



DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224
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OFFICE OF
CHIEF COUNSEL

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INTERNAL REVENUE SERVICE NATIONAL OFFICE CHIEF COUNSEL ADVICE

MEMORANDUM FOR

CC:SB: : ASSOCIATE AREA COUNSEL, SB/SE
Attn:

FROM: Paul K. Kugler
Associate Chief Counsel (Passthroughs and Special Industries)
CC:PSI:FO

SUBJECT:

This Chief Counsel Advice responds to your request for assistance in preparing the above-referenced case for trial. In accordance with I.R.C. § 6110(k)(3), this Chief Counsel Advice should not be cited as precedent.

Petitioners have raised the following issues:

1. Whether petitioners are liable for the additions to tax for negligence and valuation overstatement under §§ 6653(a)(1), 6653(a)(2), and 6659.
2. Whether the affected items statutory notice of deficiency issued to petitioners is invalid and untimely, based on the timeliness of the Notice of Final Partnership Administrative Adjustment issued in the prior partnership proceeding.
3. Whether the affected items statutory notice of deficiency was issued to petitioners within the one year suspension period of I.R.C. § 6229(d)(2).

FACTS

Petitioners were partners in for the taxable year. This partnership is part of the Tax Shelter Project promoted by . The Service issued a Notice of Final Partnership Administrative Adjustment for the partnership within the period for assessment under § 6229(a) as extended by the Tax Matters Partner of the partnership. The Tax Matters Partner filed

a timely petition. On _____, Judge _____ issued an undated decision in the partnership case.

On _____, Judge _____ issued an Order stating the following:

On the same date the Court issued a new Decision dated _____.

The Service then issued penalty only affected item notices of deficiency to the partners of the partnership. The notices were timely issued within one year of the date the decision of the court became final pursuant to § 6229(d), based on a decision date of _____.

One of the limited partners allowed the penalty notice of deficiency to default, paid the penalty, and sued for refund in District Court. The District Court held that the earlier undated decision issued _____, controlled for purposes of computing the timeliness of the subsequent penalty notices of deficiency.

_____ . Based on this earlier decision date, the penalty notices and underlying tax assessments were untimely. Id.

The petitioners in the present case petitioned their notice of deficiency to the Tax Court and their case is scheduled for trial _____. In their Petition, they allege that they are not liable for the additions to tax for negligence because they reasonably relied on the advice of a disinterested adviser who confirmed their eligibility for the various deductions and credits claimed on their return for _____ in connection with their investment in _____. Petitioners also allege there is no basis for imposition of the addition to tax for valuation overstatement because any underpayment in tax is not attributable to a valuation overstatement within the meaning of § 6659. They further allege that the Tax Matters Partner of _____ had no authority to extend the period for assessment, and thus, the FPAA issued in the prior partnership proceeding was untimely. As a consequence, they allege that the notice of deficiency upon which the present case is based is invalid and untimely. Alternatively, they allege that their notice of deficiency issued on _____, was untimely if the date the decision became final in the underlying partnership proceeding is computed based on the vacated _____ decision.

DISCUSSION

The timeliness of an FPAA must be raised in partnership level proceeding rather than in a later affected item proceeding. See Genesis Oil & Gas, Ltd. v. Commissioner, 93 T.C. 562, 565 (1989) (Period for assessment must be raised in a timely petition at the partnership level). See also Davenport Recycling Associates v. Commissioner, 220 F.3d 1255 (11th Cir. 2000) (Holding that the statute of limitations is an affirmative defense that does not affect the validity of the TEFRA partnership proceeding). Crowell v. Commissioner, 102 T.C. 683 (1994)(Taxpayer cannot raise period of limitations under section 6229(a) for either partnership items or affected items in a partner level proceeding.); Saso v. Commissioner, 93 T.C. 730 (1989)(Partner cannot raise partnership period of limitation in a partner level proceeding). This follows from the fact that partnership items must be determined at the partnership level (see I.R.C. § 6221; Maxwell v. Commissioner, 87 T.C. 783 (1986)), and that the period of limitations is an affirmative defense on the merits as to partnership items. See Columbia Building, Ltd. v. Commissioner, 98 T.C. 607, 611-612 (1992)(Partnership period of limitations is a defense on the merits). See also Badger Materials v. Commissioner, 40 T.C. 1061, 1063 (1963)(Period of limitations is a defense on the merits). Thus, failure to raise the issue at the partnership level precludes a taxpayer from later raising the issue in a partner level proceeding. Crowell v. Commissioner, *supra*.

Thus, petitioners in the present affected item proceeding may not challenge the timeliness of the FPAA issued to

They can, however, challenge whether the penalty affected item notice subject to the current proceeding was issued within one year of the date the decision in the underlying partnership proceeding became final. For these purposes, however, the later decision, issued and dated _____, controls. The Tax Court will undoubtedly favor its own interpretation of the rules governing the finality of its decisions over that of the district court. In this regard, the Tax Court clearly viewed the undated decision as incapable of being entered for appeal purposes since it had not been dated and thus “rendered” within the meaning of section 7459(c). Thus, only the later dated decision could be treated as an “entered decision” initiating the appeal period and becoming final at the close of that period under section 7481. Under this interpretation, the Service timely issued the affected item notice in this case within one year of the date the decision became final pursuant to section 6229(d).

Moreover, petitioners can challenge the assessed negligence and valuation overstatement penalties. Application of the negligence and valuation overstatement penalties, in the context of _____ cases, has been considered by the Tax Court in numerous cases, most recently in

The imposition of negligence penalties has been upheld in practically all of the _____ cases considered by the Tax Court.

Additional information regarding the application of the negligence and valuation overstatement penalties will be forwarded to you separately.

This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse affect on privileges, such as the attorney client privilege. If disclosure becomes necessary, please contact this office for our views.

Please call if you require further information or assistance.

By: _____
Eileen M. Shatz
Special Counsel to the Associate Chief
Counsel
Passthroughs and Special Industries