
Michael B. Lang
When a House Is Not Entirely a Home: Deductions Under Internal Revenue Code § 280A for Home Offices, Vacation Homes, Etc.†

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I. INTRODUCTION

The fuzzy dichotomy between business or profit-motivated expenses and personal expenses has long plagued both taxpayers and the government, creating continuing confusion as to the deductibility for federal income tax purposes of expenses of maintaining a residence used for both personal and business or profit-oriented purposes. Internal Revenue Code (I.R.C.) § 280A, which sets forth an exclusive series of circumstances in which such deductions are permissible, represents the latest phase in the ongoing battle and the first attempt to deal with the issues by statute. Enacted in 1976 and effective for taxable years beginning after 1975,1 § 280A

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seems to have been directed primarily at so-called home offices and vacation homes. Its scope, however, is much broader because it precludes any deductions for profit-oriented uses of a residence that are not expressly mentioned in its provisions. This unfortunate coupling of a broad general rule of disallowance with narrowly circumscribed exceptions, principally addressed to the home office and vacation home problem areas, raises questions concerning both the applicability and equity of the provision in certain other contexts. These questions have been further complicated by restrictive Proposed Treasury Regulations recently issued by the Treasury Department and a subsequent congressional reaction to the proposals in the form of a joint resolution prohibiting the use of funds to implement regulations or rulings relating to certain aspects of I.R.C. § 280A.

The basic structure of I.R.C. § 280A is rather simple:

(1) I.R.C. § 280A(a) disallows any deduction with respect to a dwelling unit used by the taxpayer as a residence during the taxable year.

(2) I.R.C. § 280A(b) excepts from the general disallowance rule of § 280A(a) deductions allowable without regard to the taxpayer’s business or profit motivation, such as those for interest, taxes and casualty losses.

(3) I.R.C. § 280A(c) excepts from the general disallowance rule of § 280A(a) certain expenses for residences used for business, storage, rental or providing day care services.

(4) I.R.C. § 280A(c)(5) limits the allowable amount of deductions

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2. See text accompanying notes 54-85 infra.

3. See text accompanying notes 89-109 infra.

4. See text accompanying notes 26-33 infra.

5. See Baie v. Commissioner, 74 T.C. 105 (1980). In Baie, the court rejected a hot dog stand owner’s claim that her home kitchen was a “manufacturing facility” rather than a home office and therefore fell outside the intended scope of I.R.C. § 280A:

It is true that the potential for abuse in this area was typified by the situation where a taxpayer would make a dubious claim for a home office deduction . . . Unfortunately . . . the words of the law which Congress passed are straightforward and much broader in their applicability—sufficiently broad as to catch petitioners in their net. We are not therefore at liberty to “bend” the law, much as we may sympathize with petitioner’s position.

Id.


8. See I.R.C. § 163 (interest); I.R.C. § 164 (taxes); I.R.C. § 165(c)(3) (casualty losses).
for an excepted use to the amount of gross income derived from that use.

(5) I.R.C. § 280A(e) further limits deductions for expenses attributable to rental use of the dwelling unit to that portion of the total expenses allocable to rental of the unit.9

This simple structure rests on a complex maze of definitions and conditions not often found in Code provisions directed at a broad spectrum of individual taxpayers.

II. GENERAL RULE AND DEFINITIONS

I.R.C. § 280A(a) elegantly declares: “Except as otherwise provided in this section . . . no deduction otherwise allowable under this chapter shall be allowed with respect to the use of a dwelling unit which is used by the taxpayer during the taxable year as a residence.” Although the provision expressly applies only to individuals and Subchapter S corporations, the IRS will undoubtedly extend its application to trusts, estates and partnerships in accordance with expressions to this effect in the committee reports.10 Congressional concern with Subchapter S corporations, whose shareholders could pass through to their own tax returns any deductions for corporate use of their residences in contravention of I.R.C. § 280A’s policy, apparently did not extend to other corporations, whose deductible use of shareholder residences cannot directly affect the shareholders’ tax returns. Nonetheless, deductions by closely held non-Subchapter S corporations for use of shareholder residences and other shareholder living expenses have produced litigation in the past and will probably continue to do so.11

9. This rule applies whenever the taxpayer uses the unit for personal purposes during the taxable year, even if his personal use is insufficient to bring the remainder of I.R.C. § 280A into play.


11. Compare Wayburn v. Commissioner, 32 B.T.A. 813 (1935) (nonacq.) (Cohan rule applied to allow portion of corporate payments for home entertainment expenses of president) and International Artists, Inc. v. Commissioner, 55 T.C. 94 (1970) (acq.) (allocable portion of home depreciation and maintenance expenses allowed where substantial business and personal motives existed) with Greenspon v. Commissioner, 23 T.C. 138 (1954) (acq.), aff'd as to this issue, 229 F.2d 947 (8th Cir. 1956) (business use of shareholder farm irregular and incidental; no deduction for maintenance expense). See also Benjamin v. Commissioner, 66 T.C. 1084 (1976), aff’d on other grounds, 592 F.2d 1259 (5th Cir. 1979) (payment
The general disallowance rule of § 280A(a) must be applied according to its definitional props. For instance, "dwelling unit" is defined to include "a house, apartment, condominium, mobile home, boat, or similar property, and all structures or other property appurtenant" to the unit, such as a garage,12 but not a portion of a unit "used exclusively as a hotel, motel, inn or similar establishment."13 The latter exception presumably applies to taxpayer-lessees of such units, such as hotel operators, not taxpayers who lease them from the operator. In two private rulings,14 the IRS has elaborated on the applicability of the exception to condominium units available for rental through a rental pool or similar arrangement when not reserved for occupancy by the owners. The IRS regards the exception as applicable only if the unit (or portion) is regularly available for occupancy by paying customers on a transient basis and if persons with an interest in the unit do not exercise any preferential rights with respect to the use of the unit.15 This position follows directly from the congressional desire to subject vacation homes to I.R.C. § 280A.16

A taxpayer who uses a dwelling unit for personal purposes for more than both fourteen days and ten percent of the number of days during the taxable year that it is rented at a fair rental has used the unit as a residence within the meaning of I.R.C. § 280A(a).17 Use of a dwelling unit for personal purposes for a day for upkeep and maintenance of dominant shareholders' residence held constructive dividend. For the suggestion that a corporation may be used to avoid I.R.C. § 280A in some instances, see Note, supra note 1, at 147.

12. I.R.C. § 280A(f)(1); S. Rep. No. 94-938, supra note 1, at 154. See Proposed Treas. Reg. § 1.280A-1(c)(1), [1981] 3 Fed. Taxes (P-H) ¶ 16,979.18-A (applying § 280A to deductions attributable to rental space in garage appurtenant to house). However, it appears that a boat or mobile home will be treated as a dwelling unit only if it provides "basic living accommodations such as sleeping space, toilet and cooking facilities." Id. See Haberkorn v. Commissioner, [1981] Tax Ct. Rsr. (CCH) ¶ 37,322 (1980) (mini-motorhome with "relatively uncomfortable" living facilities held a dwelling unit). Cf. I.R.C. § 167(k)(3)(C) (defining "dwelling unit" for purposes of accelerated depreciation).


16. See text accompanying note 96 infra.

17. I.R.C. § 280A(d)(1). A unit is not treated as rented at fair rental for any day that it is used for personal purposes any part of the day. Id. § 280(d)(1), (d)(2); Proposed Treas. Reg. § 1.280A-1(d)(2), example 2, [1981] 3 Fed. Taxes (P-H) ¶ 16,979.18-A. The "any part" language may be subject to a de minimis exception. See text accompanying note 25 infra. See also Fine v. United States, 46 A.F.T.R.2d 5617 (N.D. Ill. 1980) (§ 280A(d)(1) applied because "fair rental" does not include "lease" to management agency in exchange for limited payment, insufficient to produce profit, based on availability of unit for rental).
occurs whenever the unit is used for any part of the day by either the taxpayer or one of a category of persons whose use is attributed to the taxpayer by the Code:18

(1) The taxpayer's brother, sister, spouse, ancestor or lineal descendant;19

(2) A person who has an interest in the unit, such as a joint tenant or other part owner, or a member of such a person's family, as defined in (1);20

(3) An individual who uses the unit under a reciprocal arrangement enabling the taxpayer or, in the case of a Subchapter S corporation, any shareholder of the corporation, to use some other dwelling unit;21

18. I.R.C. § 280A(d)(2). These categories will overlap in many contexts.
19. I.R.C. §§ 280A(d)(2)(A), 287(e)(4). In this context, it is irrelevant that the relative pays fair rental for the unit. Ltr. Rul. 8014079 (Jan. 11, 1980) (parents); Ltr. Rul. 8015008 (Dec. 17, 1979) (mother); Ltr. Rul. 8029030 (April 22, 1980) (brother, sister). But see H.R.J. Res. 610, § 123, supra note 7 (prohibiting IRS from funding implementation of regulations or rulings relating to rental of dwelling unit to member of taxpayer's family).
20. See note 19 supra. Proposed Treas. Reg. § 1.280A-3(f)(1) to -3(f)(3) would apply § 280A to a person holding an interest under a time sharing arrangement. [1981] 3 Fed. Taxes (P-H) ¶ 16,979.18-C. An interest triggers this section even if it does not entail immediate rights to possession or enjoyment of the home. However, a security interest or an interest under a lease for fair rental does not trigger the section. See S. Rep. No. 94-938, supra note 1, at 154. The statute does not indicate which rights with respect to a home rise to the level of an interest. For example, if a partnership owns the unit, does a partner have an interest? Does the beneficiary of an estate have an interest in an estate-owned unit, or does this depend on whether the beneficiary directly succeeds to title in the unit under state law? Proposed Treas. Reg. § 1.280A-1(e)(3) would treat the entity (i.e., partnership, etc.) as making personal use of the unit on any day “on which any member of the partnership, beneficiary of the trust or estate, or shareholder in the corporation would be considered to have made personal use of the unit” if that person had an interest in the unit. [1981] 3 Fed. Taxes (P-H) ¶ 16,979.18-A. It should be noted that use by the partner or beneficiary for personal purposes will be personal use anyway under I.R.C. § 280A(d)(2)(C) unless the unit is rented for fair rental for the day in question.
21. I.R.C. § 280A(d)(2)(B), (f)(2). The existence of rental charges or a quid pro quo is irrelevant. See Rev. Rul. 80-55, 1980-9 I.R.B. 7 (I.R.C. § 280A(d) applies where two homeowners rent homes to each other for fair rental value for use as personal residences). The Senate Finance Committee indicated the target of this rule: “[C]ertain arrangements have been devised whereby an individual owner of a condominium unit is entitled to exchange the time set aside for the personal use of his own unit (typically three to six weeks) for the use of a different unit under the same general management at another location.” S. Rep. No. 94-938, supra note 1, at 152. See Proposed Treas. Reg. § 1.280A-1(e)(5), examples (1) & (2), § 1.280A-3(e)(6), [1981] 3 Fed. Taxes (P-H) ¶ 16,979.18-A, -C (reciprocal arrangements for rental pool participants). The committee reports refer to a rule similar to that in I.R.C. § 280A(f)(2) for Subchapter S corporations for ascertaining personal use by a partnership, estate or trust on the basis of use by the partners or beneficiaries. The committee reports, out of an excess of caution, both continue: “However, if two or more partners, beneficiaries, or stockholders personally use the vacation home during the same day, that day would constitute only one day of personal use.” S. Rep. No. 94-938, supra note 1, at 153-54; H.R. Rep. No. 94-658, supra note 1, at 164-66. See Proposed Treas. Reg. § 1.280A-1(e)(3), [1981] 3
(4) An individual (other than an employee with respect to whose use I.R.C. § 119 applies), unless for such day the unit is rented for fair rental; or

(5) In the case of a Subchapter S corporation, any shareholder of the corporation or member of a shareholder’s family as defined in (1). 

This complex definition of personal use clearly implies that a day of nonuse does not count as a day of personal use, although this point is not stated expressly. Regulations will indicate when use of a unit for repairs or annual maintenance will not constitute personal use and will perhaps provide a more general de minimis rule so that incidental use of a unit “for any part” of a day by a proscribed person does not make that day a personal use day.

Once triggered, I.R.C. § 280A(a) disallows all expenses for a dwelling unit used as a residence by the taxpayer during the taxable year except to the extent that another part of I.R.C. § 280A authorizes a deduction. Disallowed expenses generally include rent or depreciation, maintenance, utility and insurance expenses. It is

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FED. TAXES (P-H) ¶ 16,979.18-A. While the IRS will probably rely on the committee reports, the courts may be slow to accept this inexcusable substitution of legislative history for careful draftsmanship.

22. I.R.C. § 280A(d)(2)(C). I.R.C. § 119 excludes from an employee’s income the value of lodging provided by his employer if he is required to accept such lodging as a condition of employment, it is furnished on the employer’s business premises, and it is furnished for the convenience of the employer.

Although § 280A(d)(2)(C) does not require that the rental for fair rental and the user of the unit be connected for the use to escape personal use characterization, this implication is clear. Thus, if I can persuade my brother to pay fair rental for a unit that my friends use for three days, these three days are presumably personal use either because fair rental has not been paid for my friends’ use or because allowing such use of the unit constitutes a gift to the friends equivalent to personal use by my brother or me.


24. See S. Rep. No. 94-938, supra note 1, at 154 (a normal work day of cleaning, painting, repairing or otherwise maintaining does not count as personal use). Proposed Treas. Reg. § 1.280A-1(e)(4), [1981] 3 FED. TAXES (P-H) ¶ 16,979.18-A would ignore any day on which the taxpayer performs repair or maintenance work on the unit for “the lesser of 8 hours or ½% of the time that the individual is present on the premises.” See id. § 1.280A-1(e)(5), example 3. For the significance of a child who accompanies the taxpayer to the unit and plays while the taxpayer works, see id., example 4. But see H.R.J. Res. 610, § 123, supra note 7 (prohibiting IRS from funding implementation of regulations or rulings relating to when use of dwelling unit for repairs or maintenance constitutes personal use).

25. The regulations will probably include illustrative examples similar to those set forth in the proposed regulations.

26. See S. Rep. No. 94-938, supra note 1, at 144; Ltr. Rul. 7734023 (May 24, 1977) (allocable portion of home mortgage and utility expenses). The ruling does not clarify what the taxpayers meant by their “home mortgage” expenses. Interest would have been deductible anyway if the taxpayers itemized deductions, while the principal payments on a mort-
important to distinguish expenses allocable to the use of the dwelling unit, which are nondeductible, from other expenses not allocable to the use of the dwelling unit, which may constitute deductible ordinary and necessary business expenses. Thus, the taxpayer who acquires an electric typewriter for use in a part-time typing business operated out of a corner of his recreation room should be able to deduct expenses allocable to the business use of the typewriter, including depreciation, electricity and insurance. Such deductions should be allowed despite both I.R.C. § 280A and the occasional typing of a letter to a friend or the editor of the Washington Post expressing disenchantment with the tax laws.27

I.R.C. § 280A(b) excepts from the disallowance rule items that are deductible under other statutory provisions regardless of the taxpayer’s profit motivation, such as interest, casualty losses and taxes.28 The taxpayer may only deduct other expenses attributable to a dwelling unit used as a residence if the expenses are allocable to one of the excepted uses to I.R.C. § 280A(a) found in I.R.C. § 280A(c).29 Even then, such deductions are generally subject to a further limitation based on the gross income generated by the excepted use.30 In particular, items such as interest, which are deductible absent profit motivation but are allocable to an excepted use, reduce the amount of potential deduction for other expenses allocable to the excepted use.31

One apparent but unheralded application of I.R.C. § 280A involves away-from-home lodging expenses. Section 280A(a) seems to disallow the lodging expenses of the business traveler who stays at the same lodging for more than both fourteen days and ten percent of the number of days during the year for which it is rented at a fair rental (presumably by him to someone else). If the lodging is a “hotel, motel, inn or similar establishment,” the traveler might argue that it did not constitute a dwelling unit by virtue of I.R.C. § 280A(f)(1)(B). This exception, however, evidently refers to taxpayers who are lessors of such establishments and not to those who

gage are not deductible under any circumstances. Perhaps they were referring to insurance and depreciation expenses.


28. See note 8 supra; see Proposed Treas. Reg. § 1.280A-1(b), [1981] 3 FED. TAXES (P-H) ¶ 16,979,18-A.

29. The excepted uses are discussed in detail beginning at text accompanying note 33 infra.

30. See text accompanying notes 127-145 infra.

31. I.R.C. § 280A(c)(5). Rental use deductions are also limited by I.R.C. § 280A(e).
rent and occupy rooms or suites.

In addition, the visiting professor or businessman on temporary assignment who must rent an apartment or house for several months cannot resort to this definitional argument, and none of the exceptions of I.R.C. § 280A(c) is likely to benefit him. The visiting professor or businessman might argue that he is not using the house or apartment for “personal purposes” within the meaning of I.R.C. § 280A(d)(1). Such a position, however, is difficult to reconcile with the fact that, at least in the lay sense, he is using the unit as a residence. Moreover, it seems inappropriate to assert that an overriding business use (travel away from home) should deactivate a provision aimed at limiting business expense deductions to those satisfying narrowly circumscribed business use requirements. Nonetheless, since this far-reaching application of I.R.C. § 280A is not mentioned by the committee reports, it is probably an unintended result of congressional haste in response to Treasury Department pressure. Only the future will tell whether the IRS will contend for this application of § 280A(a) and whether Congress will clarify its intentions.

III. EXCEPTED USES

I.R.C. § 280A(c) excepts from the § 280A(a) disallowance rule expenses incurred in connection with certain uses of the residence for business, storage, rental or providing day care services. There is no general exception for the home office expenses of an investor that were deductible under I.R.C. § 212 under prior law. If expenses are attributable to one of the excepted uses set forth in I.R.C. §§ 280A(c), such expenses must still meet any requirements of I.R.C. §§ 162, 167, 183, or 212 not addressed by § 280A, and of

32. Both committee reports do mention away-from-home lodging expenses in their discussion of prior law applicable to the business use of residences. See S. Rep. No. 94-936, supra note 1, at 145; H.R. Rep. No. 94-658, supra note 1, at 158. Reading these statements as indicative of a legislative intent to change the law seems a bit strained.

33. See Imhoff v. Commissioner, [1980] Tax Ct. Mem. Dec. (P-H) ¶ 80,030 & n.11; Anderson v. Commissioner, 43 T.C.M. (P-H) 218 (1974), aff’d on this issue per curiam, 527 F.2d 198 (9th Cir. 1975). However, I.R.C. § 280A(c)(3) and (e) may support such a deduction to the extent the home office expenses relate to investment activities involving rental of a portion of the dwelling unit where the office is maintained.

34. The statutory framework seems to suggest that in addition to the requirements of § 280A, all of the requirements of I.R.C. §§ 162, 167 or 212 would have to be met inasmuch as § 280A does not actually authorize any deductions. It seems clear, however, that § 280A represents a legislative revision of certain basic requirements under the controlling statutory provisions instead of merely another obstacle for the taxpayer to contend with. Thus, in I.R.C. § 280A(c)(1), Congress has refined the “ordinary and necessary” standard applicable
any other applicable provisions, to qualify for deduction.\textsuperscript{35} Thus, a capital expenditure such as the cost of adding a room to the residence may not be deducted currently under I.R.C. § 162, even if the room will be used exclusively and on a regular basis as the taxpayer’s principal place of business within the meaning of I.R.C. § 280A(c)(1)(A).

A. Home Offices

1. History—I.R.C. § 280A resulted largely from the Commissioner’s lack of success in limiting deductions for home offices under the “ordinary and necessary” criteria of I.R.C. §§ 162 and 212. Since the § 280A(c)(1) exception to § 280A(a) reflects this genesis, it is instructive to examine the principal features of pre-§ 280A case law. The regulations under pre-1976 law clearly precluded the taxpayer who incidentally conducted business at home from deducting as business expenses any expenses of maintaining the home. If part of the home was used as a “place of business,” the portion of household expenses\textsuperscript{36} attributable to this use was deductible under I.R.C. §§ 162 or 167, as appropriate.\textsuperscript{37} A similar principle, although nowhere spelled out, also applied to home office expenses in connection with income-producing activity for which any allowable deduction was taken under I.R.C. § 212.

This pre-1976 approach produced two major bones of contention: (1) the extent or nature of the business or profit-oriented use required to support any home office deduction at all, and (2) the method of allocating a portion of household expenses to an admittedly sufficient business or profit-oriented use. The dispute and subsequent confusion on the first issue can be traced to the IRS position on home offices of employees, the classic statement of

\textsuperscript{35} For example, if travel or entertainment expenses are involved, the taxpayer will have to satisfy any pertinent requirements of I.R.C. § 274.

\textsuperscript{36} Deductible household expenses included rent or depreciation, maintenance, utilities and insurance. See Treas. Reg. § 1.262-1(b)(3) (1960).

\textsuperscript{37} Id.
which is Revenue Ruling 62-180. The ruling allowed an employee a home office deduction only if his employer required the employee to maintain a home office as a condition of employment and if the office was regularly used for the performance of the employee's duties. A similar official statement on the deductibility of home offices by investors and the self-employed probably failed to appear because of the difficulty of discovering the issue on the returns of such taxpayers disguised the extent of the problem. Such cases did arise, however, and the Commissioner unsuccessfully sought application of Revenue Ruling 62-180 in at least one nonemployee case.

The courts initially rejected the IRS position, even where the employee had an employer-provided office available at all relevant times. This rejection stemmed from the well-established principle that the "ordinary and necessary" criterion of I.R.C. § 162 requires only that an expense be "appropriate and helpful" to the taxpayer's business. Neither the IRS nor the courts seemed to attach significance to the phrase "place of business" in the regulations.

39. Self-employed taxpayers take their home office deductions on schedule C of the Form 1040 ("Long Form") Individual Income Tax Return. In the past, home office rent, depreciation, utilities, etc. listed as deductions on this schedule were indistinguishable from those listed for nonhome office rent, depreciation and utilities. The current form of Schedule C, however, reflecting post-1976 amendments designed to draw the attention of IRS examiners to I.R.C. § 280A issues, requires the taxpayer to indicate whether he is taking any deductions for the use of a home office in his trade or business.

Investors, like employees, list their home office deductions as miscellaneous itemized deductions. Unlike employees, however, investors also have miscellaneous items of gross income; hence, their home office deductions probably seem statistically less significant.

40. See Demor, Inc. v. Commissioner, 37 T.C.M. (P-H) 1631 (1968) (use of home office necessary due to lack of space in shop). See also Kasey v. Commissioner, 45 T.C.M. (P-H) 1145 (1976) (on appeal) (expenses deductible for home office maintained in connection with mining explorations where no other office apparently available). As to investors, see authorities cited at note 33 supra.

Bodzin v. Commissioner,42 involving an IRS attorney who worked in his study on weekends and evenings despite the availability of his government office, finally provided the IRS a reward for its tenacity. Although the Bodzin Tax Court opinion followed the “appropriate and helpful” standard, future forebodings appeared in both the majority opinion’s emphasis on the principle that maintaining the office primarily for personal convenience would bar the deduction and the plethora of dissents.43 The Court of Appeals for the Fourth Circuit, finding the case easy enough to decide without setting forth any legal standard at all, reversed: “We conclude that the expense of renting the Bodzin’s apartment was a personal expense within the meaning of § 262 and not a business expense.”44 The court of appeals relied on a narrow reading of the previously overlooked “place of business” language in the regulations to conclude that the priority ordering directive of I.R.C. § 161 precluded any business expense deduction under I.R.C. § 162 for an item for which I.R.C. § 262 precluded a personal expense deduction. However, the court seems to have viewed any use of the home office by Bodzin as partially for personal convenience, leaving open whether the use of a portion of a home part of the time for business would support a deduction when the personal convenience factor was not present.

The Tax Court also failed to address this issue when it adopted the view of the Fourth Circuit in Sharon v. Commissioner,45 a case “virtually identical” to Bodzin, and shortly thereafter addressed the “place of business” question in Meehan v. Commissioner.46

Quite succintly, petitioner’s office area in his living room does not constitute a “place of business,” in terms of either quantum or quality of activity, as contemplated by the regulation.... [P]etitioner’s use of the office area in his living room for some read-

43. See 60 T.C. at 826, 827-29.
44. 509 F.2d at 681. The court distinguished all contrary cases (with no discussion or citation other than Newi v. Commissioner, 38 T.C.M. (P-H) 735 (1969), aff’d, 432 F.2d 998 (2d Cir. 1970)) as involving employer-provided offices that either were not available in the evening or on weekends or were not suitable for the purposes for which the taxpayer used his home office. For a more recent case in the latter category, see Kirby v. Commissioner, [1980] Tax Ct. Mem. Dec. (P-H) ¶ 80,194 (home office deduction allowed teachers for pre-§ 280A year where teachers were ordered to leave unsafe schools after classes, necessitating 20 hours of class preparation at home).
45. 66 T.C. 515 (1976), aff’d, 691 F.2d 1273 (9th Cir. 1978), cert. denied, 442 U.S. 941 (1979).
46. 66 T.C. 794 (1976).
ing, preparation and checking mechanical drafts pursuant to his various graduate assistantship responsibilities does not rise to the dignity of a "place of business." 47

Although later cases applied the "place of business" test in various contexts and developed intimations in *Meehan* and *Sharon* that no home office deduction should be allowed absent evidence that additional household expenses were incurred because of the home office use, 48 these later cases did not play a role in the enactment of I.R.C. § 280A.

The portion of household expenses attributable to a home office was determined under pre-1976 law by any reasonable method of allocation. The space element of the allocation usually depended on the amount of floorspace used for business purposes, although a simple allocation based on the number of rooms in the house or apartment would have been acceptable if the rooms were of roughly equivalent size. 49 Where exact figures were not available, an esti-

47. *Id.* at 807-08.
48. See, e.g., Tyson v. Commissioner, 48 T.C.M. (P-H) 526 (1979) (home office of physician not used for patients not place of business where office at professional corporation could be used at all times); C.A. White Trucking Co. v. Commissioner, 46 T.C. 18 (1977) (on appeal) (room with office phone line occasionally used for business not place of business); Cobb v. Commissioner, 45 T.C.M. (P-H) 1452 (1976) (following excess cost principle to deny home office deduction for apartment rental). But see Galazin v. Commissioner, 48 T.C.M. (P-H) 813 (1979) (rejecting excess cost principle in context of water and garbage collection expense, but denying deduction for lack of sufficient information for an allocation to the home office). The excess cost principle is analogous to that laid down by the Supreme Court for the commuter who incurs additional commuting expenses because he must transport the tools of his trade to and from his place of business. Fausner v. Commissioner, 413 U.S. 838 (1973) (per curiam). For the IRS interpretation of *Fausner*, see Rev. Rul. 75-580, 1975-2 C.B. 59 (only excess cost, if any, of commuting by mode of transportation actually used is deductible, not difference in cost resulting from use of more expensive mode of transportation). An analogous rule in the home office area would have eliminated virtually the entire home office deduction in most cases!

See also Lucke v. Commissioner, 48 T.C.M. (P-H) 1775 (1979) (accountant's feeling of pressure to read tax journals at home not tantamount to employer-required home office, since employer office available; use of home office reflected personal preference and convenience); Roberts v. Commissioner, 48 T.C.M. (P-H) 950, 962 (1979) (professor who used apartment to study while graduate student at Harvard Law School did so as a matter of personal preference; "[W]e are certain that the facilities for study, research, and writing at Harvard Law School are adequate"); Coleman v. Commissioner, 48 T.C.M. (P-H) 581, 587 (1979) (occasional use of living room card table for typing "more a matter of personal convenience and comfort than measurable business usage"); On-Ri-Ga Medical Professional Ass'n v. Commissioner, 47 T.C.M. (P-H) 183 (1978) (home office expenses of physicians for personal convenience, not a condition of employment).

mate was made under the Cohan rule.\(^{50}\)

A conflict arose as to the proper method of allocation based on time of use when the home office portion of the residence was not used exclusively for business. The IRS, focusing on the availability of the portion of the residence for personal use when not used for business, ruled that the allocation should be based on the ratio of time actually used for business purposes to total time available for all uses.\(^{51}\) This approach was endorsed by the Court of Appeals for the Ninth Circuit.\(^{52}\) However, the Tax Court used the ratio of actual business or profit-oriented use to actual total use.\(^{53}\)

2. \textit{I.R.C. § 280A(c)(1)}—Congress recognized the need for definitive rules to resolve the confusion surrounding the deductibility of home office expenses.\(^{54}\) The Treasury Department, however, persuaded Congress that this was best accomplished by substantially curtailing home office deductions:

With respect to the "appropriate and helpful" standard employed in the court decisions, the determination of the allowance of a deduction for these expenses is necessarily a subjective determination. In the absence of definitive controlling standards, the "appropriate and helpful" test increases the inherent administrative problems because both business and personal uses of the residence

\begin{itemize}
\item The fact that a taxpayer who has extra space chooses to stack some income tax papers or investment-related papers in extra space in his home because it is convenient for him to do so does not cause that space to be directly or proximately connected with his production of income or to be an ordinary and necessary expense. \textit{Imhoff} also noted that closets and hallways should not be ignored in making a floor space allocation.
\item \textit{See} Browne v. Commissioner, 73 T.C. 723 (1980) (rejecting Ninth Circuit's analysis), following Gino v. Commissioner, 69 T.C. 304 (1973) (nonacq.), rev'd per curiam, 538 F.2d 833 (9th Cir.), cert. denied, 429 U.S. 979 (1976); Anderson v. Commissioner, 43 T.C.M. (P-H) 218 (1974), aff'd on this issue per curiam, 527 F.2d 198 (9th Cir. 1975); International Artists, Ltd. v. Commissioner, 55 T.C. 94 (1970) (acq.). \textit{Anderson} was affirmed by the Ninth Circuit six months before \textit{Gino} was reversed.
\item \textit{See} S. Rep. No. 94-938, \textit{supra} note 1, at 147.
\end{itemize}
are involved and substantiation of the time used for each of these activities is clearly a subjective determination. In many cases the application of the appropriate and helpful test would appear to result in treating personal[,] living, and family expenses which are directly attributable to the home (and therefore not deductible) as ordinary and necessary business expenses, even though those expenses did not result in additional or incremental costs incurred as a result of the business use of the home. Thus, expenses otherwise considered nondeductible personal, living, and family expenses might be converted into deductible business expenses simply because, under the facts of the particular case, it was appropriate and helpful to perform some portion of the taxpayer's business in his personal residence. For example, if a university professor, who is provided an office by his employer, uses a den or some other room in his residence for the purpose of grading papers, preparing examinations or preparing classroom notes, an allocable portion of certain expenses might be claimed as a deduction even though only minor incremental expenses were incurred in order to perform these activities.\(^{56}\)

As a result, home office deductions are allowed only in accordance with I.R.C. § 280A(c)(1)'s restrictive conditions.

I.R.C. § 280A(c)(1) only allows the deduction of expenses allocable to a portion of the dwelling unit exclusively used on a regular basis—

(A) as the taxpayer's principal place of business;
(B) as a place of business which is used by patients, clients or customers in meeting or dealing with the taxpayer in the normal course of his trade or business, or
(C) in the case of a separate structure which is not attached to the dwelling unit, in connection with the taxpayer's trade or business.

Such use of a portion of a dwelling unit by an employee must be for the convenience of his employer.\(^{56}\) The exclusivity requirement eliminates the time-of-use allocation problem,\(^{57}\) and the specifically defined circumstances needed to support a deduction eliminate the conflict over what constitutes a sufficient business or profit-oriented use. It is also noteworthy that Congress clearly intended to disallow home office deductions of taxpayers engaged in nonbusiness profit-oriented activities, such as those who use home

\(^{55}\) Id.

\(^{56}\) I.R.C. § 280A(c)(1) (last sentence).

\(^{57}\) Cf. Luben v. Commissioner, 47 T.C.M. (P-H) 844 (1978) (time of use allocation inappropriate as to room of house used exclusively as an office).
offices, even if exclusively and on a regular basis, to read financial periodicals and reports and clip bond coupons. 58

Although I.R.C. § 280A(c)(1) responds to the problems created by prior case law, it raises a phalanx of its own interpretive problems because its application inevitably depends on how the particular statutory terms, such as “portion,” “exclusive use” or “regular basis,” will apply to a broad spectrum of factual situations. At the outset, it is far from clear what will constitute a “portion” of a dwelling unit. Perhaps the taxpayer will need to establish a clear physical demarcation between his home office and the remainder of his home. Although this approach may appear unduly restrictive, the Treasury’s difficulty in verifying the existence of a “portion” meeting the other statutory requirements may otherwise be insurmountable. For example, whether the exclusive-use test is met may depend on how the relevant portion of the dwelling unit is defined. 59

The exclusive-use requirement connotes use of a specific part of the dwelling unit or the separate structure “solely” for one of the specified business purposes. 60 The committee report states that

58. S. Rep. No. 94-938, supra note 1, at 149. Senator Bartlett proposed a floor amendment that would have revived such deductions to the extent they would have been available under I.R.C. § 212(2), apparently to aid taxpayers involved in rental activities. See 122 Cong. Rec. 26138 (1976). For speculation over whether this amendment was rejected as superfluous in the case of such rental activities or for other reasons, see Curphey v. Commissioner, 73 T.C. 766 (1980) (on appeal).

59. The author understands that publication of proposed regulations under I.R.C. § 280A was originally delayed in part by an internal dispute as to whether a qualifying portion of the dwelling unit must be separated from the remainder of the dwelling unit by a “permanent partition.” Although the adoption of such a view would severely curtail I.R.C. § 280A deductions, it is easy to understand the underlying concern.

The proposed regulations in existence at the date of this writing do not address this point. Nevertheless, a demarcation requirement seems implicit in Gomez v. Commissioner, [1980] Tax Ct. Mem. Dec. (P-H) ¶ 80,565, which held that “portion” did not refer to “various segmented parts” of the living room where the saleswoman-taxpayer physically located furniture exclusively used as her principal place of business. (Other parts of the living room were used for personal purposes.) The court assumed arguendo that “portion” did not refer exclusively to “a space that is physically separated by a wall, partition, etc. from space used for personal purposes.” Id. at 2390.

60. Suppose, however, that two family members both use the home office on a regular basis for an I.R.C. § 280A(c)(1) use and that the office is not otherwise used. Is the exclusive-use requirement then satisfied? The literal language of the statute, referring in each subparagraph to “the taxpayer,” suggests it is not. But see Comment, supra note 1, at 504 (“280A focuses on the facility to be used, not on who uses it.”). Perhaps this is correct in this context, but as a general rule it goes too far: to the extent the user is a corporation, I.R.C. § 280A does not apply at all. See text accompanying note 11 supra. Hopefully, the IRS will recognize that so limited a construction of § 280A(c)(1) would be an inequitable absurdity and allow deductions in such a case.
a taxpayer may not deduct expenses allocable to a den used "to write legal briefs, prepare tax returns, or engage in similar activities as well as for personal purposes." The proposed regulations give the exclusive-use requirement an extremely strict construction. No nonbusiness use of the specified portion of the dwelling unit is permitted during the entire taxable year. Although this strict construction finds some support in the case law, it represents misguided tax policy that can only create further disrespect for the tax laws. The taxpayer who includes personal books or other objects or mementos on his den bookshelves and incidentally uses the desk for an hour or so a month to pay his bills, balance his checkbook and perform similar tasks should be allowed to deduct the expenses attributable to the den if it is otherwise used for business purposes in accordance with I.R.C. § 280A(c)(1). A literal interpretation of the exclusive-use requirement will only encourage perjury on the part of taxpayers whose nonbusiness use of a den or other portion of the dwelling unit is so limited. Indeed, there is


Petitioner converted one bedroom in his home into an office. He had a desk, a telephone, a calculator, a chair and a large number of books, some of which were related to his employment activities and others that were not. Petitioner used this office in his home for grading of papers, preparation of class work, planning rehearsals and similar activities connected with his employment as a music instructor at Valley College. In addition, petitioner used his home office for preparing his Federal income tax returns, sorting his mail, paying his personal bills and doing work in connection with his investments in commodities and stocks.

The living room in petitioners' home has an L-shaped extension which the previous owner had used as a conversation room or a den. Petitioners converted this L-shaped extension of the living room into a music room. This room contained a grand piano, a bench, a chair and a stereo receiver. Petitioner used the music room for practice of the piano in connection with recitals that he was expected to give as a music instructor at a college and also to meet with students who were participating in the opera to rehearse particular sections or ensembles. He also used the music room in connection with the practice of particular students who were members of the A Cappella choir. In addition to the piano in the music room, petitioners also had a piano in the living room. Since the music room opened into the living room, guests used the music room as well as the living room at parties given by petitioners at their home.

Id. at 2047 (emphasis added).

64. For a discussion of several cases in which the term "exclusive" has received a more liberal construction in other contexts, see Comment, supra note 1, at 502-04.
already evidence of this occurring.\textsuperscript{65}

As a practical matter, the Commissioner's concerns are amply protected by the § 280A(c)(1) requirement that the portion of the dwelling unit or separate structure be used for one of the specified purposes on a "regular basis," which the committee reports distinguish from incidental or occasional use.\textsuperscript{66} Although a full understanding of this provision will have to await case-by-case development, the examples illustrating "regular use" under Revenue Ruling 62-180\textsuperscript{67} provide guideposts. Thus, use of the portion of the dwelling unit for an average of two hours per day should satisfy the statutory test,\textsuperscript{68} although daily or even almost-daily use is probably not required.

The convenience-of-the-employer test applicable to employees appears more lenient than the condition-of-employment test previously applied by the IRS.\textsuperscript{69} The convenience-of-the-employer test under I.R.C. § 119\textsuperscript{70} provides a useful source of interpretive material for this aspect of § 280A(c)(1), although the experienced tax lawyer knows the foolhardiness of assuming that the courts and the IRS will equate the two tests. A substantial business reason of the employer should, however, satisfy the test. Relevant factors will probably include the availability of the employer's facilities, the employer's requirements and expectations, the presence or absence of employer facilities for meeting clients or customers, the suitability of the employer facility for the business activity, and the location of the employer facility in a high-crime area or other

\textsuperscript{65} See Weiner v. Commissioner, [1980] Tax Ct. Mem. Dec. (P-H) ¶ 80,317, at 1427. ("Although petitioner initially testified that a room in her residence was exclusively used for business purposes, she later admitted that the room was also used for personal purposes.").

The proposed regulations are curiously liberal in one respect: the portion of the dwelling unit can be used for more than one § 280A(c) excepted use, provided it is used only for such excepted uses. Query whether all such uses must be by the same taxpayer, i.e., can a husband and wife share a home office and still qualify for any home office deductions? Certainly, they should be able to. See note 60 supra.


\textsuperscript{69} Id. In Bodzin v. Commissioner, 60 T.C. 820, 825 (1973), rev'd on other grounds, 509 F.2d 679, cert. denied, 423 U.S. 825 (1975), the Commissioner, reiterating somewhat, argued that to satisfy the condition-of-employment test, the employee only needed to show that the home office was "required in order to properly perform the employment duties."

\textsuperscript{70} I.R.C. § 119 deals with meals or lodging furnished to an employee for the employer's convenience.
area of limited accessibility.71

Meeting the convenience-of-the-employer test, however, will benefit only employees who can also make use of one of the three categories of excepted business use in I.R.C. § 280A(c)(1), none of which is entirely free of interpretive problems. The “principal place of business” test seems to refer to whether the home office is the taxpayer’s principal place of business for the particular business for which it is used rather than whether it is his principal place of business for all of his businesses viewed in the aggregate. This interpretation reflects a focus on the location that produces expenses generating income, regardless of whether the source of income is the taxpayer’s principal business. Under this view, the taxpayer will have difficulty establishing that a portion of his residence is used as his principal place of business under I.R.C. § 280A(c)(1)(A) if he has another place of business that is the “focal point” of his activities in the business conducted there.72

Notwithstanding this analysis, the IRS has taken the position that a taxpayer can have only one principal place of business, regardless of how many businesses are involved. According to the IRS, this principal place of business must be ascertained by considering all of the businesses together and evaluating all the facts and circumstances, including time spent, the degree of business activity, the financial return from the activity and the facilities available at each business post.73 The IRS has buttressed its position by noting the congressional intention to restrict the deductibility of home office expenses,74 an argument which does little to resolve

71. See generally Rose, supra note 1, at 561; Comment, supra note 1, at 510-12. The proposed regulations offer no guidance. See Proposed Treas. Reg. § 1.280A-2(g)(2), [1981] 3 Fed. Taxes (P-H) ¶ 16,979.18-B.

72. See Baie v. Commissioner, 74 T.C. 105 (1980) (hot dog stand was taxpayer's principal place of business, not home where food was prepared); Chauls v. Commissioner, [1980] Tax Ct. Mem. Dec. (P-H) ¶ 80,471 (following Baie to hold teacher's principal place of business to be college where teaching done, not home, even though teacher claimed to spend more time working at home); Kastin v. Commissioner, [1980] Tax Ct. Mem. Dec. (P-H) ¶ 80,341 (track coach's principal place of business was school athletic facilities despite lack of office there).


74. See Ltr. Rul. 8030024 (April 28, 1980), in which the IRS also seems to assert that statutory construction unambiguously requires its interpretation, a position so devoid of merit that it requires no response. A better, but still unconvincing, IRS argument could be made by analogy to the “tax home” concept of I.R.C. § 182(a)(2). Cf. Comment, supra note
any ambiguity in the statute and has no bearing on an attempt to find expenses that truly generate income. The Tax Court, however, in *Curphey v. Commissioner*, a case involving a dermatologist who used his home office only to manage six rental units, found no indication in the statute or legislative history that the strained interpretation urged by the IRS was correct and held that all the statute requires is that the home office be the principal place of business for the particular business conducted there. Otherwise, the court noted, I.R.C. § 280A would “disallow otherwise allowable deductions in connection with the use of a home office which is a principal place of business.” The IRS decision to appeal *Curphey* dashes any hope that it will revise its position prior to promulgating final regulations. Should *Curphey* be affirmed, however, perhaps the IRS will limit its position to situations involving related businesses or those where the existence of two separate businesses is unclear. For example, does the high school art teacher with a home art studio have two businesses or only one?

Resolution of many disputes over potential home office deductions under the new provision will depend on whether the taxpayer exclusively uses the portion of the dwelling unit on a regular basis “as a place of business which is used by patients, clients, or customers in meeting or dealing with the taxpayer in the normal course of his trade or business.” Unfortunately, I.R.C. § 280A(c)(1)(B) contemplates home offices maintained by certain professionals, such as doctors and lawyers, and by salesmen and perhaps businessmen generally. In such cases, its application will factually depend on whether the use of a portion of the dwelling unit as a place of business for meeting or dealing with patients, customers or clients is in the normal course of the taxpayer’s trade

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1. at 507 (definition applied under § 162 might not be applicable to § 280A).
2. 73 T.C. 766 (1980) (on appeal).
3. Id. at 776-77. See also *Hynes v. Commissioner*, [1981] Tax Ct. Rep. (CCH) ¶ 37,232 (1980) (following *Curphey* analysis to find newsman’s principal place of business to be at television station and real estate saleswoman’s at her real estate office).
4. Id. at 775. See also Note, supra note 1, at 141-42. It is perhaps noteworthy that the *Curphey* court first found the rental of six units to constitute a trade or business.
5. But see H.R.J. Res. No. 610, § 123, supra note 7 (prohibiting IRS from funding implementation of regulations or rulings relating to determination of taxpayer’s principal place of business).
6. *Compare* Comment, supra note 1, at 507-08 (concluding that a publisher’s employee who works as a freelance writer at night could be considered to have a principal place of business for each of his individual undertakings) with Ltr. Ruls. 8030024 (April 28, 1980) and 8030025 (April 28, 1980).
or business. The proposed regulations indicate that the use must be "substantial and integral to the conduct" of the business, rather than merely for occasional meetings.

In other cases, however, I.R.C. § 280A(c)(1)(B) produces serious inequity, whether or not it is interpreted literally. A journalist or writer who interviews sources at home does not appear to be covered by the exception. Nor does a musician who must practice his skills at home, or a photographer or artist with a home studio in his dwelling unit who also maintains an outside studio. Why should a lawyer who chooses to have his evening clients call at his home receive a deduction for a portion of his household expenses when an English professor who meets with students in a home library otherwise used for professional reading and writing cannot deduct any home office expenses? Although the requirement that the taxpayer meet third parties at the home office may facilitate accurate audits of home office claims, such a requirement could have easily been extended to cover the broad range of taxpayers who may meet third parties at home instead of an elite group of professionals and businessmen. Even so extended, however, the requirement would still be inequitable: why should a lawyer or accountant have to meet clients at his home office to qualify for a deduction? Suppose the lawyer or accountant deals with his clients primarily by telephone or mail? Such questions raise serious doubts about the care with which Congress considered I.R.C. § 280A before yielding to Treasury Department pressure for a restrictive provision in the home office area.

I.R.C. § 280A(c)(1)(C) allows deductions for expenses attributable to a separate structure not attached to the dwelling unit used exclusively on a regular basis in connection with the taxpayer's trade or business. Examples of such structures include an artist's studio, a florist's greenhouse and a carpenter's workshop. In some cases, this exception will undoubtedly preclude arguments over whether the separate structure is part of the dwelling unit under I.R.C. § 280A(f)(1). It nevertheless creates a preposterously un-

81. The exclusive-use test will still apply here. Hence, the lawyer who uses his living room part of the time to interview clients will not receive the deductions he could take under prior law. See Solon v. Commissioner, [1980] Tax Ct. Mem. Dec. (P-H) ¶ 80,077.
85. See text accompanying note 12 supra.
fair distinction in tax treatment between, for example, artists with secondary home studios as part of their residences and those whose studios are not attached to their residences.

B. Storage Use

I.R.C. § 280A(c)(2) authorizes the deduction of expenses allocable to space in the dwelling unit used on a regular basis to store inventory held for use in the taxpayer’s trade or business of selling at retail or wholesale, provided the dwelling is the sole fixed location of the trade or business. The space must be “separately identifiable space suitable for storage.” Since the exclusive-use test does not apply to this exception, it is unclear whether a time-of-use allocation is required. Probably, however, the continuing availability of the storage space for regular business use entitles the taxpayer to deduct all expenses allocable to the space.

C. Vacation Homes

I.R.C. § 280A(c)(3) excepts from § 280A(a)’s general rule of disallowance “any item which is attributable to the rental” of a dwelling unit or a portion thereof. This part of § 280A responds to congressional concern with so-called vacation homes, and an understanding of the provision requires an understanding of that concern, especially in light of the inartful drafting of the provision.

Prior to the effective date of I.R.C. § 280A, the deductibility of expenses for a vacation home depended on whether the taxpayer’s activity with respect to the vacation home was profit-motivated. If the taxpayer engaged in the activity for the purpose or with the intention of making a profit, ordinary and necessary expenses were deductible under I.R.C. § 162 or § 212, as appropriate. Absent profit motivation, however, I.R.C. § 183 limited the taxpayer’s deductions to the gross income derived from the activity reduced by any deductions allowable without regard to profit motivation, such

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86. It is not clear why “fixed location of the business” appears here instead of “place of business,” although the language apparently originated in the Senate. See S. Rep. No. 94-938, supra note 1, at 148.

87. Id. The House version of the Tax Reform Act of 1976 had limited this exception to retail storage. See S. Rep. No. 94-1236, supra note 1, at 435.

88. The proposed regulations limit the deduction to the “space actually used for storage,” but this seems intended to distinguish the storage area from the remainder of the room or basement, not to require proof of the volume of stored inventory at various times. See Proposed Treas. Reg. § 1.280A-2(e), [1981] 3 Fed. Taxes (P-H) ¶ 16,979.18-B.

89. Depreciation was deductible under I.R.C. § 167.
as those for interest, taxes and casualty losses.\textsuperscript{90} In this respect, I.R.C. § 183 represented a 1969 codification of earlier IRS policy.\textsuperscript{91}

The regulations under I.R.C. § 183 set forth a list of factors relevant to determining whether the taxpayer engages in an activity for profit.\textsuperscript{92} In addition, I.R.C. § 183(d) establishes a statutory presumption that an activity was engaged in for profit in the taxable year if, for at least two of the five consecutive taxable years ending with the taxable year, the gross income from the activity exceeded the deductions attributable to the activity. Presumably in accordance with the listed factors, the regulations treat a beach house as held for personal purposes if the taxpayer himself uses it for one month of the three-month recreational season and rents it for the other two months.\textsuperscript{93} However, this example illustrates an allocation of expenses between the rental income use and the personal use of the beach house and does not appear to have been intended to illustrate application of the various factors relevant to determining profit motivation in a vacation home context.\textsuperscript{94} Aside from this example, of dubious relevance, and the § 183(d) presumption, the pre-§ 280A law left determinations of profit motivation for vacation homes to the vagaries of the judicial process.\textsuperscript{95}

\textsuperscript{90} See I.R.C. § 163 (interest); § 164 (taxes); § 165(c)(3) (casualty losses).


\textsuperscript{92} Treas. Reg. § 1.183-2 (1972). These factors represent a distillation of prior case law. See Jasionowski v. Commissioner, 66 T.C. 312 (1976); Hurd v. Commissioner, 47 T.C.M. (P-H) 496 (1978) (same tests applied to pre-§ 183 and post-§ 183 taxable years).

\textsuperscript{93} Treas. Reg. § 1.183-1(d)(3) (1972).

\textsuperscript{94} The example precedes the list of factors and does not discuss them. Indeed, if the beach house is also held for capital appreciation, a contrary conclusion as to the taxpayer's profit motivation is possible on the facts given.

\textsuperscript{95} Generally, the courts looked to the taxpayer's primary or predominant motive. The leading pre-§ 280A cases include Carkhuff v. Commissioner, 425 F.2d 1400 (2d Cir. 1970) (cottage reserved for personal use during two months of four-and-one-half-month rental season not held for profit where no proof of expectation that ownership would be profitmaking operation); Johnson v. Commissioner, 59 T.C. 791 (1973), aff'd, 495 F.2d 1079 (6th Cir.), cert. denied, 419 U.S. 1040 (1974) (apartment bought primarily to minimize vacation expenses not held for profit where no rental income in year at issue; extensive factual discussion and review of prior cases); Coors v. Commissioner, 60 T.C. 368 (1973) (acq.), aff'd, 519 F.2d 1280 (10th Cir. 1975), cert. denied, 423 U.S. 1087 (1976) (profit motivation existed where personal use limited to two weeks and management agency was paid substantial fee whether rented or not); Kanter v. United States, 31 A.F.T.R.2d 973 (E.D. Va. 1973), aff'd per curiam, 33 A.F.T.R.2d 523 (4th Cir. 1974) (summer home rented during off-season held primarily for personal enjoyment); Wachter v. United States, 35 A.F.T.R.2d 577 (W.D. Wash. 1974) (profit motivation existed where condominium unit in rental pool was acquired primarily for purpose and with bona fide expectation of making a profit where taxpayer acted on basis of investment advice, rooms in unit were designed for separate rental, rental pool agent made extensive efforts to attract renters, incidental personal use averaged less
The judicial process, however, did not provide objective rules to prevent conversion of personal vacation home expenses into deductible business expenses. As the Senate Finance Committee explained:

Where expenses attributable to a residence are treated as deductible business expenses, an opportunity exists to convert nondeductible personal, living and family expenses into deductible expenses. In the case of so-called "vacation homes" that are used both for personal purposes and for rental purposes, the committee believes that frequently personal motives predominate and the rental activities are undertaken to minimize the expenses of ownership of the property rather than to make an economic profit.

In marketing vacation homes, it has become common practice to emphasize that certain tax benefits can be obtained by renting the property during part of the year, while reserving the remaining portion for personal use. . . .

Under many of these arrangements, it is extremely difficult under existing law to determine when an activity is engaged in for profit. . . . The committee believes that definitive rules should be provided to specify the extent to which personal use would result in the disallowance of certain deductions in excess of gross income. In a case where personal use is the controlling factor to be considered, this approach would obviate the need to require subjective determinations to be made concerning the taxpayer's motive and the primary purpose for which the vacation home is held.96

I.R.C. § 280A(c)(3) and (e) represent Congress' new definitive

than one day per month over five-year period and losses in part due to sagging local economy).

More recent cases applying the factors outlined in the § 183 regulations include Monfore v. United States, 40 A.F.T.R.2d 5338 (Ct. Cl. 1977) (Canadian vacation property that taxpayer acquired without investigating profit potential and attempted to develop into resort in unbusinesslike manner not maintained for profit in pre- or post-§ 183 years; collecting prior cases); Davis v. Commissioner, 47 T.C.M. (P-H) 1430 (1978) (no profit motive for condominium unit never rented but used personally where fee only payable to rental agent if actually rented; no deductions under § 183 since no income); Richardson v. Commissioner, 47 T.C.M. (P-H) 1322 (1978) (various factors including personal use for three or four months each winter indicated unit not held for production of income); Lindow v. Commissioner, 47 T.C.M. (P-H) 1243 (1978) (various factors indicated rentals primarily to minimize vacation expenses, not to make profit); Hollesen v. Commissioner, 48 T.C.M. (P-H) 1016 (1979) (motor home not held primarily for profit but leased merely to reduce costs of personal recreation use where only 5,232 of 33,023 miles attributable to leasing); Copeland v. Commissioner, [1980] Tax Ct. Mem. Dec. (P-H) ¶ 80,476 (deductions allowed for beach cottage expenses where taxpayers acquired property for investment purposes and operated it in business-like manner). See also Jones v. Commissioner, 47 T.C.M. (P-H) 1208 (1978) (yacht constituting taxpayer's principal residence not held for the production of income).

treatment of this area.\textsuperscript{97}

I.R.C. § 280A(c)(3) excepts from § 280A(a)'s general rule of disallowance any item "attributable," as limited by § 280A(e), to the rental of a dwelling unit\textsuperscript{98} or portion thereof (used as a residence). I.R.C. § 280A(e) limits the deduction for expenses attributable to such rental during the taxable year to the total expenses\textsuperscript{99} multiplied by the following fraction:

\[
\frac{\text{number of days during year rented at fair rental}}{\text{total number of days of use during year}}
\]

Thus, in the beach house example mentioned above, if the personal use was in June, the deduction would be limited to \(\frac{31+31}{30+31+31}\) or 67.4\% of the expenses for the taxable year.\textsuperscript{101} Of course, the real estate taxes and interest would be deductible in full,\textsuperscript{102} but these deductions as well as the gross income from the property would affect the general limitation on deductions applicable to all I.R.C. § 280A(c) excepted uses.\textsuperscript{103}

Although this new rule is evidently designed to replace the profit-motive test of the § 183 regulations in the vacation home context with a mechanical rule for determining the allowable de-

\textsuperscript{97} See generally Locarno & Steele, supra note 1; Kaplan, supra note 1; Proposed Treas. Reg. § 1.280A-3, [1981] 3 FED. TAXES (P-H) ¶ 16,979.18-C.

\textsuperscript{98} See note 59 supra.

\textsuperscript{99} The statute here uses the phrase "such expenses," which appears to refer to the phrase "expenses attributable to the rental of the unit." This suggests a two-level limitation rule: first, a determination of "attributable" expenses and then, application of the limitation ratio. Despite the statutory language, this approach seems to be unsound in all respects. See Kaplan, supra note 1, at 1306; Proposed Treas. Reg. § 1.280A-3(c), [1981] 3 FED. TAXES (P-H) ¶ 16,979.18-C.

\textsuperscript{100} The numerator includes days on which the unit is rented at fair rental but deemed used for personal purposes because, e.g., the lessee is a family member. See Ltr. Rul. 8029030 (April 22, 1980) (rental to sister); Proposed Treas. Reg. § 1.280A-3(c)(1), (4), [1981] 3 FED. TAXES (P-H) ¶ 16,979.18-C (use for repairs and maintenance disregarded).

\textsuperscript{101} See text accompanying note 93 supra. This calculation assumes a June-July-August season and a rental at a fair rental during July and August. For another example see Proposed Treas. Reg. § 1.280A-3(c)(4), [1981] 3 FED. TAXES (P-H) ¶ 16,979.18-C.

\textsuperscript{102} See I.R.C. §§ 280A(e)(2), (b).

\textsuperscript{103} See text accompanying notes 127-44 infra. The wording of I.R.C. § 280A(c)(5), which limits the allowable amount of deductions for an excepted use to the amount of gross income derived from that use, indicates it only applies to vacation homes "where the dwelling unit is used by the taxpayer during the taxable year as a residence." This language is superfluous since this condition is necessary to trigger § 280A(a) in the first instance. I.R.C. § 280A(c)(5) does not apply to certain principal residences converted to rental. See text accompanying notes 128-132 infra.

It should be noted, however, that I.R.C. § 280A(e) applies even if the dwelling unit is not used as a residence during the taxable year.
ductions whenever significant personal use is present, a close examination of the place of § 280A in the Internal Revenue Code reveals that it simply adds another hurdle to those already imposed by I.R.C. §§ 162 and 212 when profit motives are present. When profit motives are absent, § 280A confuses matters further because, unlike I.R.C. § 183, § 280A(c)(3) does not on its face authorize any deductions: the deduction measured under § 280A is apparently taken under I.R.C. § 183. Presumably, the gross income limitation of § 183(a) would then apply if it were more restrictive than the similar limitation in § 280A(c)(5), but Congress probably intended the two limitations to be equivalent. Accordingly, vacation home deductions will probably stand or fall within the following parameters:

(1) Whenever use of a dwelling unit as a residence triggers § 280A(a), deductions dependent in other contexts on the existence of a profit motive will depend on the mechanical rules of I.R.C. § 280A(c)(3) and (5) and I.R.C. § 280A(e).

(2) When insufficient personal use of the dwelling unit occurs to bring § 280A(a) into play, the profit-motive test will still govern whether deductions are available under any of I.R.C. § 162, § 167, § 183 or § 212, subject to the § 280A(e) limitation on deductions to the extent there is any personal use of the unit at all.

(3) Any year to which I.R.C. § 280A(a) applies enters into the five-year presumption rule of I.R.C. § 183(d).

(4) Each year is treated separately and may be subject to a differ-

105. Cf. I.R.C. § 280A(f)(3)(A) (§ 183 inapplicable when § 280A(a) applies); Proposed Treas. Reg. § 1.280A-1(f), [1981] 3 Fed. Taxes (P-H) ¶ 16,979.18-A (similarly). Unfortunately, this conclusion becomes less clear upon closer examination of the statute. Although § 280A(a) does not apply to expenses attributable to the portion of the taxable year the vacation home is used for rental within the meaning of § 280A(c)(3), § 280A(a) does apply to expenses not attributable to the rental use for the taxable year. This application of § 280A(a) arguably prevents I.R.C. § 183 from applying for the taxable year as a whole, leaving the taxpayer without a profit motive no deduction at all for items attributable to his rental use. Such an interpretation would seriously undermine the congressional intent in enacting § 280A and should be rejected in favor of the position taken in the text.

106. Other issues may still depend on the existence of a profit motive. See, e.g., I.R.C. § 62, setting forth items deductible in computing adjusted gross income, as opposed to items deductible only in computing taxable income. The latter are known as itemized deductions. See I.R.C. § 63.

107. See S. Rep. No. 94-938, supra note 1, at 153, indicating § 183’s continuing relevance in this context.

108. I.R.C. § 280A(f)(3)(B); Proposed Treas. Reg. § 1.280A-1(f), [1981] 3 Fed. Taxes (P-H) ¶ 16,979.18-A. It is unclear whether this refers to a year in which § 280A(a) applies in part or in full. See note 105 supra. Congress probably intended that all years enter into the § 183(d) presumption rule.
ent governing rule.

Finally, I.R.C. § 280A(g) contains a de minimis rule: if during the taxable year a dwelling unit is used as a residence and actually rented for less than fifteen days, the taxpayer cannot claim any deductions for expenses of renting the unit other than those allowable without regard to profit motivation; the rental income, however, is not includible in the taxpayer's gross income.109

The proposed regulations contain provisions applying the vacation home rules to participants in rental pools and time-sharing arrangements.110 A rental pool is defined as "any arrangement whereby two or more dwelling units are made available for rental and those persons with interests in the units agree to share at least a substantial part of the rental income from the units without regard to the actual use of the various units."111 Participants must, of course, include their shares of the total rentals in their gross incomes.112 The proposed regulations' statement that the limitation of I.R.C. § 280A(e) is applied on the basis of actual rental and actual use of the particular taxpayer's own unit113 is peculiarly harsh. Relating the limitation to the nature of a rental pool would obviously be more appropriate and equitable.

A "time-sharing arrangement" refers to an "arrangement whereby two or more persons with interests in a dwelling unit agree to exercise control over the unit for different periods during the taxable year,"114 such as schemes currently underway to sell a week's use per year to each of some fifty participants in various vacation area condominiums. The proposed regulations apply the various vacation home provisions to participants in a time-sharing arrangement by treating all persons with interests in the same unit in the aggregate for purposes of both the § 280A(e) limitation115

109. The rental apparently need not be at fair rental to count as part of the fifteen days.
110. See Proposed Treas. Reg. § 1.280A-3(e), (f), [1981] 3 Fed. Taxes (P-H) ¶ 16,979.18-C.
111. Id. § 1.280A-3(e)(2), [1981] 3 Fed. Taxes (P-H) ¶ 16,979.18-C.
112. Id. § 1.280A-3(e)(3), [1981] 3 Fed. Taxes (P-H) ¶ 16,979.18-C. Interest on escrow deposits does not count as rental income.
113. Id. § 1.280A-3(e)(4), [1981] 3 Fed. Taxes (P-H) ¶ 16,979.18-C. For reciprocal arrangements within the rental pool, see id. § 1.280A-3(e)(5), [1981] 3 Fed. Taxes (P-H) ¶ 16,979.18-C. See also Fine v. United States, 46 A.F.T.R.2d 5617 (N.D. Ill. 1980) (rental pool agreement treated as lease to management agency of taxpayer's unit where agency paid limited amount for each day unit was available for rental, but not rented at "fair rental" since taxpayer could never make a profit at rate charged).
115. Id. § 1.280A-3(f)(5), [1981] 3 Fed. Taxes (P-H) ¶ 16,979.18-C. That is, the frac-
and the de minimis rule. This approach may allow a taxpayer who uses the unit personally during most of his time period, but rents it for a few days at fair rental, to deduct most of his expenses for the unit if the other participants in the arrangement rarely make personal use of the unit, but instead rent their time to others at fair rental. It thus fails to effectuate I.R.C. § 280A(e)'s policy of precluding the deduction of personal vacation expenses.

D. Provision of Day Care Services

I.R.C. § 280A(c)(4)(A) excepts from the general disallowance rule of § 280A(a) items "allocable to the use of any portion of the dwelling unit on a regular basis in the taxpayer's trade or business of providing day care" for children, individuals who have attained age sixty-five, or individuals physically or mentally incapable of caring for themselves. In explaining the rationale for allowing deductions for such nonexclusive business use of part of the dwelling unit, the Senate Finance Committee noted:

[I]t is not practicable to cordon off a portion of the residence to be devoted exclusively to provide day care services. However, where a portion of the residence is used for personal purposes and day care services, the committee believes that this type of business activity in the residence will ordinarily result in incurring incremental expenses attributable to the residence beyond those which [would] have been incurred if the residence had been used solely for personal purposes. For example, it has been pointed out that this type of business activity will usually result in additional wear and tear on the residence which would be reflected in depreciation in the value of a home owned by the taxpayer providing the services, additional repair and maintenance expenses, and additional utilities expenses.

The committee did not mention two other factors that probably provided a significant impetus for § 280A(c)(4): the public policy favoring expansion of day care facilities and the appropriateness of a home for providing day care services.

To forestall disputes over what constitutes a trade or business of providing day care, items accruing after August, 1977 are deductible by virtue of § 280A(c)(4) only if the owner or operator of

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the trade or business has, or is exempt from having, a license, certification, registration, or approval as a day care center or as a family or group day care home under applicable state law, or if the owner or operator has an application for such a document under consideration.\textsuperscript{118} In addition, the proposed regulations contain a lengthy definition of day care services, emphasizing that they are of a custodial nature and are provided only for certain hours of the day.\textsuperscript{119} On the former aspect, incidental educational, developmental, or enrichment services are apparently not fatal.\textsuperscript{120} The latter definitional aspect seems appropriate in the context of "day" care as opposed to foster care. As a result, the requirement of use on a "regular basis" in this context will presumably carry a meaning similar to the requirement in the home office context.\textsuperscript{121}

The principal peculiarity of § 280A(c)(4) is the absence of the exclusive-use requirement generally applicable to home office deductions.\textsuperscript{122} Although the Senate Finance Committee justified enactment of the provision partly on the ground that taxpayers incur extra expenses in providing day care in their homes,\textsuperscript{123} the statute limits the taxpayer's deductions attributable to providing day care services on an altogether different basis, a time-of-use allocation. \textit{I.R.C.} § 280A(c)(4)(C) thus limits the deduction of expenses allocable to space used to provide day care\textsuperscript{124} to the total expenses allocable to such space multiplied by the following fraction:

$$\frac{\text{total weekly hours of use for providing day care services}}{168 \text{ hours (i.e., total available weekly hours of use)}}.$$  

This, of course, is the time-of-use allocation that the IRS asserted with mixed success in cases involving pre-§ 280A home office deductions.\textsuperscript{125} Its appearance here is curious: if the taxpayer uses a portion of the dwelling unit \textit{exclusively} in the trade or business of


\textsuperscript{120} For example, the proposed regulations treat educational instruction provided to children of nursery school age as incidental to the custodial services, but allow the same result for children of kindergarten age only if the instruction is not "in lieu of public instruction under a State compulsory education requirement." \textit{Id.}

\textsuperscript{121} \textit{See} text accompanying notes 66-68 supra.

\textsuperscript{122} \textit{See} text accompanying notes 60-65 supra.

\textsuperscript{123} S. Rep. No. 95-66, supra note 1, at 91.

\textsuperscript{124} For a discussion of the space-of-use allocation principles, see text accompanying notes 49-50 supra.

\textsuperscript{125} \textit{See} text accompanying notes 51-53 supra. For its application here, see Proposed Treas. Reg. § 1.280A-2(i)(4), [1981] 3 Fed. Taxes (P-H) ¶ 16,979.18-B.
providing day care services, he can presumably take advantage of the more liberal rules of § 280A(c)(1) and will not need to make a time-of-use allocation, even if the portion is not used at all between 5:00 p.m. and 9:00 a.m. on weekdays or on weekends.  

IV. OVERALL LIMITATION ON DEDUCTIONS FOR EXCEPTED USES

I.R.C. § 280A(c)(5) generally limits any deductions for the taxable year for items attributable to a § 280A(c) excepted use to the excess of the gross income “derived from such use” for the taxable year over the deductions allocable to the use that would be allowable for the taxable year absent such use, such as those for taxes and interest. In 1978, however, Congress added § 280A(d)(3) to the Code to prevent application of this overall limitation to a principal residence converted to rental use for a consecutive period of at least twelve months (“qualified rental period”). During this period the taxpayer must either rent the residence to a person other than a member of his family as defined in § 267(c)(4) or hold it for rent at a fair rental. Expenses allocable to this qualified rental period are subject to the limitations of § 280A(c)(3) and (e), but not to the overall limitation of I.R.C. § 280A(c)(5).

The § 280A(c)(5) limitation seems to parallel the limitation found in I.R.C. § 183(a), although the statute spells out the § 280A(c)(5) rule with somewhat more specificity. Thus, in determining the allowable amount of deduction, it will ordinarily not be crucial whether the dwelling unit is held for profit. However, the § 183 limitation appears to be applicable when a converted principal residence not held for profit is exempted from § 280A(c)(5) by § 280A(d)(3). Nevertheless, the fact that such an application of § 183 would subvert the congressional design in enacting § 280A(d)(3) should persuade the Commissioner not to seek it. Such a decision could be rationalized on the theory that a converted principal residence is always held for profit.

126. See text accompanying note 57 supra.
128. S. Rep. No. 95-745, supra note 1. This amendment is retroactive to the effective date of the original § 280A: post-1975 taxable years.
129. The term “principal residence” carries the same meaning as in I.R.C. § 1034.
130. See Ltr. Rul. 8029030 (April 22, 1980).
131. A 12-month combination of actual rental and holding for rental at a fair rental will presumably satisfy the statute.
132. See text accompanying notes 97-100 supra.
133. See text accompanying notes 90-91 supra.
The usual application of I.R.C. § 280A(c)(5) may be broken into the following steps:

(1) **Gross Income Derived from Use**—The taxpayer whose home is his sole place of business or fixed location of his business or whose income derives from rental use will usually have little difficulty establishing that all of the gross income in question is derived from the excepted use. In general, the total gross income from the business activity need only be reduced by “expenditures required for the activity but not allocable to the use of the unit itself, such as expenditures for supplies or compensation.” Gross receipts from rental use are reduced by expenditures to obtain tenants for the unit; rentals at less than fair rental are included in the gross rental receipts.

Taxpayers with additional offices or other facilities outside the dwelling unit, including many employees, may have difficulty finding a suitable basis for allocating gross income between the dwelling unit and the other offices or facilities. Time spent at various business locations may provide a suitable basis for allocation in the case of taxpayers, such as some attorneys, who are paid on an hourly basis, but in many cases it may not even be clear which time periods are relevant. For example, should a lawyer who spends a large part of his time in court compare the time he uses his home office with the time he uses his outside office, the time he uses either his outside office or is in court, or the total time he is employed but not in his home office (including business meals and time spent in clients’ offices and homes)? The committee report indications that a reasonable allocation should be based on all the facts and circumstances do not provide much guidance. This issue offers a potentially fertile source of future litigation.

(2) **Non-§ 280A(c) Deductions Allocable to Use**—Neither the Code nor the legislative history suggests how deductions allowable without regard to the excepted use are to be allocated between the excepted use and other uses. Presumably, however, the space-of-use and, in the case of day care service use, the time-of-use formulas otherwise applied to allocate other deductions are applicable. 

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135. Id. § 1.280A-3(d)(5), [1981] 3 Fed. Taxes (P-H) ¶ 16,979.18-C.
136. See generally Rose, supra note 1, at 562; Smith, supra note 1, at 357.
appropriate here as well.\textsuperscript{138}

(3) Limitation—The deduction for items allowable under I.R.C. § 280A(c)(1), (2), (3) or (4) is limited to the amount by which the gross income derived from the use ((1) above) exceeds the non-§ 280A(c) deductions allocable to the use ((2) above).\textsuperscript{139} This limitation calculation applies on a taxable year basis; there is no provision for carrying over excess deductions. Thus, a taxpayer such as a novelist, sculptor, or construction contractor who receives income from several years of work in one year apparently loses all deductions attributable to the earlier years in which no income was received.\textsuperscript{140} Furthermore, the taxpayer who loses money in a business run solely from a home office may not be able to use the full net operating loss carryover deduction provided in I.R.C. § 172.\textsuperscript{141}

\textsuperscript{138} See text accompanying notes 49-50, 124-125 supra. See also Proposed Treas. Reg. § 1.280A-2(f)(3), [1981] 3 Fed. Taxes (P-H) ¶ 16,979.18-B. Expenses not related to the business use are ignored. The proposed regulations exemplify such expenses with a rather dubious example, expenditures for lawn care.

\textsuperscript{139} Id. §§ 1.280A-2(f)(5) (home office), (7), example, and -3(d)(3) (vacation home), (4), example, [1981] 3 Fed. Taxes (P-H) ¶¶ 16,979.18-B, -C.

\textsuperscript{140} See Gestrich v. Commissioner, 74 T.C. 525 (1980) (author with no income in years at issue whose only office was at home; allowed home office deduction for pre-§ 280A year, but not for years subject to § 280A because of this gross income limitation).

\textsuperscript{141} The net operating loss calculation in the context of an I.R.C. § 280A disallowance can become very complicated. For a simple case, assume gross income of $3,000 and business expenses not subject to I.R.C. § 280A of $50,000, deductions not requiring a business connection of $3,000, and expenses allocable to the business use of dwelling unit space of $5,000. In this case, I.R.C. § 280A disallows the $5,000 of expenses allocable to the business use of the dwelling unit space and the net operating loss is limited to $50,000. As a general rule, then, the net operating loss is lost at least to the extent that the sum of expenses allocable to business use of the dwelling unit space and the deductions not requiring a business connection (interest, certain taxes, casualty losses) is greater than the gross income from the business. (This, of course, assumes that an item allowable without regard to a business connection is treated as an I.R.C. § 280A(b) expense even if it also qualifies as a business expense.) This parallels the result under I.R.C. § 183 for activities not engaged in for profit: such activities never produce a net operating loss.

The net operating loss computation becomes more difficult when we assume gross income from the business of $50,000, business expenses not subject to I.R.C. § 280A of $50,000, and expenses allocable to the business use of the dwelling unit of $5,000. There are at least four possible ways to treat this case. First, the business expenses not subject to I.R.C. § 280A could be assigned deduction priority, thus offsetting the entire amount of gross income, possibly on the theory that § 280A(c)(5)(B) encompasses these expenses. I.R.C. § 280A(c)(5) would then disallow the $5,000 of expenses allocable to the business use of the dwelling unit and there would be no net operating loss to carry forward under I.R.C. § 172. One problem with this approach is that the Senate Finance Committee Report indicates I.R.C. § 280A(c)(5)(B) was intended to be coextensive with § 280A(b) rather than refer to any otherwise allowable expenses at all. See S. Rep. No. 94-938, at 147-49. Nevertheless, this approach represents a natural interpretation of the statute and could easily be adopted by the Treasury Department through the promulgation of regulations.

The second approach would be to assign deduction priority to the $5,000 of expenses
Hopefully, Congress will correct these obvious inequities in the near future.

(4) Application of the Limitation—The committee reports indicate that allowable deductions are to be determined "in the same manner as provided" in the regulations under I.R.C. § 183.¹⁴² This apparently refers to certain priority ordering rules providing that the allowable amount of deduction is first applied to allow deductions such as maintenance expenses that do not result in basis adjustments; then, any additional amount of allowable deduction may be used to take depreciation or similar deductions that do result in basis adjustments.¹⁴³ The proposed regulations would apply these rules.¹⁴⁴

V. Conclusion

More than four years have passed since the original enactment of I.R.C. § 280A. This short span in the history of the federal income tax is long enough to raise serious questions about the wisdom of the provision. In the home office area, it has done little to allocate the business use of the dwelling unit space. Then, the entire $55,000 of expenses would be allowable and there would be a $5,000 net operating loss for the year. This would be consistent with reading I.R.C. § 280A(c)(5)(B) as coextensive with I.R.C. § 280A(b) if (1) none of business expenses are in the § 280A(b) expense categories, or (2) I.R.C. § 280A(b) is only intended to refer to expenses that are not otherwise deductible as business expenses, a position apparently inconsistent with Proposed Treas. Reg. § 1.280A-2(i)(5)(i). See [1981] 3 Fed. Taxes (P-H) ¶ 16,979.18-B. The latter would seem to be a strained reading of the statute, but the former condition may be met.

The third possibility is simply to read I.R.C. § 280A(c)(5)(B) as coextensive with § 280A(b), but to otherwise assign deduction priority to the $5,000 of expenses allocable to the business use of the dwelling unit. This interpretation would lead to disallowance of the $5,000 of expenses allocable to the business use of the dwelling unit to the extent the $50,000 of other expenses falls into the § 280A(b) category. (Whether this category includes items otherwise qualifying as business expenses that would be deductible as interest, taxes, etc. absent a business connection would again be crucial. Proposed Treas. Reg. § 1.280A-2(i)(5)(i) seems to resolve this question in favor of inclusion, albeit probably inadvertently. See [1981] 3 Fed. Taxes (P-H) ¶ 16,979.18-B.) This interpretation comports with the apparent congressional intent mentioned above, but does not necessarily follow from the statute.

Finally, an allocation could be used instead of assigning deduction priority to either category of expenses. Then, $5,000/$55,000 of the $5,000 of expenses allocable to the business use of the dwelling unit would be disallowed and the net operating loss would be limited to $50,000/$55,000 x ($5,000) or $4,545.45. While this approach does not seem to follow from the statute, Congress obviously did not consider the net operating loss issue when it enacted I.R.C. § 280A. This approach equitably apportions the various expenses in figuring the net operating loss instead of simply eliminating it to the extent of an I.R.C. § 280A disallowance.

¹⁴⁴ See authorities cited note 139 supra.
stem the flow of litigation. The issues are now statutory ones concerning the meaning of terms such as "principal place of business" and "exclusive" use, terms representing concepts that have only tangential relevance to whether an expense plays a role in generating income. The old "ordinary and necessary" standard was far more relevant, even if it led to hard cases and a somewhat smaller revenue yield from some categories of relatively highly taxed taxpayers. The Treasury Department’s overreaching in the § 280A standards is best exemplified by a 1979 private ruling to the effect that disallowance of a home office expense under I.R.C. § 280A(a) does not negate the fact that the home office was used for business purposes when the home is subsequently sold: any gain on the portion of the home used for business purposes may not be rolled over taxfree under I.R.C. § 1034 on the purchase of a new principal residence.145

The vacation home or rental use aspect of § 280A does not appear as troublesome. In part, this results from the limited scope of the original problem. Nevertheless, the new provision has set forth objective, easily applied rules that seem to resolve the cases reasonably fairly. Unfortunately, the taxpayer must ferret out these rules from the ill-conceived and poorly drafted labyrinth of § 280A and then speculate on the relationship of the § 280A provision to the remainder of the Code. Is a carefully articulated statutory provision on this issue too much to demand?
