



## From the Frying Pan and Into the Fire: Handling Audits Under the New Centralized Partnership Audit Regime

**November 18, 2022**

**Panelists:**  
Philip J. Wilson, CPA, Marcum, LLP, Costa Mesa, CA  
Steven Hurok, Esq., Citrin Cooperman & Company LLP, New York, NY  
G. Michelle Ferreira, Esq., Greenberg Traurig LLP, San Francisco, CA

**Moderator:**  
Caroline D. Ciraolo, Esq., Kostelanetz LLP, Washington, DC

**MARCUM**  
ACCOUNTANTS ▲ ADVISORS

[marcumllp.com](http://marcumllp.com)

1

## Why learn about partnership audit rules?

- ▶ The BBA changed the IRS's procedures for auditing partnerships.
- ▶ TEFRA was repealed, so no partnerships will be audited under those rules for any tax year after 2017.
- ▶ Partnerships that elect out of the BBA use pre-TEFRA audit rules.
- ▶ BBA audit rules apply to years beginning 1/1/18.

[marcumllp.com](http://marcumllp.com)

2  
0822000N

2

## BBA Highlights

---

- ▶ Adjustments made at Partnership Level
  - ▶ Assessment and collection of additional tax at partnership levels
  - ▶ Deficiency is imposed on the partnership at the highest individual or corporate rate.
  
- ▶ Review Year vs. Adjustment Year
  - ▶ Review Year is the year under audit
  - ▶ Adjustment year is the year audit is completed or judicial proceeding final.

3

## BBA Highlights

---

- ▶ Imputed Underpayment
  - ▶ Imputed underpayment is computed at the partnership level and calculated by netting all adjustments without regard to character.
  - ▶ Partnership is liable for the imputed underpayment in the adjustment year.

4

## BBA Highlights

- ▶ Alternatives to Partnership Level Tax
  - ▶ Partners File Amended Returns
    - ▶ If one or more partners file amended returns taking into account the adjustments and pay tax with the amended return. Applies to reviewed partners.
  - ▶ Push Out Election
    - ▶ Within 45 days of the conclusion of the audit, the partnership can issue amended K-1s to reviewed year partners to “push out” the imputed underpayment.
    - ▶ If the partnership pushes out, each partner will take the adjustments into account in the year in which that statement is furnished to the partner.
    - ▶ Regs allow for push out through tiers to the ultimate taxpaying owner.

[marcumllp.com](http://marcumllp.com)

5

0822000N

5

## Consequences of Electing Out of BBA

- ▶ The IRS audits the partnership and partners separately and must assess/collect from each partner individually.
- ▶ Partnership adjustments imposed on partners.
- ▶ Partners individually decide whether and how to challenge adjustments (Appeals, Tax Court, District Court, Ct. Fed. Claims).
- ▶ Each partner may have a separate reasonable cause defense.
- ▶ Each partner may receive a different tax outcome on partnership items.

[marcumllp.com](http://marcumllp.com)

6

0822000N

6

## BBA Partnerships: Partnership Representative

- ▶ BBA partnerships must have a partnership representative (PR).
- ▶ The PR has sole authority to act for the partnership with the IRS, including statute extensions, IDR responses, agreeing to adjustments, etc.
- ▶ The PR cannot be changed unless the IRS starts an exam.
- ▶ If a partner is chosen as the PR and then leaves the partnership, the PR cannot be replaced until audit.
- ▶ The PR will be the sole point of contact with the IRS and binds partnership.
- ▶ Unlike under TEFRA, partners under the BBA do not have notice or participation rights from the IRS.

7

## Difference Between Tax Matters Partner & PR

- ▶ Under TEFRA, the Tax Matters Partner (TMP) managed the IRS audit on behalf of the partners.

Tax Matters Partner	Partnership Representative
Had to be a partner in the partnership	Need not be a partner in the partnership, but must have US presence
Did not have absolute authority to bind all partners and the partnership in the IRS audit	Has absolute authority to bind all partners and the partnership in IRS audit
If TMP became ineligible to act as TMP, little recourse for IRS	Limited opportunity for partners to replace the PR, and the IRS can appoint the PR if partnership fails to

8

## Practice Point

- ▶ Under TEFRA, the TMP had duties and obligations to the IRS, the partnership, and the partners.
- ▶ Under the BBA, the PR has duties and obligations to the IRS alone, although state law may impose fiduciary duties.
  - ▶ The partnership and all partners are bound by the PR, but the PR doesn't have any statutory duty even to notify the partnership, or partners or an exam. Any duties must be found under state law or written into partnership agreements.
  - ▶ The PR can settle, litigate, or do nothing without any obligation to notify others. Partnership and partners cannot intervene.

9

## Proposed Imputed Underpayment

- ▶ The proposed IU contained in the Notice of Proposed Partnership Adjustment ("NOPPA"):
  - ▶ Is the proposed assessment of tax, penalties and interest against the partnership itself;
  - ▶ Is calculated by multiplying the total net partnership audit adjustments by the highest tax rate for individuals or corporations (currently 37%);
  - ▶ May include penalties and interest computed based on the partnership taxable year to which the adjustment related (the "reviewed year"). Reg. § 301.6233(a)-1(b)(1).

10

## Proposed Imputed Underpayment, Cont.

- ▶ The IU, subject to the IRS's acceptance of comments and modifications from the PR, is paid as if it were a tax imposed on the partnership in the adjustment year.
- ▶ All adjustments to partnership income, gain or loss for the reviewed year are netted (but not adjustments to partners' distributive shares).
  - ▶ Partnership can make a deposit under I.R.C. § 6603 to stop interest from accruing.
  - ▶ Interest is due from the due date for the reviewed year.

11

## IRS Audits Partnership

- ▶ The IRS will conduct audit exclusively through communications with the PR.
- ▶ The BBA grants partners no notice or rights to participate in the audit, contest the final partnership adjustment (FPA), or participate in litigation concerning the FPA.
- ▶ PR has sole and absolute authority to bind the partnership:
  - ▶ Extend statuses of limitations on assessment;
  - ▶ Respond to IDRs;
  - ▶ Attend meetings with the IRS; and
  - ▶ Agree to proposed adjustments.

12

## First Opportunity to Go to Appeals

- ▶ The Partnership can go to Appeals prior to the mailing of the NOPPA. TD 9844 Preamble
- ▶ “All issues with respect to the adjustments will generally be resolved at the administrative level prior to the mailing of the NOPPA and the start of the 270-day modification period.” TD 9844 Preamble

13

## Modification

- ▶ The IRS recognized that the IU likely will be an amount larger than the total tax partners would have paid if the adjustment amount had been correctly reported at the outset.
- ▶ The partnership may have taxpayers taxed at a lower rate, tax exempt partners, and partners with different attributes.
- ▶ After the PR receives the NOPPA, (only the) the PR can request modification of the IU.
- ▶ Modification request must:
  - ▶ Be filed within 270 days after the NOPPA;
  - ▶ Contain all required information and substantiation of the facts supporting modification.

14

## Modification

- ▶ Modification is requested by filing IRS Form 8980.
- ▶ Modification extends the statute of limitations on assessment of the IU. IRC § 6235(a)(2)
- ▶ Facts supporting modification:
  - ▶ A portion of the proposed adjustment would be allocated to a partner with a lower tax rate, a tax-exempt partner, etc.;
  - ▶ Partners amended returns (or use of the pull-in procedure) to report and pay part of the IU;
  - ▶ For tax exempt partners, a partnership must also file Form 8983.

15

## Push-Out Election

- ▶ The Partnership must pay the IU unless it elects to “push out” the adjustments to the **reviewed year** partners. IRC § 6226.
- ▶ The election must be made not more than 45 days after the FPA is issued; no extensions available.
  - ▶ The PR must provide all information required by the IRS.
- ▶ Partnership must issue push-out statements (new K-1s) to all reviewed partners within 60 days after partnership adjustments are final.
- ▶ Partners self-assess additional tax and report and pay for the year the new K-1 is received.
- ▶ Note: push-out happens after FPA; pull-in is an alternative to modification, pre-FPA.
- ▶ A partnership that makes a push-out election can still seek judicial review under IRC § 6234(a).

16

## Consequences of Push – Out Election

- ▶ The election is binding on partnership and all partners.
- ▶ The election must be made and is binding before the outcome of judicial review is known.
- ▶ A higher underpayment interest rate imposed (2% more than normal rate) IRC § 6226(c)(2).

17

# Thank You!

**MARCUM**  
ACCOUNTANTS ▲ ADVISORS

18