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BLAK Affirms the Necessity of Raising Statute of Limitations Defense Early in TEFRA Partnership Proceedings

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BLAK Investments, 133 TC No 19, Tax Ct Rep Dec (RIA) 133.19, 19, 2009 WL 4981301 (reviewed), is the latest in a series of cases that bring together two of the most intriguing and heavily discussed current topics in the federal income tax world, Son-of-BOSS transactions[1] and the TEFRA rules[2] regarding the administrative and judicial proceedings for resolving disputes between taxpayers and the IRS concerning the tax treatment of "partnership items."

TAX COURT JURISDICTION AND THE TEFRA STATUTE OF LIMITATIONS

BLAK presented the question whether, in a partnership-level proceeding, there are circumstances in which it is beyond the Tax Court's jurisdiction to consider a meritorious defense, based on the statute of limitations, that is presented by one or more partners.

Statutory Background

The Tax Court in *BLAK* had to determine the interactions among one group of statutory provisions relating to the period of limitations generally, another group of provisions governing the TEFRA partnership procedures, and one brief subsection that provides, at least in limited circumstances, coordination between the two.

Period of limitations. Generally, the amount of any income tax imposed by the Code must be assessed within three years after the return was filed.[3] Many special rules, however, operate to extend the period of limitations, either for a fixed number of years, or until the occurrence of a specific event, or indefinitely.[4] If a statutory notice of deficiency is issued to a taxpayer, assessment and collection are prohibited until after the taxpayer's time for filing a Tax Court petition has expired and, if such a petition is filed, until after the decision of the Tax Court becomes final,[5] but the running of the limitations period is suspended during the time that assessment and collection are prohibited.[6]

If a notice of deficiency with respect to a particular tax year is issued to a taxpayer and the taxpayer petitions the Tax Court, the court may consider facts with relation to other years, including years closed by the statute of limitations, that are necessary to determine the deficiency, if any, for the year in issue.[7] Thus, if a taxpayer claimed a deduction, on the return for the year before the Tax Court, for loss carryovers from another (open or closed) year, the court may consider whether those loss carryovers actually arose during that other year.[8] Similarly, the Tax Court would seem to have statutory authority to consider whether loss carryovers from a prior year that were deducted on the taxpayer's return for the year before the Tax Court were actually absorbed by unreported income in yet another (open or closed) year and were thus unavailable to reduce the taxpayer's income in the year before the court.

Tax treatment of partnership items. In the case of partnerships subject to the TEFRA procedures, the tax treatment of any "partnership item" is determined at the partnership level,[9] through judicial and administrative procedures set out in Sections 6221 through 6234. "Partnership item" is defined in Section 6231(a)(3) as, "with respect to a partnership, any item required to be taken into account for the partnership's taxable year under any provision of subtitle A to the extent regulations prescribed by the Secretary provide that, for purposes of this subtitle, such item is more appropriately determined at the partnership level than at the partner level."[10]

The Code generally draws a sharp distinction between "partnership items," on the one hand, and other items, such as "nonpartnership items" and "affected items" (which have significant partner-specific components), on the other. Issues relating to partnership items must be raised by the IRS and by taxpayers in the partnership proceeding, and, if not raised there, are considered to have been determined conclusively by its result.[11] Partner-specific matters cannot be raised in the partnership proceeding and must be raised by the Service and by taxpayers in some other forum.[12]

No assessment of a deficiency attributable to any partnership item may be made before the close of the 150th day after the day on which a notice of final partnership administrative adjustment (FPAA) is mailed to the tax matters partner (TMP) of the partnership. If a proceeding for judicial review of the FPAA is brought in the Tax Court within that 150-day period, no such assessment may be made until the decision of the Tax Court becomes final.[13]

The TEFRA provisions contain special rules relating to the statute of limitations on assessment of tax. The period for assessing any tax attributable to any partnership item for any partnership tax year does not expire before the date that is three years after the date on which the partnership return for such tax year is filed.[14] This three-year period is extended if any partner has, with the intent to evade tax, signed or participated directly or indirectly in the preparation of a partnership return that includes a false or fraudulent item.[15] If the partnership fails to file a return for any tax year, any tax attributable to a partnership item arising in that year may be assessed at any time.[16] If an FPAA is mailed, the period of limitations on assessment is suspended during the time that assessment is prohibited by reason of that mailing (150 days plus, if a Tax Court petition is filed, the period of time ending when the Tax Court decision becomes final) and for one year thereafter.[17]

The period of limitations with respect to adjustment of partnership items for a particular tax year of a particular partnership does not necessarily expire as to all partners at the same time. This situation can arise from two sorts of circumstances.

The first is inherent in the TEFRA provisions themselves, which contain several rules under which some partners may be treated differently for limitations periods than others are. For example, as described above, for a partnership return that contains a false or fraudulent item, the tax of the "culpable" partner(s) attributable to any partnership item may be assessed at any time, but there may be a cap on the extended period of limitations applicable to the "non-culpable" partner(s). Also, the period of limitations may be extended with respect to any partner by an agreement entered into between the IRS and the partner.[18] If one partner enters into such an agreement and another does not, different periods of limitations will apply to the partners.

More fundamentally, however, the Tax Court, as well as those courts of appeals that have considered this issue, have unanimously come to the conclusion that the TEFRA provisions do not themselves create any statute of limitations either with respect to the assessment of taxes or within which an FPAA must be sent. Rather, the statute of limitations on assessment of income tax attributable to partnership items is set by Section 6501, the provision that governs the assessment of income tax generally; Section 6229, the TEFRA provision, merely extends that period of limitations in certain circumstances.[19] Thus, if a partner's tax return for a year is filed some number of days, weeks, or months after the filing of the partnership return for that year, the period of limitations with respect to tax attributable to the partnership items of that partner will expire three years after the date on which the partner filed his return.[20] The period of limitations with respect to the tax of other partners attributable to partnership items of the same partnership will expire at some other time.

Statute of Limitations as issue in partnership-level proceeding. One provision of the Code deals specifically with whether the defense of the statute of limitations can be raised by a partner in a partnership-level proceeding. Section 6226(d)(1)(B) provides that a person who was a partner in a partnership at any time during a partnership tax year will not be treated as a party to an action brought in the Tax Court (or another court) to review an FPAA "after the day on which ... the period within which any tax attributable to [the partnership items of such partner for the partnership tax year] may be assessed against that partner expired."

Flush language at the end of Section 6226(d), added by section 1239(b) of TRA ’97 to "clarify" the law,[21] provides that a person who was a partner in a partnership at any time during a partnership tax year will be permitted to participate in such an action "solely for the purpose of asserting that the period of limitations for assessing any tax attributable to partnership items has expired with respect to such person, and the court having jurisdiction of such action shall have jurisdiction to consider such assertion." The intent of Congress in adding this flush language and its meaning and scope were the subject of vigorous debate between the concurring and dissenting opinions in *BLAK*.

The Issues Drawn

These statutory provisions have presented several overlapping issues to the courts, including:

- In what proceeding, partnership-level or partner-level, does a court have jurisdiction to consider a defense based on the statute of limitations to adjustments asserted in an FPAA? The Tax Court in *BLAK* held that it had jurisdiction to consider such a defense in an action filed for review of an FPAA, i.e., a partnership proceeding.

- What are the consequences of failure to raise such a defense in a partnership-level proceeding? Some of the opinions in *BLAK* suggest that such a failure may result in a permanent forfeiture of the defense.

Earliest cases. One fairly early case to touch on some of these issues was *Columbia Building, Ltd.*, 98 TC 607 (1992). In that case, the partnership return for 1984 was apparently filed on or before 4/15/85. No FPAA was mailed to the TMP of the partnership at any time on or before 4/15/88.[22] On 5/16/88, an FPAA was sent to certain partners in the partnership, other than the TMP, and one of them filed a petition in the Tax Court initiating a partnership-level proceeding.

In a joint motion, the petitioner and the IRS agreed that the "statute of limitations for assessment has expired because no FPAA was sent to the TMP ... before the period for assessment ... had expired."[23] The Tax Court stated that it could "think of no reason why" the "well-established principle in deficiency cases that the assertion of the bar of the statute of limitations is an affirmative defense and not a jurisdictional question"[24] should not apply in TEFRA partnership cases. Accordingly, the court did not dismiss the case for lack of jurisdiction, but rather granted the taxpayer's motion for summary judgment on all issues.[25]

In *Columbia Building*, the IRS did not contend that, in a partnership-level proceeding, the Tax Court lacked "jurisdiction over the issue" to consider the statute of limitations defense raised by the taxpayer, nor did the court raise that "jurisdiction over the issue" question on its own. It is fair to suppose that the absence of an objection by either party to the court's consideration of that issue was grounded in (or at least related to) the Tax Court's implicit understanding that, as a matter of substantive law, the applicability of the statute of limitations defense depended only on whether or not an FPAA had been sent to the TMP in its capacity as such within the period of time described in Section 6229. That fact clearly had the flavor of a "pure" partnership-level determination required, under Section 6221, to be decided in the partnership-level proceeding.

Columbia Building was a partnership-level proceeding. A different procedural posture was presented by *Crowell*, 102 TC 683 (1994), a partner-level case. In *Crowell*, an FPAA with respect to the partnership's 1983 year, the return for which was presumably filed some time in mid- to late 1984, was mailed to the TMP on 9/13/91. No petition for review of the FPAA was filed by any partner in any court. The Service then assessed the tax attributable to the "computational adjustment" arising from the FPAA[26] and sent the individual taxpayer, a partner in the partnership, a notice of deficiency with respect to certain "affected items."[27] The taxpayer filed a Tax Court petition asserting, among other arguments, that the FPAA had been untimely. The court rejected the taxpayer's argument, stating:

"[T]he sufficiency of the FPAA covering 1983 affects our jurisdiction in the instant case to the extent that it is directly related to the validity of the affected items deficiency notice. On the other hand, petitioners' assertion of the bar of the statute of limitations does not affect our jurisdiction but is merely an affirmative defense.[[28]] See Columbia Building, Ltd.... We conclude that the statute of limitations defense as it pertains to the FPAA for 1983 should have been prosecuted within the context of a partnership level proceeding and is not properly before us in this proceeding."[29]

Again, the court's insistence that the statute of limitations issue sought to be raised by an individual partner should have been decided in the partnership proceeding (and was thus effectively waived by failure to seek judicial review of the FPAA) can be most readily understood by reference to an implicit rule of substantive law to the effect that the applicability of a statute of limitations defense as to any partner depended only on whether or not an FPAA had been sent to the TMP within the period described in Section 6229, a partnership-level determination.

A similar result was reached in *Chimblo,* 83 AFTR 2d 99-2610, 177 F3d 119 (CA-2, 1999), also a partner-level proceeding, where the Second Circuit said: "In the context of this case, one involving the application of TEFRA, petitioners had a right to raise the partnership's statute of limitations defense in the earlier partnership-level proceeding but failed to do so.... Allowing individual taxpayers to raise a statute of limitations defense in multiple partner-level proceedings would undermine TEFRA's dual goals of centralizing the treatment of partnership items and ensuring the equal treatment of partners. Accordingly, we hold that petitioners are barred from raising their statute of limitations defense in this partner-level, affected items proceeding."

No facts are stated in the Second Circuit's opinion (or in the Tax Court opinion that the appellate court was reviewing) regarding when the partners filed their tax returns. Accordingly, it is possible to understand the insistence by the court of appeals that the statute of limitations issue be decided solely in a partnership-level proceeding as dependent on its understanding that only "partnership-level" facts, such as the date of the filing of the partnership's return, would be relevant in deciding whether the period of limitations was still open.

The Fifth Circuit agreed with *Chimblo* in *Weiner*, 94 AFTR 2d 2004-6518, 389 F3d 152 (CA-5, 2004), which contained what appears to be an even more explicit statement that only the partnership return is taken into account in determining whether the statute of limitations for issuance of an FPAA is still open.

Later developments. The landscape changed with the next building block in our understanding of the issues, *Rhone-Poulenc Surfactants and Specialties, L.P.,* 114 TC 533 (2000), reviewed by the court.

Although *Rhone-Poulenc* was a partnership-level proceeding, the FPAA did not adjust any item of income, loss, deduction, or credit of the partnership. In particular, the FPAA did not assert that the partnership had omitted any gross income from its return. Rather, the only assertion in the FPAA was that a transfer of property that had been made by GAF Chemicals Corporation to the partnership and that had been reported by GAF and the partnership as a contribution to the capital of the partnership not taxable to GAF pursuant to Section 721 was, in substance, a taxable sale of the property by GAF to the partnership.[30] Thus, the only partner whose taxable income for the year in question would have been affected by the adjustments proposed by the FPAA appears to have been GAF.[31]

The FPAA was issued more than three years after the partnership had filed its return for the year of the transaction, but less than six years after GAF had filed its return for that year. In the Service's view, the FPAA was timely because GAF, by reporting the transfer of the property to the partnership as nontaxable, had omitted from the gross income that should have been reported on its own return an amount in excess of 25% of the gross income actually stated on its return. Under Section 6501(e)(1)(A), in the case of such an omission on the return of any individual or corporation, the tax can be assessed at any time within six years of the filing of the return. After the sixth anniversary of the filing of its own return, GAF moved for summary judgment on three grounds:

> (1) The only relevant period of limitations on assessment of its tax attributable to the transaction—the period that ended three years after the filing of the partnership return described in the TEFRA provisions—had expired.[32]
>
> (2) Even if the six-year statute of limitations was in any way relevant, it had not been "suspended" by the mailing of the FPAA,[33] so that the period of limitations had in any event expired.
>
> (3) There had been adequate "disclosure" of the transaction on the relevant returns, so that Section 6501(e)(1) by its own terms did not apply.[34]

A majority of the Tax Court (11 of the 14 participating judges) agreed that the periods of limitations found in Section 6229, within the four corners of the TEFRA provisions, were not intended to be the exclusive periods of limitations on the assessment of tax attributable to partnership items. If GAF had made a sufficiently large omission from gross income, whether or not attributable to partnership items, the IRS, in assessing GAF's income tax attributable to partnership items, was entitled to attempt to rely on the six-year period that applied to the assessment of income tax generally. A smaller majority (eight of the participating judges) also agreed that the six-year non-TEFRA period of limitations was suspended by the mailing of the FPAA and the filing of a petition for review with the Tax Court, so that GAF was not entitled to assert the bar of the statute of limitations even after the sixth anniversary of the filing of its return had passed.

With respect to GAF's final argument, the majority of the Tax Court stated: "The parties disagree over whether the return provides a clue. Indeed the parties disagree over which documents comprise the "return".[Footnote 35 of the Tax Court's opinion.] Such disagreements present genuine issues of material fact, making a summary judgment improper." In footnote 35, the court said: "As a general rule, information contained in a partnership return will be taken into consideration in determining whether an omitted item was adequately disclosed on the return of a partner for purposes of sec. 6501(e)(1)(A)(ii).... Respondent's position in the related case ... includes, among other arguments, the argument that certain trust returns necessary to petitioner's partnership return disclosure argument were never filed."[35]

Accordingly, the Tax Court denied GAF's summary judgment motion. The court did not, however, suggest that it lacked jurisdiction over the issue to consider, in the partnership-level proceeding, GAF's statute of limitations defense, even though the considerations necessary to determine the validity of that defense appear to have included a number of "non-partnership" facts, such as whether or not the "trust returns" were filed. The holding in *Rhone-Poulenc* that Section 6229 cannot shorten an otherwise applicable period of limitations under Section 6501 has been approved by several courts of appeals.[36]

Following *Rhone-Poulenc*, the Tax Court addressed another novel and important statute of limitations issue in a partnership-level proceeding without suggesting that such issues were beyond its jurisdiction over the issue. In *G-5 Investment Partnership*, 128 TC 186 (2007), a partnership reported capital losses on its return for 2000. Certain of the individual partners in the partnership, unable to use their respective distributive shares of those losses in full on their returns for 2000, carried a portion of their shares to their individual returns for 2001, 2002, 2003, and 2004.[37] It is unclear from the court's opinion whether this was true of all or only some of the partners.

An FPAA with respect to the partnership's 2000 return, disallowing the claimed capital losses, was issued on 4/12/06, more than three years after the filing of the partnership's return for 2000 and the partners' returns for 2000 and 2001, but within the three-year period of limitations following the filing of the partners' returns for 2002, 2003, and 2004. The IRS conceded that the period of limitations had expired with respect to losses claimed on the partners' 2000 and 2001 returns, but claimed that the FPAA for 2000 was timely for the purpose of disallowing the loss claimed as carryovers on the partners' 2002, 2003, and 2004 returns.

The Tax Court agreed with the Service, holding that the "period of limitations for assessing taxes attributable to partnership items for petitioners' 2002-04 taxable years is open." [38] The court expressed no reservations regarding the appropriateness of its addressing the statute of limitations issue in a partnership-level proceeding.

Trouble in Paradise. The opinions described above lead to results that seem difficult to reconcile from a doctrinal perspective. Under *Columbia Building, Crowell, Chimblo,* and *Weiner*, statute of limitations issues relating to the timeliness of issuance of an FPAA must be litigated in the partnership-level proceeding, and not in a subsequent partner-level proceeding, for the stated reason that such issues involve solely partnership-level determinations. But under *Rhone-Poulenc* and *G-5*, partner-level issues—such as when particular partners may have filed their returns, whether particular partners are subject to any rule extending the period of limitations, and during which of their individual tax years partners may make use of their distributive share of partnership items by reason of carryovers and carrybacks—have become relevant to the determination of whether the period of limitations has expired.

The tension between these lines of authority was not immediately evident. Thus, in *McConnell*, TC Memo 2008-167, RIA TC Memo ¶2008-167 , an FPAA with respect to a partnership's 1983 tax year had been issued on 5/30/89, more than three years after the partnership's return was filed. No indication is given in the opinion regarding when the partners had filed their returns or whether there were any partnership- or partner-level facts that would have extended the period of limitations.

A Tax Court petition was filed with respect to the FPAA, but the statute of limitations defense was not raised in the Tax Court. Ultimately, a Tax Court decision upholding the FPAA in full was entered. An "affected items" notice of deficiency was then mailed to one of the partners seeking an accuracy-related penalty.[39]

The partner filed a Tax Court petition with respect to the notice of deficiency and attempted to raise the defense before the court that, "because respondent issued the FPAA more than 3 years after the date on which [the partnership's] 1983 partnership return was due to be filed, there can be no proceedings to adjust petitioners' income or losses reported on their 1983 joint Federal income tax return." The court rejected that contention, holding that "a statute of limitations defense predicated on facts relating to the issuance of an FPAA must be raised at the partnership level," in reliance on *Crowell* and similar cases.

At the same time, the Tax Court's opinion also contains an extensive discussion of *Rhone-Poulenc,* although the relevance of how the statute of limitations on assessment is computed (the issue decided in *Rhone-Poulenc*) to the court's decision in a case like *McConnell*, in which it decided that the defense of the statute of limitations could not be raised at all, is not clear. The Tax Court's reference to "facts relating to the issuance of an FPAA" may suggest an inchoate awareness that partnership-level facts may, in some cases, be sufficient to demonstrate that the period of limitations *is* still open when an FPAA is issued. Nevertheless, the holdings in *Rhone-Poulenc* and *G-5* make clear that proving the negative, i.e., establishing that the period of limitations is *no longer* open with respect to *any* year of *any* partner the income tax liability for which may be affected by partnership items adjusted in an FPAA, will necessarily require inquiries regarding facts that are likely to vary from partner to partner.

The inconsistency between the partnership-level and partner-level approaches to limitations issues bubbled nearer to the surface in *Curr-Spec Partners, LP*, TC Memo 2007-289, RIA TC Memo ¶2007-289 , *aff'd* 104 AFTR 2d 2009-5894, 579 F3d 391 (CA-5, 2009), the facts in which paralleled those in *G-5.* A partnership filed its return for 1999 on 10/11/00. More than three years later, on 10/13/04, an FPAA was issued to the partnership with respect to that return. The partnership moved for summary judgment on statute of limitations grounds, but the Service contended that "at least three partners claimed a net operating loss (NOL) carryforward of a 1999 partnership item in 2000 and 2001," years with respect to which the period of limitations had not expired on 10/13/04. It is not stated in the Tax Court's opinion how many partners there were in the partnership.

In reliance on *G-5,* the Tax Court held that the assessment period for tax for the partners' 2000 and 2001 tax years that was attributable to a 1999 partnership item had not expired. Because *Curr-Spec* was appealable to the Fifth Circuit, the Tax Court opinion also contains a lengthy discussion of the Fifth Circuit's decision in *Weiner.* The *Curr-Spec* Tax Court opinion, though, focused solely on the language in *Weiner* that suggested (contrary to *Rhone-Poulenc*) that the only relevant period of limitations, the one found in Section 6229, would have expired three years after the partnership had filed its 1999 return. The Tax Court explained that it considered such language to be mere dictum, as the Fifth Circuit in *Weiner* "did not mention section 6501 or discuss any of the cases which hold that sections 6229 and 6501 establish alternative assessment periods."

No direct reference was made by the Tax Court in *Curr-Spec* to the logical connection between the Fifth Circuit's *procedural* holding in *Weiner* that the statute of limitations is a partnership item, properly decided in a partnership-level proceeding, and the *substantive* question of whether Section 6501, a provision the application of which requires reference to partner-specific facts, applies (even if in conjunction with Section 6229, a "pure" partnership-level provision) to determine the period of limitations in a TEFRA partnership audit.

Two passages in the Tax Court's opinion, however, do reflect the confusion caused by trying to maintain two inconsistent (if not irreconcilable) positions. First, the Tax Court stated, "because the Court of Appeals [in *Weiner*] concluded that the statute of limitations issue was a partnership item, the result would have been the same regardless of whether the assessment period was controlled by section 6229 or 6501." This is a *non sequitur*; perhaps the court was trying to articulate something like this: "Because the court of appeals concluded that the assessment period was controlled by Section 6229, it reached the result that the statute of limitations issue was a partnership item." Such a statement, however, would not lend support to the Tax Court's conclusion in *Curr-Spec* that Fifth Circuit precedent did not block the Tax Court from applying *Rhone-Poulenc* to the case before it.

Second, the Tax Court in *Curr-Spec* stated in footnote 4: "Petitioner also argues at length that we cannot consider when the partners filed their respective tax returns because the filing dates are nonpartnership items. This position contradicts the holding of Rhone-Poulenc ..., where we examined the partners' filing dates to decide when the assessment period under sec. 6501 expired. Although petitioner contends its position does not conflict with our existing caselaw, petitioner has not explained how the Court can apply the holding of Rhone-Poulenc without examining the partners' filing dates. Petitioner's argument is without merit."

With all due respect to the Tax Court, this statement seems almost willfully blind to the true implications of the taxpayer's argument in *Curr-Spec.* The Tax Court's opinion in *Rhone-Poulenc* focused solely on the question of whether Section 6229 alone governed the period of limitations on the assessment of tax attributable to partnership items and concluded that Section 6501, rather than Section 6229, was the primary governing provision. The court in *Rhone-Poulenc* never took the next step of asking whether its decision regarding the appropriate substantive provision to govern the statute of limitations issue should lead it to overrule its decisions in *Columbia Building* and *Crowell,* or at least to limit them to those situations in which neither party asserted the existence of any partner-level fact relevant to the determination of the limitations issue.

Thus, the court's statement in the *Curr-Spec* footnote quoted above must mean either that *Rhone-Poulenc* held that the filing dates of the partners' individual tax returns are partnership items—a position that seems self-contradictory on its face—or that *Rhone-Poulenc* held that the filing dates of the partners' individual tax returns would be considered in the partnership-level proceeding, even though those dates were nonpartnership items, a position that would properly have warranted a much more extensive discussion than was given to it in that opinion. In either event, the *Curr-Spec* taxpayer can scarcely be blamed for not being able to reconcile the Code's great conceptual divide between partnership and nonpartnership items with the Tax Court's resolution of the statute of limitations issue in *Rhone-Poulenc.*

The bulk of the Fifth Circuit's opinion affirming the Tax Court's decision in *Curr-Spec* is devoted to a discussion of the interaction between Sections 6229 and 6501. It reaches the conclusion that the Tax Court had correctly settled that relationship in *Rhone-Poulenc.* The court of appeals then noted its agreement with the Tax Court that the statements regarding the scope of Section 6229 in *Weiner* were dictum, which did not bind it when the issue was squarely presented:

"[B]ecause we held that the IRC §6229(a) period is a partnership item, ‘the district courts [in a refund action like *Weiner*] lack jurisdiction to decide the FPAA statute of limitations issue.’[Footnote 47 of the Fifth Circuit's opinion.] The jurisdictional issue was dispositive in *Weiner*; to the extent we discussed IRC §6229 as a strict statute of limitations for the issuance of an FPAA, it was mere dicta."

In footnote 47, the court said: "We did state, however, that one factor in favor of determination at the partnership level was that ‘[t]he timeliness of an FPAA affects the IRS's ability to make adjustments to partnership items, which in turn affects all partners alike.’ ... This statement remains true because an extension of the IRC §6501(a) statute of limitations by IRC §6229(a) affects the IRS's ability to adjust partnership items, which affects all partners alike."

It is difficult to know what to make of these statements. Quite obviously, the Service's ability to adjust partnership items would be most likely to affect all partners alike if only Section 6229, and not Section 6501, applied to determine the statute of limitations on assessment of tax attributable to partnership items. The application of Section 6501 introduces a situation in which the IRS adjustments are likely to affect some partners, but not others, because the facts relevant to the application of Section 6501 are likely to vary from partner to partner. Under the *Rhone-Poulenc* rule, Section 6229 has only a secondary role: it prevents the period of limitations, which is governed in the first instance by Section 6501, from expiring in certain circumstances. Indeed, in the ordinary course of events, partnership returns are filed prior to the partners' returns, since the partners need information contained on Schedule K-1 in order to complete their own filings. The three-year statute of limitations under Section 6501 with respect to each partner's tax year that "corresponds" to the tax year of the partnership—and certainly for any subsequent tax year of the partner—is thus generally likely to expire after the period described in Section 6229. Accordingly, under *Rhone-Poulenc,* Section 6229 will rarely come into play at all in determining the period of limitations.[40] For the Fifth Circuit to suggest that Section 6229's secondary role is sufficient to cause all (or even many) limitations issues to be considered partnership items reflects either a lack of thought or a disturbing disingenuousness.

A slightly more explicit recognition of the tension between the Code's perceived mandate to resolve statute of limitations issues in the partnership-level proceeding and the need to look to "partner-level" facts to effect that resolution came in a footnote in *PCMG Trading Partners XX, L.P.,* 131 TC No 14, Tax Ct Rep Dec (RIA) 131.14, 2008 WL 5191382 (2008). The issue in that case—whether a Tax Court petition raising a statute of limitations defense to adjustments made in an FPAA can be filed by one partner after another partner has already filed a Tax Court petition with respect to the same FPAA—does not concern us here. What is of interest is the court's observation in footnote 9 that "our jurisdiction over whether the period of limitations has expired as to individual partners presents an exception [to the rule that the court's jurisdiction in a partnership proceeding is restricted to determining "partnership items"] since the expiration of the period of limitations can depend on facts that are peculiar to the individual partners." [41]

The precise scope of that "exception" was the focus of the dispute between the majority and the dissenters in *BLAK.* [42]

THE *BLAK* CASE

BLAK was a Son-of-BOSS case [43] During 2001, BLAK, a partnership in which Robert and Lori Manroe were partners, effected a series of transactions that resulted in the Manroes' reporting an ordinary foreign currency loss of $2,539,769 and a short-term capital loss of $2,982,840 on their 2001 return. A portion of the losses was used on the return to offset income from other sources, and $458,190 of the capital loss was carried to 2002.[44] The Manroes used that capital loss carryover on their 2002 return to offset capital gains from other sources reported on that return.

The Manroes filed their 2001 return on 10/15/02 and their 2002 return on 10/15/03. As Son-of-BOSS is a listed transaction,[45] the partnership and the Manroes should have included an appropriate disclosure under Section 6011 regarding the transaction on their 2001 or, perhaps, their 2002 returns. [46] No such disclosure was made with the returns or at any later time, however, either by the partnership or by the Manroes. As discussed in our prior article and below, the IRS contended that this failure invoked Section 6501(c)(10), under which the period of limitations with respect to a listed transaction does not expire "before the date which is 1 year after ... the date on which the Secretary is furnished with the information so required."[47]

An FPAA with respect to the partnership's 2001 return was issued on 10/13/06, more than three years after the filing of the Manroes' 2001 return, but within three years of the filing of their 2002 return. The Tax Court petition filed by the partnership's TMP asserted that the statute of limitations barred the determination of a liability with respect to partnership items for 2001, but the Manroes did not dispute that the FPAA was timely with respect to adjustments that might be made to their 2002 return. The IRS moved for partial summary judgment on the statute of limitations issue for 2001, asserting the application of Section 6501(c)(10), and the TMP cross-moved for partial summary judgment on the same issue.

The Jurisdiction Issue: Three Approaches

Although the parties were in clear disagreement on the substantive question of whether the period of limitations for 2001 had expired, neither party disputed the Tax Court's jurisdiction to decide the statute of limitations issue. Nevertheless, the majority opinion did devote a few paragraphs to that question, presumably in accordance with the principle that the parties, by their consent, cannot confer a jurisdiction that is otherwise lacking over an issue,[48] and the concurring and dissenting opinions discussed the statute of limitations at length.

Majority opinion. The majority opinion cited three cases in support of its conclusion that the Tax Court had "authority to address the Manroes' contention that the period of limitations for assessing tax attributable to partnership items for 2001 has expired."

- *PCMG Trading* was cited for the proposition, quoted above, that jurisdiction over statute of limitations issues—issues that "can depend on facts that are peculiar to the individual partners"—"presents an exception" to the general rule that the court's jurisdiction in a partnership-level proceeding is restricted to determining partnership items.

- *Rhone-Poulenc,* a case in which neither the parties nor the Court raised or discussed a jurisdictional issue, was nevertheless cited for the propositions that "section 6226 enabled the partners in a partnership action to assert that the period of limitations for assessing any tax attributable to partnership items had expired and that the Court had jurisdiction to decide whether that assertion was correct."
- *Curr-Spec* was cited to note that the court "rejected the partners' contentions [that issues related to the period of limitations were partner-level determinations that could not be made in a partnership-level proceeding] and held that the period for assessing tax against the partners had not expired."

Concurring opinion. Judge Thornton's concurring opinion, in which all of the judges who agreed with the majority opinion joined, raised additional arguments in favor of the Tax Court's jurisdiction to decide the limitations issue. The concurring opinion focused primarily on a clause added by TRA ’97 at the end of Section 6226(d)(1).

This "flush language" constitutes an exception to the general rule of Section 6226(d)(1)(B) that a partner is not considered a "party" to a partnership proceeding after the "day on which ... the period within which any tax attributable to such partnership items may be assessed against that partner expired." The flush language provides that a partner may participate in a partnership proceeding in the Tax Court "solely for the purpose of asserting that the period of limitations for assessing any tax attributable to the partnership items has expired with respect to" the partner, and provides that the Tax Court has jurisdiction to consider that assertion.

Judge Thornton contended that the use of the word "solely" in the flush language did not mean that a "partner is entitled to assert the limitations bar only if the partner relinquishes all alternative assertions." According to Judge Thornton, Congress's assumption in adding the flush language to the TEFRA provisions in 1997 was that limitations issues already could be raised by any partner who was otherwise participating in the partnership-level proceeding. The only reason for adding the flush language was to avoid a "potential circularity" that otherwise might result in a partnership-level proceeding—a court's concluding, precisely because the period of limitations had expired as to a particular partner, that that partner was thus not a "party" to the proceeding and that the court lacked jurisdiction to hear that partner's claim that the period of limitations had expired. Rather, the flush language, taken as a whole, confirmed a "partner's ability to raise on a stand-alone basis an issue that the partner otherwise would be entitled to raise in conjunction with other issues."[49]

In Judge Thornton's view, Congress "perceived that a partner's assertion of a limitations bar is so closely intertwined with the issue of whether the partner has an interest in the outcome of the partnership proceeding that the partner should be allowed to raise the assertion during the proceeding without regard to whether it might otherwise be regarded as a partner-level item. That result is consistent with the general legislative objective of centralizing resolution of disputes over partnership adjustments."

It is difficult to know what Congress actually had in mind—either in 1982 when the TEFRA provisions were first enacted, or in 1997 when the flush language was added to the Code—with respect to the Tax Court's jurisdiction over limitations issues, particularly, partner-specific limitations issues. After all, it was not until the Tax Court's 2000 decision in *Rhone-Poulenc* that judges and litigants began to focus on the fact that there even existed such a thing as a partner-specific limitations issue in a partnership-level proceeding.

Nevertheless, we may perhaps obtain some guidance as to what Congress intended in 1997 from the amendments that were made at that time to the TEFRA provisions regarding the procedures to be followed to adjudicate partner-level defenses to penalties asserted by the IRS with respect to partnership items. Prior to the 1997 amendments, all issues relating to such penalties, whether partnership-level or partner-level, were adjudicated in a partner-level "affected items" proceeding following the conclusion of the partnership-level proceeding. The 1997 amendments brought partnership-level issues relating to penalties into the partnership-level proceeding, but specifically left partner-level defenses to be adjudicated in a separate partner-level proceeding.[50] In light of this history, Judge Thornton's description of the "general legislative objective" of the 1997 amendments to the TEFRA provisions is questionable.

Judge Thornton also raised an "alternative basis" for sustaining the court's jurisdiction to consider the limitations issue—that, in the particular case before the court, such an issue should be considered a "true" partnership item, since the question of whether Section 6501(c)(10) applied turned only on partnership-level facts. These facts were whether the transaction that BLAK (the partnership) had implemented was a "listed transaction" and whether BLAK (the partnership) had made the required disclosures to the Service.

This conclusion seems much narrower and far less questionable than the court's and Judge Thornton's discussions of the implications of prior case law and of the flush language.[51] It makes one wonder why the majority of the Tax Court judges felt the need to discuss (much less to decide) the broader jurisdictional questions that arise in cases in which the period of limitations is dependent on partner-specific facts.

Finally, Judge Thornton addressed two issues in the "it might be argued/suggested" category. First, he pointed out that the Tax Court's willingness to address limitations issues in partnership-level proceedings would not give rise to "*unexpected* preclusive effects" in subsequent partner-level litigation, including collection due process cases (emphasis added). [52] Ever since the Tax Court's decisions in *Crowell* in 1994 and *McConnell* in 2008, partners desiring to raise limitations defenses have been on notice that they will be precluded from doing so in partner-level litigation, because those cases clearly hold that the defense must be raised in the partnership-level proceeding. Of course, as noted above, the opinion in neither *Crowell* nor *McConnell* recognized that the substantive law of limitations, as articulated in *Rhone-Poulenc* and *G-5,* will, perhaps more often than not, require making partner-level determinations. [53]

Second, Judge Thornton rejected the argument that consideration of partner-level limitations issues "raises the specter that partnership-level proceedings may be made more complex or time consuming by requiring the Court to decide collateral issues relating to such assertions." In his view, "these issues have to be decided somewhere," and "it would serve no one's interests ...for this Court ... to require the parties and this or some other court to expend additional time and resources addressing the issue in some future proceeding." [54] He also noted that it was undisputed that such issues would have to be decided "where a partner asserts the limitations bar with respect to *all* the partners' affected years" (emphasis added), since such cases would come within the flush language of Section 6226(d)(1), so that it was "not such a great leap" to address such issue in *BLAK*.

Dissenting opinion. Judge Halpern filed a lengthy and vigorous dissent, taking issue in turn with each argument made by the majority opinion and by Judge Thornton. While an exploration of every nuance in the dissenting opinion is beyond the scope of this article, a few important points in the dissent provide a useful contrast with the majority opinion and a basis for some observations about the awkward structure that has been created for raising limitations defenses in partnership-level proceedings.

Judge Halpern began by articulating a simple analytical framework: "In a partnership-level proceeding, the Court has authority to decide (1) partnership items ...; (2) affirmative defenses ...; and (3) whether a partner is not a party because he has no interest in the outcome of the proceeding, see sec. 6226(c) and (d)." He noted that the majority opinion did not suggest that the limitations issue was either a partnership item or a partnership-level affirmative defense (although Judge Thornton's concurring opinion contained a suggestion that, under the particular facts of *BLAK*, the application of Section 6501(c)(10) might be a partnership item).

The dissenting opinion then drew a distinction between situations in which a partner concedes the existence of "an interest in the outcome" of the proceedings, because some, but not all, of the years affected by partnership items are closed, and situations in which the partner contends that all such affected years are closed. Only in the latter case would Judge Halpern apply the flush language to permit a partner to assert a limitations defense in the partnership-level proceeding. Moreover, in Judge Halpern's view:

"If a partner argues that he is not a party under sec. 6226(b)(1)(B), the Court must search for an open year. If the Court finds no open year, then the partner is not a party; moreover, I assume collateral estoppel would prevent the Commissioner from arguing otherwise in a later action. The moment the Court finds one open year, however, the partner is a party and the inquiry is done; the Court would not need to find (and judicial restraint would counsel against finding) the status of any other year."

Since an assertion such as that made by the Manroes, that the period of limitations had run only for some but not all affected years, did not fit into any of the three categories of items that may be addressed in a partnership-level proceeding, Judge Halpern concluded that he was not convinced that the "Court has authority [jurisdiction] in this proceeding to consider that question." [55]

Having laid down these basic principles, Judge Halpern turned to the three cases cited by the majority opinion (*PCMG Trading*, *Rhone-Poulenc*, and *Curr-Spec*) and explained why none of them directly supported the majority's contention that the Tax Court had jurisdiction to determine that the period of limitations had expired as to *one* of a partner's tax years in the context of a partnership-level proceeding in which it was clear that the period had not expired as to *another* year. Rather, Judge Halpern stated, the court should have focused on another line of cases, the line that determined in the penalty context that a partner may not raise a partner-specific defense in a partnership-level proceeding, [56] and applied a similar rule in statute of limitations cases not covered by Section 6226(d)(2)(B), that is, cases in which it was conceded that the period of limitations for at least one affected year was not closed.

Judge Halpern concluded with two points. First, he rejected Judge Thornton's alternative argument that BLAK's failure to file the required disclosure under Section 6011, by extending the limitations period under Section 6501(c)(10) for assessing any tax, also caused the question of whether the limitations period remains open to be considered a "partnership item." His view on this question was based, at least in part, on his conclusion that disclosure by *a partner* would be both necessary and sufficient to overcome the application of Section 6501(c)(10) as to that partner, so that the presence or absence of disclosure on BLAK's returns did not affect that question.

Second, he argued that the majority's view would have "adverse and surprising consequences," particularly with respect to the question of whether the defense of limitations would be considered waived if not raised in the partnership-level proceeding: "The majority opinion seems to stand for the proposition that, although generally a partner must preserve his partner-specific defenses for a partner-level proceeding, he may—and so must—mount his statute of limitations defense at the partnership level, even if he disputes neither the FPAA nor that he has an interest in the outcome of the partnership-level proceeding. I doubt that Congress set such a perilous trap for the unwary."

PICK YOUR POISON

The opinions in *BLAK* set out contrasting approaches to whether statute of limitations defenses based on partner-specific facts can, should, and must be raised in a partnership-level proceeding under the TEFRA provisions. The majority opinion seems to conclude that the Tax Court has jurisdiction in such a proceeding over such limitations defenses asserted by any partner to the assessment of additional tax arising from the FPAA in any tax year of any partner.

Judge Halpern, on the other hand, would allow consideration of a limitations defense raised by a partner only when the defense, if sustained, would preclude assessment for every possible year. (If sustained in the partnership proceeding, such a limitations defense would have preclusive effect against the Service in any subsequent partner-level proceeding. Similarly, the court's refusal, on jurisdictional grounds, to address a limitations defense as to any year because the court found that some other year was "open" presumably would have preclusive effect against the taxpayer if the limitations issue with respect to that other year were raised in a subsequent partner-level proceeding.)

Neither approach is fully satisfying. Under the rule adopted by the majority, the partnership-level proceeding will now be cluttered with partner-specific defenses in every case in which any partner thinks that assessment for any of the partner's tax years is barred by the statute of limitations, and Judge Halpern is undoubtedly correct that meritorious defenses will sometime get lost in the shuffle.

By contrast, Judge Halpern's approach would create a hypertechnical distinction between cases in which a partner asserted and could demonstrate that all relevant years were "closed" and cases in which a partner conceded or the court found that at least one year was "open." In the latter situation, the partner would be relegated to some forum other than the partnership-level proceeding to adjudicate any asserted limitations defense, while the court still might have to review the facts relevant to numerous tax years in order to find the one "open" year that required it to deny the taxpayer's motion to dismiss on limitations grounds.

It may have been these difficulties that led Judge Thornton to his alternative suggestion, however tentative, that the court decide that the application of Section 6501(c)(10) made the limitations issue a partnership item in *BLAK*, while deferring consideration of the broader jurisdictional issue raised whenever a limitations defense is presented for a case in which it was more squarely presented.

Perhaps in choosing between the two approaches one additional factor should be taken into account. There are only limited circumstances in which a partner is entitled to receive a notice of deficiency before the Service can assess what it asserts is a "computational adjustment" applying the results of a partnership-level proceeding to compute the partner's actual tax liability. [57] In the absence of a requirement that the IRS issue such a notice of deficiency, the partner is deprived of a preassessment forum in the Tax Court to raise any relevant partner-level defenses, and is relegated either to a refund action, after the asserted tax has been paid in full, or—for those with the nerves of steel needed to decline to pay the tax even after it has been assessed—a collection due process action.[58] The majority's approach has the virtue of guaranteeing that a partner who is diligent enough to raise a limitations defense in a Tax Court partnership-level proceeding will obtain a prepayment and preassessment hearing on this important issue.[59]

In any event, the source of the difficulty that led us to this point is clear. The Tax Court may have been correct in holding in *Rhone-Poulenc* that Congress, had it thought about the question, would have wanted a non-TEFRA provision, Section 6501, to govern the assessment of tax attributable to partnership items, even though the period set by Section 6501 may extend beyond the time described in Section 6229 (the TEFRA limitations period). Alternatively, the Tax Court may have been correct in holding in *Columbia Building* and its progeny that statute of limitations issues relating to the timeliness of issuance of an FPAA must be litigated in the partnership-level proceeding, and not in a subsequent partner-level proceeding, for the stated reason that such issues involve solely partnership-level determinations. Nevertheless, the two rules do not stand well together.

Neither the drafters of the TEFRA provisions nor the judges of the Tax Court appear to have contemplated the conceptual inconsistencies and practical difficulties that arise from the need to adjudicate a host of partner-specific issues—including, for example, the date on which each partner's return for each affected year was filed—within the partnership-level proceeding. [60] When the substantive rule by which the period of limitations is to be computed focuses on partner-specific facts, it makes little sense, as either a doctrinal matter or one of efficient judicial administration, to decide the issue in a partnership-level proceeding. Perhaps the only faint praise that we can give the majority opinion in *BLAK* is that it provides a rule that is easy to understand, if not always to apply.

OTHER UNCERTAINTIES

BLAK's holding—that the Tax Court, in a partnership-level proceeding under the TEFRA provisions, has jurisdiction to adjudicate partner-specific statute of limitations defenses to the assessment of additional tax arising from the FPAA in any tax year of any partner—may ultimately lead to nonsensical results when combined with the court's holdings in other cases. Think back to *G-5,* which involved tax years to which a partner had already carried and during which the partner had already used, at the time of the issuance of the FPAA, a loss that was then disallowed in the FPAA. The period of limitations with respect to those "carryover" years had not expired at the time that the FPAA was issued. Accordingly, it was clear in that case that the adjustments in the FPAA would have an effect on a partner's tax liability for some "open" tax year. Other fact patterns, however, are possible.

Example: At the time that an FPAA is issued, no portion of a loss allocated by a partnership to a partner and disallowed by the FPAA has been used by any partner, and all of the partners still are carrying such losses over in the anticipation that they will be used in future years. (This could be true regardless of whether the period of limitations for the year in which the loss was purportedly realized had expired.)

In this case, one would expect a court to find that the FPAA was timely and that a decision sustaining it would bar the partners from claiming the losses in future years. A more difficult case is presented by the following fact pattern.

Example: A partnership on its return for 2003 reported that it had realized a loss. That loss was allocated to the partners, and each partner used its distributive share of the loss in full to reduce income from other sources reported on the partner's return for 2003. The partnership's and the partners' returns for 2003 were filed during October 2004. No extraordinary circumstances (fraud, omission of gross income, etc.) exist at either the partnership or the partner level that would extend the statute of limitations for 2003. For each year from 2004 through 2008, each partner reported positive taxable income, and it is undisputed that the partnership's income for each of those years was correctly reported by the partnership and taken into account by the partners.

If an FPAA with respect to 2003 were issued sometime during 2008, asserting that the partnership did not, in fact, incur a loss during 2003, we would expect the defense of the statute of limitations to be raised, since more than three years would have passed since all the relevant returns for 2003 were filed during October 2004. The possible application of loss carrybacks from future years, however, raises questions about this analysis.

Under several provisions in the Code, losses can be carried back for many years. These include the up-to-five year carryback of losses incurred during 2008 and 2009 permitted by Section 172(b)(1)(H) as amended by the Worker, Homeownership, and Business Assistance Act of

2009,[61] and the ten-year carryback of "specified liability losses" permitted by Section 172(b)(1)(C). Under Section 172(b)(2), carryback losses are generally absorbed in the earliest year(s) in which the taxpayer has sufficient income.

Suppose that the IRS asserted, in response to the taxpayers' statute of limitations defense to the FPAA, that:

- One (or more) of the partners might possibly incur an NOL during 2008 (a year that had not yet concluded when the FPAA was issued) that was eligible for carryback to 2003, a closed year, and also to subsequent open years, such as 2005-2007.
- Determination of the amount of carryback loss that was available to reduce the taxpayer's liability for the open years was dependent on knowing how much of the loss had in fact been absorbed in the closed year, 2003.
- Accordingly, the court should adjudicate the substance of the FPAA, notwithstanding that, based on the facts as they were known at the time the court decided the motion to dismiss on limitations grounds, all affected years appeared to be closed.

A yet more extreme version of these issues would be presented if the Service were to argue that one or more partners might incur a specified liability loss during some year from 2009 through 2014 (a year that might not even have begun at the time that the FPAA was issued), which could be carried back to 2003. It is true as a computational matter that, if the FPAA were substantively correct and the loss allocated to the partner by the partnership in 2003 were disallowed, some portion of the partner's NOL carryback would be absorbed in 2003, a closed year, and thus would be unavailable to reduce tax liability in open years. A rigidly theoretical reading of *G-5* seems to suggest that this hypothetical possibility—which could arise in almost any partnership-level proceeding—would be enough to require the court to deny the motion to dismiss on limitations grounds and to allow the case to go forward.

Nevertheless, it seems bizarre (and contrary to the clear intent of Section 6226(d) that the defense of the statute of limitations be allowed in *some* partnership-level proceedings) to deny the partners the protection of the statute of limitations and to require them to litigate the substantive correctness of the FPAA simply because a particular contingency, not in existence at the time of the issuance of the FPAA or of the court's decision on a motion to dismiss, might occur months, or even years, in the future.

Indeed, such a result also seems inconsistent with decisions that have at least on occasion sustained a statute of limitations defense in a partnership-level proceeding, most recently *Virginia Historic Tax Credit Fund 2001 LP*, TC Memo 2009-295, RIA TC Memo ¶2009-295 , albeit not in the face of the explicit articulation of this potential argument, derived from the logic of *BLAK* and *G-5*, by the IRS. [62]

In light of these conceptual difficulties, it remains to be seen just how far the logic of *BLAK* and *G-5* can and will be extended.

REPORTABLE TRANSACTION ISSUES

The Tax Court in *BLAK* relied on Section 6501(c)(10) to conclude that the period of limitations on assessment of the petitioners' tax for 2001 had not expired. Under that provision, "[i]f a taxpayer fails to include on any return or statement for any taxable year any information with respect to a listed transaction (as defined in section 6707A(c)(2)) which is required under section 6011 to be included with such return or statement, the time for assessment of any tax imposed by this title with respect to such transaction shall not expire before the date which is 1 year after ... the date on which the Secretary is furnished the information so required."[63]

Some of the conditions for the applicability of Section 6501(c)(10) were clearly present in *BLAK.* Son-of-BOSS transactions are listed transactions, [64] and the taxpayers did not appear to contend very seriously that the transaction in issue did not fit within that rubric. Also, it was undisputed that BLAK did not include, with its return for any tax year, any information required under the Section 6011 Regulations with respect to the transaction in issue.

The taxpayers, however, challenged the validity of a Temporary Regulation promulgated under Section 6011 that, they argued, was the only source for an alleged "requirement" that BLAK include any specific information about the transaction with its return. Were there no such "requirement," Section 6501(c)(10) could not have applied, and any assessment with respect to 2001 would have been untimely.[65] In particular, the taxpayers argued that the information requirements imposed on them by Temp. Reg. 1.6011-4T, after amendment by TD 9000, 6/14/02 (the "June 2002 amendment"), were invalid because that amendment violated Executive Order 12866 [66] and the Regulatory Flexibility Act (RFA),[67] and because it did not comply with the notice and comment requirements of the Administrative Procedures Act (APA).[68]

In order to better understand these arguments, it is helpful to review the history of the rules governing "reportable transactions" and "listed transactions."

Congress and Treasury are generally in agreement that "the best way to combat tax shelters is to be aware of them."[69] With this premise in mind, on 2/28/00 Treasury issued TD 8877, promulgating Temporary Regulations under Section 6011(a) requiring certain taxpayers to disclose on their income tax returns that they had engaged in "reportable transactions" (the "disclosure Temporary Regulations").

Under Temp. Reg. 1.6011-4T(b)(2), one species of "reportable transactions" consisted of "listed transactions," i.e., transactions that are the "same as or substantially similar to one of the types of transactions that the Internal Revenue Service (IRS) has determined to be a tax avoidance transaction and identified by notice, regulation, or other form of published guidance." At the same time, the IRS issued Notice 2000-15, 2000-1 CB 826, identifying ten "listed transactions." Additional transactions have been "listed" over time,[70] and Son-of-BOSS transactions were included in that category by Notice 2000-44, 2000-2 CB 255, on 9/5/00.

Originally, the disclosure Temporary Regulations applied only to certain corporate taxpayers, but underwent several rounds of amendments before the adoption of final Regulations in TD 9046, 2/28/03. The petitioners in *BLAK* focused their challenge on the validity of the June 2002 amendment, which was particularly significant in two respects:

> (1) Language was added that for the first time imposed the obligation to disclose on individuals and partnerships that had participated directly or indirectly in a reportable transaction.
> (2) Temp. Reg. 1.6011-4T(d)(1) was revised so as to provide that, if a transaction became a reportable transaction after the taxpayer had filed the return for the first year in which such transaction affected the taxpayer's tax liability, a disclosure statement had to be filed as an attachment to the taxpayer's next-filed return (the "next-return disclosure requirement").

The June 2002 amendment applied generally to tax returns filed after 2/28/00, but the imposition of the disclosure requirement on individuals and partnerships and the next-return disclosure requirement applied only to transactions entered into after 2000. Final Reg. 1.6011-4, adopted (as noted above) on 2/28/03, applies to all tax returns filed after 2/28/00, but for rules concerning the reporting of transactions entered into before 2003 (and reported on returns filed after 2/28/00) it incorporates by reference the disclosure Temporary Regulations as in effect prior to that date.[71]

The taxpayers in *BLAK* filed their 2001 return on 10/15/02, when the disclosure Temporary Regulations, as amended by the June 2002 amendment, were operative. Moreover, Notice 2000-44 had earlier made it clear that the Son-of-BOSS transaction was thenceforth a "listed transaction." As discussed below, however, the *BLAK* court seemed at times to assume that the disclosure Temporary Regulations did not, of its own force, impose an obligation on the Manroes to attach a disclosure statement to their 2001 return.[72]

The taxpayers' 2002 return was filed on 10/15/03—after the final Regulations were issued—and was subject to those Regulations. Under the court's understanding of the June 2002 amendment's incorporation by reference in the final Regulations, the taxpayers should have included an appropriate disclosure under Section 6011 regarding the 2001 transaction on their 2002 returns. The taxpayers in *BLAK* did not attach the appropriate disclosure statement to either their 2001 or their 2002 returns.

The taxpayers argued that the June 2002 amendment was invalid and that they had thus included on their returns all the information regarding their transaction that was "required," even though they had not included any information at all. The Tax Court's response to the taxpayers' arguments is a bit confusing but the result is clear.

The court concluded that the taxpayers had no right to challenge whether the June 2002 amendment was valid under Executive Order 12866, and the court was not persuaded to override the relevant certification under the RFA made by Treasury with respect to the June 2002 amendment. The court did not discuss the application of those rules to the final Regulations.

At the same time, the court held that the applicable Regulations, for purposes of its APA analysis, were the final Regulations, rather than the June 2002 amendment of the Temporary Regulations, and that promulgation of the final Regulations complied with APA requirements.

The taxpayers had conceded that the only potential imperfection under the APA with respect to the final Regulations was that they incorporated by reference a prior Temporary Regulation (the June 2002 amendment) that, so the taxpayers argued, had been invalidly issued without notice and comment. As the court was untroubled by this shortcut, it was unnecessary for the court to address whether the June 2002 amendment would have independently passed muster under the APA. The court did not explain why it looked at different versions of the Regulations for purposes of the various parts of its analysis, but the bottom line was clear: the disclosure Regulations were valid, and Section 6501(c)(10) could apply.

Executive Order 12866. Executive Order 12866 requires that the Office of Management and Budget (OMB) review proposed "significant regulatory actions." If, however, the agency proposing a regulatory action concludes that such action was not, in fact, a "significant regulatory action," OMB review pursuant to Executive Order 12866 is not required.

The Executive Order states explicitly that it "does not create any right ... enforceable ... by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person." The June 2002 amendment contained a statement by Treasury that it was not a "significant regulatory action." The taxpayers in *BLAK* argued that the June 2002 amendment was invalid as to the transaction at issue because Treasury incorrectly concluded that the June 2002 amendment was not a "significant regulatory action." The Tax Court, however, concluded that the taxpayers had no right to challenge Treasury (non)compliance with Executive Order 12866.

RFA. In certain situations, the RFA requires that an agency prepare a "regulatory flexibility analysis."[73] To avoid the requirement to prepare such an analysis, the agency seeking to promulgate a rule can certify that the rule will "not have a significant economic impact on a substantial number of small entities."

With respect to the June 2002 amendment, Treasury made such certification, in part on the basis of a finding that the time required of any return filer to prepare and submit a disclosure with a return was not expected to be lengthy.[74] The taxpayers argued that the June 2002 amendment would have a significant economic impact, apparently because of the additional taxes that would become payable when the deductions claimed with respect to the disclosed transactions were disallowed. But the Tax Court concluded that the taxpayers had confused the economic impact from "the disclosure of a tax avoidance transaction with its disallowance," that the burden of making disclosure was minor, and that the court would not override Treasury's certification.

APA. Under section 553 of the APA, federal agencies are required to follow certain procedures on the issuance of substantive "legislative rules," including the requirement that a notice of proposed rulemaking be published in the *Federal Register.* An exemption from the notice requirement applies to, among other things, "interpretive rules," and, even if a federal agency issues legislative rules, it may avoid the notice requirement if it finds for "good cause" that notice is "impracticable, unnecessary, or contrary to the public interest" (the "good cause exception").

The taxpayers argued that the June 2002 amendment was invalid because Treasury did not comply with the public notice requirement of APA section 553. In the Special Analysis section of the Preamble to TD 9000, Treasury stated that the APA section 553(b) notice requirement did not apply, but did not articulate any basis for that conclusion. The IRS, in its filings in *BLAK*, argued in the alternative that the June 2002 amendment was an interpretive rule and that, if it were a legislative rule, the good cause exception applied.

Of the three arguments against the validity of the Temporary Regulations that were raised by the taxpayers in *BLAK*, the APA argument clearly had the most substance. Indeed, the Tax Court ordered a special round of briefing on the issue, perhaps suggesting that the court was troubled by an apparent lack of compliance by Treasury with the requirements of the APA.

Treasury's lack of compliance may be a problem that extends beyond the specific factual context in *BLAK*, as a recent empirical study of Treasury Regulations promulgated over a three-year period found that more than 40% of those examined "are susceptible to legal challenge for Treasury's failure to follow procedural requirements imposed by the Administrative Procedures Act." [75]

Nevertheless, and despite the "[t]remendous potential ... for unhappy taxpayers to challenge Treasury regulations in court for their procedural failings," the author of the study concluded that "taxpayers rarely contest Treasury regulations on procedural grounds."[76] Our own search for cases in which taxpayers have included APA-based procedural challenges to Treasury Regulations over the past half-century yielded less than a dozen such cases. And, from this small pool of decisions, there are only two in which a court invalidated a Regulation on APA grounds.[77]

The seriousness with which the Tax Court handled the APA issue in *BLAK* suggests that tax lawyers should perhaps be more aggressive in seeking out and asserting claims that unfavorable Regulations—particularly Temporary Regulations as to which there has been no opportunity for notice and comment—were not validly promulgated.

In any event, the majority opinion in *BLAK* was able largely to ignore the parties' arguments regarding whether the June 2002 amendment complied with APA requirements, because the Tax Court found that the final disclosure Regulations, promulgated on 2/28/03 after APA-compliant notice and comment, controlled the outcome of the case. The taxpayers had not challenged the validity of the *final* Regulations, except to object to their incorporating by reference, for transactions entered into before 2/28/03, the rules of the June 2002 amendment. The court concluded that, even if the June 2002 amendment was invalid under the APA, the mere fact that the later, validly promulgated final Regulations took the shortcut of incorporation by reference, rather than restating the rules of the June 2002 amendment verbatim and at length, did not taint or invalidate the final Regulations.

The Tax Court seemed thus to conclude that the Manroes were for the first time required to attach a disclosure statement related to the 2001 transaction to their 2002 return, which they filed on 10/15/03: "[t]he Manroes' transaction first became a reportable transaction on February 28, 2003, when the final regulation was issued." Since there was no holding, however, that the June

2002 amendment was *not* valid, what the court perhaps meant to say was something like the following:

If, as the taxpayers argue, the June 2002 amendment was invalid under the APA, the Manroes' transaction first became a reportable transaction on 2/28/03 when the final disclosure Regulations, which incorporated by reference the June 2002 amendment, were promulgated. On the other hand, if the June 2002 amendment was valid under the APA, the Manroes' transaction first became a reportable transaction on 6/14/02 when the June 2002 amendment itself was promulgated. In either event, the June 2002 amendment's next-return disclosure requirement applied in some way to the taxpayers. Accordingly, the period of limitations never expired for their returns for 2001 and 2002.

CONCLUSION

With *BLAK*, the Tax Court has held that statute of limitations defenses to the assessment of additional tax arising from the FPAA in any tax year of any partner based on partner-specific facts can, should, and, indeed, must be asserted by the partner in a partnership-level proceeding. A practical effect of *BLAK* may be to place a burden on any TMP receiving an FPAA to focus on each partner's potential limitations defenses at the time that a petition is filed in the Tax Court. Indeed, it seems that, at least in the context of statute of limitations defenses, the courts have turned the TEFRA drafters' intent to keep partnership and partner matters in separate proceedings on its head. And this will cause headaches for those partners (and their tax advisors) who remain unaware of this turn of events.

Practice Notes

The seriousness with which the Tax Court handled the APA issue in *BLAK* suggests that tax lawyers should perhaps be more aggressive in seeking out and asserting claims that unfavorable Regulations—particularly Temporary Regulations as to which there has been no opportunity for notice and comment—were not validly promulgated.

[1] See, e.g., Bergmann, TC Memo 2009-289, RIA TC Memo ¶2009-289 ; Kligfeld Holdings, 128 TC 192 (2007).

[2] So called because they were added to the Code by the Tax Equity and Fiscal Responsibility Act of 1982. The TEFRA procedures are applicable to all partnerships other than "small partnerships" that meet the requirements of Section 6231(a)(1)(B)(i) and do not elect to have the procedures apply and "electing large partnerships" as defined in Sections 775 and 6255(a)(1). In this article, all partnerships are assumed to be subject to the TEFRA procedures unless otherwise stated.

[3] Section 6501(a).

[4] See, e.g., Section 6501(e)(1)(A) (six years for omission from gross income of amount in excess of 25% of gross income stated in the return), Section 6501(c)(10) (statute not to expire with respect to "undisclosed" listed transactions until one year after certain information is provided to the Service), and Sections 6501(c)(1) and (3) (tax can be assessed at any time in case of false or fraudulent return with intent to evade tax or failure to file return).

[5] Section 6213(a). Although a Tax Court decision does not, under Section 7481(a), become "final" until after completion of appellate review, a deficiency found by the Tax Court may be assessed pending appeal unless the taxpayer posts a bond under Section 7485(a).

[6] Section 6503(a)(1).

[7] Section 6214(b) (first sentence).

[8] See, e.g., Phoenix Coal Co., 49 AFTR 445, 231 F2d 420 (CA-2, 1956); Calumet Industries, Inc., 95 TC 257 (1990); State Farming Co., Inc., 40 TC 774 (1963); R.H. Donnelley Corp., 105 AFTR 2d 2010-989 (DC N.C., 2010); Davidson, TC Memo 2010-38, RIA TC Memo ¶2010-038.

[9] Section 6221.

[10] See also Reg. 301.6231(a)(3)-1.

[11] See, e.g., Lindsey, TC Memo 2002-278, RIA TC Memo ¶2002-278 ; Serfustini, TC Memo 2001-183, RIA TC Memo ¶2001-183 ; Palmer, TC Memo 1992-352, RIA TC Memo ¶92352 .

[12] Reg. 301.6221-1(d); Klamath Strategic Investment Fund, 103 AFTR 2d 2009-2220, 568 F3d 537 (CA-5, 2009) (upholding the validity of Reg. 301.6221-1(d)); New Millennium Trading, L.L.C., 131 TC No 18, Tax Ct Rep Dec (RIA) 131.18, 2008 WL 5330940 (2008) (same). Items that cannot be raised in the partnership proceeding include "affected items" described in Reg. 301.6231(a)(5)-1, partner-level defenses to penalties (see Pisem, "The Uncertain Boundary Between 'Partner-Level' and 'Partnership Level' Defenses," 111 JTAX 151 (September 2009), and Pisem, "What Happened to My Prepayment Forum? The Penalty Problem in TEFRA Partnership Audit Cases," 108 JTAX 269 (May 2008)), and challenges to the accuracy of the Service's "computational adjustment" by means of which the results of the partnership proceeding are translated into an amount of additional tax due from each partner. In some of these situations, the IRS cannot assess additional tax without issuing a notice of deficiency to the partner, thereby giving him an opportunity to challenge the Service's assertions on a prepayment basis in the Tax Court. In other cases, however, immediate assessment and collection are permitted, and the partner's only remedy may be to sue for a refund or (as discussed in note 52, *infra*, and in our prior article cited in note 3, *supra*, at footnotes 20-23 and the accompanying text) to attempt to bring the matter within the rubric of the "collection due process" procedures of Sections 6230 and 6330. See, e.g., Kimball, TC Memo 2008-78, RIA TC Memo ¶2008-078 . The difficulty in distinguishing between the different types of affected items is illustrated by Chief Counsel Notice CC-2009-011, which states: "Given the different types of affected items—those that can be directly assessed and those requiring determinations at the partner level—the IRS may not know with certainty how a court will classify the affected item."

[13] Section 6225(a). As is the case in nonpartnership proceedings (see note 7, *supra*), a bond is required to prevent assessment pending appeal in the case of an adverse Tax Court decision; see Section 7485(b).

[14] Section 6229(a)(1). If the partnership return is filed before its unextended due date, the statute of limitations does not expire before the date that is three years after the unextended due date; see Section 6229(a)(2).

[15] Section 6229(c)(1). In such event, the tax of the culpable partners attributable to any partnership item for the partnership tax year can be assessed at any time, and the minimum three-year period described in Section 6229(a)(1) is extended to six years for all other partners.

[16] Section 6229(c)(3).

[17] Section 6229(d).

[18] Section 6229(b)(1)(A).

[19] There was no clear authority for this proposition until 18 years after enactment of the TEFRA provisions, but it now seems settled. See the discussion in the text, below, of Rhone-Poulenc Surfactants and Specialties, L.P., 114 TC 533 (2000). Some courts of appeals, without consideration of whether the statute of limitations on assessment of income tax attributable to partnership items is instead set by Section 6501, seem to have applied only Section 6229(a), the TEFRA provision, in determining the statute of limitations. See, e.g., Desmet, 104 AFTR 2d 2009-6456, 581 F3d 297 (CA-6, 2009); Weiner, 94 AFTR 2d 2004-6518, 389 F3d 152 (CA-5, 2004); Monahan, 91 AFTR 2d 2003-918, 321 F3d 1063 (CA-11, 2003); CC&F Western Operations Limited Partnership, 88 AFTR 2d 2001-7165, 273 F3d 402 (CA-1, 2001); Anderson, 76 AFTR 2d 95-6004, 62 F3d 1428 (CA-10, 1995). We have not found any appellate decisions, however, where the IRS placed before the court the argument that the statute of limitations on assessment of income tax attributable to partnership items is set by Section 6501, but the court deciding the matter instead applied only Section 6229(a).

[20] Similarly, if the partner failed to file a return or filed a false or fraudulent return, the partner's tax, including amounts attributable to partnership items, can be assessed at any time, even though the partnership's return may have been filed in a timely and completely accurate manner.

[21] H. Rep't No. 105-148, 105th Cong., 1st Sess. 594 (1997).

[22] An FPAA had been mailed on 4/12/88 to a corporation that had formerly been the TMP, but the Tax Court found that the corporation's designation as TMP had been terminated prior to that date and that the Service was aware of that fact. The IRS also had failed to timely mail an FPAA addressed generically to "tax matters partner."

[23] As will be discussed in the text, below, it is unlikely that the IRS today would make this concession if the period of limitations for assessment of any partner's tax attributable to non-partnership items for the year were still open at the time that an FPAA was sent to the TMP. For example, if any one partner had filed his own return for 1984 on "final extension" on or about 10/15/85 (so that the period of limitations for assessment of that partner's 1984 tax ordinarily would expire on or about 10/15/88), and an FPAA for 1984 had been sent to the TMP prior to that date, the law now seems clear that the FPAA would have been timely, at least as to that partner.

[24] The Tax Court used the word "jurisdictional" in this sentence in a "matter-based" sense, with reference to the question of whether the entire case was properly before the court, and the court's explicit holding on that question was affirmative. As discussed in text, below, the separate "issue-based" "jurisdictional" question of whether the court should properly consider the statute of limitations defense in a partnership-level or in a partner-level proceeding (the issue that divided the concurrence and the dissent in BLAK) was not raised in Columbia Building by the IRS or by the Tax Court on its own.

[25] This case was decided prior to the addition of the flush language at the end of Section 6226(d)(1), but the Tax Court nevertheless concluded that Section 6226(d) "would not preclude petitioner from litigating a statute of limitations defense which is applicable to *all* partners due to respondent's failure to issue a timely FPAA" (emphasis in original).

[26] *See* note 14, *supra.*

[27] The affected items in this case were additions to tax for negligence and valuation overstatement. Under changes to the Code made by TRA '97 and discussed extensively in our prior articles cited in note 14, *supra,* partners are no longer entitled to receive a notice of deficiency, with the concomitant opportunity to litigate in the Tax Court on a prepayment basis, before the IRS can assess such penalties. Partnership-level, but not partner-level, defenses to the application of the penalties can, however, be raised in a partnership-level Tax Court proceeding for review of the FPAA; see Section 6221.

[28] As in note 26, *supra,* and the accompanying text, "jurisdiction" is being used here to refer to the Tax Court's ability to hear the case that could have been, but was not, brought to seek review of the FPAA, rather than to the court's ability to consider a statute of limitations defense in a case otherwise properly brought before the court ("jurisdiction over the issue"), either in that hypothetical case or in the actual case before the court.

[29] The court's opinion does not indicate whether the IRS, in addition to arguing that the taxpayer's statute of limitations defense was being raised in the wrong forum, also raised any substantive argument in favor of the timeliness of the FPAA, either as to all the partners or specifically as to the taxpayer.

[30] It was undisputed by the parties that the proper characterization of the transaction for federal income tax purposes was a "partnership item" that should be adjusted by means of an FPAA with respect to the partnership, rather than by means of a notice of deficiency issued to GAF.

[31] The opinion does not discuss the impact on the other partners of the step-up in the basis of the property that presumably would have resulted had the transaction been characterized as a taxable sale.

[32] See note 16, *supra,* and the accompanying text.

[33] See the text accompanying notes 8 and 19, *supra.*

[34] Section 6501(e)(1)(A)(ii) provides that amounts that are "disclosed ... in a manner adequate to apprise the Secretary of the nature and amount of such item" are not considered to have been omitted.

[35] The "related case" mentioned in the Tax Court's note 35 is GAF Corp., 114 TC 519 (2000), in which the majority of the Tax Court held that a notice of deficiency relating to GAF's affected items should not have been sent until conclusion of the partnership proceeding (in Rhone-Poulenc) and that the Tax Court accordingly lacked subject matter jurisdiction over a petition that was based on such a notice.

[36] Curr-Spec Partners, L.P., 104 AFTR 2d 2009-5894, 579 F3d 391 (CA-5, 2009); AD Global Fund, LLC, 99 AFTR 2d 2007-1259, 481 F3d 1351 (CA-F.C., 2007); Andantech L.L.C., 91 AFTR 2d 2003-2623, 331 F3d 972 (CA-D.C., 2003). The Ninth Circuit also has referred to Section 6229(a) as a minimum period for assessment; see Bakersfield Energy Partners, LP, 103 AFTR 2d 2009-2712, 568 F3d 767 (CA-9, 2009). Similarly, in dicta discussing a case involving the otherwise applicable period of limitations under Section 6601 (relating to, inter alia, assessments of interest accruing at the rate in former Section 6621(c), which applied to substantial underpayments attributable to "tax-motivated transactions"), the Second Circuit stated in a footnote that "section 6229(a), by its terms, does not purport to *limit* the time available to assess tax, but only to *extend* limitations otherwise applicable." (Emphasis in original.) See Field, 94 AFTR 2d 2004-5588, 381 F3d 109 (CA-2, 2004).

[37] See Section 1211(b) (limitation on allowability of capital losses) and Section 1212(b) (carryover of unused capital losses).

[38] Kligfeld Holdings, *supra* note 1, decided the same day as G-5, involved a variation on this fact pattern. (The following description is somewhat simplified.) During 1999, as part of a Son-of-BOSS transaction, a partnership and a partner engaged in a series of steps, including a distribution of property from the partnership to the partner, that were reported as not having been currently taxable, but as having increased the partner's basis in his interest in the partnership. During 2000, the partner received a cash distribution from the partnership. This cash distribution would not have been in excess of the partner's basis in his partnership interest if the tax treatment of the 1999 transactions (including the property distribution) had been as reported, but would have been in excess of that basis if the 1999 transactions had been ineffective to increase the partner's basis in his partnership interest. An FPAA with respect to the partnership's 1999 return was sent during September 2004, more than three years after the filing of the partnership's and the partner's returns for 1999, but less than three years after the filing of the partner's return for 2000, asserting that the partner's basis in his partnership interest had not been increased as a result of the 1999 transactions. (It is not clear whether any other partners were affected by the adjustments made in the FPAA.) The partner did not argue explicitly that the issue of whether or not he recognized gain on the receipt of the cash distribution during 2000 should have been raised by the Service in an FPAA issued with respect to the partnership's 2000 return, rather than, as actually occurred, in an FPAA issued with respect to the partnership's 1999 year. (The court touched lightly on this issue in responding to one of the statute of limitations arguments that the taxpayer did make; a thorough analysis would be beyond the scope of this article.) Rather, the partner contended that the statute of limitations, which was open only with respect to his individual return for 2000, would bar the assessment of taxes attributable to an FPAA for 1999; the taxpayer argued that Rhone-Poulenc permitted using the Section 6501 statute of limitations with respect to the partner's return, divorced from the period used with respect to the partnership's return described in Section 6229, only when there was an "overlap" between the two years, but not when the relevant partner-level tax year did not overlap the partnership year for which the FPAA was issued. The Tax Court rejected the taxpayer's argument and, without expressing any doubts as to its jurisdiction over the issue, held that the IRS "may issue an FPAA adjusting [the partnership's] partnership items more than three years after [the partnership] timely filed its partnership return."

[39] Because the tax year involved (1983) was prior to the effective date of amendments to the TEFRA provisions made by TRA ’97, the issuance of such a notice of deficiency was a prerequisite to the assessment of such penalties against a partner. Under present law, penalty issues other than partner-level defenses are litigated within the partnership-level proceeding, and a partner must pay any penalties that were sustained in the partnership-level proceeding and then sue for a refund in order to raise partner-level defenses. See our earlier articles cited in note 14, *supra*.

[40] Indeed, the Service has recently indicated that the due date for filing partnership returns will not be extended beyond the 15th day of the ninth month following the end of the tax year (see TD 9407, 8/18/08), while the due date for returns of individual partners can be extended to the 15th day of the tenth month following the end of the year. This new rule makes it even more likely that, in the vast majority of cases, Section 6229 will play no role in determining the period of limitations in which the assessment of tax attributable to partnership items must be made.

[41] Just two days before BLAK was decided, the Tax Court in Virginia Historic Tax Credit Fund 2001 LP, TC Memo 2009-295, RIA TC Memo ¶2009-295 , concluded that the IRS was "barred from adjusting the Virginia Historic Funds' partnership items for 2001 or assessing tax attributable to these partnership items at the individual partner level." No consideration was apparently given to the possibility that the period of limitations had been extended as to any particular partner's 2001 tax year by facts specific to that partner or to the possibility that partnership items for 2001 might affect a partner's tax liability for another, open year. Also lacking was any hint that the court's consideration of the issue raised a jurisdictional question. See also Candyce Martin 1999 Irrevocable Trust, 104 AFTR 2d 2009-7826 (DC Calif., 2009) (denying motion for partial summary judgment on limitations issue, without discussion of jurisdiction).

[42] Another illustration of the confusion engendered by these self-contradictory approaches can be found in Blonien, 118 TC 541 (2002), a partner-level "affected items" proceeding. In reliance on Overstreet, TC Memo 2001-13, RIA TC Memo ¶2001-013 , *aff'd in part and dismissed in part* 89 AFTR 2d 2002-2120, 33 Fed Appx 349 (CA-9, 2002), the court in Blonien stated explicitly that it lacked jurisdiction to consider the taxpayer's argument that the issuance of the FPAA was not timely. On the very next page, however, in explaining why it had jurisdiction over other issues raised in the affected items proceeding, the court said: "Determining whether the assessment of the deficiency is timely under the applicable statute of limitations requires a partner-level determination of the timeliness of respondent's assessment with respect to each partner in the partnership," and the final issue discussed in the opinion

(for three full pages) is why an extension of the period of limitations executed by the TMP extended, under Section 6229, the period for assessing tax against the partner before the court. In the course of this final portion of the discussion, the Tax Court stated that it was bound by the conclusion that had been reached in the prior partnership proceeding that the taxpayer was a partner in the partnership, but it did not suggest that the legal issue relating to the interaction between Sections 6229 and 6501 should have been raised in the partnership-level proceeding.

[43] See Kligfeld Holdings, *supra* note 1, for a description of these transactions. In Notice 2000-44, 2000-2 CB 255, Son-of-BOSS transactions were designated as "listed transactions" for purposes of the Regulations under Section 6011.

[44] See Section 1212(b).

[45] See note 45, *supra.*

[46] See the text following note 74, *infra.*

[47] Section 6501(c)(10)(A). See Pisem, *supra* note 3. Since no "material advisor" provided the IRS with information regarding the partnership's or the Manroes' participation in the transaction, Section 6501(c)(10)(B), which could have caused the period of limitations to close, did not come into play.

[48] See, e.g., Commodity Futures Trading Commn. v. Schor, 478 US 833, 92 L Ed 2d 675 (1986).

[49] Judge Thornton also discussed (and dismissed) the possibility that the court's "jurisdiction to consider a partner's assertion of a limitations bar should depend on whether the partner asserts the issue for all the partner's affected years ... or [only] for fewer than all of the partner's affected years." Because Judge Thornton's discussion of this issue, a premise crucial to Judge Halpern's dissent, discussed below, is so brief, we present Judge Thornton's view in note 57, *infra*, in connection with our explanation of Judge Halpern's position.

[50] As discussed in our prior articles cited in note 14, *supra*, the 1997 amendments also provided that the penalties would have to be paid before the partner-level proceeding was commenced, although the availability of collection due process procedures under Sections 6320 and 6330, added by the Internal Revenue Service Restructuring and Reform Act of 1998, may change that result for any taxpayer with the fortitude to refuse to pay a penalty that has been sustained by a court in a partnership-level proceeding and that has been properly assessed against the taxpayer.

[51] Even Judge Halpern in dissent conceded that Judge Thornton's Section 6501(c)(10) argument (or, as Judge Halpern put it, "listed transaction speculation") "raises interesting points."

[52] See note 52, *supra*, and our prior article cited in note 3, *supra*, at footnotes 20-23 and the accompanying text.

[53] Those sorts of partner-level determinations are, outside of the limitations area, considered to have no place in partnership-level proceedings. See Hambrose Leasing Ltd. Partnership, 99 TC 298 (1992) (Tax Court lacks jurisdiction in partnership-level proceeding to determine whether partners were at-risk for partnership liabilities they had personally assumed, since at-risk determination was affected item, not partnership item, that could be dealt with only in a partner-level proceeding). See generally CCA 201007057; Maxwell, 87 TC 783 (1986) (Congress intended existing rules relating to administrative and judicial proceedings to exclusively govern determination of tax liability attributable to nonpartnership items); H. Rep't No. 97-760, 97th Cong., 2d Sess. 611 (1982), ("Neither the Secretary nor the taxpayer will be permitted to raise nonpartnership items in the course of a partnership proceeding nor may partnership items, except to the extent they become nonpartnership items under the rules, be raised in proceedings relating to nonpartnership items of a partner").

[54] In contrast, the Tax Court in Smith, 133 TC No 18, Tax Ct Rep Dec (P-H) 133.18, 2009 WL 4980885 , discussed in our prior article (see note 3, *supra*), refused to consider issues relating to an asserted penalty under Section 6707A even though those issues, too, "have to be decided somewhere."

[55] Without specifically articulating Judge Halpern's argument, Judge Thornton took issue with Judge Halpern's view because "it would be anomalous for this Court's jurisdiction to depend upon the litigating tactics of well-advised (or poorly advised) partners."

[56] For a discussion of these cases, see the articles cited in note 14, *supra*, as well as note 52, *supra*, and the accompanying text.

[57] A partner is entitled to receive a notice of deficiency before the IRS can assess what it asserts is a "computational adjustment" only where an increased liability stemming from an affected item requires a factual determination at the partner level. See Section 6230(a)(1); Temp. Reg. 301.6231(a)(6)-1T; Domulewicz, 129 TC 11 (2007); GAF Corp., *supra* note 37. The precise scope of those circumstances, though, remains uncertain.

[58] See the discussion in our prior article cited in note 3, *supra*, at footnotes 20-23 and the accompanying text.

[59] Compare the G-5 and Kligfeld cases, in which the court argued that application of the TEFRA procedures to a particular partnership-level proceeding should not change the longstanding rule, developed in ordinary deficiency

cases, that assessments could be made in an "open" year that were based on disallowing deductions for NOL carryovers from "closed" years that had been claimed on the taxpayer's return. Similarly, just as the Tax Court provides a preassessment forum in which a taxpayer can challenge an ordinary notice of deficiency on limitations ground, some type of preassessment forum in which to raise limitations defenses should be available whenever the Service issues an FPAA.

[60] We do acknowledge that Section 6229, by providing that an individual partner can extend the period of limitations as to himself, does appear to contemplate that at least some partner-specific limitations issues may inevitably arise even under the TEFRA provisions themselves.

[61] P.L. 111-92, 11/6/09.

[62] See also Leatherstocking 1983 Partnership, 102 AFTR 2d 2008-6695, 296 Fed Appx 171 (CA-2, 2008); Grapevine Imports, Ltd., 100 AFTR 2d 2007-5228, 77 Fed Cl 505 (Fed. Cl. Ct., 2007).

[63] The period of limitations may expire earlier (see note 49, *supra*), but that had not happened in the case before the court.

[64] See note 45, *supra*.

[65] We discussed in our prior article (see note 3, *supra*) another, unsuccessful argument made by the taxpayers relating to the effective date of Section 6501(c)(10).

[66] 3 C.F.R. 638 (1994).

[67] 5 U.S.C. sections 601-612.

[68] 5 U.S.C. sections 553(b) and (c) (1994).

[69] H. Rep't No. 108-548, pt. 1, 108th Cong., 2d Sess. 261 (2004).

[70] There are now 34 listed transactions enumerated in Notice 2009-59, 2009-31 IRB 170.

[71] Reg. 1.6011-4(h). The effective date provision of the final Regulations places tax returns filed after 2/28/00 into three categories: (1) For transactions entered into on or after 2/28/03, the rules in the final Regulations apply; (2) for transactions entered into between 1/1/03 and 2/28/03, the taxpayer may rely on the rules in the final Regulations, but otherwise the rules of the Temporary Regulations as in effect prior to 2/28/03 apply; (3) for transactions entered into before 2003 and reported on a return filed after 2/28/00, the rules of the Temporary Regulations as in effect prior to 2/28/03 apply.

[72] The Tax Court, in considering the impact of the APA and whether Treasury's asserted lack of compliance therewith invalidated the next-return disclosure requirement, stated that "[t]he Manroes' transaction *first* became a reportable transaction on February 28, 2003, when the final regulation was issued" (emphasis added). As discussed in the text, below, the court chose to analyze the taxpayers' APA argument under the final Regulations and declined to address whether the June 2002 amendment violated the APA.

[73] 5 U.S.C. sections 603-604.

[74] See TD 9000, 6/14/02.

[75] Hickman, "Coloring Outside the Lines: Examining Treasury's (Lack of) Compliance with Administrative Procedures Act Rulemaking Requirements," 82 Notre Dame L. Rev. 1727 (2007).

[76] Hickman, "A Problem of Remedy Responding to Treasury's (Lack of) Compliance with Administrative Procedures Act Rulemaking Requirements," 76 Geo. Wash. L. Rev. 1153 (2008).

[77] American Standard, Inc., 44 AFTR 2d 79-5149, 220 Ct Cl 411, 602 F2d 256 (Ct. Cl., 1979) (holding a consolidated return Regulation invalid for violation of the notice provision); Vail, 17 AFTR 2d 1545, 252 F Supp 823 (DC Ohio, 1966) (holding TD 6091, 8/16/54, which provided "stopgap Regulations" related to the filing of gasoline excise tax returns, invalid under the APA).