Making the most of special allocations of partnership income and coping with risks

Special allocations of partnership income can result in substantial tax savings. Here's how such allocations can be used to make certain capital expenses, in effect, deductible, subject to the risks of possible Internal Revenue Service attack.

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THE RULES GOVERNING special allocations among partners of partnership income, loss and component tax items, appear in Section 704(a) and (b).[1] Special allocations offer unique tax planning opportunities, but they are subject to limitations and must be defended against IRS attack.

Varieties of special allocations

Perhaps the most common kind of special allocation is that of a specified deduction to certain partners. Those deductions include, for example, depreciation,[2] depletion, intangible drilling and development expenses,[3] research and experimental expenditures and losses on the disposition of certain partnership assets.[4] Partners in high tax brackets may welcome a special allocation of a disproportionately large share of partnership deductions to increase their share of partnership losses, which, subject to certain limitations under Sections 465 and 704(d), may be used to offset income from nonpartnership sources. The classic example of this kind of taxpayer is an investor in a tax shelter partnership.

At the opposite end of the spectrum, some partners may not be able to use (or to use currently) any portion of partnership losses, and thus they may be willing to let other partners receive the benefit of them. This is frequently the case with foreign taxpayers who, with minor exceptions, cannot claim deductions except to the extent of income that is effectively connected with the conduct of a U.S. trade or business, which includes their share of deductions or losses of a partnership that is engaged in such a trade or business.[5] Consequently, in U.S. partnerships that have both U.S. and foreign partners, it generally makes good sense to allocate all but a small percentage of current net partnership losses to the U.S. partners, who presumably can use them. (In theory, allocation of all current net partnership losses to U.S. partners would be even better, but such an allocation would strengthen any claim that the partners who were allocated none of the losses were not really partners.)[6] Other taxpayers who also might not want allocations of extra deductions or net losses include those with existing net operating losses and those who anticipate income in later years that will be taxable at a higher rate than if realized currently.

Less familiar, but equally important, are special allocations of income—in their simplest form, of net income to partners whose personal tax situations are just the opposite of the "loss-hungry" taxpayers described above. Variations include special allocations of net income attributable to particular items of partnership property and special allocations of income of a specified character, *e.g.*, long-term capital gain, tax-exempt interest or foreign-source income. Particular care, however, must be exercised in structuring allocations based solely on the character of income, because if their only effect is upon a partner's tax liability, the allocations will usually lack substantial economic effect.[7]

Allocations of income for services

Particularly useful are special allocations of items of gross income to certain partners, because they frequently can produce more favorable tax results to the other partners than other more commonly encountered techniques intended to achieve the same result. Special allocations of gross income are a marvelous device in limited partnership tax shelters where it is agreed that the general partner or part-

ners will be compensated by the partnership for services rendered even though the partnership shows a net loss. The customary way to compensate a general partner and to produce additional deductions that will increase the investor partners' share of partnership losses is to give the general partner a relatively small interest in partnership capital, profits, losses and distributions but substantial income in the form of fees for various services. There is, however, one overriding tax problem inherent in compensating a general partner with such fees: the payments may not be deductible. If they are not, investor partners will receive no current tax benefit from the payments that must still be made.

To be deductible, compensation for services must be ordinary and necessary business expenses, must be "reasonable", and must represent compensation for services rendered during the current taxable year or in prior taxable years, not compensation for services to be rendered in the future.[8] Even if a fee for services passes these basic tests, under Section 263 (a), it cannot be deducted if it represents an expenditure required to be capitalized. It is common knowledge that, notwithstanding the imaginative forms in which many fees payable to general partners are cast, the fees frequently represent compensation for the organization of the partnership and the acquisition, improvement and disposition of assets with a useful life of more than one year, expenses which cannot, or should not, be currently deducted by the partnership.[9]

In addition to the foregoing requirements, fees paid by a partnership to a partner for services will be deductible only if they qualify either under Section 707(c) as a guaranteed payment or under Section 707(a) as a payment to a partner who is not acting in his capacity as such. In order for a payment to constitute a guaranteed payment under Section 707(c), the payment cannot be determined with reference to the income of the partnership, and *Pratt*[10] has held that Section 707(c) covers not only a fee based upon partnership net income but one based upon gross income as well. This presents a difficult planning problem, because general partner fees are frequently based upon partnership income. Furthermore, if a payment to a general partner fails to qualify under Section 707(c), then it is unlikely that it will qualify under Section 707(a), because usually it will have been paid to a partner who has rendered the services in his capacity as a partner. General partners typically receive fees for performing services that general partners are supposed to perform, *e.g.*, managing the partnership and acquiring, improving, leasing and disposing of partnership property. Last but not least, the Service views deductible payments to general partners with a particularly jaundiced eye, thereby increasing a partnership's exposure to audit and all of its adverse consequences, *viz.*, adjustments to income, interest and penalties, including, perhaps, tax return preparer penalties.

Instead of a partnership's paying fees of questionable deductibility to a general partner, it can frequently obtain the desired tax result by instead allocating to the general partner a comparable amount of gross partnership income accompanied by a matching distribution of cash. The primary tax advantage of this technique is avoidance of the Code provisions that limit deductibility of fees paid to a partner: Sections 162, 263 and 707. In either case—fee or special allocation of gross income—income received by the general partner will be ordinary income. Thus, the general partner usually will not care which method is chosen. And as long as there is sufficient gross income to allocate to the general partner, the tax effect on the other partners will be the same as a deductible payment. Section 702 (a)(8) and Reg. 1.704-1(a) provide that, in determining taxable income, each partner must take into account separately, among other items, taxable income or loss of the partnership exclusive of items requiring separate computation. Under Reg. 1.702-1 (a)(8)(ii), among the items requiring separate computation are items of gain, loss, deduction or credit subject to a special allocation. Thus, gross income specially allocated to the partner will reduce gross income allocable among the other partners and thereby either decrease their share of partnership taxable income or increase their share of partnership losses.

Fee v. special allocation

The following example contrasts the effects of paying a nondeductible fee to a general partner and specially allocating to the general partner an identical amount of partnership gross income accompanied by a corresponding cash distribution.

Example. In a two-person real estate limited partnership, the general partner has a 10% interest in all partnership tax items and the limited partner a 90% interest. In addition, the general partner is entitled to receive a $50 fee for supervising improvement of partnership property. The partnership and both partners compute their income on the cash

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basis. The partnership's income and expenses are:

Gross rental income	$100
Depreciation deduction	100
Other deductions	50
Nondeductible fee to general partner	50

The partners' income or loss and cash from the partnership will be as follows:

	General Partner	*Limited Partner*
Gross rental income	$10	$90
Depreciation deduction	(10)	(90)
Other deductions	(5)	(45)
Net income (loss) from the partnership	(5)	(45)
Nondeductible fee	50	0
Total income (loss)	$45	($45)
Cash received	$50	$ 0

Instead of paying a $50 nondeductible fee to the general partner, the partnership specially allocates $50 of gross income to the general partner and makes a corresponding $50 cash distribution to him. The partners' income or loss and cash from the partnership will be as follows:

	General Partner	*Limited Partner*
Gross rental income		
a. Specially allocated to general partner	$50	$ 0
b. Remainder	5	45
Depreciation deduction	(10)	(90)
Other deductions	(5)	(45)
Taxable income (loss) from the partnership	$40	($90)
Total income (loss)	$40	($90)
Cash received	$50	$ 0

The economic results are exactly the same: the general partner still receives $50 of cash; the limited partner still receives nothing. But the tax results to the partners, particularly the limited partner, are significantly different. The effect of the special allocation of $50 of gross income to the general partner has been to increase the limited partner's share of partnership losses from $45 to $90 and to reduce the general partner's total taxable income from $45 to $40. The special allocation effectively has converted a nondeductible $50 payment into the equivalent of a $50 deductible payment.

The result is the same as if the general partner had received a deductible fee:

	General Partner	*Limited Partner*
Gross rental income	$10	$90
Depreciation deduction	(10)	(90)
Deductible fee	(5)	(45)
Other deductions	(5)	(45)
Net income (loss) from the partnership	($10)	($90)
Compensation income	50	0
Total income (loss)	$40	($90)
Cash received	$50	$ 0

In these circumstances, the results of such a special allocation of gross income to the general partner are as good as those of a deductible fee and far superior to the results of a nondeductible fee. Furthermore, the special allocation of gross income possesses substantial economic effect, because it has dramatically affected the general partner's share of partnership economic income. The general partner has become entitled to receive a distribution of an additional $50 of economic income as a result of the special allocation of $50 of additional gross rental income. Viewed in terms of a capital account analysis, the general partner's capital account has been increased by the $50 of specially allocated gross income and then reduced by the corresponding $50 distribution. This kind of special allocation was recently approved by the Tax Court which noted simply that ". . . This [Section 704(b)(2)] limitation is satisfied here because the income allocated to petitioner was in fact paid over to him, and the royalties received by . . . [the partnership's] other partners in those years [were] reduced accordingly."[11]

Such a special allocation should be valid under Section 704(b)(2) even if less than all of the specially allocated income is currently distributed to the partner as long as the partnership agreement provides that eventually distributions to partners will be made in accordance with their adjusted capital account balances. An income allocation accompanied by less than a matching cash distribution will increase the partner's capital account, thereby entitling him to receive the unpaid balance later.

Limitations

This technique is not without its limitations, however. A special allocation of gross income is as good as a deductible fee only if there is sufficient gross partnership income to allocate and sufficient distributable cash to cover the amount of the agreed-upon payment to the general partner. Absent the former, in an accrual-basis partnership the allocation will not be as advantageous to the other partners as a deductible fee, because subject to certain limitations under Reg. 1.461-1(a)(2), an accrual basis partnership can accrue and deduct the full amount of the fee owed to the general partner without making current payment. This difference will not exist, however, in a cash-basis partnership, because it would not be able to claim a deduction except to the extent that it actually makes payment. On the other hand, if there is sufficient gross income to allocate to the general partner but insufficient distributable cash to match the special allocation, the general partner will probably be unwilling to accept the arrangement because taxable income will exceed economic income.

One should not, therefore, replace all payments to general partners for services with special allocations of gross income and corresponding cash distributions. If the fee is clearly deductible, then it should be structured as compensation assuming that the partnership can satisfy the requirements of Section 707(a) or (c). Payments of dubious deductibility or payments that must be tied to partnership income, however, probably should be restructured as special allocations with matching cash distributions.

In choosing between fees for services and special allocations of income, the taxpayer should bear in mind several additional factors. First, a payment for services received by the general partner, whether or not deductible by the partnership, will usually qualify as personal service income eligible for the 50% maximum tax under Section 1348. On the other hand, under Section 702, any special allocation of income to a general partner will retain the character of the income so allocated, and it is unlikely that such a special allocation will be of personal service income to the partnership. Even if it were, the Service takes the position that characterization of partnership income as personal service income is made at the partner, not the partnership level, a proposition of dubious validity.[12] Second, although the Service once ruled that it would recognize the validity of a special allocation of 100% of intangible drilling and development expenses to the limited partners of an oil and gas limited partnership, it recently reaffirmed its longstanding position that it would not rule on the validity of special allocations under Section 704(b)(2).[13] Finally, in *Ltr. Rul.* 7813001, the Service noted pointedly that it would not rule on the validity of special allocations of gross income to a partner where the partnership shows a net loss. Thus, those who wish to obtain the tax benefits of special allocations must do so without the comfort of official approval.

Special allocations of gross income with a corresponding cash distribution also can be employed to decrease partnership income or increase partnership losses by converting a portion of what otherwise would be the nondeductible cost of acquiring a capital or Section 1231(b) asset into "soft" dollars, *i.e.*, expenditures that produce the same tax effect to the partners as deductible expenditures. The technique is the same as replacing a nondeductible fee for services with a special allocation of income. In this instance, a partnership could negotiate a reduction of the asking price for a capital or for a Section 1231(b) asset and give the seller a compensating special allocation of gross income and corresponding cash distribution. This technique will work, however, only if the seller will become or remain a partner of the partnership or if the seller is willing to permit a related party to receive the special allocation in his stead, an approach that may cause additional tax problems.[14] Furthermore, because a special allocation of gross income in lieu of additional purchase price usually will involve a special allocation of ordinary income, it may not be acceptable to nondealer or nondeveloper sellers, such as investor partners of a selling partnership, who expect to claim capital or Section 1231 gain on the sale of the property. In addition, any such allocation will result in a reduction of the purchasing partnership's basis of the acquired asset, thereby reducing any future depreciation or cost depletion and increasing any future gain or reducing any future loss upon disposition of the property. However, these disadvantages will likely be more than offset by the immediate tax benefit of the special allocation—if it works, a result which, for the reasons discussed below, is by no means certain.

Attacks on special allocations of income

In addition to the inherent limitations on the usefulness of special allocations of gross income, such allocations are vulnerable to attack on a number of grounds. First, and most obvious, is lack of substantial economic effect, although this problem may be

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[1] See Cates. *Insuring that special allocations of partnership income and loss are recognized*, 9 TL 203 (Jan./Feb., 1980).
[2] *Orrisch*, 55 TC 395 (1971), *aff'd per cur.* 31 AFTR2d 1069 (CA-9, 1973); *Magaziner*, TCM 1978-205.
[3] *Rev. Rul.* 68-139, 1968-1 CB 311.
[4] *Harris*, 61 TC 770 (1974).
[5] Sections 873, 882(c) and 875.
[6] See, *e.g.*, *Rev. Proc.* 74-17, 1974-1 CB 438, Section 3.01; *Luna*, 42 TC 1067 (1964); *Miller-Smith Hosiery Mills*, 22 TC 581 (1954). But see *McDougal*, 62 TC 720 (1974); *Estate of Koen*, 14 TC 1406 (1950); *Drake*, 1 BTA 1235 (1925); *Halstead*, TCM 1960-106, *aff'd per cur.* 296 F.2d 61, 62-1 USTC ¶9109, 8 AFTR2d 5811 (CA-2, 1961); *Rev. Rul.* 54-84, 1954-1 CB 284.
[7] Reg. 1.704-1(b)(2), example (4); *Rev. Rul.* 67-158, 1967-1 CB 188. Compare Reg. 1.704-1(b)(2), example (2).
[8] Section 162(a)(1); Reg. 1.461-1(a). But see *Zaninovich*, 69 TC 605 (1978), *rev'd* 80-1 USTC ¶9342, 45 AFTR2d 80-1442 (CA-9, 1980).
[9] Sections 263(a) and 709.
[10] 550 F.2d 1023, 77-1 USTC ¶9347, 39 AFTR2d 77-1258 (CA-5, 1977).
[11] *Davis*, 74 TC No. 66. See also McKee, Nelson and Whitmire, *Federal Taxation of Partnerships and Partners* (1977), ¶13.03[1][a], 53. See also *Pratt*, 64 TC 203 (1975), *aff'd on this issue*, *supra* note 10; *Klein*, 25 TC 1045 (1956), *acq.*; *Schmitz*, TCM 1978-317.
[12] *Mim.* 3283, IV-1 CB 14, *declared obsolete by Rev. Rul.* 67-406, 1967-2 CB 420; IT 2286, V-1 CB 52, *declared obsolete by Rev. Rul.* 67-466, 1967-2 CB 427; *Basye*, 410 U.S. 441 (1973); Reg. 1.702-1(a).
[13] *Rev. Rul.* 68-139, *supra* note 3; *Rev. Proc.* 80-22, IRB 1980-26, 22, Section 3.01(23).
[14] See, *e.g.*, *Knipe*, TCM 1965-131 *aff'd per curiam sub nom. Equitable Publishing Co.*, 356 F.2d 514, 66-1, USTC ¶9298, 17 AFTR2d 514 (CA-3, 1966); *Sparks Nugget, Inc.*, 458 F.2d 631, 72-1 USTC ¶9351, 29 AFTR2d 72-927 (CA-9, 1972), *cert. den.*; *Rev. Ruls.* 78-83, 1978-1 CB 79 and 69-630, 1969-2 CB 112. But see *Dean*, 57 TC 32 (1971); *Sammons*, 472 F.2d 449, 73-1 USTC ¶9138, 31 AFTR2d 73-497 (CA-5, 1972).
[15] See Cates, *supra* note 1.
[16] Manual Supplement M.T. 4236-2 (6/20/79).
[17] 542 F.2d 845, 76-2 USTC ¶9710, 38 AFTR2d 76-5840 (CA-2, 1976).
[18] See *Kelly*, TCM 1970-250; See also *Gant*, 263 F.2d 558, 59-1 USTC ¶9219, 3 AFTR2d 618 (CA-6, 1959); *Rupe*, 68-1 USTC ¶9179, 21 AFTR2d 628 (DC Neb., 1968).
[19] *Pounds*, 372 F.2d 342, 67-1 USTC ¶9214, 19 AFTR2d 514 (CA-5, 1967); *Estate of Smith*, 313 F.2d 724, 63-1 USTC ¶9268, 11 AFTR2d 878 (CA-8, 1963).
[20] But see *Communications Satellite Corp.*, 80-1 USTC ¶9338, 45 AFTR2d 80-1189 (Ct. Cls., 1980); *Otey*, 70 TC 312 (1978).

avoided by proper drafting of the allocation and distribution provisions of the partnership agreement.[15] But clearing the Section 704(b)(2) hurdle does not mean that the purported allocation is, in fact, an allocation. In its audit manual, the Internal Revenue Service has indicated that it may attempt to treat a special allocation of income as an assignment of income by the partnership or by the other partners to the recipient of the allocation.[16] If this approach is valid, then the income will be taxable to the person who earned it (in this case, the partnership) although if, as is likely, the income assigned represents something other than a gift or a loan to the assignee, the assignor may then be entitled to an offsetting deduction. If the partnership is entitled to an immediate offsetting deduction, application of the assignment-of-income doctrine will make no difference to it, but, as noted above, other provisions of the Code such as Section 263 may preclude an immediate deduction.

The infirmity of using the assignment-of-income doctrine in this context is that it is inconsistent with the basic proposition that for the purpose of computing taxable income and loss, a partnership is a separate entity. Income is earned or realized, therefore, at the partnership level. Allocation of that income among the partners in accordance with Section 704 constitutes an allocation and not an assignment. Stated another way, once partnership income is determined at the partnership level, it is carved up among the partners, not "assigned" to them by the partnership. Nevertheless, in *Rodman*,[17] the Second Circuit adopted an assignment-of-income approach as an alternative ground for invalidating an attempted retroactive allocation of partnership losses to a partner entering the partnership at the close of its taxable year.

Quite apart from any attack based on the assignment-of-income doctrine, the Service can attempt to recharacterize a special allocation of income accompanied by a corresponding cash distribution as a mere payment for services to the recipient partner rather than a distribution out of specially allocated income. This, too, is a difficult argument to sustain. The general rule of Subchapter K is that payments received by a partner from a partnership are received by him in his capacity as such, and we are assuming for the time being that the allocation at issue is made to one who is in fact a partner. The general rule will not apply if the transaction is treated under Section 707 as occurring between a partnership and one who is not a partner. However, in trying to bring a special allocation of income for services within this exception, the Service will encounter the same stumbling block that partnerships usually encounter in trying to qualify such payments to a general partner under Section 707(a) or (c). If a partner is receiving the special allocation for partner-type services, Section 707(a) cannot apply. Because the amount to which the partner is entitled is directly tied to the partnership income, under *Pratt*, Section 707(c) will not apply either.

The Service should not also have any greater success in seeking to superimpose the limitations of Sections 162(a) and 263 on Section 704(b) to prevent a special allocation of gross income for services from having the same effect on the other partners as a deductible third-party payment. As with any attempt to apply the assignment-of-income doctrine to defeat special allocations of income, the Service is confronted with the fundamental problem that, under Section 703, income is determined at the partnership level and is then allocated among, not assigned or paid to, the partners pursuant to Section 704. In the partnership context, therefore, Sections 162 and 263 should have a place only at the first level. Nevertheless, the effect of special allocations of gross income for services of a capital nature remains an open issue on which the courts have not yet spoken.

All of the foregoing does not mean, however, that special allocations of income made for reasons other than compensation for services cannot be properly recharacterized to reflect their true nature. Section 704(a) refers to the determination of a *"partner's* distributive share of income, gain, loss, deduction or credit. . . ," and Section 704 prescribes the rule for allocating these tax items among *partners*. Therefore, it would be perfectly proper for the Service to assert either that the purported allocation was not made to a partner or, even if it were, that it was not made to him in his capacity as such and was, therefore, subject to Section 707(a). This approach may well be the strongest line of attack on a purported allocation to a seller (or an affiliate of the seller) in lieu of what would have been a higher purchase price of an asset. A person who purports to be a partner of a partnership can instead be, or can be acting in such capacities as, a lender, a lessor, a licensor or a seller, to name but a few. The indicia of true partner status are numerous and varied. They include intent of the parties to join in a common enterprise for profit, sharing of profits as co-owners, sharing of losses, joint participation in management, and the manner in which the parties hold themselves out to the world. Although no one factor is decisive, one of the most important indicia is ownership of an interest in partnership capital (the assets of the partnership upon liquidation), and Section 704(e)(1) provides that a person will be treated as a partner if he owns a capital interest in a partnership in which capital is a material income-producing factor. A purported partner would probably not satisfy

these criteria if his primary or sole interest in the partnership were simply a temporary, limited special allocation of income and corresponding cash distribution, and several cases have refused to recognize the validity of just this kind of purported special allocation in the case of a person who was found to be a seller, not a real partner.[18] If the person to whom the allocation is made is not a partner, then the distribution will be treated as income,[19] and, of course, the deductibility of the payment will be subject to Section 263. Similarly, even if the recipient of the "allocation" does qualify as a partner, if, under all the facts and circumstances, it is found that the allocation was not made to him in his capacity as a partner, Section 707(a) will apply to produce an identical, unhappy result.

Additionally, the characterization of a payment to a partner as a "distribution" does not insure that it will be regarded as such. For example, Regs. 1.721-1(a) and 1.731-1(c)(3) provide that a contribution of property to a partnership by one partner preceded or followed within a short time by a corresponding distribution to another partner may be treated as a constructive sale or exchange of an interest in the partnership between the two partners rather than as a capital contribution by one and a distribution to the other.

Shifting allocations

In T.A.M. 7707260880A, the Service announced another basis for attacking a rather commonplace kind of special allocation, the so-called "shifting" allocation, in which the partners' respective interests in income and loss change at some future date or upon the occurrence of some future event. The facts involved an oil and gas partnership in which the limited partners contributed 95% of the capital and the general partners the remaining 5%. The partnership agreement specially allocated 95% of the income, losses and distributions to the limited partners and 5% of these items to the general partners until all the partners had recouped their original capital contributions, at which time the sharing ratios shifted to 40% for the general partners and 60% for the limited partners. Upon liquidation of the partnership prior to the return of invested capital to the partners, the general partners' share of the liquidation proceeds would be reduced by an amount necessary to compensate the limited partners for their as yet unreturned capital investment. In addition, if prior to payout the general partners transferred their interests, those interests would remain subject to the recoupment provision in favor of the limited partners.

The Service refused to recognize the validity of the initial 5%-95% sharing ratio on the ground that from the outset the general partner possessed 40% in partnership capital. The source of the general partner's additional 35 percentage point interest, reasoned the Service, was either a constructive nonrecourse loan by the limited partners to the general partners of 35% of total partnership capital or an immediate acquisition by the general partners of an additional 35% interest in partnership capital out of funds that the limited partners had invested.

However flawed the reasoning of this Technical Advice Memorandum, it does indicate another avenue of attack by the Service on special allocations—and not just those found in oil and gas partnerships. The theory applies equally to all investment partnerships in which certain partners are eventually entitled to receive a greater percentage interest in partnership income, losses and distributions than that which corresponds to their initial contributions to partnership capital.

Even if the skilled tax adviser has devised special allocations that pass muster under all of the tests and withstand all of the possible challenges described above, special allocations may have an unanticipated, important collateral consequence that could affect their desirability. Sections 705 and 752 permit a partner to increase the basis of his partnership interest by his share of the increase in partnership liabilities and cause the basis of a partner's interest to be reduced by his share of any reduction in partnership liabilities. Regulation 1.752-1(e) defines a partner's share of different kinds of partnership liabilities by reference to the partner's interest in partnership "profits" or "losses." Nowhere are these two key terms defined. The determination of a particular partner's interest in partnership "profits" or "losses" will be difficult when a partnership agreement is rife with special allocations. To date, the effect of special allocations on a partner's interest in profits or losses under Reg. 1.752-1(e) remains an open question.

Conclusion

Special allocations of partnership income and loss and component items thereof offer numerous tax-planning opportunities to the tax adviser and the client who is patient enough to endure the additional complexities that special allocations usually inject into the negotiation and preparation of a partnership agreement and subsequent partnership operations. Care in drafting special allocations will enable partners to avoid the most common mistake—allocations that lack substantial economic effect under Section 704(b)(2). Even then, however, one must be prepared to fend off attacks by the Service on other grounds. ★