OFFICE OF
CHIEF COUNSEL

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
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INTERNAL REVENUE SERVICE NATIONAL OFFICE FIELD SERVICE ADVICE

MEMORANDUM FOR

FROM: DEBORAH A. BUTLER
ASSISTANT CHIEF COUNSEL CC:DOM:FS

SUBJECT: National Office Field Service Advice

This Field Service Advice responds to your memorandum dated October 16, 1998. Field Service Advice is not binding on Examination or Appeals and is not a final case determination. This document is not to be cited as precedent.

LEGEND

A	=	
B	=	
Year 1	=	
Date 1	=	
Date 2	=	
Date 3	=	
Date 4	=	
Date 5	=	
Date 6	=	
Date 7	=	
Date 8	=	
Amount Q	=	$
Amount R	=	$
Amount S	=	$
Amount T	=	$
Amount U	=	$

Amount V = $
Amount W = $
Amount X = $

ISSUES

1. Whether the Tax Court has jurisdiction to redetermine adjustments set forth in an untimely notice of final partnership administrative adjustment.

2. Whether, under the facts described below, the Tax Court has jurisdiction to consider the Service's disallowance of the taxpayers' administrative adjustment request.

CONCLUSION

1. An action may be brought from an untimely FPAA for the purpose of raising the statute of limitations defense to any adjustments set forth therein.

2. Under the facts described below, the Tax Court has jurisdiction to determine all partnership items.

FACTS

Taxpayer A

Taxpayer A filed a U.S. Partnership Return of Income (Form 1065) for Year 1 on Date 1. A later filed what was styled as an "amended U.S. Partnership Return of Income" for the taxable Year 1 on Date 4. On the amended Form 1065, A reported a $ Q long term capital loss which had not been reported on the original Form 1065. An explanation attached to the amended Form 1065 stated that the amended return was filed to report a worthless security loss. The taxpayer did not attach a Notice of Inconsistent Treatment and Administrative Adjustment Request (Form 8082) to the amended Form 1065.

On Date 5, a Notice of Beginning of Partnership Administrative Proceeding ("NBAP") for year 1 was sent to the partners of A. The partners never responded to the NBAP. A Notice of Final Partnership Administrative Adjustment ("FPAA") was issued to the Tax Matters Partner ("TMP") of A on Date 7. The only

adjustment set forth in the FPAA[1] was the disallowance of the long term capital loss reported on the amended Form 1065. At no time did the tax matters partner agree to extend the period for assessment under I.R.C. § 6229(b).

On Date 8, the tax matter partner of A petitioned the United States Tax Court with respect to the adjustments set forth in the FPAA. The petition did not allege that the FPAA was time barred or otherwise improperly issued in any way.

Taxpayer B

Taxpayer B filed a U.S. Partnership Return of Income (Form 1065) for the Year 1 on Date 2. B filed what was styled as an "amended U.S. Partnership Return of Income" for Year 1 on Date 3. On the amended Form 1065, B reported a long term capital loss in the amount of $ R for the worthlessness of securities and a $ S long term capital loss pass through from A which had not been reported on A's original Form 1065. An explanation attached to the amended Form 1065 stated that the amended return was filed to report a worthless security loss and a change in the long term capital loss flowed through from A. The taxpayer did not attach a Notice of Inconsistent Treatment and Administrative Adjustment Request (Form 8082) to the amended Form 1065.

On Date 6, an NBAP for Year 1 was sent to the TMP of B. The following day, NBAPs were sent to each of the notice partners of B. An FPAA[2] was issued to the TMP of B on Date 7. The FPAA disallowed the $ T and $ U net long term and net short term capital losses respectively reported on the amended Form 1065. These disallowed losses included the $ R long term loss and the $ S long term loss from A not reported on B's original Form 1065. These disallowed losses also included a $ V net long term loss and a $ W net short term loss which were reported on B's originally filed Form 1065. With the exception of a $ X short term gain, these originally filed net long term and short term losses were attributable to

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[1]We acknowledge that the FPAAs were improperly formatted. An FPAA should state the amount of partnership items as originally reported and the amount determined. The FPAAs in this matter set forth as the amount originally reported the amount set forth on the amended returns. This improper formatting should bear no consequence upon the ultimate resolution of this matter.

[2]We acknowledge that the FPAAs were improperly formatted. An FPAA should state the amount of partnership items as originally reported and the amount determined. The FPAAs in this matter set forth as the amount originally reported the amount set forth on the amended returns. This improper formatting should bear no consequence upon the ultimate resolution of this matter.

items passed through from other partnerships and fiduciaries. B did not execute an extension under I.R.C. § 6229(b) as to Year 1.

On Date 8, the TMP of B filed a petition with respect to FPAA. The petition did not allege that the FPAA was time barred or otherwise improperly issued in any way.

LAW AND ANALYSIS

In 1982, Congress enacted the TEFRA unified audit and litigation procedures to simplify and streamline the partnership audit, litigation, and assessment process. The underlying principle of TEFRA is that "the tax treatment of items of partnership income, loss, deductions, and credits will be determined at the partnership level in a unified partnership proceeding rather than separate proceedings with the partners." Conf. Rep. No. 97-248 at 600 (1982). Partners are generally required to report items in a manner consistent with partnership treatment, and the Service may examine the partnership as an entity, rather than conduct separate examinations as to each of the partners. When applicable, the TEFRA provisions either supplant or augment the general administrative provisions.

Administrative Adjustment Requests

Generally, partners are required to take into account their share of partnership items in both the character and the amount reported by the partnership. I.R.C. § 6222(a). If a partner reports items inconsistent with the reporting of the partnership and fails to notify the Service of the inconsistent treatment, the Service may assess any necessary adjustments computationally. I.R.C. § 6222(c). If, however, after the initial reporting of the partnership items, partners wish to change their reporting of partnership items, the change is requested by means of filing an administrative adjustment request (AAR). I.R.C. § 6227.

An AAR generally may be filed within three years of the filing of the partnership return. I.R.C. § 6227(a)(1). If a consent to extend the limitation period is executed under I.R.C. § 6229(b), the period within which to file an AAR is extended to include the extended assessment period plus six months. I.R.C. § 6227(b). To the extent an AAR relates to worthless securities, such a request may be filed within seven years of the due date of the partnership return. I.R.C. § 6227(e).

Administrative adjustment requests can generally be divided into two categories: those filed by the tax matters partner (TMP) in which substitute return treatment is sought; and a request filed by a partner seeking an adjustment to that partner’s items. I.R.C. § 6227(c) and (d). When substitute return treatment is

sought, a valid AAR must contain revised schedules showing the effect of the adjustments on the partners plus "such other information as may be required under regulations." I.R.C. § 6227(c)(3).

The regulations require that an AAR appear on the form prescribed by the Service (Form 8082) and set forth several other requirements. Those requirements are, inter alia, that the form be filed with the service center at which the original return was filed; that the form be signed by the TMP; and that the adjustments be explained (including schedules showing how the proposed adjustments effect the partners). Temp. Treas. Reg. § 301.6227(b)-1T. With regard to these requirements, the Tax Court has held that "[t]he statute does not authorize the Secretary to consider a nonconforming request." Phillips v. Commissioner, 106 T.C. 176, 181 (1996) (when the taxpayer filed an amended individual return asserting changes to partnership items); but see Wall v. United States, 96-1 USTC ¶ 50,307 (9th Cir. 1996) (finding that a nonconforming AAR substantially complied with the regulatory requirements when it provided all necessary information).

Applying these general principles to the AARs filed in the present matter, the requests do not appear to comply with the requirements of I.R.C. § 6227(c)(3) and the regulation promulgated thereunder. Accordingly, we could argue that the taxpayer has not made a valid request for adjustment. Conversely, it could be argued that the AAR substantially complied with the regulatory requirements. Unlike in Phillips, the AARs filed in the present matter contained information pertaining to the aggregate adjustments at the partnership level. In this instance, the amended Forms 1065 were in fact treated as requests on behalf of the partnership under I.R.C. § 6227(c) because they were styled as amended returns of the partnership and were filed by the TMPs. Accordingly, the Service conducted partnership proceedings pursuant to I.R.C. § 6227(c)(2)(A)(ii). Because a court could regard the amended forms 1065 as AARs, we analyze the jurisdictional issues as though a valid AAR were filed.

Tax Court Jurisdiction

Tax Court jurisdiction over TEFRA matters is obtained either by filing a petition from an FPAA or by filing a petition for adjustment when an AAR is not allowed in full. See I.R.C. § 6226 and 6228, respectively. Under the TEFRA provisions, there is no true equivalent to the deficiency and refund procedures that exist in the general income tax procedures, because the TEFRA provisions statutorily combine deficiency and refund procedures to unify them into a single proceeding. See e.g., I.R.C. § 6228(a)(2)(B). In the present matter, the FPAAs were issued for the dual purposes of asserting adjustments and disallowing the AARs, and petitions were filed from FPAAs. Thus, jurisdiction should be evaluated from the perspective of both a petition from an FPAA as well as the disallowance of an AAR.

Petition from FPAA

Within 90 days of the issuance of an FPAA, the TMP may petition the Tax Court for a redetermination of the adjustments set forth therein, and any other partner may petition during the following 60 day period. I.R.C. §§ 6226(a) and (b), respectively. Once the petition has been filed, the court is vested with jurisdiction to determine all partnership items for the year at issue and the proper allocation of the items among the partners. I.R.C. § 6226(f). Accordingly, because the taxpayers filed timely petitions from FPAAs, the Tax Court is vested with jurisdiction to determine all partnership items.

Petition for Review of Adjustments Not Allowed in Full

Pursuant to I.R.C. § 6228, taxpayers may file a petition from an AAR seeking an adjustment of partnership items as a result of an administrative adjustment request not being allowed in full. In such a case, the petition seeking adjustment must be filed more than six months and less than two years from the date of the administrative adjustment request. I.R.C. § 6228(a)(2)(A). Where, as here, a notice of beginning of administrative proceeding is issued, the taxpayer is prohibited by I.R.C. § 6228(a)(2)(B) from filing a petition with regard to the AAR unless the Service fails to issue an timely FPAA (as occurred here). I.R.C. § 6228(a)(2)(C). In such a case, the taxpayer has at least six months after the expiration of the I.R.C. § 6229(a) period within which to file suit with regard to the AAR. Id. In the present matter, the petition from the FPAA was filed by the taxpayer more than six months after the expiration of the I.R.C. § 6229(a) period and more than two years after the filing of the AAR. Accordingly, if the present cases are deemed to have been brought pursuant to I.R.C. § 6228, both actions would be deemed untimely.

Parties

Though the court has jurisdiction over this matter by virtue of the issuance of the FPAA, a more troubling issue arises with regard to who would be deemed to be parties to these actions. Generally, all partners of the partnership are treated as parties to the action, regardless of whether the partner petitioned the Tax Court or elected to intervene. I.R.C. § 6226(c)(1); T.C. Rule 247. However, to be a party to the proceeding, a partner must have an interest in the outcome. I.R.C. § 6226(d). A partner is deemed not to have an interest in the outcome of the proceeding if the period within which tax attributable to the adjustment of partnership items may be assessed has expired. I.R.C. § 6226(d)(1)(B). In such a case, a partner may participate in the action for the limited purpose of asserting the statute of limitations defense. I.R.C. § 6226(d)(1).

Applying this to the present matter, the limitation on assessment is generally set forth in I.R.C. § 6501 and provides that taxes must generally be assessed within three years from the later of the due date or actual date of filing the taxpayer's return. I.R.C. § 6501(a). In the case of partnership items, I.R.C. § 6501(n)(2) provides for an "extension of the period in the case of partnership items" and refers to I.R.C. § 6229. The TEFRA provisions set forth a minimum period within which the Service is able to conduct an examination of a partnership return and flow any adjustments through to the partners. Section 6229(a) provides that the period for assessment of any tax resulting from partnership items "shall not expire before the date which is 3 years after the later of" the filing of the partnership return or the due date for filing the partnership return. In essence, I.R.C. § 6229 sets forth a minimum period within which adjustments attributable to partnership items generally may be assessed against all partners of a partnership, without regard to a specific partner's limitation period under I.R.C. § 6501. Unless the period of limitations as it relates to a specific partner is held open, the I.R.C. § 6229(a) period is the controlling time frame. Under this rationale, partners would be parties to this case for the limited purpose of asserting the statute of limitations defense.

Independent Action Regarding an AAR

If the statute of limitations defense prevented the partners from being deemed to be parties to the action, the AAR could not go forward either. First, as noted above, the court lacks jurisdiction over an independent action on the AAR because the petition would have been filed out of time. However, a TEFRA proceeding unifies refund and assessment procedures with the intent that partnership items would be finally determined in a single proceeding. One of the manners in which this unification is achieved is that once an notice of beginning of administrative proceeding is issued, a petition from the disallowance is prohibited unless the Service fails to issue an FPAA. Thus, because an FPAA was issued, the AAR cannot go forward as a separate action.

This case is further complicated by recent amendments to the TEFRA provisions. In 1997, Congress amended I.R.C. § 6227 to allow administrative adjustment requests to be filed with respect to bad debts and worthless securities up to seven years after the due date for filing the partnership return. I.R.C. § 6227(e); Taxpayer Relief Act of 1997 § 1243. Taxpayers have already filed AARs regarding worthless securities; however if the action were to be dismissed, an issue as to whether a taxpayer may file another AARs remains unresolved. There is no statutory provision limiting a taxpayer’s right to file multiple claims, even as to the same adjustment. However, I.R.C. § 6227(a)(2) provides that an AAR may not be filed after the issuance of an FPAA. Thus, the filing of another AAR would be prohibited in these cases.

Conclusion

In the present matters, the taxpayers filed petitions from FPAAs, thus vesting the Tax Court with jurisdiction over all partnership items. Though a technical argument could be made that the partners cannot litigate the disallowed AAR, we do not believe Congress intended an untimely FPAA to limit a partner's right to assert adjustments. Accordingly, we recommend that no jurisdictional motion be filed with regard to the untimely FPAA and that the matter proceed under the Tax Court's broad grant of jurisdiction of I.R.C. § 6226(f). We note, however, that to the extent the taxpayer asserts adjustments in its favor, the bar of the statute of limitations on assessment will not prohibit offsetting adjustments.

If you have any further questions, please call (202) 622-7950.

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By: _____
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