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The Receipt of a Profits Interest in a Partnership as a Taxable Event after
Campbell and Mark IV

I. INTRODUCTION

For years tax advisors have assumed that the receipt of a profits interest in a partnership in return for services is not a taxable event; instead, the stream of income derived from the profits interest is taxable as received. The only authority to the contrary was considered an "aberration" and nearly completely disregarded. A tax court memorandum decision, Campbell v. Commissioner, appeared to change the way in which tax advisors must approach the topic. Mark IV Productions, Inc. v. Commissioner, a memorandum decision handed down only seven months after Campbell, however, abruptly altered once again the tax court’s position on taxing the receipt of a partnership interest as income when received in exchange for services. Most recently, the Eighth Circuit reversed the tax court’s decision in Campbell. The Eighth Circuit, however, did not settle this issue of partnership tax law.

This Comment explores the history of the taxation of a partnership profits interest and discusses how the tax court’s Campbell decision deviated from prior law. It also examines the recent Mark IV case, which fails to follow the Campbell analysis. Finally, this Comment analyzes the Eighth Circuit’s opinion in Campbell. All three cases raise serious questions and confusion for anyone trying to advise clients of the tax liability on the receipt of a profits interest in a partnership in return for services. Therefore, this Comment discusses the possible ramifications of each decision and suggests the most desirable course for the law to follow.

3. Diamond v. Commissioner, 56 T.C. 530, aff’d, 492 F.2d 286 (7th Cir. 1974).
4. 59 T.C.M. (CCH) 236 (1990), aff’d in part, rev’d in part, 943 F.2d 815 (8th Cir. 1991).
5. 60 T.C.M. (CCH) 1171 (1990).
II. THE DIAMOND CASE

In *Diamond v. Commissioner*, the tax court first held that the receipt of an interest in the profits and losses of a partnership in exchange for services was subject to taxation upon its receipt. The *Diamond* decision engendered an array of negative commentary, and later court decisions seemingly diminished its importance. Practitioners assumed that the *Diamond* holding was limited to the unique factual setting presented by the case.

Diamond, the taxpayer, had arranged the financing of an office building for a person who owned an option to purchase it. In return for his services, the taxpayer received a sixty percent interest in the profits and losses of a partnership formed to sell the property. Only three weeks later the taxpayer sold his interest in the partnership for $40,000. The taxpayer reported the gain as a short-term capital gain rather than as income.

While admitting that an interest in partnership capital in exchange for services would be taxable upon receipt of the interest, the taxpayer contended that an interest in partnership profits and losses (a "profits interest") qualified for nonrecognition under Treasury Regulation section 1.721-1(b)(1).

The tax court, while noting that the regulation was unclear, rejected the taxpayer's argument. The court held that the regulation did not require the application of section 721 to the facts and that such an application would result in a distortion of the statute. The court easily rejected the taxpayer's argument that the interest he received was worthless because that interest was sold less than three weeks later for $40,000. The court held that the taxpayer should include this amount in the taxpayer's gross income upon receipt of the partnership interest.

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7. 56 T.C. 530, aff'd, 492 F.2d 286 (7th Cir. 1974).
8. Id.
9. Id. The regulation provides, in part:
   Normally, under local law, each partner is entitled to be repaid his contribution of money or other property to the partnership . . . . To the extent that any of the partners gives up any part of his right to be repaid his contributions (as distinguished from a share in partnership profits) in favor of another partner as compensation for services (or in satisfaction of an obligation), section 721 does not apply.
11. Id.
12. Id.
13. Id.
The Seventh Circuit affirmed, but the court recommended that regulations be issued to clarify the proper treatment of the receipt of a profits interest in exchange for services.  

III. THE DIAMOND AFTERMATH: CRITICISM, CASES AND PRACTICE

Until 1990, Diamond was the only case to hold that the receipt of a profits interest in a partnership was a taxable event. Commentaries heavily criticized the case, later cases limited the scope of the holding, and tax advisors confidently advised clients that their profits interests were not taxable upon receipt unless the situation was comparable to Diamond itself. Therefore, it became a "settled administrative practice" not to include the profits interest in income upon receipt unless the interest had an immediate liquidation value.

Because of the peculiar facts in Diamond (namely, that the partnership interest received in exchange for services was sold soon after receipt), most practitioners considered the holding of the case to be limited to the situation involved therein. No other cases extended the Diamond holding beyond the facts presented there, reinforcing the idea that Diamond was indeed a narrow holding. Tax advisors followed the Diamond holding only where the interest in partnership profits received had a "determinable market value." Furthermore, a "sufficiently speculative" income interest could have no market value.

Criticism of Diamond abounded. Much of the criticism centered on two problems with the decision: valuation and double taxation. While

16. Id. at 216. For a discussion of valuing profits interests as the income to be received upon immediate liquidation, see infra notes 17-21 and accompanying text.
18. Id. For example, a partnership interest in a partnership that owned a completely leased shopping center and which had a history of stable rental streams and triple net leases would probably have a determinable market value. On the other hand, a partnership interest in a start-up real estate venture by a new developer who has no real estate development experience and who relies only on financial projections would have only a speculative value.
valuation was easy in the Diamond case because of the immediate sale of the interest, valuing other profits interests posed quite a problem. If no sale of the profits interest occurred, valuation would only be a speculative venture, particularly in the case of a start-up business. Also, because the stream of income from the profits interest would be taxable as received, taxing the receipt of the right to receive profits resulted in double taxation. This was a particularly untenable result where the profits interest had restrictions upon transfer, making the value of the profits interest the present value of the future income stream. The Service and the courts soon redressed the frustration vented in the commentaries.

Soon after the announcement of Diamond the Service issued General Counsel's Memorandum 36,346.20 "The GCM stated that the Diamond decision was soundly criticized as being contrary to Regulations Section 1.721-1; it created severe valuation problems; and it resulted in double taxation to the service partner."21 The Service stated that because the regulations were meant to achieve the opposite result, the Service would not use Diamond to require service partners to report as income the receipt of a profits interest in return for services.22 Furthermore, the GCM indicated that a pure profits interest was similar to "an unfunded, unsecured promise to pay contingent deferred compensation," and was, therefore, not taxable under section 61 and not property under section 83.23

Unlike an interest in partnership capital, a pure profits interest gives the holder no immediate right to partnership assets upon liquidation.24 On the other hand, a "profits interest" that grants the recipient the right to participate in previously accrued profits and appreciation is, in reality, a capital interest and should be taxed as such.25 This "liquidation approach" (testing the value of the partnership interest received by determining its value upon immediate liquidation of the partnership and only subjecting to current taxation that liquidation value) was followed in the post-Diamond cases.

The three major cases that followed Diamond found that the service partner was not required to include the value of his partnership profits interest in income. In St. John v. United States, 26 the court adopted the liquidation approach as a matter of law. The court held for the taxpayer, finding that the taxpayer's interest could be valued, if ever, only when the partnership became

22. Id.
23. Id.
24. Id. at 216-17.
25. Id. at 217.
profitable. In *Kenroy, Inc. v. Commissioner,* the court, applying the liquidation test, held that the limited partners' priority rights upon immediate liquidation were greater than the equity in the partnership; thus, the general partner's profits interest had no value upon liquidation, and the taxpayer need not include receipt of the interest in income when received. In *National Oil v. Commissioner,* the Service agreed that a pure profits interest was not taxable. The Service proceeded on the theory that the taxpayer had instead received a capital interest in the partnership. Because the court disagreed with the Service's interpretation, the taxpayer won the case.

Interestingly, neither GCM 36,346 nor the cases decided subsequent to *Diamond* were cited in *Campbell.*

**IV. CAMPBELL V. COMMISSIONER**

William G. Campbell and his wife challenged the Commissioner's determination of his tax liability for the years 1979 and 1980 before Judge Scott of the United States Tax Court. Campbell and his wife ("taxpayer") filed income tax returns on the cash method of accounting.

Campbell was employed by the Summa T. Group and performed most of his services for Summa T. Realty, a real estate brokerage and consulting firm. The Summa T. Group and its affiliates formed and syndicated limited partnerships. Taxpayer's duties included: locating suitable properties for Summa T. Realty, negotiating the acquisition of those properties, obtaining the financing necessary to acquire the properties, organizing the partnerships that would eventually acquire those properties, and assisting in the preparation of offering materials in connection with the syndication of those partnerships.

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30. 55 T.C.M. (CCH) 596 (1986).
32. 59 T.C.M. (CCH) 251, *aff'd in part, rev'd in part,* 943 F.2d 815 (8th Cir. 1991). Although the tax court's decision was later reversed, the Eighth Circuit's opinion fails to resolve many of the legal issues presented by the case; *see infra* text accompanying notes 159-167. A full discussion of the tax court's decision is, therefore, warranted.
33. *Campbell,* 159 T.C.M. (CCH) at 236.
34. *Id.*
35. *Campbell,* 943 F.2d at 817-18.
36. *Id.*
37. *Id.* at 818.
Taxpayer "also helped promote the sale of partnership interests to prospective investors."^{38}

In return for his services, taxpayer received fifteen percent of the proceeds stemming from each partnership syndication.^{39} For the partnerships that the taxpayer helped to form and finance, he also received a "special limited partnership interest."^{40} Two tax attorneys advised Campbell that he need not include these special limited partnership interests as taxable income in the year of receipt. Both attorneys knew of the Diamond decision.^{41} The receipt of these partnership interests would generate immediate tax benefits, but "[c]ampbell was also enthusiastic about the residual value these interests might have."^{42}

In 1979, the taxpayer received a two percent special limited partnership interest in Phillips House Associates, Ltd.. In 1980, taxpayer received a one percent special limited partnership interest in The Grand, Ltd. and Airport 1980, Ltd. The taxpayer received each of these special limited partnership interests in consideration for services performed by him in the creation and syndication of the partnerships.^{43} While each of the limited partnerships contemplated separate business ventures, they were all similarly structured, and the benefits that Campbell received were nearly identical in each partnership.

Phillips House Associates, Ltd. ("Phillips House") serves as an excellent example of the structure of these limited partnerships. The partnership acquired a hotel in Kansas City, Missouri, for $1.6 million.^{44} Restoration costs were estimated at $6,675,000 and losses were expected for the first several years.^{45} Of the partnership’s $3,505,050 total capitalization, the two special limited partners contributed $300.^{46}

According to the Phillips House offering memorandum, 94 percent of the profits and losses of the partnership were to be allocated to the Class A limited partners, 2 percent of the profits and losses were to be allocated to

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38. Id.
39. Id. at 817.
40. Id.
41. Id. This illustrates the point made earlier that the Diamond holding was disregarded except for situations resembling the facts presented in that case. See supra notes 20-30 and accompanying text. The Diamond decision is discussed supra notes 6-30 and accompanying text.
42. Id. at 816.
43. Id. at 817.
44. Id. at 816-17.
45. Id. at 819.
46. Id.
the general partner, and 2 percent of the profits and losses were to be allocated to each of the special limited partners.\footnote{47}

From cash generated from the partnership’s operation, the Class A limited partners (those to whom the limited partnership interests were syndicated) were entitled to a "priority return" each year of ten percent of their capital contributions.\footnote{48} Cash would then be allocated to the special limited partners who had "special priority returns" of $7,391.\footnote{49} Next, the sole general partner would receive the same amount. The partnership was to distribute the remaining cash according to the schedule described above.\footnote{50}

The offering memorandum projected that the special limited partners could expect $128,280 in tax losses, $26,120 in income, and $10,151 in investment tax credits over the ensuing eleven years.\footnote{51} In addition, the special limited partners "were entitled to share in any proceeds which might become available from the sale or refinancing of the Hotel."\footnote{52}

In 1979, taxpayer claimed $4,191 in deductions from his special limited partnership interest in Phillips House.\footnote{53} In 1980, he claimed $50,413 in deductions from losses incurred by the three limited partnerships.\footnote{54} In response, the Service contended that the taxpayer realized $42,084 in income from the receipt of his interest in Phillips House and $37,651 in income from the interests in The Grand, Ltd. and Airport 1980, Ltd. After deducting the losses from the operations of the partnerships, the Service contended that

\footnotesize{\begin{itemize}
  \item \footnote{47} Id.
  \item \footnote{48} Id.
  \item \footnote{49} Id. at 820.
  \item \footnote{50} See supra note 46 and accompanying text.
  \item \footnote{51} Id.
  \item The offering memorandum warned that the partnership intended to take positions with respect to certain deductions and allocations that were not based on settled interpretations of tax law and that, if the Internal Revenue Service were to audit the returns of the partnership and its Class A limited partners, some or all of the deductions and allocations would probably be disallowed.
  \item \footnote{52} Id. at 820.
  \item \footnote{53} Id. at 821.
  \item \footnote{54} Id.
\end{itemize}}
taxpayer had income of $40,164 in 1979 and $40,131 in 1980 from the partnerships.56

Before trial, the taxpayer and the Commissioner agreed on the proper amounts of losses of the partnerships, the proportionate deductions, and the allowable amounts of charitable contributions.57 Thus, issues left for adjudication were whether the limited partnership interests were to be included as income upon receipt, and, if so, the values to be assigned to those interests.58

Campbell challenged, on three grounds, the Commissioner’s determination that the partnership interests were to be included as income at the time of receipt. First, the taxpayer argued that because the special limited partnership interests were interests only in profits and losses they should not be included as income upon receipt; the taxpayer based this argument on section 721 and its regulations.59 Second, the taxpayer argued that section 83 precluded inclusion of the interests in income in the year of receipt because the interests were never "transferred" to him, or, alternatively, the interests were subject to a substantial risk of forfeiture.60 Third, the taxpayer contended that even if the other arguments failed, the interests were too speculative to be valued at more than $1,000 each.61

A. Section 721

Section 721(a) is a nonrecognition provision, excluding from income any gain or loss realized when a partner exchanges "property" for an interest in a partnership.62 The taxpayer reasoned that regulation 1.721-1(b)(1) allows a contributing partner to contribute services as well as property in exchange for a partnership interest.63 The taxpayer argued that the regulation creates a distinction between the receipt of an interest in the capital of a partnership and the receipt of a profits interest.64 The tax court responded by citing and

55. This amount is greater than the value put on the two partnership interests by the Service because the Service contended that the taxpayer received $9,324 in income from the Phillips House partnership.
56. Id.
57. Id.
58. Id. These same issues were also raised on appeal.
59. Id.
60. Id.
61. Id.
62. See supra note 7.
63. Campbell, 492 F.2d. at 819 n.4.
64. Id.
reaffirming *Diamond.* In refusing to reverse the holding in *Diamond*, the tax court stated the following:

[S]ection 721(a) and the regulations thereunder are simply inapplicable where . . . a partner receives his partnership interest in exchange for services he has rendered to the partnership. In order to invoke the benefits of nonrecognition under section 721(a), the taxpayer must contribute "property" to the partnership in exchange for his partnership interest. . . . The Stafford case makes it clear that services are not "property" for the purposes of section 721(a).

Section 721, the court stated, was intended to afford nonrecognition to a taxpayer who, through the contribution of property in exchange for a partnership interest, merely changes the form of an asset; it was not intended to provide nonrecognition for a partnership interest received as compensation for services rendered to the partnership. Furthermore, the court declared that section 721 makes no distinction between capital and profits interests in providing nonrecognition treatment to partners. The court stated it was therefore "inconsistent" for Campbell to argue that a service partner would be taxed upon the receipt of a capital interest in a partnership in exchange for services at the time of receipt, but that the same partner could avail itself of nonrecognition under section 721(a) if it received a profits interest in exchange for services. The court summarized, "after reexamining our holding in *Diamond v. Commissioner*, supra, we are convinced that section 721(a) is inapplicable to the receipt of any type of partnership interest in exchange for services." Therefore, the court held that the partnership interests received by Campbell were not within the nonrecognition protection of section 721(a).

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65. *Id.* at 730. The *Diamond* case is discussed, *supra* notes 6-30 and accompanying text.

66. *Id.* (citing United States v. Stafford, 727 F.2d 1043, 1048 (11th Cir. 1984)).


68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*
B. Section 83

The court found that section 83 governs the timing of the inclusion of the value of a partnership interest in income.\textsuperscript{72} Section 83 is satisfied and the partnership interest must be included in income when three factors are present. "First, the thing transferred in connection with the performance of services must be 'property' as that term is used in section 83."\textsuperscript{73} The court reasoned that the partnership interests were personal property under state law, and that there was no distinction between a profits interest and a capital interest.\textsuperscript{74} The taxpayer, however, argued that a pure profits interest is akin to "an unfunded and unsecured promise to pay money or property in the future," which is excluded from the definition of property in the section 83 regulations.\textsuperscript{75} The court found that "a partnership profits interest is not a 'promise to pay'" because a promise to pay is usually for a fixed amount and is not determinant upon business success, unlike a profits interest.\textsuperscript{76} Also, the

\textsuperscript{72} Id.

\textsuperscript{73} Section 83 provides, in part,

(a) General Rule.—If, in connection with the performance of services, property is transferred to any person other than the person for whom such services are performed, the excess of—

(1) the fair market value of such property (determined without regard to any restriction other than a restriction which by its terms will never lapse) at the first time the rights of the person having the beneficial interest in such property are transferable or are not subject to a substantial risk of forfeiture, whichever occurs earlier, over

(2) the amount (if any) paid for such property,

shall be included in the gross income of the person who performed such services in the first taxable year in which the rights of the person having the beneficial interest in such property are transferable or are not subject to a substantial risk of forfeiture, whichever is applicable.


\textsuperscript{74} Id. at 819.

\textsuperscript{75} Id. Regulation section 1.83-3(e) provides that "the term 'property' includes real and personal property other than either money or an unfunded and unsecured promise to pay money or property in the future." Treas. Reg. § 1.83-3(e) (1971). One should compare the \textit{Campbell} conclusion with the opinion expressed in Gen. Couns. Mem. 36,346 (July 25, 1977). For a discussion of GCM 36,346, see supra note 20 and accompanying text.

\textsuperscript{76} \textit{Campbell}, 59 T.C.M. (CCH) at 250.
taxpayer's partnership interest allowed deductions for partnership losses, a feature unknown to promises to pay.\textsuperscript{77}

The second factor that must be satisfied for the inclusion of the interest in income under section 83 is that the property "must be transferred in connection with the performance of services."\textsuperscript{78} Because the taxpayer had been the only limited partner at the time that two of the partnerships were formed and the taxpayer had paid $100 and $150 for his limited partner shares, he asserted that there was no "transfer" in connection with services.\textsuperscript{79} Rather, he contended that the partnership interests were transferred in exchange for his monetary investments and that those sums paid for his interests were adequate at the time of transfer; any increase in the values of his partnership interests was "sweat equity" due to his hard work.\textsuperscript{80} The tax court responded that "for the purposes of Federal taxation, the substance of a transaction, rather than its form, will control."\textsuperscript{81} In substance, the court claimed, the partnerships "were nothing more than empty shells awaiting syndication" at formation.\textsuperscript{82} Campbell received his beneficial interests in the partnerships as part of his compensation package from Summa T. Group, and he did not acquire his interest until after syndication. As evidence that the special limited partnership interests were transferred in connection with services rendered rather than purchased by the taxpayer, the tax court pointed out that the limited partnership interests received upon partnership formation were quite dissimilar from the special limited partnership interests that he expected to own and in fact did own later.\textsuperscript{83} Furthermore, the amount of capital contributed by the taxpayer "bore no relation to the value of the different interests he received for his services."\textsuperscript{84}

The third factor that must be present for section 83 to apply is "that either the property transferred must be transferable by the recipient or the property transferred must not be subject to a substantial risk of forfeiture."\textsuperscript{85} Because both parties apparently agreed that the taxpayer's rights to transfer his special limited partnership interests were restricted, the court focused on the issue of whether the interests were subject to a substantial risk of forfeiture. The taxpayer claimed that there was a substantial risk of forfeiture under section

\textsuperscript{77} Id.

\textsuperscript{78} Id. See Treas. Reg. § 1.83-3(a)(1) (1971).

\textsuperscript{79} Campbell, 59 T.C.M. (CCH) at 251.

\textsuperscript{80} Id.

\textsuperscript{81} Id. at 251 (citations omitted).

\textsuperscript{82} Id.

\textsuperscript{83} Id.

\textsuperscript{84} Id.

\textsuperscript{85} Id. at 252.
The risk of forfeiture stemmed from the fact that the partnership would distribute nothing to the taxpayer until its economic performance improved. Thus, the taxpayer argued, he could not fully enjoy the partnership interests until he improved the financial performance of the partnerships with substantial services.\textsuperscript{87}

The tax court rejected this line of attack.\textsuperscript{88} The taxpayer had focused on the speculative nature of the partnership interests received. According to the court, the speculative nature affected the interests' values but did not render the interests subject to forfeiture.\textsuperscript{89} Also, the court held that section 1.83-3(c)(2) did not apply when the forfeited property was not to be returned to the employer.\textsuperscript{90} Therefore, the taxpayer's interests were not subject to a substantial risk of forfeiture once the partnerships reached the subscription levels necessary to become operational, and the court required the taxpayer to include the receipt of the partnership interests in income.\textsuperscript{91}

\section*{C. Valuation}

Having determined that the value of the partnership interests was to be included in income, the tax court next addressed how to value those interests. The Commissioner had asserted that the value of the interests should be the present value of the projected tax benefits and cash flows based on each partnership's offering memorandum.\textsuperscript{92} The Commissioner calculated the discount rate by finding the discount rate that would reduce the future value of all the tax and income benefits the class A limited partners were projected to receive from each partnership interest to the value that the class A limited partners paid for that interest.\textsuperscript{93} Applying this method, the Commissioner determined that the total value of the taxpayer's special limited partnership interests was $116,000.\textsuperscript{94} The taxpayer objected to this valuation.

\begin{footnotes}
\item[86] \textit{Id.} Section 83(c)(1) provides: "[t]he rights of a person in property are subject to a substantial risk of forfeiture if such person's rights to full enjoyment of such property are conditioned upon the future performance of substantial services by any individual." I.R.C. § 83(c)(1) (1988) (quoted in \textit{Campbell}, 59 T.C.M. (CCH) at 252).
\item[87] \textit{Campbell}, 59 T.C.M. (CCH) at 252.
\item[88] \textit{Id}.
\item[89] \textit{Id.} The court likened this to a corporate employee who receives unrestricted common stock as part of his compensation. \textit{Id}.
\item[90] \textit{Id.} at 252-53.
\item[91] \textit{Id.} at 253.
\item[92] \textit{Id}.
\item[93] \textit{Id.} The discount rate was 17.9 percent. \textit{Id.} at 253.
\item[94] \textit{Id.} at 254.
\end{footnotes}
First, the taxpayer objected to valuing his partnership interests at all, claiming that their value was too speculative to be included in income. An expert on valuation of intangible assets testified for the taxpayer at trial. The taxpayer’s expert, like the Commissioner, discounted the expected cash distributions from each partnership. The expert, however, calculated the discount rate by multiplying the Baa corporate bond rate for the year in which each partnership interest was received by a factor of 2.5. Thus, the expert found that the present value of the projected income stream totaled $14,306. Taxpayer’s expert did not add the value of the projected loss stream from the partnerships because the offering memoranda stated that there was a substantial risk that the tax benefits would be disallowed if the partnerships were audited. The taxpayer’s expert, unlike the Commissioner, took other factors into account as well, such as the restrictions on the transferability of the special limited partnership interests and the inability of the special limited partners to take part in management. Thus, he concluded that none of taxpayer’s partnership interests were worth more than $1,000 upon receipt.

The tax court rejected the assertion of the taxpayer’s expert that the valuation was only speculative because limited partnership interests, which were characterized by the court as "similar interests" to those received by taxpayer, were sold for "concrete prices" at the same time the taxpayer received his special limited partnership interests. The court also rejected the expert’s approach to valuing the projected tax losses. The court stated, "it is true that some of the items that generated these losses were questionable. However, the Class A limited partners were willing to pay substantial amounts for these very same tax losses despite the chance that some of them might be disallowed." Because taxpayer’s expert had valued each partnership interest at $1,000 despite differences between the partnerships as to their economic positions, the prices for the limited partnership interests, the projected cash distributions, and the projected tax benefits, the court refused

95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.* As far as one can glean from the opinion, the offering memoranda detailed how gains from sales of partnership properties were to be divided but did not make any projections as to the amount of those gains.
99. *Id.* Tax benefits are considered the pass-through deductions.
100. *Id.* at 254.
101. *Id.* at 255.
102. *Id.*
"to accept an expert valuation which is unreasonable, without basis, and quite obviously plucked out of thin air." 103

The tax court, however, did agree with the taxpayer's expert on the correct method of choosing a discount rate. 104 The rate that the Commissioner had chosen was based on assumptions about the future of the partnerships' operations and was thus incorrect. 105 When valuing the taxpayer's interest in Phillips House, the court further reduced the value of the partnership interest to account for the substantially superior rights that the limited partners had as compared to the special limited partners. 106 The court concluded that the total value of taxpayer's partnership interests was $56,818. 107

D. Negligence Penalty

The Commissioner additionally sought a negligence penalty 108 for a variety of "abusive deductions," 109 asserting that, "given Mr. Campbell's contacts with the partnerships and his position within Realty Properties as well as the other members of the Summa T. Group, he must have been aware that these deductions were abusive and, therefore, petitioners were negligent in deducting their distributive share of these amounts on their returns." 110 The tax court agreed and imposed the penalty, 111 but the court specifically disavowed that it allowed the penalty on the ground that the taxpayer was negligent in not including in income the value of the partnership interests received for services in the year of receipt. 112

103. Id.
104. Id. at 256.
105. Id. at 255. The Commissioner, for example, made the assumption that the projects would be sold when they ceased providing tax benefits. Id.
106. Id. at 256.
107. Id.
108. Id. For the period of time at issue, the negligence penalty was codified in I.R.C. section 6653(a). The penalty was equal to five percent of the underpayment. Id.
109. Id. at 257.
110. Id. at 257.
111. Id. at 258.
112. Id. The court stated:
Since we have concluded that the part of the deficiencies due to petitioners' claiming excessive deductions and credits in each year here involved was due to negligence, we need not discuss whether petitioners' failure to include in each year any amount as the value of a partnership interest received for services rendered was negligent.
Id.
V. THE REACTION TO *CAMPBELL*

The reaction to *Campbell* has been uniformly negative. The *Campbell* decision "has caused confusion and alarm among some tax professionals." 113 "The *Campbell* decision sent the organized bar into hysteria, with many practitioners and former government officials apparently ready to start chucking tea into Boston harbor." 114 One commentator states, "it would have been difficult for a case more to have disturbed the status quo of partnership tax advisors than *Campbell* has done—quite a lot for a memorandum decision to accomplish." 115 Indeed, the tax court’s decision wrought great criticism and even more speculation as to the correct law to be applied.

Nothing in the *Campbell* decision addresses any of the criticisms previously leveled at *Diamond*. Thus, all of the pre-*Campbell* commentary remains valid today. Although *Campbell* apparently clarified how to value a profits interest (by calculating the present value of the projected cash distributions and tax benefits set forth in financial projections), the court’s approach remains subject to valid concerns. Furthermore, the case leaves in doubt the precedential value of the cases decided between *Diamond* and *Campbell*, as none of those cases was cited in *Campbell*. The same doubt lingers as to the Service’s position taken in GCM 36,346. Commentators have also criticized the court’s failure to address whether a taxpayer who fails to include the receipt of a partnership profits interest in income is subject to a negligence penalty. 116 While the scope and applicability of *Campbell* are of great concern, the more difficult questions arise concerning the consequences to a service partner and to the partnership where the *Campbell* decision is applicable.


The surprise that *Campbell* has caused belies its designation as a Memorandum decision. "Memorandum decisions ... involve the application of settled legal principles to the facts." Boris I. Bittker & Martin J. McMahon, *FEDERAL INCOME TAXATION OF INDIVIDUALS* 46-9 (1988). See also GAIL L. RICHMOND, *FEDERAL TAX RESEARCH: GUIDE TO MATERIALS AND TECHNIQUES* 77 (4th ed. 1990). The reaction to *Campbell* shows that the principles it espouses are far from settled. Indeed, one need only compare *Campbell* with *Mark IV*, discussed infra notes 132-52, to find that the proper treatment of a partnership profits interest in exchange for services is an unclear area of tax law.

116. See, e.g., Cuff, supra note 114, at 56.
One commentator outlined six difficult collateral issues associated with the *Campbell* decision. First, the tax court did not define the scope of section 83 as applied to the receipt of profits interests in partnerships. Section 83 could apply where, as in *Campbell*, the service partner received its interest for services rendered for its employer, or it could apply more broadly to encompass situations where the service partner rendered its services for the partnership. More importantly, section 83 could create an "impossible administrative burden" if applied to a service partner who is obliged to perform future services. The commentator suggested that this would be most troublesome in professional partnerships where interests in the partnership are given in exchange for both past and future services; *Campbell* could be interpreted as possibly creating a taxable event even to the extent that the interest is given for future services.

Second, if a service partner is taxed upon the receipt of its interest, it should be able to increase its basis in the interest and be able to use this basis against the income stream. No present authority, however, allows this treatment. If amortizing the basis against future income is not allowed, the service partner might still take a capital loss upon withdrawal or liquidation. The service partner, however, may not be able to use this loss, and the partner must pay the double tax in the meantime. Indeed, if a partnership profits interest is taxed upon receipt just like a capital interest, then identical tax treatment should be followed throughout the time during which the service partner has a profits interest in the partnership.

Next, the commentator questions whether a capital account is created in the partnership when the service partner receives a profits interest. The partnership should be able to account for the value of the asset acquired (future services). The regulations fail to cover this area, and tax advisors are at a loss as to the proper treatment. Again, this treatment would be consistent with the holding that a profits interest is taxed the same as a capital interest.

118. *Id.*
119. *Id.*
120. Indeed, imagine the desirability of becoming a partner in a law firm if the immediate consequence is a tax on the present value of the partner’s future income stream!
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.*
Fourth, the transfer of a profits interest to the service partner may be a taxable event to the partnership because, if section 721 does not protect the service partner from recognizing income, then it also fails to protect the partnership from recognizing gain on the transfer. The commentator suggests that either of two theories might compel the partnership to recognize gain, either "under an assignment of income theory (the transfer of a profits interest being treated as an assignment of future income), or under the theory that the partnership has sold a partnership interest in a taxable transaction." Also, this commentator questions whether the partnership may deduct the profits interest as compensation and whether the partnership must comply with the employee tax withholding obligation. Recognition of partnership gain, compensation deductions, and tax withholdings are all natural consequences of holding that a transfer of a profits interest is a taxable event. These unsolved issues add greatly to the confusion generated by the *Campbell* decision.

Fifth, a special allocation of the deductions associated with the transfer of the profits interest is difficult without first resolving the previously considered issues. Moreover, the commentator warns that such allocations "may affect the economics of the partnership." Finally, any attempts to prevent the inclusion of the profits interest in current income by making the interest non-transferable and subject to a substantial risk of forfeiture may have collateral effects.

How does the service partner account for income or loss that arises during the period that the partnership interest is restricted? Is it possible to allocate income or loss to someone who is not treated as a partner? How is capital contributed by the service partner properly accounted for by the partnership, since the service partner is not yet treated as a partner? What is the status of a two-man partnership when the interest of one of the two partners has not vested? What is the status of a partnership all of the interests in which have not vested? What is the status of a limited partnership where the sole general partner's interest has not vested? These questions remain unanswered.

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126. *Id.*
127. *Id.*
128. *Id.* at 50.
129. *Id.*
130. *Id.*
131. Recall that in *Campbell*, the taxpayer contributed some capital, albeit a small amount, at the time he received his profits interest. *See* note 40 and accompanying text.
And if one thought that the course had not yet been sufficiently confused, still another tax court memorandum decision attempts to dizzy any would-be tax navigator.

VI. **MARK IV PICTURES, INC. v. COMMISSIONER**

*Mark IV*, decided by the tax court on October 31, 1990, followed on the heels of *Campbell*, which was handed down in March 1990, and yet the opinion does not track the *Campbell* analysis. In *Mark IV*, several individuals and a corporation organized and syndicated limited partnerships for the purpose of producing and distributing motion pictures with religious themes. The organizers contributed certain film rights to the partnerships and provided the partnerships with services in creating, producing, and distributing the films. The organizers conceded that these services were not provided as a result of arms-length negotiations between themselves and the partnerships; instead, the partnerships paid the organizers what the organizers considered fair compensation for their services.

The organizers also acted as the general partners of the limited partnerships. They contended that they received the general partnership interests in exchange for the motion picture film rights; however, they failed to establish any value for those rights. Additionally, the organizers failed to show that the partnerships had otherwise fully compensated the general partners for their services. Thus, the court concluded "that the general partnership interests were received entirely in exchange for services." Having made this determination, the court went through a three-step analysis in deciding whether the general partners must report the value of their interests as income upon receipt.

First, the court felt it had to decide "whether the general partnership interests were capital interests or mere profits interests." *Campbell*, of course, held that this determination was unnecessary. The tax court in *Campbell* found no distinction between capital and profits interests for section 721(a) purposes. *section 721(a) is inapplicable to the receipt of any type

133. 60 T.C.M. (CCH) 1171 (1990).
134. *Id.* at 1172.
135. *Id.* at 1173.
136. *Id.*
137. *Id.* at 1174-75.
138. *Id.* at 1175.
139. *Id.*
140. *Id.*
141. *Id.*
142. *See supra* notes 61-70 and accompanying text.
of partnership interest in exchange for services. Here, however, the tax court purported to use the pre-\textit{Campbell} liquidation method of distinguishing between capital and profits interests. The court summarized the task of distinguishing a capital interest from a profits interest as follows:

Deciding whether a partner's interest in a partnership is a capital interest, rather than a mere profits interest, turns on whether that partner has the "right to receive" a share of the partnership's assets upon a hypothetical winding up and liquidation immediately following acquisition of the interest, rather than the mere right to share in future partnership earnings or profits.

First, in determining the general partners' rights, the court looked to the Articles of Limited Partnership (Articles), which provided that, in addition to receiving fifty percent of partnership profits and losses, the general partners were "entitled to receive Fifty Percent (50\%) of the liquidation proceeds of the Partnership in the event of its liquidation." The Articles also provided, however, that "[t]he proceeds of the liquidation shall be distributed, as realized, in the payment of liabilities of the Partnership in the order provided in Section 545.42 of the 1979 Code of Iowa, as amended." Even though "[s]ection 545.42 of the Iowa Code provides that the limited partners must be repaid their capital contributions BEFORE the general partners," the court concluded the following:

Here, a fair reading of . . . the Articles indicates that the general partners had the right to receive a specified share of the partnerships' liquidation proceeds (assets). Thus, even if no partnership proceeds remained to be distributed to the general partners after distributing the liquidating proceeds in accordance with section 545.42, they nevertheless had the right to receive a share of the partnerships' assets.

The right to receive a share in the liquidation proceeds was conclusive in determining that the general partners had received capital interests in the partnerships.

Second, the court determined that section 83 did not preclude the inclusion of the interests in income because the general partner interests were

\begin{itemize}
  \item 144. The liquidation method approved in the pre-\textit{Campbell} decisions is summarized, \textit{supra} notes 23-24 and accompanying text.
  \item 145. \textit{Mark IV}, 60 T.C.M. (CCH) at 1776.
  \item 146. \textit{Id.}
  \item 147. \textit{Id.} at 1173-74.
  \item 148. \textit{Id.} at 1176 (emphasis added).
\end{itemize}
freely transferable and not subject to a substantial risk of forfeiture. "Although petitioners were to perform substantial services in the future, the transfer of their capital interest was not conditioned upon their further performance of services. At the time the partnerships were formed, the capital interests vested in [the general partners]."149

Finally, the court considered "whether the capital interests [had] determinable market values." Citing Diamond and Campbell, the court declared that the fair market value of a partnership interest received in exchange for services must be included in income upon receipt.150 The Commissioner calculated the fair market value under Regulation section 1.721-1(b)(1) by multiplying the total contributions made by the limited and general partners by the general partners' ownership interest (fifty percent) and treating that value as income for the year in which the partnership was syndicated.151 Although the court agreed that the values of the capital interests were determinable and that section 1.721-1(b)(1) applied,152 it amended the calculation in two ways. First, the court treated the general partners' shares of the limited partners' contributions as income for the year in which the limited partnership interest was actually sold to the limited partners (as opposed to when the partnership was syndicated). Second, the court deducted the amounts contributed by the general partners in their capacities as limited partners from the total amount of contributions to prevent them from being taxed on the return of their own contributions.153

A. A Vexing Valuation

The Mark IV court's valuation is completely baseless. The cost of the court's mistake to the general partners was a tax liability on $338,492 of income that they did not and could not have received. The regulations issued under section 721 state that the amount to be reported as income "is the fair market value of the interest in capital so transferred ... at the time the transfer is made for past services."154 While the general partners may have had the abstract right to receive one half of the proceeds generated upon liquidation of the partnership, that right was worthless at the time of its receipt because the partnership agreement (and Iowa law) required the limited

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149. *Id.* at 1177 (citing 26 U.S.C. § 83(c)(1) (1988); Treas. Reg § 1.83-3(b), (c)(1) (1988)). See also *supra* note 69.
150. *Mark IV*, 60 T.C.M. (CCH) at 1176.
151. *Id.* at 1177.
152. *Id.*
153. *Id.* at 1177-78.
154. *Id.* at 1176 (quoting Treas. Reg § 1.721-1(b)(1) (1988)). See also *supra* note 9.
partnership to distribute liquidation proceeds first to the limited partners to the extent of their contributions before making distributions according to the partners’ relative shares of earnings and profits. At the time the general partners received their interests, a liquidation of the partnership would have resulted in all of the partnership assets being repaid to the limited partners. Thus, the general partners would have realized nothing upon liquidation. True, the general partners could have shared in the proceeds of a later liquidation if the partnership had acquired additional assets or the partners’ contributions had appreciated, but, at the time of receipt, the capital interests owned by the general partners were worth nothing.

Aside from the problem of valuing a capital interest, which tax advisors may want to consider in drafting partnership liquidation provisions, Mark IV raises some serious questions concerning the status of both Diamond and Campbell.

B. Mark IV: A Repudiation of Campbell?

After Mark IV, is Campbell’s statement still true that any interest received in exchange for services is includable in income? Apparently not, for if that statement were true, then the tax court’s discussion of the distinction between capital interests and profits interests would have been unnecessary. One cannot argue that the court in Mark IV was unaware of the recent Campbell holding, because Campbell is cited in Mark IV. Is the liquidation method of valuing a partnership capital interest in vogue again? It is interesting to note that the Mark IV opinion, just as the Campbell opinion, does not cite any of the cases falling between the Diamond and Campbell decisions. If the liquidation method is correct, does one accomplish the calculation by following regulation section 1.721-1(b)(1) or by following the Mark IV interpretation of that regulation? Or, perhaps, might one value a capital interest by reference to the prospectus for partnership syndication as was done in Campbell? Is the present value of expected future capital losses considered in valuing a capital interest received in consideration for services rendered to a partnership? Unfortunately, Mark IV raises more questions than it answers. Mark IV does, however, provide some hope that the Campbell decision does not really mean what it says.

155. Id. at 1176. See also supra note 5.
156. See the similar assertion made in Kenroy Inc. v. Commissioner, 53 A.F.T.R.2d (P-H) 84-718 (C.D. Ill. 1983).
157. Id.
158. Mark IV, 60 T.C.M. (CCH) at 1176.
VII. **CAMPBELL ON APPEAL: "THE ENIGMATIC EIGHTH CIRCUIT DECISION"**159

On August 27, 1991, the Eighth Circuit Court of Appeals decided Campbell’s appeal, affirming in part and reversing in part the tax court’s decision.160 The opinion does not appear, however, to be the aspirin desired by practitioners to cure the headaches caused by the earlier *Campbell* decision.

In his brief, the Commissioner attempted to concede that the tax court erred in holding that the profits interests received in exchange for services rendered to a partnership were taxable.161 The Commissioner contended that the taxpayer received his profits interests from his employer rather than from the partnerships. "According to the Commissioner, the tax court held that Campbell received the interests as compensation from his employer. Thus, he is not a service partner; the principles of partnership taxation do not apply; and Campbell’s receipt of compensation from his employer was taxable upon receipt."162 The Eighth Circuit, however, declined to accept the Commissioner’s concession.163 The court did not believe that the tax court had specifically found that the taxpayer had received his profits interests from his employer.164 Also, the court noted that *Diamond* supported the tax court’s position and that the Commissioner had not previously asserted that only partnership interests received from employers (rather than from partnerships) as compensation are to be included in income.165 Therefore, the court disregarded the concession because it had been raised for the first time on appeal and was not adequately presented for the court’s decision.166

The taxpayer raised two arguments on appeal: the taxability of a profits interest received in exchange for services, and valuation.167 Although the court considered the issue of taxability at length, it appears the court reached no decision on this issue.168 In discussing the effect of section 721 and its regulations, the court concluded that "some justification exists for treating

159. See Cuff, supra note 113, at 643.
160. Campbell v. Commissioner, 943 F.2d 815, 823 (8th Cir. 1991) (reversing the tax court’s holding that the Campbells should have included the receipt of profits interests in Phillips House, The Grand and Airport in ordinary income in the year of receipt, affirming the remainder of the decision).
161. Campbell v. Commissioner, 943 F.2d 815, 816-17 (8th Cir. 1991).
162. *Id.* at 818.
163. *Id.*
164. *Id.*
165. *Id.*
166. *Id.* at 818-19.
167. *Id.*
168. *Id.* at 819-23.
service partners who received profits interests differently than those who receive capital interests" because nonrecognition principles are not affected where there is no capital asset transfer. The court also addressed section 707, which "provides that when a partner engages in a transaction with a partnership in a nonpartner capacity that transaction will be treated as between the partnership and one who is not a partner." The court stated that in Diamond the taxpayer had not intended "to function as or remain a partner" and that he had become a partner only to avoid tax liability, leaving no doubt that the taxpayer had acted in a nonpartner capacity. However, would not be so easily applied to Campbell because his interests were not transferrable, nor did they result in immediate returns; Campbell was to remain a limited partner for the life of the partnership, and his profits interest was not intended to disguise immediately realized income. "Thus," the court concluded, "we doubt that the tax court correctly held that Campbell's profits interests were taxable upon receipt."

The Eighth Circuit merely expressed its reservations on the taxability of Campbell's profits interests, but it reversed the tax court only on the issue of valuation. The court held that the tax court had put too much emphasis on the amounts paid by Class A limited partners for their interests. The substantial differences between those interests and Campbell's interests made the price of the Class A limited partnership interests irrelevant to the valuation of Campbell's special limited partnership interests. The tax court should not have disregarded the expert's testimony that the tax benefits claimed were speculative. Also, the tax court should have realized that the offering memoranda contained only speculative predictions about the operations' success. The court concluded that the taxpayer's profits interests had no fair market value at the time of receipt and should not have been included in income at that time.

The Eighth Circuit's opinion has not been received favorably. Rather

169. Id. at 822.
170. Id.
171. Id.
172. Id. at 822-23.
173. Id. at 823.
174. Id.
175. Id.
176. Id.
177. Id.
178. Id.
179. Id.
180. Sheldon I. Banoff, Status of Service Partners Remains Unclear Despite Eight Circuit's Reversal in Campbell, J. TAX'N, Nov. 1991, at 268.; Cuff, supra note 114,
than expressing displeasure with a result with which they disagree, the commentators complain of the failure of the court to resolve the issues. "This opinion is likely to receive considerable criticism for its reluctance to deal with legal issues and its preference for making factual determinations of value."

The Eighth Circuit, which was made clearly aware of the case's importance by the briefs of both the taxpayer and amici curiae, could have resolved Campbell in any of a number of ways. Instead, the Eighth Circuit chose to decide the case on valuation grounds. In so doing, the appellate court did little to resolve the controversies under Sections 61, 83, and 721 relating to the taxability of partnership profits interests for services.

In addition to criticizing the court for its failure to decide the taxability issue, commentators have also focused on the Eighth Circuit's apparent confusion of speculative value with no determinable value. The difference between speculative value and no value "is of importance administratively: it would be difficult for most taxpayers to prove a profits interest has no value, but many taxpayers will be able to prove their profits interests to be of speculative value." The Eighth Circuit noted several problems with the tax court's valuation of the profits interest: the tax court had placed too much emphasis on the prices paid for the Class A limited partnerships, had disregarded the speculative nature of the tax benefits to be claimed, and had ignored the fact that the offering memoranda contained merely predictions of a venture with no track record. One cannot discern which of these errors, or what combination of them, would lead to a conclusion that the profits interest were so speculative as to have no fair market value. Similarly, the opinion doesn't provide any guidance as to when the value of a profits interest will be sufficiently determinable to be included in income, especially when future value calculations and offering memoranda are not to be relied upon.

Nevertheless, the decision may have some limited value. "As a result [of the Eighth Circuit's Campbell decision], many practitioners may conclude that equilibrium has been re-achieved—such partnership profits interests, if technically taxable, are taxable at a value of zero—a result that would satisfy

at 650-52. Indeed, the latter article criticizes the Eighth Circuit's opinion as having "many characteristics of a badly written law school examination: issue spotting without any attempt to come to grips with and to resolve any of the major issues." Id. at 651 n.39.

181. Cuff, supra note 114, at 651.
182. Banoff, supra note 180, at 268 (emphasis added).
183. Banoff, supra note 180, at 273; Cuff, supra note 114, at 654.
184. Banoff, supra note 180, at 273 (emphasis added). See also Cuff, supra note 114, at 654-56 for an extended analysis of the Eighth Circuit's approach to valuation.
most tax advisors and service partners, and would equate to nontaxabil-
ity. The result reached in Campbell suggests some strategies for
avoiding taxation for profits interests received by service partners. For
example, the service partner should receive a restricted, special class of limited
partnership interests and should receive it from the partnership rather than
from his employer. Furthermore, the decision may prompt the IRS to
issue a Revenue Ruling or Notice as to when a partnership profits interest will
not be included in income. The Eighth Circuit's "speculative value equals
no value approach" suggests that the Service should be cautious in litigating
cases where the profits interest, although potentially valuable, is speculative
because of the difficulty in predicting financial performance. "Such a
message is appropriate—the courts (and taxpayers) should not be burdened
with litigating the accuracy of inherently speculative values.

VIII. CONCLUSION

Admittedly, there are situations in which the immediate taxation of the
receipt of a partnership profits interest makes sense. Nevertheless, the tax
court's broad proposition in Campbell that "section 721(a) is inapplicable to
the receipt of any type of partnership interest in exchange for services" leaves much to be desired from both a policy and administrative perspective. The significance of Mark IV remains completely up in the air. And because
of the court's reliance on specific valuation evidence, the Campbell appellate
opinion is of dubious precedential value. In sum, the current state of the law
lies in shambles. Further litigation is likely to ensue unless the Service or
Congress clarify the proper treatment to be afforded partnership profits
interests received in exchange for services. The Service must come to grips
with the problems it has wrought with its successful prosecutions of both
Mark IV and the taxability issue in Campbell, and the tax court must establish
the method to be used in valuing a partnership profits interest. If practitioners
are to receive any guidance whatsoever as to the treatment of partnership
interests received in exchange for services, the Service will have to take
responsibility for establishing workable rules. The Campbell experience has
demonstrated that dodging the issues until the courts rule may not be

185. Banoff, supra note 180, at 276.
186. Id.
187. Id.
188. Id.
189. Id.
190. See Cuff, supra note 114, at 50 for five specific situations in which
immediate taxation is appropriate.
satisfactory; the courts may fail to provide a set of uniformly applicable guidelines, and what opinions are generated may vary with the facts or with the lunar cycle.

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