col. 1. While a slow economy contributed to the short-fall, the blunting of the minimum tax also appeared to have played a significant role. Id. at 1, col. 6.

\textsuperscript{235} 1987 Senate MLP Hearings, supra note 7, at 73 (statement of Mentz).

\textsuperscript{236} Congress did mention "disincorporation," i.e., conversion of a large C corporation into a publicly traded partnership and, hence, elective integration of the corporate and shareholder levels of tax circumventing the congressional intent to preserve the corporate level tax, See 1987 House Report, supra note 21, at 1066. But Treasury and other witnesses agreed that the IBMs and General Motors's of the world would not shift to the PTP form. See 1986 Passthrough Entity Hearings, supra note 8, at 39 (statement of Mentz); 50-51 (statement of McKee & Kuller); 72 (statement of Professor Ginsburg). Under the 1986 Code, the immediate cost of full inside recognition of built-in gain to the liquidating corpo-
long run through the structuring of new ventures as limited partnerships, with a view to going public later as PTPs, and the shifting of future appreciation in existing C corporation assets to limited partners in PTPs, utilizing the "frozen" general partnership interest technique.

Ironically, the 1986 Act made a number of changes which, Treasury and Congress believed, made conduit entities more attractive as vehicles for business activity than corporations. For example, under the 1986 Act, the maximum regular corporate tax rate is higher than the maximum individual tax rate. Thus, in addition to the fact that corporate earnings bear a second level of tax when distributed, retained earnings are generally taxed at a higher rate than amounts directly earned by an individual. In addition, by increasing the tax rate on capital gains and making that rate generally equivalent to the rate on ordinary income, the Act reduced an investor's incentive to realize income through sales of appreciated stock rather than in the form of current income.

Further, the 1986 Act generally imposed a corporate level tax on certain liquidating sales and distributions that were not taxed under prior law. Appreciation in corporate assets is thus now subject to a corporate level tax on the ultimate disposition of the business. The 1986 Act also included a new corporate minimum tax regime that includes as a preference item a portion of the excess of

ration under § 336, plus outside owner-level recognition under §§ 331 and 1001 of appreciation, less the inside tax, outweighed the present value of a step-up of depreciable assets to fair market value in the PTP's hands. Even under the 1954 Code, the current tax costs of the "recapture income" overrides to the General Utilities shield against recognition of built-in gain upon liquidation, a sale pursuant to liquidation, or a deemed sale pursuant to a deemed liquidation (Int. Rev. Code of 1954 §§ 336, 337 and a later version of 338, respectively), often outweighed the present value of the step-up. See Cohen Symposium, supra note 156, at 700 (comments of Sam Thompson); cf. Sheppard, Mirror Moves: Life Without the General Utilities Rule, 32 Tax Notes 847 (Sept. 1, 1986).

237 "The recent proliferation of publicly traded partnerships has come to the committee's attention. The growth in such partnerships has caused concern about long-term erosion of the corporate tax base." 1987 House Report, supra note 21, at 1065; see also 1987 Senate MLP Hearings, supra note 7, at 55 (statement of Mentz) (new ventures would find their way into MLP form), 141 (statement of John Chapoton) (existing corporate tax base protected from erosion by repeal of General Utilities).

the income that is reported for financial purposes over the amount of corporate alternative minimum taxable income.239

Indeed, in the 1986 passthrough entity hearings, Assistant Secretary Mentz stated that if he were in private practice advising a client starting a business, "I would advise him to start in limited partnership form, because that way you get to the one level of taxation right away."240

The above-mentioned factors of a maximum inside corporate income tax rate higher than the outside maximum individual rate (often actually a "phantom" rate of 33% rather than 28% would apply at the individual level),241 and a corporate level tax on liquidating and non-liquidating sales and distributions of appreciated assets and deemed sales of such assets upon a deemed liquidation, probably are not very significant in reality as to most large C corporations (other than non-leveraged and non-capital intensive enterprises in the case of the rate differentials).

First, as to rate differentials, due to leverage and capital recovery deductions, most large C corporations are not taxed under the regular corporate income tax regime.242 Indeed, at the same time the 1986 Act reduced the maximum corporate rate 26% (from 46% to 34%), it actually increased the projected corporate sector tax burden by a net 22% through alternate minimum tax and tax accounting changes (from 21% to 25% of economic income).243 Thus, the more valid comparison is between the corporate and individual minimum tax regimes,244 and the major "tax preference" item dif-

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239 1987 House Report, supra note 21, at 1065-66. The 100th Congress drew from these changes and the repeal of General Utilities "an intent to preserve the corporate level tax," id. at 1066. Cf. 1987 Senate MLP Hearings, supra note 7, at 31-32, 59-64 (hearing pamphlet and statement of Mentz, respectively).


241 The humpback 5% rate begins at $71,900 of taxable income for a married taxpayer filing a joint return. I.R.C. § 11(g). This asymmetric technique was necessary to maintain the fiction of the 28% "maximum" rate and meet the "distributional equitability" requirement that the maximum rate reduction benefit be offset. See Kies, supra note 51, at 184; Birnbaum & Murray, supra note 23, at 220.

242 See supra note 194.

243 See supra note 176 and accompanying text.

244 The 1986 Senate Report, supra note 7, at 521-40, analyzes the corporate and individual minimum tax regimes, describing some common tax preferences for individuals and corporations, principally BURB for the latter. These preferences are added back to taxable
ference between the two regimes—50% of the excess of book over taxable income or BURP\(^2\)-may be more cosmetic than real.\(^2\)

As to the new "liquidating sales" corporate level tax (i.e., the 1986 Code repeal of the \textit{General Utilities} doctrine)\(^3\) referred to by the House Budget Committee report on OBRA,\(^4\) today most acquisitions of large C target corporations are not cast as asset acquisitions from a liquidating target.\(^5\) Instead, in a tender offer, the acquisition is cast as a stock purchase for control of the target corporation,\(^6\) after which the acquiring corporation rarely elected the section 338 step-up before the advent of the 1986 Code and rarely has elected it since.\(^7\) (Section 338 now triggers the target income, adjusted by certain items, and then the alternate minimum rate, 20% for corporations and 21% for individuals, is applied. Id. at 521-22.


\(^{3}\) The Committee reports do not break out revenue estimates for BURP from the estimates for revenue increases in general from the corporate minimum tax changes.


\(^{5}\) 1987 House Report, supra note 21, at 1065.

\(^{6}\) Acquisitions of closely held targets often are accomplished as asset acquisitions. According to the author's conversations with tax professionals, the difference probably lies in the virtual impossibility of carrying out a tender offer for assets in the large C corporation context.

\(^{7}\) Double taxation and its avoidance through interest deductions is the principal tax factor encouraging purchases. See \textit{Acquisitions and Mergers Hearings}, supra note 27, at 120-21, 134-35, 161-62 (testimony and statement of David Brockway); 191-93 (testimony of Ronald Pearlman); 612 (testimony of Preston Martin, Vice-Chairman, Board of Governors of Federal Reserve System).

\(^{8}\) Treasury and the Joint Committee on Taxation Staff believe that the 1954 Code encouraged leveraged acquisitions of lower-leveraged C corporations, especially those with low base, high current value depreciable assets, due to the 1954 Code feature of deductibility of interest but not dividends. (Note that the same is true of the 1986 Code.) See pages cited in \textit{Acquisitions and Mergers Hearings}, supra note 250. See also \textit{Staff of Joint Comm. on Taxation}, 99th Cong., 1st Sess., \textit{Federal Income Tax Aspects of Mergers and Acquisitions} 4-5 (Comm. Print 1985). While they do not discuss whether such acquisitions are cast as cost or carry-over basis acquisitions, witnesses at other hearings and other commentary suggest that purchasers rarely elected cost basis treatment under the 1954 Code. This was evidently the case because "recapture income," taxable to the target under the 1954 Code upon a liquidation, or sale pursuant to a liquidation triggered upon a stock acquisition and § 338 election, often equalled the present value of any step up in basis of the depreciable asset. See \textit{Reform of Corporate Taxation Hearings}, supra note 9, at 518-21 (statement of David Glickman); \textit{Philadelphia Tax Conference Focuses on Business Planning After the 1986 Act}, 35 Tax
corporate level tax on all appreciation. Thus, the target’s assets generally retain their old, presumably lower than fair market value basis after acquisition. Theoretically, the acquiring corporation would reduce its purchase price to reflect the loss of step-up in basis, but the practical reality is that the target’s purchase price often is based on a multiple of its earnings and earnings are

Notes 934, 935 (June 8, 1987).

Conventional wisdom had it that the purchaser and seller could carve out of the purchase price any costs attributable to such “customer base intangible” assets as goodwill, 1987 House Report, supra note 21, at 1058-59, amortizable by the purchaser and purportedly not triggering “recapture income” to the seller. Query whether application of the tax benefit doctrine to recovery of the seller’s costs of creating such intangible assets, at one time currently deductible as advertising or other ongoing business expenses, id. at 1059, and based on a premise now known to be inaccurate, viz., that such intangibles should give rise to a current deduction, would not produce distortion of income. See Lee & Bader, Contingent Income Items and Cost Basis Corporate Acquisitions: Correlative Adjustments and Clearer Reflection of Income, 12 J. Corp. L. 137, 204-09 (1987). This shield was repealed in 1986. See authorities cited in note 247 supra. Now the target will recognize all built-in gain upon a liquidation, asset sale pursuant to a liquidation, or § 338 election. See Yin, supra note 247. (Of course, where the target’s NOLs equaled the built-in gain or recapture income, election might be advisable.) Nevertheless, Treasury’s interest in purchase price allocations and amortization of customer base intangibles once attracted is not easily abated. See I.R.C. § 1060 and H.R. 3545, 100th Cong., 1st Sess. § 10120 (1987) (included among revenue provisions of OBRA, as passed by the House Ways & Means Committee).

384 See generally Yin, supra note 247.

385 Where the stock is sold rather than redeemed the effect of a “double tax” would occur only where the purchaser’s price was discounted for the burden of corporate taxation on future earnings.

386 There have been four merger waves since the late 1890s: 1890-1904, 1919-1929, 1960-1969, and 1974 to present. See Corporate Takeover Hearings, supra note 7, at 147-48 (colloquy between Sen. Riegle and Martin Lipton; Mr. Lipton characterized the present period as a “liquidation wave”). Prior to the mid-1960s, businesses typically combined by merger, sale of assets, consolidation, or through proxy contests. Id. at 452 (statement of John Shad, Chairman of the Securities and Exchange Commission [the “SEC”]). In the current wave of mergers, the form of acquisition has shifted to the tender offer, typically using borrowed cash, which results in leveraged takeovers, id. at 285, 310 (SEC staff report). See also id. at 451 (statement of Shad); 733-36, 742-46 (statement of Preston Martin). The shift has been from the conglomerate merger era of the 1960’s to the large, often hostile takeover bids of the 1980’s. Id. at 668-69 (statement of Felix Rohatyn). While merger transactions in recent years are fewer than in the 1960s, the dollar size of the recent transactions is far larger. Id. at 576, 581, 591-93 (statement of Preston Martin). These tender offers average a 30% to 50% premium above current trading value of the target shares (which reflect a multiple of earnings). Id. at 240 (statement of John Shad). See also Jensen, Takeovers: Folklore and Science, 62 Harv. Bus. Rev. 109, 112 (1984). This premium may reflect the shelter of the purchaser’s interest deductions (for the borrowed purchase price) against the target’s earnings or a greater value for the sale of much of target’s assets than the stock price. See Corporate Takeover Hearings, supra note 7, at 45, 137, 157, 596, 672, 751-52, 884, 1101-03. For a case history see id. at 1102-03 (statement of Sir James Goldsmith).
actually increased by any lower basis due to lessened capital recovery deductions. In short, the only real factors weighing towards the choice of a passthrough entity for conducting a large active business in the traditional pattern are the higher corporate than individual tax rate in service industries, different corporate and individual alternate minimum tax rules in capital-intensive businesses, and "double tax" on owner level realization of gain in capital transactions (or, more rarely, dividend distributions in high profit distribution ventures).

As discussed previously, PTPs often do not fit the traditional large C corporation pattern. Instead, the limited partners' equity traditionally served as an alternative to conventional debt financing, with resultant lower PTP debt-equity ratios and higher rates of PTP distributions (corresponding to debt amortization in conventional large C corporations) than those of large C corporations in general. Treatment of active business PTPs as corporations undoubtedly will lead to substitution of conventional financing to buy up the limited partners' interests.

b. Functional Corporate Resemblance

Congress took a broad approach to functional corporate resemblance, echoing the recent Treasury and Joint Committee staff studies:

Publicly traded partnerships resemble publicly traded corporations in their business functions and in the way their interests are marketed, and limited partners as a practical matter resemble corporate shareholders in that they have limited liability, may freely transfer their interests, generally do not participate in management, and expect continuity of life of the entity for the duration of the conduct of its business enterprise.

However, all of these factors merely embody aspects of the deep
structure issue: whether the owners of the entity have control over the process of earning the entity's income or control the use and disposition of such earnings. The Joint Committee staff in the 1986 passthrough entities hearing pamphlet described the relationship between these factors and the deep structure issue well:

Certain factors identified as relevant by applicable case law or regulations have a direct bearing on whether an entity is acting separately from its owners, or as their agent or alter ego. For example, each of the four factors relied upon by Treasury regulations to determine whether an entity is taxed as a corporation or as a partnership is relevant to this issue.

The existence of either continuity of life or free transferability of interests suggest that an entity has legal significance substantially separate from the interest of a particular owner. For example, when an entity has these two characteristics, amounts earned while one is an owner may never be distributed to such owner, and amounts distributed to an owner may not have been earned during his period of ownership. Thus, if these two characteristics are present, it can be argued that taxing the entity is appropriate. More generally, such continuity and transferability suggest that the entity is not wholly dependent for its existence on the continuing involvement of current owners, and may continue to exist even if any of such owners cease to possess ownership interests.

The existence of centralization of management suggests that owners of an entity may not, at least by reason of their ownership interests, guide the activities of the entity on a regular and continuous basis. The presence of centralized management suggests at least some separation between the activities of the entity and those of owners, even though the management may be viewed, in some respects, as the agent of owners. In particular, it can be argued that an owner who is not involved in managing the entity is not properly viewed, in a realistic and substantial economic sense, as the party responsible for earning the income of the entity.

For several reasons, the fact that owners have only limited liability with respect to an entity suggests that the entity should be treated as a separate taxpayer. To begin with, limited liability establishes a potentially substantial economic distinction between owners and the entity itself. Limited liability may lessen the degree to which the economic resources of the owners themselves, rather than solely those of the entity, are critical to the conduct of

See Passthrough Entity Hearing Pamphlet, supra note 8, at 14.
the business. In addition, when the liability of owners is limited, the owners may never have to bear losses incurred by the entity in excess of the entity's capital resources. Accordingly, in such a circumstance, it may be inappropriate to view losses of the entity as realized by owners.

Although Congress concluded that public trading involved a lack of identity of the owner with the entity, which particularly justified separate taxation of the entity, Treasury itself admitted in the 1986 passthrough entity hearings that public trading may be "indicative of the existence of the other, more relevant, classification factors . . . that may, to a lesser extent, be present in many other partnerships." Assistant Secretary Mentz apparently based selection of public trading as the sole criterion for corporate treatment of limited partnerships upon political considerations, such as the repeated lack of success of earlier and broader reclassification proposals. However, Treasury's reading of political history in this instance myopically overlooked the fact that the earlier, unsuccessful attempts had been aimed at problems (first retirement plans for self-employed persons and then tax shelters) now resolved by Congress, so that the political pressure against re-classification may have lessened. Had Treasury and then Congress distinguished the question of separate entity treatment from integration/separate taxpayer treatment, the goals of deep structure policy might have been attained. Instead, Congress sacrificed good policy and allowed political considerations to carry the day. Congress should have coupled separate entity treatment with a horizontally equitable, schedularly equivalent tax rate, which would have served a broader and more equitable policy than

263 Id. at 14-15.
264 See 1987 House Report, supra note 21, at 1067.
265 1986 Passthrough Entity Hearings, supra note 8, at 31 (statement of Mentz).
266 Id. at 11 (testimony of Mentz).
268 See 1986 Passthrough Entity Hearings, supra note 8, at 38 (statement of Mentz); 55-56 (statement of Joel Rabinovitz).
269 See supra note 146.
265 See supra note 265 and accompanying text.
is presently the case.\textsuperscript{270}

c. Economic Efficiency

The PTP legislative history underscores one of the great contributions of Reagan era tax reform: articulation of deep structure policy principles, such as economic efficiency (i.e., "economic neutrality"\textsuperscript{271} or horizontal equity). During the Reagan era, serious consideration of tax policy issues evolved from being solely an academic and ideological concern to being a broad-based congressional concern, arguably for the first time.\textsuperscript{272} The pre-1987 PTP format favored less leveraged, mature enterprises with earnings available for high rates of distributions over start-up and capital intensive (leveraged) enterprises, thus creating "new economic inefficiencies of the type the 1986 Act was designed to reduce."\textsuperscript{273} The 1987 changes eliminated some of these inefficiencies through the reclassification of PTPs as regular corporations; but by limiting corporate separate entity treatment to publicly-traded, active businesses conducted in partnership form, Congress left in place the horizontal disparity between large but not publicly-traded corporations and large but not publicly-traded limited partnerships.

\textsuperscript{270} See supra note 200, accompanying text and preceding sentence in text.

\textsuperscript{271} See supra note 232. Horizontal equity is defined as equal treatment of taxpayers with equal income. Economic efficiency in turn is the principle that a market economy operates most efficiently if all business activities are subject to the same rate of tax, see, e.g., 1986 Passthrough Entity Hearings, supra note 8, at 10 (statement of Mentz); 1984 Treasury Proposals, supra note 9, at 442; Simmons, The Tax Reform Act of 1986: An Overview, 1987 B.Y.U. L. Rev. 151, 153. As Representative Downey of the House Ways & Means Committee stated, "[O]ne of the things I learned when I came on this Committee is the desire on our part, especially when you deal with economic matters, to be economically neutral." Tax Shelter Hearings, supra note 102, at 31. See also id. at 26-27. This emphasis is a turnaround from earlier Congressional reliance upon ability to pay coupled with economic incentives. See Simmons, supra at 151, 167-71. This shift has been explained in an ideological sense by Professor Ott. See Ott, supra note 50, at 1223 (sees more balance than Simmons); see also Hettich & Winer, Blue Prints and Pathways: The Shifting Foundations of Tax Reform, 38 Nat'l Tax J. 423 (1985). For a brief but cogent statement of the view that the federal tax code should be "neutral," see Corporation Takeover Hearings, supra note 7, at 449 (statement of Shad).


\textsuperscript{273} 1987 House Report, supra note 21, at 1066; cf. 1987 Senate MLP Hearings, supra note 7, at 49, 141-42.
2. Passthrough (Passive Income) PTPs

Congress based its exception to corporate treatment for "passive income" or passthrough PTPs on two rationales. The first was that investors could choose to acquire, directly and independently, investments generating passive income, such as interest and dividends, from activities not conducted in corporate form. The second rationale was based on political considerations and applied to the exceptions for real estate and natural resource development activities. In the case of these activities, political considerations prevailed. Although it acknowledged that a higher level of entity activity might be present in the areas of real estate and natural resource development, Congress reasoned that such activities "have commonly or typically been conducted in partnership form, and . . . disruption of present practices in such activities is currently inadvisable due to general economic conditions in these industries."

Traditionally, Congress has permitted limited integration as to entity income (but not losses) between a separate entity and its numerous passive owners where the conduit entity conducted only limited business activities in the form of, e.g., REITs and RICs. The rationale given for such integration generally has been to enable middle income taxpayers, who are of course numerous, to acquire liquid and diversified passive investments without incurring double income taxation. However, the level of permissible activity as to rental real estate and natural resources has been substantially lower than that allowed for passthrough PTPs, suggesting that political, rather than policy, considerations dominated Congress' consideration of the treatment of such activities.

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274 1987 House Report, supra note 21, at 1066.
275 Id. at 1066.
276 See supra notes 66 and 67.
278 See supra note 78.
279 Treasury suggested consideration of continued passthrough treatment, ideally more a limited income integration, along the RIC-REIT model for real property rental and natural resource development activities, see 1986 Passthrough Entity Hearings, supra note 8, at 31, because activities of holding relatively passive assets and distributing the income to owners traditionally were conducted in non-corporate form and a "similar rationale has supported passthrough treatment for publicly traded entities organized as REITs, RICs, and, more recently, REMICs." 1987 Senate MLP Hearing, supra note 7, at 73 (Treasury statement). Treasury's numbers show that roughly a third (42) of the 126 PTPs in existence on June 29,
More significantly, passive-owner entities which conduct passive activities generally have been treated as separate entities as to all aspects, other than limited integration of income.\textsuperscript{280} Along these lines, Treasury advocated in 1986\textsuperscript{281} (although not in 1987)\textsuperscript{282} that instead of the (aggregate) partnership model, Congress should employ a dividend relief provision, comparable to the RIC and REIT approach, such that natural resources development, housing development, and other research and development activities conducted in PTP form be excepted from regular PTP double taxation. Instead, Congress structured OBRA so that it inappropriately permitted continued aggregate treatment (except as to passthrough of some losses under the separate-basket PAL rules) for “passive” activity passthrough PTPs.\textsuperscript{283} This congressional structuring could only be due to a failure to separate the entity classification and owner-entity integration policy issues. Nevertheless, this aggregate treatment is consistent with the final 1986 Code REMIC provision, which passes through both income and losses.\textsuperscript{284}

3. \textit{PALs and PTPs}

a. \textit{Active Business PTPs}

In characterizing active business PTPs as corporations for tax

\textsuperscript{180} See supra notes 66 and 67.
\textsuperscript{181} 1986 Passthrough Entity Hearings, supra note 8, at 31 (statement of Mentz). Assistant Secretary Pearlman too had been earlier concerned about the impact of reclassification upon capital formation “for natural resource exploration, research and experimentation and housing development.” Reform of Corporate Taxation Hearings, supra note 9, at 63.
\textsuperscript{182} 1987 Senate MLP Hearings, supra note 7, at 73 (Treasury statement). Perhaps Assistant Secretary Mentz divined some political message in the Conference Committee’s failure to follow traditional separate entity policy, as the Senate provisions had, in the REMIC provisions which it adopted in the Tax Reform Act of 1986. See supra note 147. Cf. 1987 Senate MLP Hearings, supra note 7, at 199 (statement of John Chapoton) (unknown provenance of REIT rules).
\textsuperscript{183} See supra note 138 and accompanying text. See also sentence following text accompanying note 145, supra.
\textsuperscript{184} See supra note 147. Of course, REMICs also contravene the pattern and deep structure policy with their aggregate-like treatment of losses.
purposes, Congress treated PTP income (presumably only to the extent distributed) as portfolio income for purposes of the passive loss rule,\textsuperscript{285} consistent with the deep structure policy underlying the PTP and PAL provisions.\textsuperscript{286} An entity should be treated as a separate entity,\textsuperscript{287} and its distributed income treated as portfolio income, if the owners do not materially participate in its operations or management. Additionally, economic losses tied to an interest in such a separate entity should not be realized by an owner until he disposes of the interest.\textsuperscript{288}

b. \textit{Passthrough PTPs}

The House of Representatives gave both policy and political rationales in designating special PAL provisions for passthrough PTPs, such as passive-income PTPs. The policy rationale was that such PTPs functionally resemble corporations. The political rationale was the House's desire to reduce the availability of tax shelters. Neither purpose holds up under examination.

Regarding the policy rationale, the House reasoned that passthrough PTPs resemble C corporations in their marketing methods and their accessing of capital markets (on the basis of hoped-for positive current yield on investment).\textsuperscript{289} The return on investment of such a PTP is essentially comparable to the return on an investment in corporate stock. Under the passive loss rule, passive losses cannot be applied to offset dividend income. Similarly, the passive loss rule treats as portfolio income [return] from other investments such as interest-bearing obligations. The committee believes that income from all publicly traded partnerships should be treated similarly to income from investments in corporations for purposes of the passive loss rule.\textsuperscript{290}

This rationale for applying the PAL rules to PTPs conflicts with the rationale given for the passive income exception to corporate treatment. The passive income exception is based on the idea that

\textsuperscript{285} 1987 House Report, supra note 21, at 1071.
\textsuperscript{286} See supra notes 139 and 218-219 and accompanying text.
\textsuperscript{287} See supra note 218.
\textsuperscript{288} See supra note 219 and accompanying text.
\textsuperscript{289} 1987 House Report, supra note 21, at 1073.
\textsuperscript{290} Id.
the taxpayer could otherwise directly acquire these investments (which, if held by a PTP, would generate portfolio income\(^{291}\)) without falling under the passive activity classification. This would be true because the PTP would not be conducting a trade or business\(^{292}\) or be engaged in a section 212 activity rising above the portfolio investment threshold, and yet the PTP’s activity would not rise to the level of a trade or business.\(^{293}\) Similarly, the stated political rationale of retarding expansion of tax shelters\(^{294}\) cuts too broadly in that it would not support any exceptions to the tax shelter rules. Nevertheless, the basic “separate basket” concept of the PAL rules as applied to passthrough PTPs\(^{295}\) is sound as a matter of tax policy. Under the separate basket rule, net income from a passthrough PTP is treated as “portfolio income” and not as “passive income” for purposes of the passive loss rule;\(^{296}\) thus, such income may not be offset by passive losses from a passive activity.\(^{297}\) Also, net losses from a passthrough PTP cannot offset the partner’s positive income, whether portfolio income, compensation or passive activity gain; but are instead suspended, offsetting future income from that PTP or being realized upon a complete disposition of the taxpayer’s interest in the passthrough PTP.\(^{298}\)

This separate basket treatment is consistent with treatment for PAL purposes of the passthrough PTP as a separate entity, due to the owners not materially participating.

Such complete separate basket treatment of passthrough PTPs is much more restrictive than the general passive activities netting rule, which states that losses from one passive activity currently offset income from another passive activity.\(^{299}\) The separate entity analysis presented above shows that such a netting rule is concep-

\(^{291}\) Id. at 1066.
\(^{292}\) I.R.C. § 469(c)(1)(A).
\(^{293}\) I.R.C. § 469(c)(6)(B).
\(^{294}\) See 1987 House Report, supra note 21, at 1073.
\(^{295}\) See I.R.C. § 469(k)(1); 1987 House Report, supra note 21, at 1073; see also supra notes 89-93 and accompanying text.
\(^{296}\) See 1987 House Report, supra note 21, at 1073; see supra note 92 and accompanying text.
\(^{298}\) See 1987 House Report, supra note 21, at 1073.
\(^{299}\) See I.R.C. § 469(d)(1); 1986 Senate Report, supra note 8, at 722 (“Losses arising from a passive activity generally are deductible only against income from that or another passive activity.”).
ually unsound, due either to overemphasis on schedular income concepts or, more likely, political considerations. Unfortunately, the end result either way is schedular horizontal inequity. Similar passive activities (for example, rental of apartments) are treated differently, depending on whether they are conducted by a large limited partnership (which may even be publicly offered) or by a passthrough PTP, even though a given activity produces the same income and losses.

C. PSCs

The OBRA explanation for eliminating inside graduated income tax rates for PSCs is overly terse, probably due to the inherent difficulty in distinguishing PSCs from close C corporations in general under a deep structure analysis.

The personal service income of a corporation owned by its employees is taxed to the employee-owners at the individual graduated rates as it is paid out as salary. The committee believes that it is inappropriate to allow the retained earnings to be taxed at the lower corporate graduated rates.

The 1984 Treasury proposals would have repealed the graduated corporate rates for all corporations in order to fund a general reduction of corporate rates and to eliminate the use of closely-held corporations as inside tax shelters. These proposals provided no deep structure analysis, but simply stated that a progressive corporate income tax served no affirmative purpose.

The Joint Committee staff, however, exposed the deep policy considerations in the 1986 passthrough entities hearing pamphlet:

In the absence of the factors noted above [continuity of life, centralized management, limited liability, and free transferability of interest], it may be viewed as inappropriate to treat an entity as a separate taxable unit. For example, to the extent that the entity is merely an agent or alter ego of the owner, it may be argued that the owner truly earns any income nominally earned by the entity,

300 See Rock & Shaviro, supra note 85, at 12-15, 26-27.
301 1987 House Report, supra note 21, at 1081.
302 See 1984 Treasury Proposals, supra note 9, at 128.
303 See id.
304 Id. Actually, the graduated inside corporate brackets were enacted as an aid to capital formation in small corporations. See authorities cited in supra note 28.
and that the owner controls both the process of earning it and the income itself. Similarly, when an entity has relatively few owners, the audit and administrative difficulties of imposing taxation on the owner level are relatively manageable.\footnote{1986 Passthrough Entity Hearing Pamphlet, supra note 8, at 17.}

In short, the application of inside graduated corporate rates to an entity in which the owners materially participate violates horizontal equity by generating less current taxation on retained earnings than does direct taxation of the owners. To make matters worse, the second-tier shareholder tax on owner-level realizations of such earnings is often de minimis.

OBRA’s failure to provide any special one-shot, tax-free disincorporation provision to accompany the repeal of graduated rates for PSCs (as Congress provided in 1982 when it eliminated the retirement plan incentive for professional service corporations)\footnote{See supra note 109.} indicates that Congress expected PSCs to elect S corporation status.\footnote{See supra note 110.} In the absence of such election, the penalty for disallowed deductions by a PSC operating as a C corporation will be high.\footnote{Since the owner controls the business and the entity, expenditures for a non-business purpose should be taxed at the owner’s marginal rate.}

However, S corporations are treated as separate entities as to pass-through of income and losses and in other ways. In contrast to partnerships, “corporate liabilities are not included in a shareholder’s basis for his interest in the [S] corporation, and special allocations are not [permitted.]” Also unlike partnership treatment, a “transferee of an S corporation interest is not entitled to ‘step-up’ the basis of his share of the entity’s assets to reflect his purchase price.”\footnote{1987 Senate MLP Hearings, supra note 7, at 11.} Thus, the post-OBRA tax treatment of PSCs still ignores the deep structure of entity classification.

More significantly, elimination of the inside corporate graduated rates was too narrow. Assistant Secretary Mentz acknowledged in the 1986 passthrough entity hearings that many close C corporations as a practical matter do not manifest the traditional corporate characteristics of continuity, centralized management, limited liability and free transferability,\footnote{See 1986 Passthrough Entity Hearings, supra note 8, at 19, 28.} but he rationalized continued C corporation treatment on the certainty and fairness of objective
The apparent political reality is that once Congress had fashioned the graduated small C corporate rates as a subsidy for capital accumulation, small business was determined to keep the subsidy. Indeed, the political response to the 1984 Treasury proposals to impose a flat corporate tax was quick; the President's proposals of 1985 abandoned the idea, and the Tax Reform Act of 1986 actually increased the subsidy by doubling the base (from $25,000 to $50,000) for the lowest corporate rate (15%), violating horizontal and vertical equity principles. The stated rationale of the President's proposals of 1985 for retaining a graduated rate structure was specious, given that the various proposals and the final bill increased the corporate tax load to varying degrees.

The proposal retains a modified graduated rate structure for small corporations in recognition of the fact that complete elimination of the graduated rate structure would dramatically increase effective tax rates for many smaller corporations, thus nullifying the positive effects, for such corporations, of the proposed reduction in the maximum marginal rate.

V. TAX LEGISLATIVE PROCESS: POLICY AND POLITICS

A. 1954 Code General Pattern

The 1986 Code marks the end of one era of tax reform and the beginning of another. The second half of the 1954 Code era (comprising the 1970s and 1980-81), encompassed a period in which inflation-driven individual bracket creep permitted Congress to enact current spending programs depending on the revenue windfall of expected future bracket creep to produce a balanced budget. Congress periodically used budget surpluses produced

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311 See id. at 27-28.
312 See authorities cited in supra note 28.
313 See Birnbaum & Murray, supra note 23, at 80.
314 See 1985 President's Proposals, supra note 9, at 117.
315 See I.R.C. § 11(b).
317 1985 President's Proposals, supra note 9, at 119.
318 See Simmons, supra note 271, at 156-57.
by such bracket creep to fund "tax reform." Thus, for example, the bottom two million or so working poor were periodically removed from the federal income tax roll\(^\text{320}\) (but bracket creep promptly would put them back on the roll), middle-income individuals were given cosmetic tax cuts,\(^\text{331}\) and large, capital-intensive corporations and high-income individuals were provided increasing "tax expenditures" or preferences\(^\text{332}\) (the preferences in both cases usually enhanced by leveraging techniques\(^\text{333}\)), thereby reducing the tax base.\(^\text{334}\)

As a result of these preferences, by the end of the 1954 Code era, many large C corporations and their shareholders had gone beyond integration (where at least one tax is collected) to the enjoyment of a practical repeal of the progressive rate feature of the income tax system, which traces its origins to the populist movement of the early twentieth century.\(^\text{335}\) Neither large corporations nor their shareholders (which included high-income individuals and tax-exempt organizations) paid much tax during the last years of the 1954 Code.\(^\text{336}\) The middle-income individual taxpayers bore the brunt of erosion of the corporate tax and high-income individual tax bases under the 1954 Code era.\(^\text{337}\)

The Economic Recovery Tax Act of 1981,\(^\text{338}\) President Reagan's

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\(^{320}\) See Simmons, supra note 271, at 158.

\(^{331}\) See Kies, supra note 51, at 181; Simmons, supra note 271, at 158, 160; Verdier, supra note 233, at 172. Tax expenditures or preferences are discussed infra note 322.

\(^{332}\) See Kies, supra note 51, at 180; Leonard, supra note 49, at 971-972.

\(^{333}\) Many commentators believed that the combination of leverage and preferences constituted the core of tax shelter abuse. See infra note 333. Not surprisingly loss partnerships tend to be highly leveraged. See High-Income Taxpayer Hearings, supra note 46, at 11 (statement of Ronald Pearlman).

\(^{334}\) See Chirelstein, supra note 32, at 219-21; Simmons, supra note 271, at 198. The corporate income tax declined between 1950 and 1985 from 27% to 8% of total budget receipts and from 40% to 16% of total income tax receipts. See 1985 House Report, supra note 316, at 55.

\(^{335}\) See Birnbaum & Murray, supra note 23, at 6-8; Simmons, supra note 271, at 154, 168-69.

\(^{336}\) See, e.g., Chirelstein, supra note 32, at 211; supra note 43.

\(^{337}\) See Future Implications of 1986 Act Hearings, supra note 49, at 49 (statement of Lawrence Chimerine); Simmons, supra note 271, at 155-62.

first step in his tax policy revolution,\textsuperscript{329} which shifted the focus of
taxation from the ability to pay and use of tax preferences to flat
rates and level playing fields, contained three changes which ulti­
mately set the stage for the reforms of the 1986 Code.\textsuperscript{330} First, the
indexing of brackets for inflation and personal exemptions would
eliminate bracket creep after the 1985 effective date.\textsuperscript{331} Second, the
combination of rapid capital recovery under ACRS and ITC (which
were designed to approximate complete expensing of equipment in
the year of acquisition),\textsuperscript{332} plus leverage,\textsuperscript{333} virtually eliminated the
tax base for many large corporations and half of high-income indi­
viduals.\textsuperscript{334} So that large loss corporations could enjoy the stimulus

\footnotesize{\textsuperscript{329} See Chirelstein, supra note 32, at 208; Simmons, supra note 271, at 168-169 (explaining
how the revolution commenced in 1981 continues to work under the 1986 Code). See gener­
ally Minarik, supra note 23, at 1372.  
\textsuperscript{330} See Chirelstein, supra note 32, at 219; Minarik, supra note 23, at 1363, 1372 (1987).  
\textsuperscript{331} See Internal Revenue Code of 1954 § 1(0
(1985); Symposium on the 1986 Act, supra
note 319; Chirelstein, supra note 32, at 219 and n.32; Leonard, supra note 48, at 972; Ver­
dier, supra note 233, at 172.  
\textsuperscript{332} See Steines, Income Tax Allowances for Cost Recovery, 40 Tax L. Rev. 483, 537-538
\textsuperscript{333} See Cohen Symposium, supra note 156, at 593 (statement of Alvin Warren) ("if you
move towards expensing, to be consistent you also have to set up a regime in which there is
no deductibility of interest"); Warren, supra note 332, at 554.  
\textsuperscript{334} In a recent study by a public interest group of 275 selected large corporations, almost
half (129) managed to pay no federal income tax in at least one of the four years from 1981
to 1985, and the average effective rate for the four year period was 15%. See Citizens for
Tax Justice, Corporate Taxpayers & Corporate Freeloaders, reprinted in 29 Tax Notes 947, 948, 949 (Dec. 2, 1985). The industry response that such studies ignore deferred tax liabili­
ties, see Egger, Citizens for Tax Justice's Latest Misrepresentation of Corporate Tax Bur­
dens, 29 Tax Notes 956 (Dec. 2, 1985), is misplaced if such liabilities can be deferred for
sufficiently long periods or the liability constantly increases. Accelerated depreciation and
the investment tax credit accounted for the lower effective rates for most of the surveyed
corporations. See Citizens for Tax Justice, supra at 951. Similarly, a Treasury study of high
income individual taxpayers found that 11% paid less than 5% of their total positive in­
come in taxes, over one-half paid less than 20%; over 75% paid less than 30% and only 5%
paid taxes of a least 40% of total positive income. See High-Income Taxpayer Hearings,
supra note 46, at 18 (statement of Ronald Pearlman) (1983 data). Among high income, low
tax returns, partnership losses dominate, with 77% showing some partnership losses. See id.
at 18. Sixty-four percent of all high income taxpayers in 1983 reported some partnership
loss. See id. at 19. While Treasury data did not permit pinpointing the sources of tax prefer­
ence generating this pattern of partnership losses, interest, depreciation and mineral explo­
ration costs in the aggregate accounted for near 40% of all partnership sector deductions.
See id. at 23. This suggests a possible basis for the similar pre-1986 Act effective tax rates
for corporations and high-income individual taxpayers (21% for corporations and 19 to 22%
for individuals), since both used leverage and preferences heavily, see supra note 43. See
generally Future Implications of 1986 Act Hearings, supra note 49, at 15 (statement of Rob-}
of capital recovery, ERTA also authorized the "safe harbor" lease or sale of capital recovery tax benefits between corporate taxpayers.\textsuperscript{335} Third, ERTA combined these "business" tax cuts with high- and middle-income individual tax cuts.\textsuperscript{336}

The tax cuts and accelerated capital recovery, in combination with increased defense spending and the 1981-82 recession, produced unprecedented deficits and, without bracket creep as a source of payment, created the structural impetus for major tax change.\textsuperscript{337} Perceived popular outrage grew as big ticket "safe harbor lease" tax benefit sales were widely publicized.\textsuperscript{338} At about the same time, Robert McIntyre, a public interest advocate, exposed avoidance of the corporate income tax by big corporate sector America.\textsuperscript{339} The 1981 capital recovery changes equally drove the individual side tax shelter explosion in the first half of the 1980s.\textsuperscript{340} These structural and political forces set the stage for tax reform which increased the corporate tax and finally eliminated individual passive use of tax preferences to shelter outside portfolio or business/professional income.\textsuperscript{341}

Probably of the same order of importance in the drive toward eventual post-ERTA tax reform were the actors on the tax reform stage: a strong Republican president and a largely Democratic Congress.\textsuperscript{342} During the 1954 Code era, the major tax reform at-
tempts by Democratic presidents (Kennedy in 1964\textsuperscript{343} and Carter in 1979\textsuperscript{344}), with their party in control of Congress, were unsuccessful, probably due as much to the windfall revenue from bracket creep, which was used to fund tax expenditures, as to lack of control over their party. Nor was Congress able to slow down, much less completely halt shelter abuse when, due to the force of public opinion,\textsuperscript{345} it took the lead under Republican presidents (Nixon in 1969\textsuperscript{346} and Ford in 1976\textsuperscript{347}). The congressionally-dominated tax acts of 1982 and 1984 were the result of especially severe budget pressures and revenue reconciliation directives.\textsuperscript{348} These latter two congressional acts, while raising large amounts of revenue, did not effectively halt shelter use and added great complexity with often ad hoc solutions.\textsuperscript{349} Significantly, the 1982 and 1984 acts did not
increase rates (recently cut in ERTA in 1981), nor did they repeal indexing.\textsuperscript{350} Against this backdrop, President Reagan and the tax writing committee chairmen helped produce the 1986 Act.

B. 1986 Code General Pattern

President Reagan, in 1985-86, was able to set the parameters for structural tax reform and hence the shape of the 1986 Code. First, there could be no net revenue increase over the base period. Second, a corporate sector increase could carry an individual sector tax cut. Finally, top individual rates had to be lowered to no higher than 35\% (the lowering of the corporate rate was largely symbolic for most, but not all, big C corporations).\textsuperscript{351} Congressional political considerations added the proviso that individual tax cuts could not disproportionately benefit high-income taxpayers\textsuperscript{352}. This political reality had the effect of locking in the more recent erosion of progressivity as to high bracket taxpayers\textsuperscript{353} (as former Senator Haskell pointed out\textsuperscript{354}), but may have been politically necessary to cut off an attack on the 1986 Act by such taxpayers as a “redistributionist scheme.”\textsuperscript{355} Finally, Chairmen Rostenkowski of the
House and Packwood of the Senate tax writing committees adopted procedural rules in committee (and later used in the Senate) requiring that any revenue-losing amendments be offset by revenue raisers.\textsuperscript{356} Add the ingredients of presumed popular outrage at high-income, low-tax individual and corporate taxpayers who paid little or no tax\textsuperscript{357} and the political considerations already manifested in the President's 1985 proposals, including the retention of the home mortgage interest and accelerated capital recovery deductions (provisions which were either "sacred cows"\textsuperscript{358} or "original sins,"\textsuperscript{359} depending on one's point of view, but politically non-repealable in any event) and the final contours of the 1986 Act appear\textsuperscript{360} almost inevitable in retrospect. The actual story, as told in Showdown at Gucci Gulch,\textsuperscript{361} is fascinating and might even be suspenseful if we didn't already know the ending.\textsuperscript{362}

Structurally the 1986 Act presents many familiar 1954 Code tax reform features, but at the same time it constitutes something new. The 1986 Act contains the traditional individual tax reduction sweetener\textsuperscript{363} and again takes large numbers of working poor off the tax rolls.\textsuperscript{364} The pattern as to preferences or tax expenditures is more complex, however. In comparison to the 1954 Code, the drafters of the 1986 Code substantially scaled back or eliminated some capital recovery tax expenditures, particularly the investment tax credit and capital recovery as to real estate,\textsuperscript{365} although the tax expenditures as to personal property remained about the

\textsuperscript{356} See id. at 1369, 1371.

\textsuperscript{357} See id. at 1371. Clearly taxpayers have lost faith in the Federal tax system. See 1986 Senate Report, supra note 7, at 713. The question is whether skepticism is now so rooted that the majority of individual taxpayers do not believe that the 1986 Tax Reform Act benefits them. Cf. Future Implications of 1986 Act Hearings, supra note 49, at 46, 146.

\textsuperscript{358} See generally 1985 President's Proposals, supra note 9, at 132-59.

\textsuperscript{359} See Brannon, Tax Loopholes as Original Sin: Lessons From Tax History, 31 Vill. L. Rev. 1763 (1986).

\textsuperscript{360} See Kies, supra note 51, at 184.

\textsuperscript{361} See supra note 23.

\textsuperscript{362} The Tax Reform Act of 1986 was, indeed, a cliff-hanger at the time. See Yorio, supra note 30, at 395 n.2 ("The road through Congress was tortuous.").

\textsuperscript{363} See id. at 1372.

\textsuperscript{364} See Future Implications of 1986 Act Hearings, supra note 49, at 15 (statement of Robert McIntyre); Simmons, supra note 271, at 161, 164.

\textsuperscript{365} The ITC was repealed retroactively to the beginning of the 1986. The ACRS life for real estate was extended from approximately 50%, from 19 years to 29-30 years; and front-loaded 175% declining balance rate slowed to straight line. See, e.g., Simmons, supra note 271, at 199.
same. Under Doernberg and McChesney's "tax contracts" analysis, forestalling legislation more harmful to special interests may be viewed as preferential treatment of such interests; and in this

The ACRS deduction for personal property was actually accelerated through a more front-loaded rate to partially offset the repeal of the ITC. See 1986 Senate Report, supra note 8, at 96; Simmons, supra note 271, at 197-99; Sunley, supra note 23, at 64. Congress' rationale in the House paid lip service to economic efficiency and reasoned that accelerated depreciation had not stimulated investment in depreciable property, and, in turn had pulled the entire economic into more rapid growth. See 1985 House Report, supra note 316, at 145-46. Nevertheless the House believed, without explaining why some preferences for investment in depreciable property should be maintained, that pre-1981 depreciation should be the right target. See id. The Senate supplied the why's, and like the final legislation, enriched personal property ACRS, while paying even less credible lip service to economic efficiency.

The committee believes some further acceleration in the rate of recovery of depreciation deductions should be provided to compensate partly for the repeal of the investment tax credit. The committee is cognizant that other nations heavily subsidize business investments through tax and other policies, and the committee does not believe such policies can be completely ignored. Therefore, it was the committee's judgment that to maintain the international competitiveness of U.S. business changes were necessary to the accelerated cost recovery system which, in certain cases, provided greater incentives than those existing under present law. The bill increases the rate of acceleration from 150-percent declining balance to 200-percent declining balance for property in the 5-year and 10-year classes. Together with the large tax rate reductions, investment incentives will remain high and the nation's savings can be utilized more efficiently.

The committee believes an efficient capital cost recovery system is essential to maintaining U.S. economic growth. As the world economies become increasingly competitive, it is most important that investment in our capital stock be determined by market forces rather than by tax considerations.

Under present law, the tax benefits arising from the combination of the investment tax credit and accelerated depreciation are more generous for some equipment than if the full cost of the investment were deducted immediately—a result more generous than exempting all earnings on the investment from taxation. At the same time, assets not qualifying for the investment credit and accelerated depreciation bear much higher effective tax rates. The output attainable from our capital resources is reduced because too much investment occurs in tax-favored sectors and too little investment occurs in sectors that are more productive, but which are tax-disadvantaged. The nation's output can be increased simply by a reallocation of investment, without requiring additional saving.

The committee believes the surest way of encouraging the efficient allocation of all resources and the greatest possible economic growth is by reducing statutory tax rates. A large reduction in the top corporate tax rate can be achieved by repealing the investment tax credit without reducing the corporate tax revenues collected. One distorting tax provision is replaced by lower tax rates which provide benefits to all investment. A neutral tax system allows the economy to most quickly adapt to changing economic needs.

1986 Senate Report, supra note 8, at 96.

See Doernberg & McChesney, supra note 34, at 933-34, 942-45 (buying and selling
vein both the President's proposals and the Senate Finance Committee bill had convenient foils.\textsuperscript{888} The 1986 Code's direct treatment of these tax expenditures tells only half the story. Responding in part to the popular opposition to individual tax shelters and corporate giants who paid no tax,\textsuperscript{869} and even more to the tax revenues inherent in indirectly curtailing the tax expenditures eroding the high income individual and corporate sector tax bases, Congress enacted in the 1986 Act the passive loss rules,\textsuperscript{870} repealed the capital gains preference\textsuperscript{871} and strengthened the individual and corporate alternate minimum tax.\textsuperscript{872} Thus, in effect, the 1986 Act lessened the benefits of capital recovery and tax preferences.\textsuperscript{873} Moreover, these complex and often inelegant\textsuperscript{874} provisions, indirectly producing base broadening, gen-

\begin{footnotesize}
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\item See Minarik, supra note 23, at 1368-69.
\item See supra notes 339-341 and accompanying text.
\item I.R.C. § 469. This provision is estimated to result in a $23.4 billion revenue increase over the years from 1987 to 1991. See 1986 Bluebook, supra note 51, at 254.
\item Pub. L. No. 99-514 § 301 (repealing I.R.C. § 1202). Separate capital gains repeal revenue figures are not broken out. See 1986 Bluebook, supra note 51.
\item See Pub. L. No. 99-514 § 701. Individual and corporate minimum tax provisions should increase the fiscal budget receipts for the years from 1987 to 1991 by $8.2 billion for individuals and $22.2 billion for corporations. See 1986 Bluebook, supra note 51, at 473.
\item See Yorio, supra note 30, at 439. In essence, the 1984 Treasury Proposals constitute a “free market manifesto” as to capital recovery, as well as most other tax rules. See McLure, Where Tax Reform Went Astray, 31 Vill. L. Rev. 1619, 1625 (1986) (a principal architect of the 1985 Treasury Proposals). Congress recognized the wisdom of economic efficiency instead of preferential treatment, see supra note 308, but was subject to the intense lobbying by, and PAC contributions from, the special interests and yielded to them (other than real estate with its see-through office buildings). On the other hand, Congress effectively restricted such capital recovery deductions to corporations and individual's actively participating in the activity; and even then, the tax preferred taxpayer must pay a “minimum tax.” See High-Income Taxpayer Hearings, supra note 46, at 66-68, 98-99 (statements of Ronald Pearlman, Reps. Dorgan, Thomas, and Pease). Thus, the 1986 Code constitutes here a compromise between economic efficiency and tax expenditures for capital intensive activities, but at least rate reduction was achieved. See generally Future Implications of 1986 Act Hearings, supra note 49, at 67 (statement of Alan Greenspan).
\item A leading commentator on tax reform (and consultant to Senator Bill Bradley on his rate-lowering through base broadening proposals) described the 1984 Treasury Proposals for dealing with inflation by indexing capital recovery, inventories, and loans as “elegant.” See 1984 Treasury Proposals, supra note 9, at 177-200; Minarik, supra note 23, at 1367.
\end{enumerate}
\end{footnotesize}
erated the revenues to support Senator Bill Bradley's idea of substantially lower marginal rates, the force of which ignited consideration, passage and signing of the 1986 Act. Such indirect base broadening rendered the 1986 Act palatable to both those who desired horizontal equity or fairness and those who desired economic efficiency. The cost was abandonment of vertical equity or progressivity, but vertical equity had long been unrealized in any event, due to tax expenditures. Some, including the author, fear that reintroduction of high rates would inevitably lead Congress to fashion more of such expenditures, which are utilized mostly by high-income individual taxpayers and corporate giants and which ultimately increase effective rates for middle-income taxpayers. In addition to its low rates (which more closely approached actual effective rates), the 1986 Act more importantly eased, although it did not erase, horizontal disparity at the high end of the individual and corporate taxpayer levels.

C. OBRA PTP-PSC Changes and the Tax Legislative Process

In 1983, the Assistant Secretary of the Treasury for Tax Policy, Ronald Pearlman, testified at the Senate Finance Committee hearings on reform of corporate taxation that study of any classification issue should look at the entire business entity continuum:

argued against indexation of capital gains for the same reason that they had in 1978: they preferred an exclusion that would reward them for big gains accrued over short times, rather than inflation protection. The investment community railed against nonaccelerated indexed depreciation, asking for bigger up-front deductions that were not contingent upon inflation. Banks found that the streamlined indexation of interest income and expense would distort their profit margins.

Id. at 1370, 1372, 1373.

See id. at 1370, 1372, 1373.

See Birnbaum & Murray, supra note 23, at 223, 228, 233, 259.


See Haskell, supra note 354, at 303.

See Haskell, supra note 354, at 303.

See 1959 Panel Discussions, supra note 23, at 861 (statement of Paul Ziffren).


See supra note 43.
Questions such as how a type of organization should be taxed, whether as a so-called C-corporation, an S-corporation or as a partnership or, for that matter, as a real estate investment trust or a regulated investment company, require, we believe, an analysis of all of those classification situations. We suspect that if that analysis were undertaken, we would not agree to base tax classification on the degree of marketability of an organization’s equity interests.882

Similarly, Chairman Rangel in commencing the 1986 Select Revenue Measures Subcommittee hearings on issues relating to pass-through entities announced that the purpose of the initial hearing was “to obtain a broad overview of tax policy issues affecting pass-through entities. . . . The subcommittee is particularly concerned that specific, ad hoc modifications in this area not be made without consideration of the overall impact of such modifications on the passthrough entity area.”883

The 1986 and 1986 Joint Committee staff hearing pamphlets on passthrough entities884 and master limited partnerships,885 respectively, and Assistant Secretary Mentz’ 1986 statement,886 fortunately do provide such a broad overview and analysis, which might have produced tax policy at its best. Unfortunately, politics dominated as the specific, ad hoc modifications implemented in OBRA as to PTPs were put in place.887 Consequently, the criterion chosen (public trading of partnership units) was two steps removed from the deep structure ideal of material participation888 and the remedy provided (corporate treatment) was deficient technically.889

Similarly, the 1984 Treasury proposals pointed the way to a policy analysis of close C corporations,890 which the 1986 passthrough entity hearing pamphlet briefly provided, also properly resting on material participation.891 But again politics prevailed with the OBRA criterion for elimination of the inside shelter (professional

383 Reform of Corporate Taxation Hearings, supra note 9, at 11.
384 1986 Passthrough Entity Hearings, supra note 8, at 1.
385 See supra note 19.
386 See id.
387 See supra note 8.
388 See supra notes 144-145 and accompanying text.
389 See supra notes 260-264 and accompanying text.
390 See supra notes 189-198 and accompanying text.
391 See supra notes 216, 302-304 and accompanying text.
392 See Passthrough Entity Hearing Pamphlet, supra note 8, at 17; supra note 305 and accompanying text.
services) being too narrow;\textsuperscript{392} and the remedy (elimination of graduated rates) technically deficient.\textsuperscript{393} Standing alone, then, the 1987 PTP and PSC provisions represent a failure of policy, possibly lessening the impetus for true deep structure, policy-based reform.

One should not be overly pessimistic about future prospects, however.\textsuperscript{394} OBRA's general tone may indicate the direction of tax revisions over the next five years or so. That direction should be: maintenance of low individual and corporate rates with incremental base broadening,\textsuperscript{395} directed by the budget revenue reconciliation process\textsuperscript{396} and derived (as in the case of the PTP and PSC provisions) from earlier, broader Treasury and Joint Committee studies.\textsuperscript{397} To the extent future tax revisions thus reverse the dominant, but not exclusive pattern of 1954 Code "reform" by gradually broadening the base, rather than gradually narrowing it\textsuperscript{398} (note that Chairman Rostenkowski now appears to favor the base broadening course\textsuperscript{399}), consistent treatment of all large limited partnerships in which most owners do not materially participate and of all entities in which the owners do materially participate might at last be obtained.

\textsuperscript{392} See supra note 217 and accompanying text.
\textsuperscript{393} See supra notes 306-309 and accompanying text.
\textsuperscript{394} "Hope springs eternal in the human breast. Man never Is, but always To be blest." Alexander Pope, An Essay on Man [1733-34] Epistle I, 1.95.
\textsuperscript{395} This is the pattern of the 1982, 1984 and 1987 tax acts. See supra notes 48, 53 and accompanying text.
\textsuperscript{396} See id.
\textsuperscript{397} See supra note 54.
\textsuperscript{398} See supra notes 371-375 and accompanying text.
\textsuperscript{399} See supra note 55 and accompanying text.