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Why Section 179(b)(3)(A)'s Business Income Limitation Does Not Apply to Partnerships and S Corporations

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Why Section 179(b)(3)(A)'s Business Income Limitation Does Not Apply to Partnerships and S Corporations

by
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Abstract

This article breathes new life into the argument Section 179(b)(3)(A)'s business income limitation does not apply to partnerships and S corporations. On the other side of the debate sits the Tax Court's 1999 *Hayden* decision affirmed by the Seventh Circuit in early 2000. Those authorities buttress Treasury's Section 1.179-2(c)(2) promulgation as valid. While the odds appear to be formidable to otherwise construe the business income limitation, this article challenges the court decisions and regulatory promulgation as inconsistent with the plain meaning of the statute and Congress's underpinning policy objectives.

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I
Introduction

The Tax Court's 1999 *Hayden* decision was the first time the judicial department addressed the issue whether Section 179(b)(3)(A)'s business income limitation applies to partnerships.[1] The Tax Court's affirmation that the business income limitation did indeed apply to partnerships was upheld on appeal to the Seventh Circuit.[2] In the process, both courts sustained the validity of Treasury Regulation 1.179-2(c)(2) against the taxpayer's challenge.[3]

This article supplants the *Hayden* taxpayers' validity argument by challenging Treasury Regulation 1.179-2(c)(1) as an impermissible expansion of the statute's language by including this sentence in paragraph (1):[4]

> For purposes of section 179(b)(3) and this paragraph (c), the aggregate amount of taxable income derived from the active conduct by an *individual, a partnership, or an S corporation* of any trade or business is computed by aggregating the *net income (or loss)* from all of the trades or businesses actively conducted by the individual, partnership, or S corporation during the taxable year.

The emphasized language bears witness to an appearance Treasury foresaw the partnership taxable income issue the *Hayden* courts eventually decided in its favor.

This article condemns the *Hayden* decisions as problematic and Treasury Regulation Section 1.179-2(c)(1) and (2) as impermissible expansions of the statute's plain and obvious language on two inextricable fronts. First, taxable income of a partnership is not qualitatively equal to taxable income of individuals or C corporations. The *Hayden* court decisions failed to properly characterize this distinction. The *Hayden* courts should have counseled that while the notion of a "taxpayer" applies equally to partnerships and individuals for Section 179(b)(1) and

[1] See *Hayden v. Commissioner*, 112 T.C. 115 (1999) ("*Hayden* TC").
[2] See *Hayden v. Commissioner*, 204 F.3d 772 (7th Cir. 2000), *aff'g*, 112 T.C. 115 ("*Hayden* 7th Cir."). Note, the Seventh Circuit's geographic jurisdiction embraces the Central, Northern, and Southern Districts of Illinois, the Northern and Southern Districts of Indiana, and the Eastern and Western Districts of Wisconsin.
[3] See *Hayden* TC at 121; also see *Hayden* 7th Cir. at 774-75.
[4] See Treasury Regulation Section 1.179(c)(1) (*emphasis added*).

(2) purposes, the Section 179(b)(3)(A) notions of "taxpayer" and "taxable income" do not. Had they done so, both decisions would have invalidated Treasury Regulation Sections 1.179-2(c)(1) and (2).

Second, the *Hayden* taxpayer failed to raise the inextricable issue involving Section 179(b)(3)(A)'s requirement that taxable income "derived from the active conduct by the taxpayer of any trade or business" is contextually qualified by Section 469's passive activity loss rules, particularly the Section 469(c)(1)(B) participation conclusive presumption.[5] Within the Section 469 context, partnerships do not engage in the *active* conduct of a trade or business because active conduct implicates only the aforementioned participation conclusive presumption.[6] It can only be said partnerships engage in the conduct of a trade or business, which implicates the Section 469(c)(1)(A) activity conclusive presumption.[7] Moreover and for underpinning policy reasons, this article concludes while Section 179(d)(8) extends the Section 179(b)(1) and (2) dollar limitation to partnerships and partners alike, it only extends Section 179(b)(3)(A)'s business income limitation to partners but not to partnerships.[8]

II
The Hayden *Decisions*

Let us begin substantive discussion by reviewing the *Hayden* decisions. Dennis and Sharon Hayden were the sole members in a Frankfort, Indiana limited liability company ("LLC") treated as

[5] For a discussion regarding the Section 469(c)(1)(B) participation conclusive presumption see D. R. Jenkins, "Section 469 Activity and Participation Conclusive Presumptions," *Journal of Taxation*, 125(4), October 2016, pp. 168-179 (Section 469 Paper).
[6] *Ibid.*
[7] *Ibid.*
[8] Some commentators may consider that Section 168(k), as modified by the Tax Cuts and Jobs Act of 2017, now overrides the importance of Section 179. One important difference between Sections 179 and 168(k), even after the recent changes, is the Section 179(d)(5)(B) noncorporate lessor conclusive presumption. Section 469(c)(2) provides that all rental activity is *per se* passive activity. The Section 469(c)(2) rental real property trade or business activity conclusive presumption is one exception to this mandate. See Section 469 Paper. The other exception to the Section 469(c)(2) mandate is the Section 179(d)(5)(B) noncorporate lessor rental activity conclusive presumption. Section 168(k) does not have such a preemptive conclusive presumption. Conclusive presumptions are an affirmative defense to an IRS equitable challenge. See, D. R. Jenkins, "A Note on the Noncorporate Lessor Activity Conclusive Presumption," *Journal of Taxation*, 128(2) February 2018. (expected). Therefore, taxpayers relying on the noncorporate lessor conclusive presumption will prefer Section 179 expensing over Section 168(k) bonus depreciation notwithstanding changes wrought by the Tax Cuts and Jobs Act of 2017.

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a partnership for federal income tax purposes.[9] The LLC commenced operations on September 1, 1994 and purchased Section 179 property, placing same in service during the 1994 calendar-based taxable year.[10] The partnership's Form 1065 showed an operating loss, pre-Section 179 depreciation.[11] The partnership's Form 4562 claimed a Section 179 deduction in the amount of $17,500, which passed through to the Haydens' Form 1040, Schedule E.[12] On audit, the IRS disallowed the Section 179 deduction.[13] The Haydens filed a timely Petition for Redetermination in the United States Tax Court.[14]

The Tax Court recognized the partnership's 1994 Section 179 depreciation deduction did not exceed the Section 179(b)(1) and (2) dollar limitation.[15] Rather the Tax Court focused its decision on whether the partnership's Section 179 $17,500 expense was limited by Section 179(b)(3)(A)'s business income limitation.[16]

In the first instance, the *Hayden* Tax Court noted Section 179(d)(8) provided in material part "[i]n the case of a partnership, the limitations of subsection (b) shall apply with respect to the partnership and with respect to each partner."[17] Without further analysis, the *Hayden* Tax Court cited Treasury Regulation Section 1.179(c)(2):[18]9

> The taxable income limitation * * * applies to the partnership as well as to each partner. Thus, the partnership may not allocate to its partners as a section 179 expense deduction for any taxable year more than the partnership's taxable income limitation for that taxable year, and a partner may not deduct as a section 179 expense deduction for any taxable year more than the partner's taxable income limitation for that taxable year.

[9] *Hayden* TC at 116. Dennis Hayden was a Certified Public Accountant. The Haydens represented themselves, *pro se*, in both the Tax Court and Seventh Circuit proceedings.
[10] *Ibid*.
[11] *Ibid*.
[12] *Ibid*.
[13] *Ibid*.
[14] *Ibid*.
[15] See *Hayden* TC at 117.
[16] *Ibid*.
[17] *Ibid quoting* Section 179(d)(8).
[18] *Ibid* at 117-18, *quoting* Treasury Regulation Section 1.179(c)(2).

The Tax Court noted the taxpayers acknowledged that under the foregoing regulation the partnership's Section 179 $17,500 deduction is not allowable; and, further acknowledged their sole responsive argument was that Section 1.179(c)(2) was invalid.[19] Thereupon, the Tax Court set the stage for rebuking the taxpayers' invalid regulation argument.

First, the *Hayden* Tax Court reviewed a select few guidelines in considering whether a Treasury Regulation should be sustained. The Tax Court noted the primary consideration is that a Treasury Regulation must be sustained if it implements the congressional mandate in some reasonable manner.[20] The tax tribunal counseled that courts refuse to displace the Commissioner's regulation with a judicial construction when the former is reasonably based.[21] The Tax Court's valid Treasury Regulation soliloquy concluded by noting regulations must be sustained unless unreasonable and plainly inconsistent with the revenue statutes.[22]

Indulge noting a few relevant weaknesses in the *Hayden* Tax Court's valid regulation legal analysis. In the first instance, it appears to be well settled that when the judicial department is able to measure executive interpretation against a specific provision of the tax code the executive interpretation is owed less deference than a regulation issued under a specific grant of authority to define a statutory term or prescribe a method of executing a statutory provision.[23] While Section 179's plain language empowered the executive specific grants of legislative regulatory authority, Congress did not empower Treasury to 1) conclude Section 179(d)(8) imposed the Section 179(b)(3)(A) business income limitation at the partnership level, 2) define Section 179(b)(3)(A)'s "taxable income" notion, and as well be relevant later in this article, 3) define

[19] *Ibid* at 118.
[20] *Ibid citing United States v. Vogel Fertilizer*, 455 U.S. 16, 24 (internal citations omitted). Also see *Rowan Cos., Inc. v. United States*, 452 U.S. 247, *citing United States v. Correll*, 389 U.S. 299, 307 (1967) (the same decision cited by the Court in *Vogel Fertilizer*, *supra*).
[21] *Ibid citing Schaefer v. Commissioner*, 105 T.C. 227, 230 (1995) (internal citations omitted).
[22] *Ibid citing Commissioner v. South Texas Lumber Co.*, 333 U.S. 496, 501 (1948).
[23] See *Rowan*, *supra*, at 253 (internal citations omitted).

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"active conduct by the taxpayer of any trade or business" as that term is used in Section 179(b)(3)(A). As a result of these enumerated matters, it can be said the judicial department owes Treasury's regulatory interpretations less deference on these three points.[24]

Two other infirmities in the Tax Court's valid regulation analysis are relevant in this article's discourse. First, the Supreme Court has expounded the meaning of "implementing the Congressional mandate in some reasonable manner." It has held courts should look to see whether the regulation harmonizes with 1) the plain language of the statute, 2) the statute's origin, and 3) the statute's purpose.[25] It is plain and obvious Section 179's policy objective is to provide an impetus to small business capital formation. This article demonstrates the *Hayden* courts failed to counsel that policy objective and Treasury likewise ignored it when it promulgated Section 1.179-2(c)(1) and (2).

The Supreme Court has further held the judicial department must inquire whether an executive regulation is a substantially contemporaneous construction of the statute by those presumed to have been aware of congressional intent.[26] This article demonstrates the *Hayden* Tax Court failed to harmonize the statute's contemporaneous construction. Specifically, the *Hayden* Tax Court failed to consider Section 179(b)(3)(A)'s business income limitation and Section 469's passive activity loss rules were both enacted in the Tax Reform Act of 1986 (TRA86). The harmony is wanting because, as this article demonstrates, the latter statute contextually qualifies the meaning of the former statute's term "active conduct by the taxpayer of any trade or business" to limit the taxpayer reference therein to those taxpayers described in Section 469(a)(2).

[24] *Ibid*.
[25] *Ibid citing National Muffler Dealers Association v. United States*, 440 U.S. 472, 477 (1979).
[26] *Ibid*.

Let us follow the *Hayden* Tax Court's nominal review of Section 179's legislative history. It began by noting Section 179 first became a part of the tax code in the passage of the Small Business Tax Revision Act of 1958.[27] At the time of this initial enactment, Section 179(b) had only a dollar limitation: 20% of the amount of Section 179 property placed in service up to a maximum of $10,000. In this initial legislation, the dollar limitation was not reduced dependent on the total amount of Section 179 property placed in service.[28] Moreover, in the 1958 enactment of Section 179, the provision's reference to "taxpayer" was unqualified.

The *Hayden* Tax Court further noted Section 179(d)(8) was first enacted in the Tax Reform Act of 1976 (TRA76).[29] At that time, Section 179(d)(8) provided:

> (8) Dollar limitation in case of partnerships and S corporations. In the case of a partnership, the dollar limitation contained in subsection (b)(1) shall apply with respect to the partnership and with respect to each partner. A similar rule shall apply in the case of an S corporation and its shareholders.

As can be seen, the foregoing 1976 provision only applied to the dollar limitation contained in Section 179(b)(1). The original incorporation of Section 179(d)(8) necessarily meant the dollar limitation applied both at the partnership and the partner levels. The business income limitation wouldn't become a part of the tax code for another ten years.

The *Hayden* Tax Court concluded that in order to sustain the taxpayer's position it would "have to read the Section 179(b)(3)(A) limitation out of Section 179(d)(8)."[30] The tribunal concluded it could not do so.[31] Rather, the *Hayden* Tax Court, citing a Tax Court Memorandum

[27] See *Hayden* TC at 118, *citing* Pub. L. 85-866, 72 Stat. 1606, 1676.
[28] See Small Business Tax Revision Act of 1958, Section 204. At the inception, Section 179 was considered a form of depreciation. It would not be transformed to an "expense" until the Economic Recovery Tax Act of 1981 (ERTA), Pub. L. 97-34, Section 202(a), 95 Stat. 172. See *Hayden* TC at 118-19. In TRA86, it was transformed back to a depreciation deduction. See Staff of Joint Comm. on Taxation, General Explanation of the Tax Reform Act of 1986 (Jt. Comm. Print 1987), at 110. As a result, and in this article, I interchangeably refer to the Section 179 deduction as an expense or depreciation.
[29] See Pub. L. 94-455, Section 213(a), 90 Stat. 1525, 1547.
[30] See *Hayden* TC at 121.
[31] *Ibid*.

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Opinion,[32] substantively construed Section 179(d)(8) as requiring that its terms apply to all subsection (b) limitations regardless of any subsection (b) paragraph's express language or unique underpinning policy objective.[33] The *Hayden* Seventh Circuit's decision likewise takes the substantive position Section 179(d)(8) requires that its terms apply to each and every subsection (b) limitation without regard to any respective limitation's express language or underpinning policy objective.[34]

Neither the *Hayden* taxpayer nor the IRS disputed the Section 179(b)(1) dollar limitation applied both at the partnership level and at the partner level. The $17,500 limitation amount at bar in the *Hayden* decision was introduced by the Small Business Job Protection Act of 1996.[35] Accordingly, the amount of the Section 179 expense subject to the dollar limitation in *Hayden* was $17,500.

The taxpayers made two contentions to support their argument Treasury Regulation Section 1.179-2(c)(2) was invalid. First, they argued a partnership is not a taxpayer within the meaning of Section 7701(14). Their argument pleaded that since, pursuant to Section 701, a partnership did not pay taxes it could not be a taxpayer.[36] Accordingly, Section 179(b)(3)(A) could not apply to a partnership.[37] Second, the *Hayden* taxpayers argued that a partnership's trade or

[32] *Ibid citing Green v. Commissioner*, T.C. Memo 1998-356 (applying Section 179(b)(3)(A) to an S corporation). In citing *Green* the *Hayden* Tax Court ignored its own policy not to consider Tax Court Memorandum Opinions as controlling precedent. See *Nico v. Commissioner*, 67 T.C. 647, 654 (1977).

[33] The *Hayden* Tax Court recognized Section 179(d)(8) "does not say that only subsection (b)(1) and (2) shall apply." *Ibid*. Later in this article, I demonstrate underpinning policy considerations distinguish that while Section 179(d)(8) applies to partnerships for dollar limitation purposes, it does not apply to partnerships for business income limitation purposes. In the latter setting, it becomes clear when Congress changed the language of Section 179(d)(8) in TRA86 it generalized the TRA76 language to apply to partnerships for any current or prospective subsection (b) limitation as a particular limitation's express language so demands but not when it does not. Such statutory construction flexibility allows Congress to add further subsection (b) limitations without changing Section 179(d)(8)'s language.

[34] See *Hayden* Seventh Circuit at 775.

[35] See Pub. L. 104-188, Section 111(a).

[36] See *Hayden* TC at 119-120.

[37] See *Hayden* TC at 119.

business activity should be measured by its gross income and not its bottom line ordinary business income.[38] The *Hayden* Tax Court rejected both arguments.[39]

The *Hayden* Tax Court's taxpayer-adverse reasoning began by recognizing the Section 179(b)(3)(A) business income limitation was first introduced in the TRA86.[40] It proves interesting the Tax Court noted an important difference in the underpinning Senate Finance Committee Report, the House Conference Report, and the Staff of the Joint Committee on Taxation Report.[41] The Tax Court recognized that while the Senate Report would impose the Section 179(b)(3)(A) business income limitation on each of the taxpayer's trades or businesses, the House Conference and Joint Committee reports finalized the condition in terms of taxable income from *any* of the taxpayer's trades or businesses. The distinction becomes important when Section 469's contextual qualification of the Section 179(b)(3)(A) business income limitation is understood because "any of the taxpayer's trades or businesses" is Section 469(c)(1)(B) participation conclusive presumption incident.[42] That is, the business income limitation's "taxable income" aggregates all trade or business ordinary income in which the taxpayer materially participates.

The *Hayden* Tax Court correctly rejected the petitioners' argument partnerships are not taxpayers.[43] The Tax Court pointed to Section 7701(14)'s definition of a taxpayer as any person subject to internal revenue taxes.[44] While partnerships are not subject to subtitle A income taxes, they are subject to subtitle C employment taxes.[45] Accordingly and as the *Hayden* Tax Court concluded, partnerships are taxpayers for subtitle A purposes unless there is a qualification that

[38] *Ibid*.
[39] *Ibid*.
[40] See Pub. L. 99-514, Section 202(a).
[41] See *Hayden* TC at 119 *citing* S. Rept. 99-313 at 106 (1986), 1986-3 C.B. (Vol. 3), p. 106; H. Conf. Rept. 99-841, at II-49 (1986), 1986-3 C.B. (Vol. 4) 1, 49; and, Staff of Joint Comm. on Taxation, General Explanation of the Tax Reform Act of 1986 (Jt. Comm. Print 1987), at 109.
[42] See Section 469 Paper, *supra*.
[43] *Ibid* at 119-20.
[44] *Ibid*.
[45] *Ibid*.

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limits the scope of relevant taxpayers. This article acquiesces only to the extent that Section 179(a)'s reference to taxpayers is unqualified and, as a result, partnerships are properly and generally considered Section 179(a) taxpayers.

Spuriously, the *Hayden* taxpayer next argued Section 179(b)(3)(A) required measuring its business income limitation at the level of a partnership's gross receipts and not its ordinary business income.[46] The Tax Court rejected this frivolous argument.[47] The *Hayden* taxpayer did not raise the issue that Section 469 contextually qualified Section 179's business income limitation as applicable only to Section 469(a)(2) taxpayers.[48]

The *Hayden* taxpayer also did not raise the issue that applying the dollar limitation to partnerships furthered Congress's underpinning policy objectives while applying the business income limitation to partnerships was contrary to Congress's underpinning policy objectives. The *Hayden* taxpayer failed to argue this important statutory construction tenet in the Tax Court proceeding. Such incomplete argument impairs the quality of important legal precedent affecting small business capital formation.

The *Hayden* taxpayers appealed the Tax Court's adverse decision to the United States Court of Appeals for the Seventh Circuit.[49] The Seventh Circuit's reported decision did not remark any legal analysis that would supplant, amend, or otherwise be distinguished from the Tax Court's legal analysis. Notably, the Seventh Circuit also did not reason its legal conclusions grounded in the statute's underpinning intent, nor did it consider Section 469's contextual qualification of Section 179's business income limitation.

[46] *Id* at 121.
[47] *Ibid*.
[48] The commonality of Section 469(a)(2) taxpayers is that they're all subject to subtitle A income taxes and a requirement of actively conducting (*i.e.*, materially participating in) a trade or business. Notably, neither partnerships nor S corporations are among the set of Section 469(a)(2) taxpayers.
[49] See *Hayden* 7th Cir., *supra*.

III
Section 179's Taxpayer and Taxable Income Notions

Section 7701(14) defines the term "taxpayer" as any person subject to any internal revenue tax. Generally, the set of internal revenue taxes are defined in the first five subtitles of Title 26, U.S.C., to wit:

a. Subtitle A-Income Taxes,
b. Subtitle B-Estate and Gift Taxes,
c. Subtitle C-Employment Taxes,
d. Subtitle D-Miscellaneous Excise Taxes, and
e. Subtitle E-Alcohol, Tobacco, and Other Excise Taxes.

Unless otherwise specifically qualified in a given statute, the term "taxpayer" equally describes an individual, a partnership, an S corporation, a C corporation, a personal service corporation, a trust, or an estate notwithstanding the person's subtitle origin of internal revenue tax incidence.

Section 179(a) reads:[50]

> A taxpayer may elect to treat the cost of any section 179 property as an expense which is not chargeable to capital account. Any cost so treated shall be allowed as a deduction for the taxable year in which the section 179 property is placed in service.

Note, the term "taxpayer" as used in Section 179(a) is not qualified. As a result, Section 179 taxpayers potentially include any Section 7701(14) taxpayer. However, estates and trusts are specifically excluded from Section 179 expensing.[51] Moreover, personal service corporations are not involved in active trades or businesses. Accordingly, Section 179(a) taxpayers only include individuals, partnerships, S corporations, and C corporations.

[50] Section 179(a) converts a cost chargeable to a capital account to an expense. As a result, and to the extent of this conversion, Section 179 expensed capital is not subject to Section 167 depreciation.
[51] See Section 179((d)(4).

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Familiarly, the two limitations found in Section 179(b) that apply to all Section 179 taxpayers and to all Section 179 property include paragraph (1) and (2)'s dollar limitation and paragraph (3)'s business income limitation. Specifically, paragraph (1) presently provides:[52]

> (1)DOLLAR LIMITATION. The aggregate cost which may be taken into account under subsection (a) for any taxable year shall not exceed $500,000.

Also presently, paragraph (2) provides:[53]

> (2)REDUCTION IN LIMITATION. The limitation under paragraph (1) for any taxable year shall be reduced (but not below zero) by the amount by which the cost of section 179 property placed in service during such taxable year exceeds $2,000,000.

Reading paragraphs (1) and (2) within the context of subsection (a) means an individual, partnership, C corporation, or S corporation may expense up to $500,000 of Section 179 property and that the expense is reduced dollar for dollar once the amount of Section 179 property placed in service in the taxable year exceeds $2,000,000. Moreover, Section 179(d)(8) causes the Section 179 dollar limitation to apply both at the partnership level and at the partner level since the notions of a Section 179(b)(1) partnership taxpayer and a Section 179(b)(1) partner taxpayer are equal without distinction.

Poignantly, all Section 7701(14) taxpayers are equal in definition of the term "taxpayer" anywhere throughout Title 26, U.S.C., unless specifically indicated otherwise. That is, with respect to Section 7701(14) taxpayers, there is no (endogenous subtitle, exogenous subtitle) distinction. This subtitle-distinction-less quality means all Section 7701(14) taxpayers are equal for purposes of the Section179(b)(1) and (2) dollar limitation. On the other hand, Congress did not define the term "taxable income" among the terms it chose to define in Section 7701.

[52] See Section 179(b)(1).
[53] See Section 179(b)(2).

It appears Congress did not define the term "taxable income" in Section 7701 because of the complexities of confounded (Internal Revenue Tax, Section 7701(14) Taxpayer) interrelationships. Construing the meaning of "taxable income" in a given statute becomes confusing when court decisions and administrative rules and regulations fail to distill [(endogenous subtitle internal revenue tax), (endogenous subtitle taxpayer, exogenous subtitle taxpayer)] combination significance.

Here, the term "Exogenous Taxable Income" refers to the combination of an endogenous subtitle internal revenue tax and a person who is defined as a taxpayer solely because of the imposition of an exogenous subtitle internal revenue tax. That is, Exogenous Taxable Income = f(Endogenous Subtitle Internal Revenue Tax, Exogenous Subtitle Taxpayer).

For purposes of this article, the term "Endogenous Taxable Income" implicates the combination of endogenous subtitle internal revenue tax and a person who is defined as a taxpayer, *inter alia*, because of the imposition of an endogenous subtitle internal revenue tax. That is, Endogenous Taxable Income = f(Endogenous Subtitle Internal Revenue Tax, Endogenous Subtitle Taxpayer). Importantly, Endogenous Taxable Income ≠ Exogenous Taxable Income because of the fineness of the subtitle taxpayer distinction.

It can be said that Endogenous Taxable Income is meaningful because it has actual internal revenue tax consequences while, at the same time, it can be said Exogenous Taxable Income is not meaningful because it has illusory internal revenue tax consequences. Endogenous Taxable Income has actual internal revenue tax consequences because the incidence of the Endogenous Subtitle Internal Revenue Tax befalls the Endogenous Subtitle Taxpayer. Exogenous Taxable Income has illusory internal revenue tax consequences because the incidence of the Endogenous Subtitle Internal Revenue Tax is not the Exogenous Subtitle Taxpayer. Accordingly, (Endogenous,

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Exogenous) distinctions are valid when construing Section 179(b)(3) as contextually qualified by Section 179(d)(8), if only because of this distinction.

First, since the definition of a taxpayer within the meaning of the Section 179(b)(1) and (2) dollar limitation is without "taxable income" distinction, then Section 179(d)(8)'s contextual qualification of that provision with respect to partnerships and partners is likewise without distinction. This lack of taxable income distinction means Section 179(b)(1) and (2)'s dollar limitation should be construed to properly apply at both the partnership and partner levels.[54]

On the other hand and because Exogenous Taxable Income is endowed with illusory internal revenue tax consequences, Section 179(d)(8)'s contextual qualification of Section 179(b)(3)(A) means the business income limitation does not apply at the partnership level.[55] Likewise and because Endogenous Taxable Income is endowed with actual internal revenue tax consequences, Section 179(d)(8)'s contextual qualification of Section 179(b)(3)(A) means the business income limitation does apply at the partner level.[56]

In construing any statute throughout Title 26, U.S.C., the foregoing taxpayer and taxable income distinctions should be adopted as the authoritative guide unless Congress clearly speaks otherwise. Else, the inherent confusion materially, significantly, and adversely affects risk-return combinations and the allocation of scarce resources.[57] This is so because such confusion results in widening the expected outcome's variance, concomitantly lowering its expected return. As

[54] Later in this article I explain Congress's substantive underlying policy objective in applying the dollar limitation at the partnership level is to increase or sustain contributions to America's productivity through ordinal diversification or Section 704(b) special allocations.
[55] Later in this article I explain applying the business income limitation at the partnership level frustrates Congress's aforedescribed policy objective.
[56] Later in this article I explain by contextually qualifying the business income limitation with the Section 469(c)(1)(B) participation conclusive presumption Congress adds to its policy objectives. However, any attempt to contextually qualify the business income limitation with the Section 469(c)(1)(A) activity conclusive presumption simply doesn't make any productivity contribution policy sense.
[57] See D. R. Jenkins, "Section 469(c)(7) Procedure, Practice, and Regulatory Implications," *Journal of Taxation*, 125(6), December 2016, pp. 270-278; D. R. Jenkins, "Treasury's Contract Harvesting Farming Business Definition Executive Fiat," *Drake Journal of Agricultural Law*, 22(2), Summer 2017, forthcoming (Contract Harvesting Paper); and D. R. Jenkins, "Treasury's Passive Activity Interest Abuse of Power," *Journal of Taxation of Investments*, 34(3), Spring 2017, pp. 51-69 (Treasury's Abuse of Power Paper).

demonstrated later in this article, such a confused outcome undermines the articulated policy objective.[58]

When provisions like Section 703 refer to the "taxable income of a partnership" it should be construed to implicate the (Exogenous: Endogenous) Taxable Income transition.[59] That is and under such circumstances, statutory construction must always transition illusory internal revenue tax consequences into actual internal revenue tax consequences. Inherently, Section 703 does speak in terms of the (Exogenous: Endogenous) Taxable Income transition because it declares the taxable income of a partnership shall be computed in the same manner as in the case of and individual with certain exceptions.[60]

Therefore, it can be said when the *Hayden* Tax Court compared Section 703's (Exogenous: Endogenous) Taxable Income transition to Section 179(b)(3)(A)'s Endogenous Taxable Income, it was comparing "apples to oranges." To this extent, then, the *Hayden* Tax Court's decision is clearly erroneous. Likewise and to the same extent, the *Hayden* Seventh Circuit's decision is clearly erroneous.

The (Endogenous, Exogenous) Taxable Income issue is inextricably intertwined with the issue that Section 469 contextually qualifies Section 179(b)(3)(A)'s business income limitation. That means the Section 179(b)(3)(A) taxpayer reference is limited to Section 469(a)(2) taxpayers. Since all Section 469(a)(2) taxpayers are subject to subtitle A internal revenue taxes, such contemporaneous statutory construction concomitantly limits the meaning of Section

[58] *Ibid*.
[59] The Fifth Circuit's decision in *Williams v. Commissioner*, 637 Fed. Appx. 799, 803 (5th Cir. 2016), captures the essence of the (Exogenous: Endogenous) Taxpayer transition (Thus, in a real sense an S corporation is not a taxpayer; rather, its shareholders are taxpayers. Because S corporations do not pay taxes directly, there was no need for Section 469 to include S corporations in its list of potential "taxpayers"). TRA86 committee reports support the *Williams* analysis and this article's notion of the (Exogenous: Endogenous) Taxpayer transition. See S.Rpt. 99-313, *supra*, at 740 (Rather, the activity rules generally are applied by disregarding the scope of passthrough entities such as partnerships and S corporations).
[60] See Section 703.

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179(b)(3)(A)'s reference to taxable income to Endogenous Taxable Income. Accordingly, it can be said both the *Hayden* Tax Court and *Hayden* Seventh Circuit committed plain and obvious error by holding Section 179(b)(3)(A)'s reference to taxable income properly includes a reference to partnership taxable income. Moreover, by the measure of the foregoing analysis, Treasury's promulgation of Sections 1.179-2(c)(1) and (2) is an impermissible executive fiat.

III
Section 469's Contextual Qualification of Section 179

My article published in The Journal's Fall 2014 issue, "Why Section 530 of the Revenue Act of 1978 Applies to the States," gave birth to characterizing one statute construing the meaning of similar words or terms in other statutes as "contextual qualification."[61] Substantively, the *Rowan* Supreme Court's statutory construction technique underpins the meaning of the term.[62] A review of that decision's facts and holding makes the notion plain and obvious.

The *Rowan* taxpayer employed personnel on off-shore drilling rigs.[63] The employees were accommodated meals and lodging for the convenience of the employer within the meaning of Section 119.[64] Then prevailing Treasury Regulations recognized the authority of the Section 119 exclusion for Section 3402 income tax withholding purposes.[65] However, Treasury's regulations under Section 3101 (FICA tax) and Section 3301 (FUTA tax) required inclusion of the value of the Section 119 excluded meals and lodging.[66]

As explained in my 2014 article, the Supreme Court substantively held that when Congress enacted Section 119 it contextually qualified the meaning of wages for both subtitle A and subtitle

[61] See D. R. Jenkins, "Why Section 530 of the Revenue Act of 1978 Applies to the States," *The Contemporary Tax Journal*, 4(1), Fall 2014, pp. 9-20 (Section 530 Paper).
[62] See Section 530 Paper *citing Rowan*, *supra*.
[63] *Ibid*.
[64] *Ibid*.
[65] *Ibid*.
[66] *Ibid*.

C purposes.[67] Accordingly, the Court held Treasury's Sections 3101 and 3301 regulations to be invalid.[68] As a result, it can be said my Section 530 Paper recognizes contextual qualification may be a function of relative juxtaposition in the United States Code.[69] Importantly and since Section 530 of the Revenue Act of 1978 sits outside the entire United States Code, it contextually qualifies the term employee for purposes of the entire United States Code.[70]

In a *Journal of Taxation* article I explained that by properly invoking a plan asset rule exception a conclusive presumption results that the Section 4975 impounded investment risk diversification standard is contextually qualified to be on a par with investment risk diversification for a public security portfolio and, therefore, policy compliant.[71] In a *Journal of Pension Planning & Compliance* article I explained Section 4975 contextually qualifies ERISA's[72] policy provisions by impounding Section 4975 management and investment risk diversification policy requirements. In the same article I explained the tax code's enforcement provisions contextually qualify its policy empowering provisions because the former reveals the breadth and scope of the latter.[73]

To this end, it can be said Section 469 contextually qualifies Section 179. Section 469's passive activity rules operate similar to an enforcement provision because that section defines boundaries for determining when a taxpayer actively conducts a trade or business for purposes of taking loss deductions generated by any other tax code provision. While Section 469's statutory language does not expressly say as much, the underpinning committee reports do say as much.[74]

[67] *Ibid*.
[68] *Ibid*.
[69] See Section 530 Paper, *supra*.
[70] *Ibid*.
[71] See D. R. Jenkins, "Building Prohibited Transaction Chinese Walls for Retirement Plan Investment Structures," *Journal of Taxation*, 123(5), November 2015, pp. 218-30 (Jenkins' PTCW Paper). Also see D. R. Jenkins, "Got Your Assets Covered?," *Journal of Pension Planning & Compliance*, 42(2), Summer 2016, pp. 1-25, at 9.
[72] ERISA refers to the Employee Retirement Income Security Act of 1974, Pub.L, 93-406, 88 Stat. 829 (September 2, 1974).
[73] *Ibid* at 11.
[74] See General Explanation of the Tax Reform Act of 1986, Pub. L. 99-514, at 218 (1987) (The passive loss rule applies to all deductions that are

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Section 469 provides losses from passive activities are disallowed.[75] Importantly, Section 469(a)(2) limits the provisions application to individuals, estates, trusts, closely held C corporations, and any personal service corporation. It notably does not apply to partnerships or S corporations.[76]

A passive activity is defined as any activity which involves a trade or business in which the taxpayer does not materially participate.[77] It is plain and obvious that the complement of "does not materially participate" is "actively conducts." This is the heart of the Section 469(c)(1)(B) participation conclusive presumption.[78] Thus, it can be said that a taxpayer who materially participates in a trade or business actively conducts such trade or business.

Because partnerships and S corporations are not Section 469(a)(2) taxpayers, the Section 469(c)(1)(B) participation conclusive presumption does not apply to those entities.[79] Thus, while it can be said a partnership or S corporation may conduct a trade or business, it cannot be said, within the meaning of Section 469, that a partnership or S corporation can be conclusively presumed to *actively* conduct a trade or business.[80]

Had the *Hayden* taxpayer raised the issue that Section 469 contextually qualifies Section 179's business income limitation, both the *Hayden* Tax Court and *Hayden* Seventh Circuit decisions would have had a different outcome. The Supreme Court made it clear that courts are required to

from passive activities.) Also see, Conference Report, Tax Reform Act of 1986 (H.R. 3838), at II-139 (1986) (It is clarified that the passive loss rule applies to all deductions that are from passive activities . . .).

[75] See Section 469(a)(1).

[76] However, either a partnership or an S corporation can be a Section 469(c)(7) taxpayer for purposes of a rental real property Section 469(c)(1)(A) activity conclusive presumption. But, they are not taxpayers for purposes of the Section 469(c)(1)(B) participation conclusive presumption as defined by Section 469(h)(1). See Section 469 Paper, *supra*.

[77] See Section 469(c)(1).

[78] See Section 469 Paper, *supra*.

[79] *Ibid*. Also see *Williams*, *supra*.

[80] *Cf.* J. W. Lee, "'Active Conduct' Distinguished from "Conduct" of a Rental Real Estate Business," *Faculty Publications*, *William & Mary Law School Scholarship Repository*, (1972) available at: http://scholarship.law.wm.edu/facpubs/610/.

consider contemporaneous statutory construction in determining Treasury Regulation validity.[81]

In TRA86, Congress concomitantly—

1. Changed Section 179(d)(8) to its present reading,[82]
2. Introduced the Section 179(b)(3)(A) business income limitation, *and*
3. Introduced Section 469's passive activity loss rules.

Accordingly, the Supreme Court's mandate to give a contemporaneous construction to Section 179(b)(3)(A)'s business income limitation involves all three provisions, one in relation to the other.

It is plain and obvious multiple references to a "taxpayer" within the same tax code section can mean different things. For example, we know Section 469(c)(1)(B)'s participation conclusive presumption only applies to Section 469(a)(2) taxpayers meeting the Section 469(h)(1) material participation requirements.[83] At the same time, Section 469(c)(7) taxpayers are Section 7701(14) taxpayers (any subtitle taxpayers), a larger set of taxpayers than the set of Section 469(a)(2) taxpayers (subtitle A taxpayers).[84] This means that any taxpayer among the larger set of Section 7701(14) taxpayers can establish the Section 469(c)(1)(A) activity conclusive presumption for rental real property trades or businesses.[85]

Since only Section 469(a)(2) taxpayers can be conclusively presumed to *actively* conduct a trade or business, then the Section 179(b)(3)(A) requirement that the taxable income be "derived from the *active conduct by the taxpayer* of any trade or business" limits the taxpayer definition for

[81] See *Rowan*, *supra*, at 253 *citing National Muffler Dealers Association v. United States*, 440 U.S. 472, 477 (1979).
[82] Prior to TRA86, Section 179(d)(8)'s scope was limited to Section 179(b)(1)'s dollar limitation. The generalized wording of Section 179(d)(8) imposes a requirement to consider whether any subsection (b) limitation, present or future, applies at both the partnership and partner levels. As in the case of Section 179(b)(3)(A), it does not apply at both the partnership and partner level because of the express wording of that paragraph.
[83] See Section 469 Paper, *supra*.
[84] *Ibid*.
[85] *Ibid citing Aragona Trust v. Commissioner*, 142 T.C. 165 (March 27, 2014).

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that subparagraph (A) purpose to Section 469(a)(2) taxpayers.[86] Moreover and since the commonality of Section 469(a)(2) taxpayers is that they are all subject to subtitle A internal revenue taxes, the Section 179(b)(3)(A) term "taxable income" points solely to the notion of Endogenous Taxable Income explained in an earlier section in this article. Since neither partnerships nor S corporations are taxpayers characterized by Endogenous Taxable Income,[87] it can be concluded the *Hayden* Tax Court and *Hayden* Seventh Circuit committed plan and obvious error by ascribing Section 179(b)(3)(A) taxable income to partnerships (or S corporations).[88]

[86] *Emphasis added.*
[87] It does not point to either Exogenous Taxable Income or the (Exogenous: Endogenous) Taxable Income transition either.
[88] See *Rowan*, *supra citing Nat'l Muffler Dealers Ass'n*, *supra.*

IV
Why the Hayden *Decisions and Sections 1.179-2(c)(1) and (2) are Inconsistent with Congressional Intent*

The other lesson derived from Supreme Court statutory construction jurisprudence is that the judicial department should consider a statute's underpinning Congressional intent.[89] This statutory construction tenet is made more important when considering the legislative history of Section 179(d)(8). Recall Section 179(d)(8) was first made a part of the expensing provision by TRA76. There, however, the paragraph was limited to expressly providing Section 179's dollar limitation applied to both partnerships and partners.[90]

When Congress transitioned Section 179(d)(8) in TRA86 to its general subsection (b) application, as it reads today, it didn't explain any underpinning policy objective or provide guidance as to how the changed provision should be construed. As a result, executive and judicial department authorities are required to consider both a particular subsection (b) limitation's express language and underpinning policy objectives in determining the scope of Section 179(d)(8)'s relative application at both or either the partner and partnership levels.[91]

It was made clear by TRA76 that Congress intended Section 179's dollar limitation to be applied to both partnerships and partners. Understanding the economic consequences of applying the dollar limitation at both the partnership and partner levels reveals Congress's underpinning policy objective. Realizing how that policy objective is fulfilled supports a conclusion Congress intended TRA86's revised Section 179(d)(8) continue the dollar limitation's application at both the partnership and partner levels.

[89] See *Rowan*, *supra citing Correll*, *supra.*
[90] Similarly, TRA76's Section 179(d)(8) equally applied to S corporations and S corporation shareholders.
[91] See *Rowan*, *supra*, and *Correll*, *supra*.

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Earlier in this article it was declared the plain and obvious Section 179 policy objective is to provide an impetus to small business capital formation. By accelerating the expensing of Section 179 property, Congress is trading off current tax revenues for increased investment in trade or business activities that contribute to or sustain America's productivity.[92]

Counseling practical constraints makes the realization of this policy objective achievable. Many upstart entrepreneurial ventures, the kind that crystallize the Section 179 policy objective, involve operating partners who lack sufficient cash equity and credit worthiness to get proper funding to commence a small business venture.[93] The partnership tax laws favor such operating partners finding a capital partner to buttress the venture's financial shortcomings.[94] Such operating and capital partner marriages increase or sustain contributions to America's productivity at the margin, Congress's Section 179 inception policy objective.

Section 179's dollar limitation, when applied to partnerships, is a weak form of policy imposed diversification. If the dollar limitation applied only at the partner level a capital partner could absorb his or her total Section 179 dollar limitation expensing benefit from a single partnership. Because the Section 179 dollar limitation also applies at the partnership level, then the operating partner's participation in the Section 179 expensing benefit means the capital partner must become a capital partner in more than one partnership to gain maximum Section 179 expensing benefits in a given taxable year. Thus, from the perspective of the Section 179 expensing benefit, the capital partner must invest in more than one activity and not put all his or her eggs in one trade or business basket.[95]

[92] Congress doesn't take this empowerment lightly. It invests today's tax benefits to ensure continued contribution to America's productivity.
[93] See D. R. Jenkins, "Simple Substantial Economic Effect Regulatory Compliance," *The EA Journal*, 33(5), September/October 2015, pp. 14-19 (Jenkins *EA Journal* Article).
[94] *Ibid*.
[95] In order for a capital partner to benefit from Section 179 expensing, the capital partner must establish the Section 469(c)(1)(B) participation conclusive presumption. In other words, material participation is a form of "know-how" succession planning affecting all sectors of society. That is, the capital partner is empowering the operating partner with business acumen. See Treasury's Abuse of Power Paper, *supra*.

I refer to this weak form policy-based diversification requirement as "ordinal diversification."[96] The imposed diversification requirement is considered weak because the policy merely distills the maxim of not putting all of one's eggs in one basket. That is, there is no required policy compliant diversification degree, *per se*. Therefore, Section 179's dollar limitation impounds an ordinal diversification policy requirement. The transparent policy goal is to create more certainty in contributing to or sustaining contributions to America's productivity through such ordinal diversification.[97]

Based on the implicit ordinal diversification policy requirement, Section 179's dollar limitation does not impair America's productivity, but improves it by improving the certainty of the contribution. Therefore, notwithstanding Section 179(d)(8)'s (TRA76: TRA86) transition, Section 179's dollar limitation has positive consequences for upstart trade or business capital formation. Accordingly, underpinning policy objectives support construing post-TRA86 Section 179(d)(8) as implicating the dollar limitation at both the partnership and partner levels.

An alternative dollar limitation strategy is to specially allocate Section 179 expensing to one partner, usually the capital partner.[98] Congress's policies support special allocations in furtherance of increasing or sustaining contributions to America's productivity.[99] Special allocations ensure business venture startups, at the margin, don't go unfunded.[100] Substantiality's

[96] Congress typically characterizes cardinal diversification policy requirements by and through employing a disqualified person criterion. The Section 4975(e)(2)(G) fifty percent or more disqualified person criterion impounds a policy requirement majority investee entity decision-making manifest at least any two out of three capital equity interest holding combinations or greater diversification. Such management risk diversification policy compliance enables access to plan asset rule exceptions. This threshold cardinal diversification policy empowers the plan participant to transform self-dealing activities into incidental benefits. Prohibited transaction determinations are thereby avoided. See Jenkins' PTCW Paper, *supra*. Here, the investee operating company is usually a taxable C corporation to avoid adverse Section 512 unrelated business taxable income.
[97] Congress characterized the Section 409(p) disqualified person criterion at ten percent or more. When deemed share ownership manifests a majority through at least any six out of eleven plan participants or greater diversification, the incremental benefit is that the Employee Stock Ownership Plan (ESOP) can own S corporation stock without disqualification. Thus, S corporation ESOP earnings accumulate tax-free. See D. R. Jenkins, "Section 409(p)'s Economically Substantive Succession Planning Policy Implications," *Employee Benefit Plan Review*, 71(4), October 2016, pp. 24-28; D. R. Jenkins, "Management Company ESOP Structures and the Insurable Interest Doctrine," *Employee Benefit Plan Review*, 71(5), November 2016, pp. 5-12; and, D. R. Jenkins, "Management Company ESOP Structures, the Transfer for Value Doctrine, and the 3-Year Pull-Back Rule, " *Employee Benefit Plan Review*, 71(9), March/April 2017, pp. 11-17.
[98] See Jenkins *EA Journal* Article, *supra*.
[99] *Ibid*.
[100] *Ibid*.

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conclusive presumption usually translates the capital partner's commitment to assuring the venture is a going concern for a period of no less than ten years.[101] In the competition for the allocation of scarce resources, such special allocations reduce a venture's cost of capital and improves its economies of scale.[102]

Whether ordinal diversification or special allocations manifest the capital partner's Section 179 depreciation deduction, Congress's action to impose the dollar limitation at the partnership level assures its policy objective to increase or sustain contributions to America's productivity. That is, the application of Section 179(d)(8) at both the partnership and partner levels for purposes of the Section 179 dollar limitation is consonant with Congress's policy objective underpinning the initial 1958 enactment of the expensing deduction. The same cannot be said for applying the business income limitation at the partnership level.

The prior discussion concerning Section 469's contextual qualification sufficiently demonstrates Section 179's business income limitation does not apply to partnerships or S corporations. Nonetheless, underlying policy considerations make it more clear that Congress intended TRA86 Section 179(d)(8)'s purview is subject to any subsection (b) limitation's plain language to determine whether a given limitation applies to just partners or to partners and partnerships alike.

It is beyond the pale this article establishes that considering the expensing provision's dollar limitation at the partnership level is grounded in 1958's objective to improve small business capital formation and assure increased or sustained contributions to America's productivity. It is not unusual for small business startups to incur losses for one or more periods.

[101] *Ibid*.
[102] See Contract Harvesting Paper, *supra*. Also see Treasury's Abuse of Power Paper, *supra*.

Therefore, if the business income limitation applies at the partnership or S corporation level, as it did in *Hayden*, then the expensing benefit may not be fully realized for one or more periods beyond commencement. The benefit delay and uncertainty as to taxable income realization translates impaired economies of scale and higher costs of capital. Capital partners are less likely to bring needed equity and credit worthiness to the table and, as a result, many upstart business ventures will go unfunded.

Nothing could be more contrary to the provision's 1958 policy objective to encourage small business capital formation with an eye toward increasing or sustaining contributions to America's productivity. That is, applying the business income limitation at the partnership level, *prima facie*, is inconsistent with Congress's underlying policy objectives. Moreover, it is also clear Section 1.179-2(c)(1) and (2)'s impermissible promulgation truncates this underpinning policy objective.

The *Hayden*-esque emphasis on applying the business income limitation at the partnership level masks the real incremental policy objective. The relation between capital partner active and passive income manifests the importance of the Supreme Court's contemporaneous construction mandate. As discussed, Section 179's business income limitation and Section 469's passive activity rules were concomitantly enacted in TRA86.

Congress's underpinning objective in enacting the passive activity rules was to stop the drain of economic resources allocated to activities having the sole objective of producing tax avoidance.[103] Similarly, Section 179's business income limitation forecloses the ability to apply Section 179 expensing to passive income. That is, by and through the business income limitation, Congress was making it clear it was not empowering the use of the Section 179 depreciation

[103] See Section 469 Paper, *supra*.

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deductions to enlarge trade or business losses as a means to shelter capital partner passive income.

Congress did not want the capital partner to merely invest in a trade or business activity to benefit from Section 179 expensing. The business income limitation's active conduct of a trade or business requirement coalesces Section 469(c)(1)(B)'s participation conclusive presumption fulfilled through the Section 469(h)(1) material participation requirements.

Congress intended capital partners materially participate in the conduct of a trade or business activity to enjoy the benefits of Section 179 expensing. The "active conduct" or "material participation" requirement is a form of policy-driven exogenous succession planning.[104] That is, Congress is allowing capital partners to enjoy Section 179 expensing benefits provided they materially participate, which necessarily translates sharing their business acumen with operating partners. That is, the overriding business income limitation policy objective at the partner level is to assure exogenous succession planning as a means for increasing or sustaining contributions to America's productivity.

Therefore, it has been demonstrated applying the business income limitation at the partnership level is undermines the small business capital formation policy while applying it at the partner level furthers the policy of assuring contributions to America's productivity. Beyond Section 469's contextual qualification of the plain language of Section 179(b)(3)(A)'s business income limitation, Congress's underpinning policies likewise favor applying Section 179(d)(8) at the partner level but not the partnership level for this particular subsection (b) limitation.

By erroneously imposing Section 179(b)(3)(A)'s business income limitation at the partnership level, the *Hayden* Tax Court, the *Hayden* Seventh Circuit, and Treasury Regulations

[104] See Treasury's Abuse of Power Paper, *supra*.

1.179-2(c)(1) and (2) undermine Congress's forgoing important policy objectives. Therefore, the United States Tax Court should reconsider its *Hayden* decision in a future case. Moreover, absent intervening Treasury action to correct its own impermissible regulations, the judicial department should hold Section 1.179-2(c)(1) and (2) to be invalid regulations because the regulatory provisions—

1. Do not correctly construe the plain meaning of the terms "taxpayer" and "taxable income" as used in Section 179(b)(3)(A),
2. Do not counsel that Section 179(b)(3)(A)'s business income limitation is contemporaneously and contextually qualified by Section 469's passive activity loss rules, and
3. Do not coalesce Congress's intent to give impetus to small business capital formation while assuring continued contributions to America's productivity.

V
Conclusion

This article breathes new life into the notion Section 179(b)(3)(A)'s business income limitation does not apply to partnerships and S corporations. Congress never intended Section 179(b)(3)(A)'s "taxpayer" include partnerships or S corporations, but only Section 469(a)(2) taxpayers not otherwise excluded by Section 179(d)(4). As a result, Section 179(b)(3)(A)'s reference to taxable income can only be a reference to Endogenous Taxable Income as that term has been defined in this article. Therefore, Section 179(b)(3)(A)'s business income limitation does not apply to partnerships or S corporations. Policy considerations demand the judicial department correct *Hayden's* authority on point and that Treasury Regulation Sections 1.179-2(c)(1) and (2) be adjudged invalid as an impermissible executive fiat.

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