

# Court Grants IRS Major Mulligan in TEFRA Partnership Case: Three Novel Rulings Enable IRS to Avoid One-FPAA-Only Restriction

By Hale E. Sheppard\*

Hale Sheppard examines *NPR Investments, LLC*, a case yielding three unique involving TEFRA partnership procedures.

## I. Introduction

To most people, reading tax cases, particularly those involving complex transactions and thorny procedural issues, is about as entertaining as watching paint dry. Even the most avid tax fanatic, initially attracted to a certain case for one reason or another, often finds himself daydreaming a few pages into his review. Colluding with this tax tedium is the large volume of material. Given that federal tax cases can be heard by the Tax Court, U.S. District Courts, Court of Federal Claims, and U.S. Bankruptcy Courts, published tax decisions abound. Many important tax cases with consequences stretching far beyond their unique facts, therefore, go relatively unnoticed. A prime example is *NPR Investments, LLC*, which was decided earlier this year.<sup>1</sup> This case, involving the convoluted TEFRA partnership procedures, generated at least three significant rulings.<sup>2</sup> This article explains the pivotal facts of the case, describes the court's overall decision, and analyzes the major rulings. It concludes that the court granted the IRS a major mulligan, a procedural second chance with potential implications for future partnership tax disputes.

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## II. Overview of the Relevant TEFRA Procedures

To appreciate the significance of *NPR Investments*, one must first grasp the tax dispute procedures applicable to many partnerships.

Certain tax-related items (such as partnership income, gain, deductions, losses, credits, etc.) pass through a partnership and are reported directly on the income tax returns of the partners.<sup>3</sup> The partnership must file an annual Form 1065 (*U.S. Return of Partnership Income*) with the IRS, but the entity itself has no income tax liability. In other words, a partnership is a pass-through or conduit, not a taxable entity in its own right.

For many years, there was no procedure in place that allowed the IRS to conduct a partnership-level audit. Therefore, the IRS was forced to scrutinize the tax positions taken by each of the partners; it was a partner-by-partner analysis. This dramatically changed in 1982 when Congress passed the Tax Equity and Fiscal Responsibility Act (TEFRA).<sup>4</sup> This legislation introduced partnership-level audit procedures, which generally permitted the IRS to audit the entity itself, determine the appropriate adjustments, and then notify the partners of the tax effects of such adjustments on each of them based on their respective interests in the partnership.<sup>5</sup> In short, TEFRA enabled the IRS to focus its audits on the partnership, not the partners. This change made administrative sense because many partnerships have

numerous partners, the IRS had trouble locating and coordinating the income tax returns of each partner to ensure that everyone received consistent treatment, and the statute of limitations for each partner had to be individually monitored so that the assessment periods did not unexpectedly expire.

The tax treatment of any “partnership item” and related penalties generally must be determined at the partnership level.<sup>6</sup> For TEFRA purposes, the term “partnership” ordinarily means any and all partnerships that are required to file a Form 1065.<sup>7</sup> There is an exception, however, in cases involving certain “small partnerships.” These consist of partnerships with 10 or fewer partners, each of whom is an individual (other than a nonresident alien individual), a C corporation or an estate of a deceased partner.<sup>8</sup>

The “small partnership” exception does not apply, though, if any partner is a pass-through partner.<sup>9</sup> For these purposes, a “pass-through partner” includes a partnership, estate, trust, S corporation, nominee or other similar person through whom other persons hold an interest in the partnership.<sup>10</sup> A “pass-through partner” also encompasses certain disregarded entities, such as single-member limited liability companies.<sup>11</sup>

The procedures of a TEFRA partnership audit vary considerably from those utilized in a traditional audit of individuals and non-TEFRA entities, but the concepts are similar in both contexts. The IRS notifies the taxpayer that it has been selected for audit, it gathers information and documentation in the course of the audit, and it eventually issues a notice explaining the adjustments that it proposes to the returns previously filed by the taxpayer. These adjustments normally include increased taxes, as well as penalties and interest. If the taxpayer disagrees, it ordinarily has the right to dispute the suggested increases administratively, *i.e.*, with the IRS Appeals Office. If the taxpayer and the IRS are unable to resolve the conflict at this level, then the IRS issues its final notice of proposed adjustments. This entitles the taxpayer to seek review by the courts.

In the case of a TEFRA audit, the ultimate notice from the IRS is called a notice of “final partnership administrative adjustment” (FPAA).<sup>12</sup> Within 90 days of when the IRS mailed the FPAA, the tax matter partner (TMP) for the partnership has the exclusive

right to file a petition in any one of three courts—the U.S. Tax Court, proper U.S. District Court or Court of Federal Claims—asking the court to rule that the IRS’s proposed adjustments in the FPAA are incorrect.<sup>13</sup> If the TMP does not file a petition within the 90-day period, then certain other partners may file a petition within the next 60 days.<sup>14</sup>

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Importantly, the TEFRA rules clarify that the IRS normally gets just one bite at the partnership apple, so to speak. The relevant provision, Code Sec. 6223(f), specifically limits the IRS to the issuance of one FPAA:

If the Secretary mails a notice of final partnership administrative adjustment for a partnership taxable year with respect to a partner, the Secretary may not mail another such notice to such partner with respect to the same taxable year of the same partnership in the absence of a showing of fraud, malfeasance, or misrepresentation of a material fact.

This one-FPAA-only restriction represents the central issue in *NPR Investments*.

### **III. *NPR Investments*— Key Issues and Rulings**

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#### **A. The Facts**

The taxpayers were attorneys and longstanding partners in a “premier plaintiffs’ trial law firm” in Texas.<sup>15</sup> They formed NPR Investments, LLC (“NPR”) in 2001 for various investment purposes, including engaging in what the IRS characterized as a “Son of BOSS” transaction, as described in Notice 2000-44. This transaction generated a multi-million dollar loss for NPR in 2001.

NPR retained a reputable, national tax, accounting and consulting firm to prepare its Form 1065 for the relevant year, 2001. The return, which was filed with the IRS in a timely manner, contained four items critical to the dispute in *NPR Investments*.

Three items tended to indicate that NPR was a TEFRA partnership subject to the special audit rules. First, Question 2 on Schedule B to the Form 1065 asked the following question: “Are any part-

ners in this partnership also partnerships?"<sup>16</sup> The "yes" box was checked, properly indicating that NPR had a flow-through partner. As explained above, the "small partnership" exception to the TEFRA rules does not apply where any partner is a pass-through entity, such as a partnership.<sup>17</sup> An affirmative response to Question 2, therefore, would trigger a TEFRA classification. Second, at the bottom of Schedule B to the Form 1065, there was a section labeled "Designation of Tax Matters Partner." The firm had completed this, thereby identifying the TMP for NPR for 2001. According to the IRS Instructions to the Form 1065, a partnership only completes the TMP section "[i]f the partnership is subject to the rules for consolidated audit proceedings in sections 6221 through 6233 [i.e., the TEFRA partnership rules]."<sup>18</sup> Finally, Schedules K-1 were attached to the Form 1065, one of which was issued to a pass-through entity.

The Form 1065 contained one item that was contrary to the three indicia described above. In particular, Question 4 on Schedule B presented the following inquiry: "Is this partnership subject to the consolidated audit procedures of Sections 6221 through 6233?" In other words, Question 4 obliquely asked whether NPR was subject to the TEFRA rules. The firm answered "no" to this question. Not only was this response inconsistent with the other aspects of the Form 1065, it was also counter to the IRS Instructions to Form 1065. These directed NPR to check "yes" in response to Question 4 if (i) NPR had more than 10 partners at any time during the tax year; (ii) any partner in NPR was a nonresident alien, or was something other than an individual, estate or C corporation; or (iii) NPR was a "small partnership" that elected to be subject to the TEFRA rules.<sup>19</sup> One partner was something other than an individual, estate, or C corporation; therefore, the answer to Question 4 should have been "yes."

The IRS later selected NPR's Form 1065 for audit. The revenue agent and his managers did not initiate a TEFRA audit, applying instead the normal deficiency procedures set forth in Code Secs. 6211 to 6216. On March 25, 2005, the revenue agent, on behalf of the IRS, sent NPR a standard "no change" letter for 2001 ("No Change Letter"). It stated the following:

We've completed the examination of your tax return for the year(s) shown above. We made no changes to your reported tax ... . This letter is the final notice you'll receive regarding your

examination unless you are a shareholder in a subchapter S corporation, a beneficiary of a trust, or a partner in a partnership. We may examine the tax return of a subchapter S corporation, trust, or partnership in which you are involved later and find that we have to make changes to the return. Otherwise, this is the final notice you will receive regarding the examination.<sup>20</sup>

The revenue agent and his manager intended to deny the losses related to NPR's Son of Boss transaction at the partner level; that is, they planned to later issue Notices of Deficiency to the partners using the normal audit procedures.<sup>21</sup> The proposed Notices of Deficiency were subsequently reviewed by an IRS group manager with experience in handling "tax shelters." Seeing several red flags, the group manager contacted a TEFRA technical advisor, who concluded that NPR was indeed a TEFRA partnership.

The IRS, adopting an abrupt change of course, started treating NPR as a TEFRA partnership by issuing an FPAA to NPR on August 15, 2005, which was before the general three-year assessment period related to the Form 1065 for 2001 had passed. While the FPAA was issued *before* the assessment statute lapsed, it was approximately five months *after* the IRS sent the No Change Letter. Predictably, the FPAA disallowed the losses claimed by NPR on its Form 1065 for 2001 and asserted significant penalties.

On September 19, 2005, one of the partners made the necessary "jurisdictional deposit" with the IRS.<sup>22</sup> NPR filed a timely suit with the appropriate U.S. District Court shortly thereafter.

## B. The Court's Analysis

After concessions, the court needed to address just two issues, perhaps the most interesting of which was whether the FPAA issued by the IRS on August 15, 2005, was valid (thereby allowing the IRS to disallow the multi-million-dollar loss claimed by NPR, collect the resulting taxes from the partners, and possibly realize additional revenue by asserting severe penalties) or invalid (thereby depriving the IRS of the ability to question NPR's tax treatment of the critical transaction).<sup>23</sup> The government, as it is prone to do in these types of cases, attempted to vilify the second alternative, summarizing it as follows: "Despite conceding that they are not entitled to the massive artificial losses allegedly generated by their participation in [NPR], the Taxpayers seek to escape all taxes, penalties and interest arising

from their participation in [NPR]" based on a procedural issue.<sup>24</sup>

The court, citing Code Sec. 6223, explained that the IRS is required to notify a partnership and certain partners of the beginning and end of a TEFRA partnership audit.<sup>25</sup> The court also highlighted that, under Code Sec. 6223(f), the IRS can only issue one FPAA for each partnership tax year, unless there is "a showing of fraud, malfeasance, or misrepresentation of material fact" by a partnership.<sup>26</sup> The Court then noted that neither the Internal Revenue Code nor the regulations promulgated thereunder requires the FPAA to take any particular form. The critical inquiry, stated the Court, is whether the notice indicates that it is a "final notice" and that a "determination" has been made by the IRS. Furthering this liberal view of notice interpretation, the Court concluded that "[t]he mere fact that the FPAA is a 'no change' notice does not preclude it from being a valid FPAA."<sup>27</sup>

NPR took the position that the No Change Letter dated March 25, 2005, constituted an FPAA because it explicitly stated twice that it was a "final notice," it confirmed the IRS's determination that no partnership-level adjustments were appropriate, and it was sent to the necessary parties.<sup>28</sup> The Court agreed with these arguments, holding that the No Change Letter represented an FPAA to NPR with respect to its Form 1065 for 2001.<sup>29</sup>

In rendering this decision, the Court rejected three arguments raised by the IRS, namely, (i) an FPAA can be issued only after the IRS has commenced a TEFRA audit, which the IRS had not done at the time it issued the No Change Letter on March 25, 2005, (ii) the No Change Letter was issued by a revenue agent, who lacked the requisite authority to issue an FPAA, and (iii) the IRS did not intend the No Change Letter to be an FPAA.<sup>30</sup> The Court, citing a number of Tax Court and appellate cases, indicated that the validity of an FPAA is not affected by whether the IRS followed its own internal procedures in issuing the FPAA or the intent of the IRS agent who actually issued the notice.<sup>31</sup> The Court also gave little credence to the argument that the No Change Letter was not an FPAA because the revenue agent lacked express authority to send such notice. Upholding the IRS's position, reasoned the Court, "would place taxpayers at the impossible position of never knowing whether the received notice is 'valid' because of alleged internal procedure violations, despite the fact that it was officially issued, appeared to be proper and according

to the law, and provided the necessary requirements of a notice of FPAA."<sup>32</sup>

Down but not altogether out, the IRS raised an alternative argument: Even if the No Change Letter issued on March 25, 2005, were deemed to be an FPAA, the FPAA later issued on August 15, 2005, was still valid under Code Sec. 6223(f) because NPR misrepresented that it was not subject to the TEFRA procedures on its Form 1065 for 2001.<sup>33</sup> The Court recognized the issue as a novel one:

There appears to be no cases that have construed the term "misrepresentation" within the specific context of Section 6223(f). Both parties cite decisions that construe "misrepresentation" in other statutory contexts, but these decisions are unpersuasive as to this specific statute.<sup>34</sup>

After couching this as an issue of first impression, the court referred to the definition of "misrepresentation" in BLACK'S LAW DICTIONARY, underscoring the fact that this reference book delineates various types of misrepresentations, including fraudulent, innocent, material, and negligent ones. Based on this variety, the court concluded that the term "misrepresentation" is broad enough to describe "a fraudulent as well as a negligent or innocent statement."<sup>35</sup>

The court noted that the inconsistent answers to Question 2 (*i.e.*, yes, at least one of the partners in NPR is a partnerships) and to Question 4 (*i.e.*, no, NPR is not subject to the TEFRA audit procedures) on NPR's Form 1065 for 2001 were neither intentional nor fraudulent.<sup>36</sup> Nevertheless, the court held that the erroneous response to Question 4 constituted a "misrepresentation" for Code Sec. 6223(f) purposes.<sup>37</sup> The court proceeded to hold that such "misrepresentation" was "material" because it related directly to the proper audit procedures that should have been applied.<sup>38</sup> Based on the preceding line of reasoning, the court held that the IRS was entitled to invoke the exception to the one-FPAA-only rule in Code Sec. 6223(f), thereby making the FPAA issued on August 15, 2005, valid. This was the only logical result, according to the court:

To hold otherwise would prevent the IRS from relying upon submitted information in tax returns in preparing notices and would place an impermissible burden on the IRS to verify the accuracy of the submitted information and the intent with which it was submitted.<sup>39</sup>



## IV. Why Does *NPR Investments* Matter?

In this hectic, modern world that relentlessly shrinks attention spans, the importance of one case, especially a dense tax case focused on complex procedural matters, is often lost. It is critical, therefore, to dig a little deeper in analyzing a case like *NPR Investments*. Additional attention reveals that this recent case is noteworthy for a number of reasons, as shown below.

### A. Two Wrongs Don't Make a (Procedural) Right

In 1997, Congress enacted Code Sec. 6231(g), which serves as a procedural backstop for the IRS. This provision establishes that, if the IRS, based on the Form 1065 filed by the partnership, reasonably yet erroneously determines that the TEFRA procedures apply to the partnership, then the TEFRA procedures apply.<sup>40</sup> Conversely, the statute indicates that if the IRS reviews a Form 1065 and reasonably yet erroneously decides that the partnership in question is not subject to the TEFRA procedures, then they do not apply.<sup>41</sup> This provision, which creates a self-fulfilling prophecy of sorts, essentially rewards the IRS for staying the course, mistaken though it may be. According to legislative history, Congress enacted these rules because “[t]he IRS often finds it difficult to determine whether to follow the TEFRA partnership procedures or the regular deficiency procedures” and “the IRS might inadvertently apply the wrong procedures and possibly jeopardize an assessment.”<sup>42</sup> Case in point: *NPR Investments*.

As the government pointed out in its post-trial brief, Code Sec. 6231(g) had no bearing on *NPR Investments* because the IRS did not initially determine that NPR was a TEFRA partnership and then decide to stand behind that erroneous conclusion. Rather, the IRS mistakenly believed that NPR was a non-TEFRA partnership, it later reached the opposite determination, and it attempted to correct the situation by issuing an FPAA.<sup>43</sup>

Among the ironic aspects of *NPR Investments* is that the IRS could have avoided the one-FPAA-only conundrum had it simply relied on Code Sec. 6231, as opposed to attempting to rectify its mistake of first issuing the standard No Change Letter to NPR. Also ironic is the fact that the IRS's action triggering the dispute (*i.e.*, issuing the FPAA) was done by the book, literally. The INTERNAL REVENUE MANUAL informs

IRS personnel that Code Sec. 6231 should only be relied upon when the statute of limitations on assessment prevents changing audit procedures: “If the statute allows, then the examiner should switch audit procedures based upon the new determination.”<sup>44</sup>

### B. Various Meanings of “Misrepresentation”

The decision in *NPR Investments* demonstrates that context is crucial. As explained earlier in the article, there is an exception to the general one-FPAA-only rule in Code Sec. 6223(f). In particular, the restriction on the IRS does not apply where there is a “showing of fraud, malfeasance, or misrepresentation of material fact” committed by the taxpayer. The court in *NPR Investments* focused on the last possibility, a “misrepresentation.”

NPR argued that the exception to Code Sec. 6223(f) is not triggered in cases of simple mistakes by the taxpayer. Buttressing this contention, NPR cited the statute governing closing agreements, Code Sec. 7121. According to that provision, a closing agreement between the IRS and taxpayer is deemed final and conclusive, unless there is a “showing of fraud, malfeasance, or misrepresentation of material fact.” NPR then referred to a Tax Court case concerning Code Sec. 7121, *J.S. Halpern*, which notes that “[f]or purposes of Section 7121, a misrepresentation is not synonymous with a mistake” and that the party raising the challenge has the burden of establishing a misrepresentation of material fact by clear and convincing proof.<sup>45</sup>

The government, for its part, alluded to the rules pertaining to the limits on bringing erroneous-refund suits. The government generally has two years from the date it issued a refund to initiate a judicial action to recover the funds, but Code Sec. 6532(b) extends that period to five years “if it appears that any part of the refund was induced by fraud or misrepresentation of a material fact.” The government cited two cases to advance this argument, one of which states that, when it comes to invoking the exception to the two-year limitation to erroneous-refund actions, “[w]illful misrepresentation is not required.”<sup>46</sup>

The court in *NPR Investments*, effectively eschewing both parties' arguments by analogy, characterized this as an issue of first impression, as no cases had specifically addressed the definition and scope of the term “misrepresentation” within the context of Code Sec. 6223(f).<sup>47</sup> With the uniqueness of the question thus noted, the court then recognized that the

incorrect answer to Question 4 on the Form 1065 for 2001 (*i.e.*, that NPR was not subject to the TEFRA partnership audit procedures) was neither willful nor fraudulent.<sup>48</sup> Nevertheless, the court ultimately concluded that the concept of “misrepresentation,” at least as applied to Code Sec. 6223(f), was sufficiently broad to cover even “negligent or innocent statements” on a tax return.<sup>49</sup>

The potential impact of this decision is, well, startling. Provided that the IRS can demonstrate materiality, it could conceivably rely on *NPR Investments* to challenge, twice, a taxpayer’s return solely because of an innocent mistake by the taxpayer or the return preparer. Such a low threshold seems inappropriate, particularly given the IRS’s own guidance indicating that a taxpayer’s innocent mistake generally constitutes grounds for avoiding even the most basic of penalties. As the relevant regulations put it, “[c]ircumstances that may indicate reasonable cause and good faith include an honest misunderstanding of fact or law that is reasonable in light of all of the facts and circumstances, including the experience, knowledge, and education of the taxpayer.”<sup>50</sup>

More importantly, the liberal interpretation of the term “misrepresentation” in *NPR Investments* causes concern because of its potential expansion into other areas. The IRS will surely argue in future cases that, based on the broad construction of “misrepresentation” under Code Sec. 6223(f), the term “misrepresent” encompasses taxpayer negligence and innocent mistakes in other contexts, too. This is distressing when one contemplates the large number tax provisions, regulations, revenue procedures and other tax-related guidance that incorporate the concept of “misrepresentation of material fact.”<sup>51</sup> For instance, one could envision the IRS, relying on *NPR Investments* and the language in Rev. Proc. 2005-32 about “misrepresentations of material fact,” reopening closed cases to make unfavorable adjustments on grounds that a taxpayer or his representative made a negligent or innocent-yet-mistaken statement on a return or during an audit.

### **C. The Role of Reliance and Reasonableness**

NPR argued that, even if checking the “no” box in response to Question 4 on the Form 1065 somehow constituted a material misrepresentation, the court should not allow the IRS to escape the one-FPAA-only rule in Code Sec. 6223(f) because the IRS’s reliance on Question 4 was unreasonable. In support of this

argument, NPR emphasized the three aspects of the tax return that effectively announced NPR’s status as a TEFRA partnership to the IRS: (i) Checking the “yes” box for Question 2 to confirm that at least one partner in NPR was a partnership; (ii) designating a TMP; and (iii) attaching a Schedule K-1 directed to a pass-through entity. NPR also pointed out that the revenue agent handling the audit was no rookie; indeed, the record demonstrated that he had conducted approximately 50 prior TEFRA audits and had taken continuing education classes regarding TEFRA audits.<sup>52</sup>

The court rejected NPR’s argument, primarily because Code Sec. 6223(f) does not expressly require reliance by the IRS.<sup>53</sup> Moreover, to the extent that this provision mandates reliance, the court determined that the IRS relied on NPR’s erroneous response to Question 4 when issuing the No Change Letter. In the court’s opinion, “[a]t the very least, NPR’s misrepresentation created conflicts on NPR’s 2001 return and temporarily confused [the revenue agent] and his managers.”<sup>54</sup>

The court’s refusal to incorporate a reliance element into a tax statute devoid of any express language to this effect is understandable. Implying that such reliance by the IRS was reasonable under the circumstances, however, seems strained. This is because the IRS’s own agency-wide guidance contains directions and checks designed to avoid the type of partnership-classification issue that arose in *NPR Investments*. For example, the “Partnership Audit Technique Guide” begins with a dire warning to IRS personnel about the importance of properly identifying the target entity:

It is critical to the examination of a partnership that the examiner recognize whether he or she is dealing with a TEFRA or Non-TEFRA partnership. The reason for this is that the above Code sections only apply to TEFRA partnerships. Failure to properly identify a TEFRA partnership from the outset will invariably impact the statute of limitations, proper initiation of the examination, and other administrative considerations, both at the partnership and partner level.<sup>55</sup>

The INTERNAL REVENUE MANUAL, likewise, is replete with instructions on how to address partnership examination issues and admonishes IRS personnel to carefully evaluate whether the TEFRA rules apply:

Identification of returns as TEFRA vs. nonTEFRA is necessary in order to have a valid assessment of

tax, because the TEFRA partnership rules and the deficiency procedures are mutually exclusive. If the Service applies the wrong procedures, e.g., erroneously proceeds at the partnership level rather than at the partner level, or vice versa, barred deficiencies and/or refunds can result ...<sup>56</sup>

After underscoring the importance of partnership classification, the INTERNAL REVENUE MANUAL creates duties aimed at avoiding problems. It dictates, for instance, that revenue agents “must determine,” on a year-by-year basis, whether TEFRA procedures apply, and must include a specific form in their audit workpapers explaining the reasons supporting their partnership-classification conclusion.<sup>57</sup> The INTERNAL REVENUE MANUAL also obligates the IRS’s field soldiers to complete a “mandatory” form as part of every partnership examination. Specifically, revenue agents must complete a “partnership procedures check sheet” to document whether the TEFRA rules apply, and their managers are required to review the check sheet and sign-off on it.<sup>58</sup> Lest there be any doubt about this task or its critical nature, a subsequent portion of the INTERNAL REVENUE MANUAL contains the following unambiguous marching orders: “The Form 13813, Partnership Procedures Check Sheet, *must be completed* to ensure a proper determination is made. The completion of the Partnership Procedures Check Sheet *is mandatory* for every partnership examined. The completed check sheet *will be included* in the audit file to document that the partnership is or is not subject to the TEFRA procedures.”<sup>59</sup>

Given the three indicia of TEFRA partnership status on NPR’s Form 1065, the instructions and requirements for IRS personnel contained in the AUDIT TECHNIQUE GUIDE and INTERNAL REVENUE MANUAL, and the revenue agent’s familiarity with the TEFRA procedures as a result of conducting some 50 partnership audits before dealing with NPR, the reasonableness of any reliance on the mistaken response by NPR to Question 4 on the Form 1065 is dubious. In other words, the “temporary confusion” supposedly suffered by the revenue agent and his manager is baffling under the circumstances.

## D. The Many Faces and Functions of “No Change” Notices

The treatment of the No Change Letter in *NPR Investments* is perhaps the most interesting issue in terms of tax procedure and implications for future cases.

### 1. The Court’s Ruling

NPR argued that the provision requiring the IRS to issue an FPAA in TEFRA partnership cases, Code Sec. 6223(a)(2), does not specify the precise form the FPAA must take. NPR also pointed out that judicial precedent supports a flexible interpretation of this notice obligation. Several legal opinions were cited, but the seminal ruling in this area derives from a self-professed case of first impression, *Clovis I.*<sup>60</sup> In that case, the Tax Court adopted an expansive view of the FPAA based on a comparison to its non-TEFRA counterpart, the Notice of Deficiency:

The FPAA is to [TEFRA partnership disputes] ... what the statutory notice of deficiency is to tax controversies before this Court that involve respondent’s determination of a deficiency, i.e., it is the notice to affected taxpayers that respondent has made a final administrative determination for particular tax years. Issuance of a FPAA is a prerequisite to an assessment arising out of partnership items or affected items. As with a statutory notice of deficiency, however, the statute does not explicate what constitutes an FPAA. Because of the similar functions of the FPAA and the statutory notice of deficiency, we are convinced that the long established principle applicable to notices of deficiency, viz, that no particular form is necessary, should apply with equal force to a FPAA. As a corollary principle, whatever form a FPAA takes, it must minimally give notice to the taxpayer that respondent has finally determined adjustments to the partnership return.<sup>61</sup>

NPR also referenced a series of other cases for the proposition that an FPAA is valid as long as it gives the taxpayer “minimal notice” that the IRS has made a “final determination” with respect to the Form 1065.<sup>62</sup>

The court agreed with NPR’s position, holding that the No Change Letter in *NPR Investments* represented an FPAA with respect to the Form 1065 for 2001 because it expressly stated that it was the “final notice,” it included the IRS’s determination that no partnership-level adjustments were necessary, and it was sent to the appropriate parties.<sup>63</sup>

### 2. Obscure and Misunderstood “No Change” Rules and Notices

This holding raises various questions for future partnership disputes. To grasp these questions, one must



first appreciate the differences between four distinct types of IRS notices: (i) TEFRA “no change letter,” (ii) TEFRA “no adjustment letter,” (iii) TEFRA “no change FPAA,” and (iv) non-TEFRA “no change letter.” The remarkably obscure and often misunderstood details about these notices are analyzed below.<sup>64</sup>

**a. TEFRA “No Change Letters.”** The IRS must inform the relevant partners of the start of a TEFRA audit by issuing a Notice of Beginning of Administrative Procedure (NBAP).<sup>65</sup> If the IRS decides within 45 days of sending the NBAP not to propose any changes to the relevant Form 1065, it may withdraw the NBAP by mailing to the TMP a TEFRA “no change letter,” *i.e.*, a Letter 1864.<sup>66</sup> This correspondence states the following:

NO CHANGE LETTER. Our recent examination of your return for the above year(s) shows no change is necessary in the information reported, and we have accepted the returns as filed. Therefore, we are withdrawing the Notice of Beginning of Administrative Proceeding. If you wish you may provide a copy of this letter to other in your organizations.<sup>67</sup>

The regulations contain two rules lobbying against the characterization of a TEFRA “no change letter” as an FPAA. They first clarify that the IRS is entitled to issue an NBAP, decide to drop the matter, and simply never provide the taxpayer with any notice of such decision. According to the regulations, “[e]ven if the Internal Revenue Service does not withdraw the [NBAP], the Internal Revenue Service is not required to issue [an FPAA].”<sup>68</sup> The regulations also indicate that an NBAP, which is later withdrawn by the IRS by virtue of issuing a TEFRA “no change letter,” shall be treated as if the NBAP had never been mailed by the IRS in the first place.<sup>69</sup> In other words, the regulations provide that a TEFRA “no change letter” serves to halt the partnership proceeding (by pretending that it never started), not intensify the proceeding (by treating it as an FPAA and triggering litigation).

This conclusion is further buttressed by the INTERNAL REVENUE MANUAL, which includes the guidance on TEFRA “no change letters” in a section called “Key Case Closure Procedures,” not a later section titled “FPAA Cases.”<sup>70</sup> Also strengthening this conclusion is the clear delineation of notices set forth by the IRS in Rev. Proc. 2005-32: “A TEFRA partnership case is an agreed case and is closed as an agreed case only if ... a no-change letter has been issued to the Tax

Matters Partner. A no-change FPAA alone does not signify an agreed case.”<sup>71</sup>

**b. TEFRA “No Adjustments Letters.”** If the IRS decides not to further pursue a partnership audit after the initial 45-day period has passed, then it issues to the TMP a TEFRA “no adjustments letter,” *i.e.*, Letter 2621.<sup>72</sup> This correspondence conveys the following message to the partnership:

NO ADJUSTMENTS LETTER. Dear Taxpayer: We have completed our review of your return(s) for the years shown above. We are not proposing any adjustments to the return(s), and, for that reason, we will not issue a Notice of Final Adjustment. Federal law requires that you, as the Tax Matters Person (Partner), furnish this information to all other shareholders or partners in your organization (named above) within 30 days of receiving this letter.<sup>73</sup>

The INTERNAL REVENUE MANUAL instructs IRS personnel to use the TEFRA “no adjustments letter” in situations where the TMP indicates that it agrees with the IRS’s determination, the TMP does not raise any affirmative defenses, and an Administrative Adjustment Request (AAR) has not been filed yet by the TMP or any partner.<sup>74</sup> As explained more fully below, the AAR is effectively the TEFRA partnership equivalent of an amended Form 1065 for partnership items.<sup>75</sup>

The argument that this notice does not constitute an FPAA is even stronger than that in the case of a TEFRA “no change letter.” The most obvious evidence is the text of the notice itself, which expressly states that the IRS “will not issue a Notice of Final Adjustment.”<sup>76</sup> Also, like the TEFRA “no change letter,” the TEFRA “no adjustments letter” is found in a section of the INTERNAL REVENUE MANUAL containing “Key Case Closure Procedures,” not the separate section titled “FPAA Cases.”<sup>77</sup>

**c. TEFRA “No Change FPAA.”** The third notice in the TEFRA trilogy is the TEFRA “no change FPAA.” Like the TEFRA “no adjustment letter,” the TEFRA “no change FPAA” is only issued where the IRS makes its determination regarding the partnership more than 45 days after the IRS initially issued the NBAP.<sup>78</sup> The similarities essentially stop there, though. The TEFRA “no change FPAA,” *i.e.*, Letter 2064, states the following:

NOTICE OF FINAL PARTNERSHIP ADMINISTRATIVE ADJUSTMENT ... *This letter is your notice of Final Partnership Administrative Adjustment*



(FPAA) as required by the Internal Revenue Code. We have completed our examination of the partnership return(s) shown above, and no changes were made. Because of our finding, no adjustment will be made to your return as long as your return properly reflects your allocable share of partnership items as reflected on the partnership return as filed.<sup>79</sup>

The TEFRA “no change FPAA” then proceeds to explain that the partnership, through a proper partner, may contest this determination by filing a timely petition with the Tax Court, appropriate U.S. District Court, or Court of Federal Claims.<sup>80</sup>

The Internal Revenue Manual directs use of the TEFRA “no change FPAA” in situations where the TMP disagrees with the no-change determination or filing inconsistencies exist at the investor/partner level.<sup>81</sup> It is also utilized where the TMP raises affirmative issues or a partner has filed an AAR, and the IRS is disallowing the partnership-favorable adjustments or AAR.<sup>82</sup>

The INTERNAL REVENUE MANUAL then identifies the effects of issuing a TEFRA “no change FPAA,” namely, doing so enables the TMP or other appropriate partner to file a petition in the court of their choice to challenge the FPAA and, more importantly, it prevents them from filing a partnership claim for refund (*i.e.*, AAR) or from petitioning a disallowed AAR.<sup>83</sup> These consequences were nicely summarized by the Tax Court in earlier case, at a time when the TEFRA procedures also applied to certain S corporations:

The issuance of an FSAA, even one recommending that no change be made to corporate income or losses, serves to meet the statutory requirement of Section 6223(a) to give notice of the completion of the administrative proceeding. In some instances, respondent may choose to issue a “no change” FSAA to prevent a shareholder from later filing an administrative adjustment request with respect to the subchapter S items in question.<sup>84</sup>

Consistent with this holding, the courts and the IRS have repeatedly recognized that the existence of a TEFRA “no change FPAA” triggers the right to petition the courts.<sup>85</sup>

**d. Non-TEFRA “No Change Letters.”** The IRS has different notices when it comes to non-TEFRA examinations. For instance, if the IRS determines that no adjustments are necessary, the revenue

agent will issue an audit report indicating no adjustments, a letter stating that a no-change has been proposed but is subject to review, and, ultimately, the final non-TEFRA “No Change Letter,” *i.e.*, Letter 590.<sup>86</sup> This correspondence, which is the key document sent by the IRS in *NPR Investments*, states the following:

We’ve completed the examination of your tax return for the year(s) shown above. We made no changes to your reported tax ... This letter is the final notice you’ll receive regarding your examination unless you are a shareholder in a subchapter S corporation, a beneficiary of a trust, or a partner in a partnership. We may examine the tax return of a subchapter S corporation, trust, or partnership in which you are involved later and find that we have to make changes to the return. Otherwise, this is the final notice you will receive regarding the examination.<sup>87</sup>

### **3. Potential Impact on Future TEFRA Partnership Cases**

Courts have already recognized that TEFRA “no change FPAA” are FPAA, and the court in *NPR Investments* held that a non-TEFRA “no change letter,” mistakenly issued to a TEFRA partnership, also constitutes an FPAA. The court’s reasons for reaching this conclusion were three-fold: the IRS notice indicated that it was the final notice, it contained the IRS’s determination that no partnership-level adjustments were necessary, and it was sent to the appropriate parties.<sup>88</sup> Based on this rationale and the way judicial precedent functions, it is foreseeable that such holding could be expanded in the future to TEFRA “no-change” letters and TEFRA “no adjustment letters.” If so, then all four varieties (*i.e.*, TEFRA “no-change letters,” TEFRA “no adjustment letters,” TEFRA “no change FPAA,” and non-TEFRA “no change letters”) would satisfy the broad definition of FPAA. Thus, what initially appeared as a taxpayer-favorable holding in *NPR Investments* could have negative impacts on partnership cases down the road for a number of reasons.

First, an expansion of the FPAA definition could deprive some taxpayers of their day in court. As explained above, once the IRS mails the FPAA, the TMP for the partnership has the exclusive right for 90 days to file a petition in any one of three courts seeking a ruling that the IRS’s proposed

adjustments in the FPAA are incorrect.<sup>89</sup> If the TMP fails to file a petition within the initial 90-day period, then certain other partners may do so within the next 60 days.<sup>90</sup> The IRS could issue a “no change” notice of some sort to the necessary parties, who understandably fail to appreciate the fact that such notice triggers their petition-filing rights and deadlines. Once the 150-day filing period expires without any petitions being filed, the result is clear: Any proposed adjustments in the FPAA are deemed correct, and the IRS may begin the process of issuing notices to the partners.<sup>91</sup> This was summarized in a recent Chief Counsel Advisory, which states that “[a]fter we issue a no change FPAA which either defaults or is petitioned and decided, we can issue affected item notices of deficiency for partner-level limitation issues such as 465 [at-risk loss limitation], 704(d) [basis in partnership interest limitation] or 469 [passive activity loss limitation].”<sup>92</sup>

Second, a broad definition of FPAA could expose the TMP to civil actions by the partners. The TMP has certain obligations under the tax code, including sending copies of the FPAA to the partners. The relevant provision states that “[t]o the extent and in the manner provided by regulations, the tax matters partner of a partnership *shall* keep each partner informed of all administrative and judicial proceedings for the adjustment at the partnership level of partnership items.”<sup>93</sup> The corresponding regulation clarifies that this duty includes sending the necessary partners a copy of the FPAA within 60 days of date on which the IRS issued it.<sup>94</sup> Importantly, a TMP’s failure to send a copy of the FPAA to the partners or otherwise fulfill all of his duties does *not* somehow invalidate the TEFRA proceedings or any adjustments resulting therefrom.<sup>95</sup> Consequently, if the IRS were to issue a “no change” notice, such notice were deemed to constitute an FPAA, the TMP failed to forward the FPAA to the partners in a timely manner because of his ignorance of the duty to do so, the 150-day period for filing a petition with the courts expired, and the IRS began issuing Affected Item Notices of Deficiency to the partners, the finger-pointing would be directed squarely at the TMP.

Third, a flexible interpretation of the term “FPAA” could serve to preclude the filing of an AAR. As explained above, the AAR is essentially the TEFRA partnership equivalent of an amended Form 1065 for partnership items. There are three varieties of

AARs, including the so-called claim for refund AAR, which generally is used to show a decrease of taxable income on the original Form 1065 (that would flow through to the partners).<sup>96</sup> Limits exist on when an AAR may be filed, of course. A partner generally may file an AAR for any partnership tax year (i) within three years of the date on which the relevant Form 1065 was actually filed, or within three years of the deadline for filing such Form 1065, whichever is later; and (ii) *before* the IRS mails an FPAA to the TMP of the partnership.<sup>97</sup> Similarly, the TEFRA rules provide that a judicial petition concerning a disallowed or ignored AAR may not be filed after the IRS has issued an FPAA for the partnership tax year to which the AAR relates.<sup>98</sup> As discussed earlier in this article, the IRS strategically uses FPAAs to halt the filing of partnership refund actions *via* the AAR: “In some instances, respondent may choose to issue a ‘no change’ FSAA to prevent a shareholder from later filing an administrative adjustment request with respect to the subchapter S items in question.”<sup>99</sup> Adopting a broad definition of the term FPAA (to include TEFRA “no change letters,” TEFRA “no adjustments letters,” TEFRA “no change FPAAs,” and non-TEFRA “no change letters”) because of *NPR Investments* would strengthen the IRS’s ability to eliminate partnership refund actions.

## V. Conclusion

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*NPR Investments* contained at least three noteworthy rulings: A non-TEFRA “no change letter,” mistakenly issued by the IRS to a TEFRA partnership, represents an FPAA, with all that entails; a negligent or innocent-yet-inaccurate statement by a taxpayer on a tax return may equal a “misrepresentation of material fact” for purposes of triggering the exception to the normal one-FPAA-only restriction under Code Sec. 6223(f); and the IRS is not required to demonstrate that it relied, much less that it reasonably relied, on the taxpayer’s material misrepresentation before invoking the exception to the general one-FPAA-only rule. These rulings, together, yielded a mulligan for the IRS in *NPR Investments*, a veritable “do over” to make multi-million-dollar partnership-level adjustments. On a broader note, the key rulings in *NPR Investments* create more pitfalls in the already-treacherous world of TEFRA disputes of which taxpayers and their representatives should be aware.

## ENDNOTES

- \* You can reach Hale by phone at (404) 658-5441 or by e-mail at [hale.sheppard@chamberlainlaw.com](mailto:hale.sheppard@chamberlainlaw.com).
- <sup>1</sup> *NPR Investments, LLC*, 106 AFTR 2d 5788, (E.D. Tx. 2010), No. 5:05-cv-00219 (Aug. 10, 2010).
- <sup>2</sup> These rules were enacted by the Tax Equity and Fiscal Responsibility Act of 1982 (P.L. 97-248).
- <sup>3</sup> Code Sec. 6231(a)(3) and Reg. §301.6231(a)(3)-1.
- <sup>4</sup> P.L. 97-248.
- <sup>5</sup> Code Secs. 6221 through 6234.
- <sup>6</sup> Code Sec. 6221.
- <sup>7</sup> Code Sec. 6231(a)(1)(A).
- <sup>8</sup> Code Sec. 6231(a)(1)(B)(i); Reg. §301.6231(a)(1)-1(a)(1).
- <sup>9</sup> Reg. §301.6231(a)(1)-1(a)(2).
- <sup>10</sup> Code Sec. 6231(a)(9); IRM §4.31.2.2.17 (Mar. 4, 2008).
- <sup>11</sup> Rev. Rul. 2004-88; IRM §4.31.2.2.17.1 (Mar. 4, 2008).
- <sup>12</sup> Code Sec. 6223(a)(2); Code Sec. 6223(d).
- <sup>13</sup> Code Sec. 6226(a).
- <sup>14</sup> Code Sec. 6226(b). The TMP also may file a petition during the 60-day period, not in his capacity as TMP, but rather in his role as a notice partner. See *Beware of the Two-Hatted Tax Matters Partner: Analyzing How Dual Roles Can Impact TEFRA Litigation*, J. PASSTHROUGH ENTITIES, Nov.–Dec. 2007, at 31.
- <sup>15</sup> *NPR Investments, LLC*, *supra* note 1, at 2.
- <sup>16</sup> Question 2 was expanded and clarified in later years. The 2009 version of the Form 1065 asks the following: “At any time during the tax year, was any partner in the partnership a disregarded entity, a partnership (including an entity treated as a partnership), a trust, an S corporation, an estate (other than an estate of a deceased partner), or a nominee or similar person?”
- <sup>17</sup> Reg. §301.6231(a)(1)-1(a)(2).
- <sup>18</sup> 2001 IRS Instructions for Form 1065 (Cat. No. 11392V), at 20.
- <sup>19</sup> 2001 IRS Instructions for Form 1065 (Cat. No. 11392V), at 19–20.
- <sup>20</sup> *NPR Investments, LLC*, *supra* note 1, at 9. The No Change Letter is consistent with the IRS Account Transcript for NPR for 2001, whose entry for April 18, 2005, states the following: “Additional tax assessed by examination ... \$0.00.”
- <sup>21</sup> *NPR Investments, LLC*, *supra* note 1, at 9.
- <sup>22</sup> This payment is mandated by Code Sec. 6226(e).
- <sup>23</sup> *NPR Investments, LLC*, *supra* note 1, at 11. The other major issue in the case was the appropriateness of a penalty, which is not addressed in this article.
- <sup>24</sup> United States’ Post-Trial Brief, filed May 24, 2010, at 47.
- <sup>25</sup> *NPR Investments, LLC*, *supra* note 1, at 12.
- <sup>26</sup> *NPR Investments, LLC*, *supra* note 1, at 12.
- <sup>27</sup> *NPR Investments, LLC*, *supra* note 1, at 13.
- <sup>28</sup> *NPR Investments, LLC*, *supra* note 1, at 13–14.
- <sup>29</sup> *NPR Investments, LLC*, *supra* note 1, at 14.
- <sup>30</sup> *NPR Investments, LLC*, *supra* note 1, at 14–15.
- <sup>31</sup> *NPR Investments, LLC*, *supra* note 1, at 15.
- <sup>32</sup> *NPR Investments, LLC*, *supra* note 1, at 15–16.
- <sup>33</sup> *NPR Investments, LLC*, *supra* note 1, at 15.
- <sup>34</sup> *NPR Investments, LLC*, *supra* note 1, at 16.
- <sup>35</sup> *NPR Investments, LLC*, *supra* note 1, at 16–17.
- <sup>36</sup> *NPR Investments, LLC*, *supra* note 1, at 17.
- <sup>37</sup> *NPR Investments, LLC*, *supra* note 1, at 16–17.
- <sup>38</sup> *NPR Investments, LLC*, *supra* note 1, at 17.
- <sup>39</sup> *NPR Investments, LLC*, *supra* note 1, at 17.
- <sup>40</sup> Code Sec. 6231(g)(1).
- <sup>41</sup> Code Sec. 6231(g)(2).
- <sup>42</sup> Revenue Reconciliation Act, 105th Cong., 1st Sess., H. REPT. 105-148 (June 24, 1997), at 587–88.
- <sup>43</sup> *NPR Investments, LLC v. United States*, United States’ Post-Trial Brief, filed May 24, 2010, at 57.
- <sup>44</sup> IRM §4.31.2.1.7 (June 1, 2004).
- <sup>45</sup> *J.S. Halpern*, Dec. 53,870(M), 79 TCM 1976, TC Memo. 2000-151, *aff’d*, CA-2, 2002-1 USTC ¶ 50,335, 33 FedAppx 550; *NPR Investments, LLC*, Plaintiff’s Post-Trial Brief, filed Apr. 26, 2010, at 14–15.
- <sup>46</sup> *L. Merlin v. Sanders*, CA-5, 57-1 USTC ¶ 9631, 243 F2d 821, 543 (N.D. Ga. 1956); *Shannahan*, 85 AFTR 2d 2000-1317 (S.D. Ca. 1992); *NPR Investments, LLC*, United States’ Post-Trial Brief, filed May 24, 2010, at 55.
- <sup>47</sup> *NPR Investments, LLC*, *supra* note 1, at 16. The court recognized the uniqueness of the Code Sec. 6223(f) issue, but it neglected to mention the uniqueness of a similar situation elsewhere in the TEFRA realm. Reg. §301.6223(a)-2(b) provides that, if the IRS mails a Notice of Beginning of Administrative Proceeding (NBAP) to the TMP and later withdraws the NBAP, then the IRS is precluded from issuing a second NBAP unless there is evidence of “fraud, malfeasance, collusion, concealment, or misrepresentation of a material fact” committed by the taxpayer. As with the one-FPAA-only rule in Code Sec. 6223(f), there appear to be no cases specifically addressing the definition of “misrepresentation” in the context of the one-NBAP-only rule.
- <sup>48</sup> *NPR Investments, LLC*, *supra* note 1, at 17.
- <sup>49</sup> *NPR Investments, LLC*, *supra* note 1, at 16–17.
- <sup>50</sup> Reg. §1.6664-4(b)(1).
- <sup>51</sup> See, e.g., Code Sec. 6245, Code Sec. 6234, Code Sec. 7121, Code Sec. 6532, Code Sec. 9012, Code Sec. 9042, Reg. §1.481-4, Reg. §601.201, Reg. §54.9801-2, and over 100 revenue procedures.
- <sup>52</sup> *NPR Investments, LLC*, Plaintiff’s Post-Trial Brief, filed April 26, 2010, at 16.
- <sup>53</sup> *NPR Investments, LLC*, *supra* note 1, at 18.
- <sup>54</sup> *NPR Investments, LLC*, *supra* note 1, at 18.
- <sup>55</sup> PARTNERSHIP AUDIT TECHNIQUE GUIDE, Ch. 13, *Identifying the TEFRA Partnership* (Dec. 2002).
- <sup>56</sup> IRM §4.31.2.1.1 (June 1, 2004).
- <sup>57</sup> IRM §4.31.2.1.1 (June 1, 2004).
- <sup>58</sup> IRM §4.31.2.2.2 (Mar. 4, 2008).
- <sup>59</sup> IRM §4.31.5.2 (Feb. 22, 2008).
- <sup>60</sup> *Clovis I*, 88 TC 980 (1987).
- <sup>61</sup> *Clovis I*, 88 TC 980, 982 (1987) (internal citations omitted).
- <sup>62</sup> *NPR Investments, LLC*, Plaintiff’s Post-Trial Brief, filed April 26, 2010, at 2–3, 5–7, citing *Triangle Investors, LP*, 95 TC 610, 613 (1990), *Sealy Power, Ltd.*, CA-5, 95-1 USTC ¶ 50,103, 46 F3d 382, *Chomp Associates*, 91 TC 1069, 1073–75 (1988).
- <sup>63</sup> *NPR Investments, LLC*, *supra* note 1, at 13–14.
- <sup>64</sup> Neither the parties nor the court addressed these four types of notices in *NPR Investments*.
- <sup>65</sup> Code Sec. 6223(a)(1).
- <sup>66</sup> IRM §4.31.2.2.6.1 (May 31, 2005); IRM §4.31.2.4.2.1 (May 31, 2005); Reg. §301.6223(a)-2(a).
- <sup>67</sup> IRS Letter 1864(DO) (Rev. 11-1989) (emphasis in original).
- <sup>68</sup> Reg. §301.6223(a)-2(a).
- <sup>69</sup> Reg. §301.6223(a)-2(a).
- <sup>70</sup> IRM §4.31.2.4.2 (May 31, 2005)—“Key Case Closure Procedures.”
- <sup>71</sup> Rev. Proc. 2005-32, §4.01(5).
- <sup>72</sup> IRM §4.31.2.4.2.1 (May 31, 2005).
- <sup>73</sup> IRS Letter 2621 (DO) (12-1991) (second emphasis added).
- <sup>74</sup> IRM §4.31.2.4.2.1 (May 31, 2005).
- <sup>75</sup> Code Sec. 6227; Code Sec. 6228; IRS Instructions for Form 8082 (Notice of Inconsistent Treatment or Administrative Adjustment Request).
- <sup>76</sup> IRM §4.31.2.4.2.1 (May 31, 2005). This section explains that the TEFRA “no adjustment letter” will inform that partnership, through its TMP, that “the key case is being closed no change, and that an FPAA will not be issued.”
- <sup>77</sup> IRM §4.31.2.4.2 (May 31, 2005)—“Key Case Closure Procedures.”
- <sup>78</sup> IRM §4.31.2.4.2.3.1 (May 31, 2005).
- <sup>79</sup> IRS Letter 2064 (Rev. 11-2008) (second emphasis added). The TEFRA “no change FPAA” in effect at the time of *NPR Investments* was slightly different. It informed the partnership as follows: “NOTICE OF FINAL PARTNERSHIP ADMINISTRATIVE ADJUSTMENT. We have completed our examination of the partnership return(s) shown above, and no changes were made. Because of our finding, no adjustment will be made to your return. *This letter is your notice of Final Partnership Administrative Adjustment (FPAA)* as required by the Internal Revenue Code.” IRS Letter 2064 (Rev. 11-1989) (second emphasis added).
- <sup>80</sup> IRS Letter 2064 (Rev. 11-2008); IRS Letter 2064 (Rev. 11-1989).



<sup>81</sup> IRM §4.31.2.4.2.3.1 (May 31, 2005).

<sup>82</sup> IRM §4.31.2.4.2.3.1 (May 31, 2005).

<sup>83</sup> IRM §4.31.2.4.2.3.1 (May 31, 2005).

<sup>84</sup> *University Heights at Hamilton Corp.*, 97 TC 278, 282 (1991).

<sup>85</sup> See, e.g., *University Heights at Hamilton Corp.*, 97 TC 278, 282 (1991) (holding that the notice partner can petition the Tax Court “even though the FPAA contained no changes made by respondent”), Field Service Advisory 1992 WL 1354740 (June 22, 1992) (“The issuance of a no change FPAA is a determination that the Commissioner accepts the return as filed and such an FPAA meets the requirements of I.R.C. §6223(a)”). *NPR Investments, LLC v. United States*, Plaintiff’s Post-Trial Brief, filed April 26, 2010, at 4.

<sup>86</sup> IRM §4.31.5.11.2 (May 31, 2005); IRM §4.10.8.2.3 (Aug. 11, 2006).

<sup>87</sup> IRS Letter 590 (DO) (Rev. 8-2000). The current version of this letter is similar, stating the following: “We’ve completed the review of the examination of your tax return for the year(s) shown above. We made no changes to your reported tax. This is final letter we’ll send you regarding your examination unless we make a change to a partnership, S corporation, trust, or estate in which you have an interest.” IRS Letter 590 (DO) (Rev. 8-2007).

<sup>88</sup> *NPR Investments, LLC*, *supra* note 1, at 14.

<sup>89</sup> Code Sec. 6226(a).

<sup>90</sup> Code Sec. 6226(b). The TMP also may file a petition during the 60-day period, not in his capacity as TMP, but rather in his role as a no-

tice partner. See *Beware of the Two-Hatted Tax Matters Partner: Analyzing How Dual Roles Can Impact TEFRA Litigation*, J. OF PASSTHROUGH ENTITIES, Nov.–Dec. 2007, at 31.

<sup>91</sup> Code Sec. 6225.

<sup>92</sup> CCA 201011012 (Mar. 19, 2010).

<sup>93</sup> Code Sec. 6223(g).

<sup>94</sup> Reg. §301.6223(g)-1(a)(2).

<sup>95</sup> Code Sec. 6230(f).

<sup>96</sup> Code Sec. 6227(c)(2); IRS Instructions for Form 8082 (*Notice of Inconsistent Treatment or Administrative Adjustment Request*).

<sup>97</sup> Code Sec. 6227(a). This period is extended under Code Sec. 6227(e) in cases of bad debts and worthless securities.

<sup>98</sup> Code Sec. 6228(a)(3)(A).

<sup>99</sup> *University Heights at Hamilton Corp.*, 97 TC 278, 282 (1991).

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