

Practical Considerations for the BBA Audit Process

by Meeren Amin and Kristy Caron

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In this article, Amin and Caron examine the Bipartisan Budget Act's audit procedures and areas of complexity that have left both taxpayers and the IRS with questions.

In 2015, Congress passed the Bipartisan Budget Act of 2015, which repealed the Tax Equity and Fiscal Responsibility Act of 1982 and replaced it with a new centralized audit regime.¹ Under TEFRA, the IRS determined the tax treatment of all partnership items at the partnership level, but determined liability and collected underpayments at the individual partner level. This proved to be an administrative headache for the IRS.²

This new centralized audit regime, the BBA, attempts to make the audit process less complex and more efficient for the IRS. The BBA keeps in

place many of the same principles of TEFRA, namely centralizing the audit process at the partnership level. However, there are some major differences between the two regimes, such as procedures for amending returns, the default party liable for the underpayment, the new push-out election, and the modification period and its corresponding elections.

Since the BBA went into effect in 2018, practitioners have finally been able to wrap their heads around pre-audit BBA procedures. However, with audits of early-year BBA filings wrapping up, questions remain about specific BBA audit procedures. This article will cover the main BBA audit procedures and areas of complexity that have left both taxpayers and the IRS scratching their heads.

I. Selection of Partnership Representative

The first step a BBA partnership must take is to designate a partnership representative on its tax return. This election is made annually on Form 1065, "U.S. Return of Partnership Income." The partnership representative is akin to the tax matters partner under TEFRA. However, unlike the tax matters partner, the partnership representative does not have to be a partner in the partnership. The partnership representative can be any individual, trust, estate, partnership, association, company, or corporation — that is, pretty much any type of entity.³ However, there are a few limitations. First, the partnership representative must have a "substantial presence in the U.S." The partnership representative can reside abroad but must be available to meet with the IRS in person "at a reasonable time and place,"

¹ Bipartisan Budget Act, section 1101.

² Treasury Inspector General for Tax Administration, "Centralized Partnership Audit Regime Rules Have Been Implemented; However, Initial No-Change Rates Are High and Measurable Goals Have Not Been Established," Report Number: 2022-30-2020, at 1 (Mar. 17, 2022).

³ Reg. section 301.6223-1(b); section 7701(a)(1).

and must have a U.S. identification number, street address, and area code.⁴ Even with a U.S. power of attorney, large audits that involve multiple interviews and contacts with the IRS may prove difficult for foreign partnership representatives.

The partnership representative does not have to be an individual, and more often than not is another partnership or entity. If an entity does serve as a partnership representative, it must appoint a designated individual to represent the partnership representative.⁵ This is so the IRS has an individual to communicate with, rather than a potentially large organization. The onus is on the partnership representative to designate an individual to bear the partnership representative responsibility when the return is filed, rather than waiting for the IRS to commence an audit. The good news for partnership representatives is that a designated individual designation can be changed by filing Form 8979, "Partnership Representative Revocation, Designation, and Resignation." Form 8979 allows a partnership representative or designated individual designation to be revoked. However, the partnership should then designate a successor partnership representative or designated individual. Form 8979 must be signed by an individual with the authority to authorize the partnership to revoke and designate a successor partnership representative or designated individual.

Revenue agents may ask to review the operating agreement for a partnership to ensure the signer has the authority to revoke and designate a successor partnership representative or designated individual. Once a Form 8979 is accepted by the IRS, the power of attorney for the partnership will need to file a new power of attorney signed by the new partnership representative or designated individual. The updated power of attorney is important — if it is not filed, the IRS will revoke the power of attorney and will communicate directly with the designated individual. This could be problematic for designated individuals who represent many partnerships, do not have efficient mail processes

in place, or assume that the power of attorney is also receiving the same notices. As a practical matter, one of these issues is often present, which prevents clients from providing notices to their power of attorney on a timely basis. As will be discussed later, the result could be disastrous. For example, failure to act on a final partnership adjustment can lead to a loss of Tax Court jurisdiction.

The partnership representative is important because it has sole authority to act on behalf of the partnership during an audit.⁶ For federal tax purposes, the partnership is bound by the actions of the partnership representative.⁷ This means the IRS will consider the actions and decisions of the partnership representative to be those of the partnership. For example, if the partnership representative accepts a settlement from the IRS, the agency considers the partnership to be bound by the settlement. This provides designated individuals with considerable power.

Partners who disagree with the decisions of a designated individual would still be bound by their actions. Those partners would generally only have two options. First, in a docketed case, a partner could potentially seek removal of the designated individual under Tax Court Rule 255.6. Under TEFRA, a partner who disagrees with a settlement could elect to intervene under Tax Court Rule 245. However, the Tax Court does not seem to have given that right to partners in BBA cases. Instead, the corresponding Tax Court rule states: "A decision that the Court enters in a partnership action shall be binding on the partnership and on all of its partners."⁸ But the issue has not yet been litigated and while Tax Court Rule 245 is under the title for "TEFRA Partnership Actions," the rule references section 6228(a)(4)(B), which treats partners who have interests in an outcome as a party to an action.

Second, a partner might be able to file a civil suit in state or federal court. Such a suit would not be a tax claim but would instead seek equitable or other relief. Such a claim will rely on the nature of the action by the partnership representative (for

⁴Reg. section 301.6223-1(b)(2).

⁵Reg. section 301.6223-1(b)(3)(ii).

⁶Section 6223(a).

⁷Section 6223(b).

⁸Tax Court Rule 255.7.

example, was there fraud or some sort of malfeasance?) or the partnership representative's rights under the relevant partnership agreements. The partnership agreements are vital. They should spell out who the partnership representative is and their specific authority. Partnerships once relied on general provisions providing managers with authority. This often worked with TEFRA partnerships when the partnership representative and manager were often the same entity. However, with the flexibility of choosing partnership representatives, many practitioners have begun including partnership representative sections in partnership agreements. To protect partnership representatives and designated individuals from liability, partnership representative sections in partnership agreements should be carefully drafted and allow partnership representatives to have a certain degree of authority. However, as a practical matter, partnership representatives often require partners to vote on major decisions for the benefit of the partners and the partnership representative. Those decisions and the voting procedures should also be clearly described in the partnership agreement. Fortunately, or unfortunately, these provisions are often drafted in a purposefully vague manner, which gives the partnership representative wide discretion, but also opens them up to liability and clouds the view for partners. Clarity is important for certain matters, such as voting. For example, a partnership agreement should include certain key voting considerations: How much notice is required for a vote, how does proxy voting work, how long must a vote be kept open, who tallies the vote, how much is a vote worth, what is the threshold for a decision, and how are non-votes counted? While leaving certain items up to the partnership representative can be helpful, the procedures and mechanisms for decision-making should be clear, not only to protect the partnership representative but to ensure that partners clearly understand their role and authority.

II. Administrative Adjustment Requests

Generally, partnerships cannot file amended tax returns under the BBA.⁹ However, under section 6227, a partnership representative can make an administrative adjustment request (AAR), which essentially is an amended partnership tax return. An AAR is used to adjust the reporting of partnership-related items after the original Form 1065 has been filed. An AAR is made on Form 1065-X, "Amended Return or Administrative Adjustment Request (AAR)." Section 6227 provides that a partnership may file an AAR to request an administrative adjustment of one or more items of income, gain, loss, deduction, or credit for any taxable year.¹⁰

An AAR is similar to an IRS audit adjustment under section 6225. An AAR can be filed no later than three years after the later of: the date on which the partnership return for the year is filed, the last day for filing the partnership return for the year (determined without regard to extensions), or the day after a notice of administrative proceeding has been mailed under section 6231. The only circumstance in which a partnership can file an AAR after a notice of administrative proceeding (NAP) has been issued is if the IRS withdraws the NAP.

Each partner's share of the AAR adjustments is determined by rules similar to section 6226.¹¹ If the AAR adjustments result in an underpayment, the partnership has a choice: Pay the tax under rules similar to section 6225 (imputed underpayment subject to modification) or push out the adjustments to the partners under rules similar to section 6226.¹² If the partnership pays the tax, the imputed underpayment must be paid when the AAR is filed. If the partnership elects to push out the adjustments requested in an AAR, the provisions in section 6226 regarding the election to pay the safe harbor amount, interest on the safe harbor amount, and the increased rate of interest do not apply.¹³ Further, unlike an audit

⁹ See the following for exceptions: Rev. Proc. 2021-50, 2021-49 IRB 844; Rev. Proc. 2021-29, 2021-27 IRB 12; Rev. Proc. 2020-20, 2020-20 IRB 801.

¹⁰ Section 6227(a).

¹¹ See reg. section 301.6227-1(e)(2).

¹² See reg. section 301.6227-2(b) and (c).

¹³ Section 6227(b)(2). See reg. section 301.6227-3(b).

push out, an AAR can claim a refund to be paid to a reviewed-year partner.¹⁴ When the AAR push-out rules apply, a partnership must send reviewed-year partner statements that are similar to the partner statements required under section 6226 when a partnership pushes out adjustments from an audit. Under the IRS audit rules, a push-out election is invalid when a partnership fails to properly furnish partner statements to its reviewed-year partners. It is unclear whether there are consequences for failing to furnish partner statements to the reviewed-year partners under the AAR push-out rules.

When AAR adjustments do not result in an imputed underpayment, the AAR push-out rules are not elective: They are the only way in which adjustments may be taken into account.¹⁵ Further, the AAR must be signed by the partnership representative. The filing of an AAR restarts the statute of limitations for the year. Refunds are not available when an AAR push-out election is made. Similarly, refunds are not available for adjustments made under an AAR.

III. The BBA Audit Process

An audit of a BBA partnership starts with a notice of selection for examination. When a designated individual receives this letter, the partnership can file a Form 8979 if it so chooses. At least 30 days after that, the IRS will send a NAP.¹⁶ The 30-day buffer is required,¹⁷ but the IRS generally does not wait long after the 30 days to send the NAP. While a partnership should contact the IRS employee listed on the notice of selection of examination, the NAP is the true beginning of the audit. It is also the point at which no AAR can be filed.¹⁸

At this time, if the partnership is going to be represented by an attorney or CPA, it should file a Form 2848, "Power of Attorney and Declaration of Representative," to ensure no notices are missed. As discussed above, this form needs to be signed

by the partnership representative or designated individual. The IRS is strict about the use of correct names on Form 2848. An incorrect power of attorney will be kicked back to the partnership representative or power of attorney. And unfortunately, what is considered incorrect is at the whim of the revenue agent. Some revenue agents require that the taxpayer's name in box 1 include both the partnership name and the name of the partnership representative. If the designated individual signs box 7, then their title must include that they are the designated individual of the partnership representative, and the name of the taxpayer should include both the name of the partnership and the name of the partnership representative.

Once the NAP is issued, if the audit is conducted by the Large Business and International Division, the revenue agent may issue an "LB&I Examination Plan for Industry Cases Audits." This examination plan lists the IRS team members and certain additional items that the IRS will attempt to have the taxpayer agree to. While the IRS may want the partnership representative or power of attorney to sign the form, there is no obligation to do so. This examination plan should be read carefully and signed only after the partnership's tax counsel reviews the plan and is comfortable with all items.

Once the audit begins, the IRS will issue information document requests and may wish to meet with the partnership representative and visit the partnership's office or place of business. Responding to IDRs and conducting interviews and visits is outside the scope of this article. However, there are a few issues to consider specifically with regard to BBA audits.

A. Privilege Issues for Tax Counsel

Most partnerships that are selected for audit choose to be represented by their CPA and an attorney. Usually, it is helpful to have both involved if there are issues beyond basic substantiation. If the partnership hires an attorney, then to the extent there is a conflict of interest between the partnership and the individual partners, the attorney may not be able to represent the partners themselves without appropriate waivers. From a high level, that is not a huge issue because the IRS is auditing

¹⁴ See reg. section 301.6227-3.

¹⁵ Section 6227(b)(1).

¹⁶ Section 6231.

¹⁷ IRS Publication 5388 "Bipartisan Budget Act (BBA) Roadmap for Taxpayers" (June 6, 2020).

¹⁸ IRS, "BBA Partnership Audit Process" (last updated Sept. 11, 2024).

partnership-level items. However, the partnership's attorney may have sensitive communications with partners for at least two reasons: (1) partner-level items become an issue as the audit progresses, which forces the partnership's attorney to speak with partners about certain tax items, or (2) there may also be more general communications between the partnership's attorney and its partners regarding the partnership audit.

If the partnership's attorney only represents the partnership, then the IRS will take the position that there is no attorney-client privilege between the partnership's attorney and the individual partners. That is because the attorney represents the partnership and not the partners. So the IRS may ask for any communications between the partnership's attorney and the partners. This could be surprising to partners who do not understand the role of the partnership's attorney.

Partners can more easily seek protection under the work-product doctrine. The work-product doctrine protects work products prepared in anticipation of litigation.¹⁹ The work-product doctrine applies even when the attorney-client privilege does not. Importantly, unlike the attorney-client privilege, the protection is not waived upon disclosure to a third party. While not every document can be said to be prepared in anticipation of litigation, the threshold is fairly liberal. A remote prospect of future litigation is not enough, but when a taxpayer is under audit and an area of law is so unsettled that litigation can be expected, the work-product doctrine will apply.²⁰ However, the work-product doctrine doesn't protect purely factual materials — only an attorney's opinions, judgments, or thought processes.²¹ Therefore, while the IRS may argue strongly that the attorney-client privilege doesn't protect communications between a partnership's counsel and an individual partner, that argument could be weakened to the extent the work-product doctrine is also asserted.

¹⁹ Fed. R. Civ. P. 26(b)(3).

²⁰ *United States v. Telephone and Data Systems Inc. and Subsidiaries*, No. 02-C-0030-C (W.D. Wisc. 2002); *United States v. Roxworthy*, 457 F.3d 590 (6th Cir. 2006).

²¹ *SABA Partnership v. Commissioner*, T.C. Memo. 1999-359.

It is also important to note that the American Bar Association Model Rules of Professional Conduct prevent attorneys from contacting individuals who are represented by counsel. This protection extends to "constituents" of organizations, which would include partners in a partnership if the partners' acts or statements can be imputed to the partnership.²² Because revenue agents are generally not attorneys — and even if they are, they are not acting in that capacity for the IRS — the model rules would not directly apply. However, the model rules could become relevant to the extent IRS counsel makes contact. In an ideal world, these principles would apply to contacts from revenue agents because they are acting as agents of the government. But for now, the argument would be difficult to advance.

B. Summonses to Partners

The IRS has become far more aggressive in its audit procedures for large partnerships. This is true regardless of whether the transaction is a listed transaction. In addition to issuing sometimes burdensome document requests, IRS exam teams have begun issuing summonses to individual partners. Third-party summonses are a valuable and often-used tool by the IRS. But summonses to partners have increased and are often unchecked by partnership representatives.

Summonses to partners may be necessary when the partnership fails to provide the necessary information, or if the knowledge of the individual partners is at issue. However, in most other situations, summonses to partners are improper. That is because, as with TEFRA, the Tax Court only has jurisdiction to determine partnership-level items, meaning those are the only issues at play.²³ To the extent partner-level information is relevant — for example, if the IRS is attempting to prove civil fraud or the subjective prong of the economic substance test — then contact with individual partners may be appropriate. However, IRS exam team motives for contacting partners are usually not so guided. Instead, based on the authors' experience, it seems the primary motivation is often less precise

²² ABA Model Rule of Professional Conduct 4.2, comment 7.

²³ *United States v. Woods*, 571 U.S. 31, 39 (2013).

and is more of a fishing expedition. These contacts put a strain on partners who may have to hire their own counsel and spend time dealing with summonses for documents and testimony.

Unfortunately for taxpayers, the bar to quash a summons or defeat enforcement is high. Whether a partnership brings a motion to quash or a partner seeks to counter enforcement, the IRS must meet the *Powell* factors by proving: (1) the summons was issued for a proper purpose; (2) the information sought is relevant to that purpose; (3) the information sought is not already in possession of the IRS; and (4) the government has complied with the necessary administrative steps regarding the issuance and service of the summons.²⁴ If the government can prove it adhered to the *Powell* factors, a taxpayer can challenge the summons by demonstrating an abuse of process.²⁵ While the burden is on the IRS to prove the *Powell* factors, it does not take much to meet that burden. For example, some circuits explicitly allow the IRS to go on fishing expeditions without any requisite showing of relevance other than a declaration from the revenue agent.

However, there are ways to beat a summons in court. Helpful questions to raise include: Who was served and how, has a final partnership administrative adjustment been issued, is there a criminal investigation ongoing, is there a reasonable expectation the partner will have the requested information, and does the IRS already have the information requested? Those facts, in addition to understanding the legal standards of the applicable circuit, could be helpful to a partner or partnership that seeks to shut down IRS summonses.

IV. The Modification Period

Once the IRS finishes the examination, it will issue preliminary partnership examination changes and an imputed underpayment, which will include a detailed summary report. Following this, the IRS will issue a notice of proposed partnership adjustment (NOPPA). The

NOPPA begins the clock on the 270-day modification period.²⁶ The NOPPA should clearly state that it is a NOPPA and provide a 270-day deadline for making any modification requests.

The NOPPA will include the imputed underpayment, which is the amount owed by the partnership.²⁷ The imputed underpayment is calculated by multiplying the total net adjustment by the highest rate of tax for the year at issue.²⁸ The IRS nets adjustments by year, meaning there are imputed payments attributable to each reviewed year. There are two types of imputed underpayments: specific and general. Specific imputed underpayments arise from adjustments to partnership items that are allocated to partners based on the partners' shared treatment of those items.²⁹ General imputed underpayments are singular imputed underpayments that are not associated with a specific imputed underpayment.³⁰

A. Modification Requests

While the imputed underpayment captures all negative adjustments, it generally does not net taxpayer-favorable adjustments.³¹ Instead, the burden is on the partnership and partners to make modification requests to include positive adjustments. The purpose of the modification request is for partnership adjustments to accurately reflect the correct amount of tax owed. A modification may decrease the amount of the imputed underpayment by affecting the amount of adjustments, the tax rate, or the calculation of the imputed underpayment based on grouping.³² The regulations clarify that adjustments include adjustments due to amended returns, partners that are tax exempt, passive losses for publicly traded partnerships, qualified investment income, closing agreements, and tax treaty modifications.³³ Modification requests are also

²⁶ Reg. section 301.6225-2(a).

²⁷ Reg. section 301.6241-1(a)(3).

²⁸ Section 6225(b)(1); reg. section 301.6225-1(b).

²⁹ Reg. section 301.6225-1(g)(2)(iii).

³⁰ Reg. section 301.6225-1(g)(2)(ii).

³¹ Section 6225(b)(4).

³² Reg. section 301.6225-2(b).

³³ Reg. section 301.6225-2(b)(2).

²⁴ *United States v. Powell*, 379 U.S. 48, 57-58 (1964).

²⁵ *United States v. Monumental Life Insurance Co.*, 440 F.3d 729, 733 (6th Cir. 2006).

commonly made when partners file amended returns to account for partnership adjustments.³⁴

To make a modification request, a partnership needs to submit Form 8980, "Partnership Request for Modification of Imputed Underpayments Under IRC Section 6225(c)," by the 270-day deadline provided on the NOPPA. However, this deadline can be extended by agreement with the IRS by filing a Form 8984, "Extension of the Taxpayer Modification Submission Period Under Section 6225(c)(7)." The Form 8980 needs to be signed by the partnership representative. As with powers of attorney, the IRS requires strict compliance with the technical requirements of the form. For example, using the name of the prior partnership representative on the form may jeopardize its validity. Once submitted, if the partnership wants to expedite the process, it can elect to end the modification period using Form 8981, "Waiver of the Period Under IRC Section 6231(b)(2)(A) and Expiration of the Period for Modification Submissions Under IRC Section 6225(c)(7)." IRS technical services will then consider the modification request. If the IRS does not accept the partnership's modification request, the partnership can request a conference with BBA operations. The partnership can also request an Appeals conference to discuss any modification determinations.

B. The Push-Out Election

Modification is not the only option for partnerships. Instead, after the final partnership adjustment (FPA) is issued, the partnership may elect to push out the liability to partners. This election allows the partnership to shift the imputed underpayment liability to the partners themselves.³⁵ This push-out election may be useful when the partnership does not have the liquidity to pay the imputed underpayment or when review-year partners are different than current-year partners.

When the liability is pushed out, each partner determines the effect of their tax attributes on the tax owed. Similar to the modification process, the burden is on the partners and not the IRS to

account for certain tax attributes. The result is akin to TEFRA because the partners pay the tax and are the ones then subject to collections procedures. Therefore, the push-out election may be the easier option because the partnership doesn't have to account for individual partner attributes or amended returns, which runs the risk of leading to overpayments. Instead, each partner will have to determine the relevance of their own attributes. While a push-out election may be easier administratively, it is important to remember that partners will owe interest at a higher rate than the partnership would have. Partners pay an interest rate that is two points higher than the partnership would pay under section 6621.³⁶ With today's high interest rates, this is an important part of the calculation.

To make the push-out election, the partnership representative must file Form 8988, "Election for Alternative to Payment of the Imputed Underpayment — IRC Section 6226," within 45 days after issuance of the FPA. The partnership representative must include the name, address, and taxpayer identification number for each partner, and then later submit a statement providing each partner's proportionate share of adjustments.³⁷ The partnership representative must also provide each partner with a Form 8986, "Partner's Share of Adjustment(s) to Partnership-Related item(s) (Required Under Sections 6226 and 6227)." The partnership representative must include information about the partner, which often overlaps with the statement provided to the IRS, along with the partner's percentage share of the partnership's profits, losses, capital, recourse and nonrecourse liabilities, and capital account balance.³⁸ Finally, the partnership representative must include the partner's reviewed-year income, gain or loss, deductions, and all other items.³⁹

Once the push-out election is made, it can only be revoked with the consent of the IRS.⁴⁰ Any errors discovered by the partnership can be

³⁴ Reg. section 301.6225-2(d).

³⁵ Section 6226(a)(2).

³⁶ Section 6226(c)(2).

³⁷ Section 6226(a)(2).

³⁸ IRS Form 8986, Part III.

³⁹ *Id.* at Part IV.

⁴⁰ Reg. section 301.6226-1(c)(1).

corrected within 60 days of filing. After 60 days, the partnership representative will need the consent of the IRS to correct any errors.⁴¹ If the IRS discovers errors it may request that the partnership provide additional information or correct the errors. However, there is no requirement that the IRS allow corrections. Instead, the IRS may unilaterally invalidate the election.⁴² This grant of authority by the regulations means partnerships and their return preparers need to be diligent and prompt in finding and correcting errors.

Lastly, the final regulations allow for a push-out election by partners to higher-tier partners. To make that election, a partner must file a partnership adjustment tracking report with the IRS by the due date of the partner's adjustment-year tax return.⁴³

As discussed in Section I, the partnership representative has the authority to bind the partnership. As such, if the partnership representative makes a push-out election, the election is binding on the partners. Therefore, the partnership agreement should clearly state whether the partnership representative has the authority to make a push-out election, or whether the decision needs to be voted on by the partners.

C. The Pull-In Election

The alternative pull-in method allows a partnership to file an amended return and pay tax on behalf of the partners. A partnership can get credit for partner-amended returns to reduce an imputed underpayment by submitting on behalf of a relevant partner all information and payment of any tax, penalties, additions to tax, additional amounts, and interest that would be required to be provided if the relevant partner were filing an amended return.⁴⁴

Section 6225(c)(2) provides that a partnership can reduce or otherwise modify (and even eliminate) the partnership adjustments on which its imputed underpayment is determined by having one or more reviewed-year partners file

amended returns, taking into account their share of the partnership adjustment for both the reviewed year and any of the partner's other tax years for which any tax attribute is affected by those adjustments.

The amended returns under section 6225(c)(2)(A), together with full payment of all related taxes and other charges, must be filed and paid by a partner within 270 days of the partnership mailing the NOPPA to the partners unless the IRS grants the partnership an extension of that deadline. In no event will an extension be granted past the date on which the IRS issues the FPA.

The partner prepares and submits Form 8292 to the partnership representative. The partnership representative must provide the IRS with an affidavit from each partner that shows they filed the required amended returns and paid the related taxes and other charges. The affidavit must also include the dates on which the amended returns were filed and on which the taxes and other charges were paid. A partner who files amended returns and pays the related taxes and other charges under the pull-in procedure may not file a subsequent amended return without the IRS's permission. According to the preamble to the regulations, the pull-in procedure is intended to effectively replicate the result under TEFRA for the participating partners.

Partners who pay less than the highest rate of tax in effect for the reviewed year may prefer to adjust their tax returns and pay any additional associated taxes and other charges under this pull-in procedure to establish the true tax cost of their share of the partnership adjustments. To avoid effectively having to pay twice, those partners will want to ensure that the partnership agreement excludes them from having to indirectly bear the economic costs of any centralized partnership audit regime liabilities the partnership may have to pay for the partners who do not pick up their full share of the partnership adjustments under the pull-in procedures.

V. The Final Partnership Adjustment

The final step in the audit process is the FPA. Once the FPA is issued, the partnership will have 45 days to make a push-out election. The partnership has a few options on how to respond.

⁴¹Reg. section 301.6226-2(d).

⁴²Reg. section 301.6226-1(d).

⁴³Section 6226(b)(4)(A).

⁴⁴See reg. section 301.6225-2(d)(2)(x).

First, it can pay the imputed underpayment or have the partners pay if a push-out election is made. If a push-out election is accepted by the IRS, the partners will need to pay and also be cognizant of any section 6603 deposits.

Second, the partners or partnership can do nothing. If the partnership does not pay, the IRS may assess the partners individually. However, if a partner does not pay, the IRS will then begin collections activities. Eventually, a partner can request a collections due process hearing and later file a petition in Tax Court. Whether the partner can argue the substance of the liability under the *de novo* standard of review will depend on whether they had a prior opportunity to do so. However, this route may prove almost impossible to the extent that partnership-level items are at issue.

Third, the partnership can file in the Tax Court within 90 days of the FPA date. The FPA will state the due date for filing, so there should be no confusion as to the due date of the petition. Courts have recently held that the 90-day deadline is not jurisdictional and is subject to equitable tolling for notices of deficiency under section 6213.⁴⁵ However, this holding has not yet been applied to

section 6234, so there is no precedent that equitable tolling would apply to BBA partnerships that miss the 90-day deadline.

Lastly, the partnership can pay the imputed underpayment and then file suit in district court or the Court of Federal Claims.⁴⁶ These courts have jurisdiction only when the payment is made beforehand, which makes this route unappealing to many taxpayers. Further, while jury trials are never available in the Court of Federal Claims, they are also unavailable to BBA partnerships in district court, which eliminates a potential benefit of that forum.

VI. Conclusion

With BBA audits and determinations in full swing, issues are arising at a fast pace. In June, the American Institute of CPAs sent a letter to the commissioner outlining several recommendations regarding push-out elections and the AAR.⁴⁷ We expect that grouping and netting issues will become prevalent and may require further clarification by the IRS or Treasury. ■

⁴⁵ See *Culp v. Commissioner*, 75 F.4th 196 (3d Cir. 2023); *Belagio Fine Jewelry Inc. v. Commissioner*, 162 T.C. No. 11 (2024).

⁴⁶ Section 6226; section 6234(b)(2).

⁴⁷ See AICPA letter to the IRS on centralized partnership audit regime (June 28, 2024).