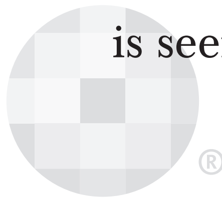
Beware of the Two-Hatted Tax Matters Partner: Analyzing How Dual Roles Can Impact TEFRA Litigation

By Hale E. Sheppard

Hale Sheppard examines the hats worn by the partner charged with handling most tax-related issues in a partnership, the tax matters partner. It is important that other partners and tax practitioners are not caught unaware as the TMP is seemingly authorized to act on behalf of the partnership in two different capacities.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Introduction

In this modern world full of frenetic activity, many people wear two hats, if not more. This duality is beneficial in the sense that it allows some people to accomplish a considerable amount, but it could have its downsides, too. This is particularly true in the area of partnership tax litigation, where the partner charged with handling most tax-related issues, the tax matters partner (TMP), is seemingly authorized to act on behalf of the partnership in two different capacities. The problem is not the breadth of the TMP's powers, but rather the potential ignorance of such powers by those most directly affected, *i.e.*, the other partners. This unawareness is attributable to many factors, including the complexity of the current partnership audit procedures, court decisions interpreting these rules in unanticipated ways and the deceptive straightforwardness of certain tax provisions regarding which partners may seek judicial review. It is often said that what you don't know can't hurt you. This adage has no place in tax litigation concerning partnerships, where the unknown can cause serious harm. This article examines the two hats worn by the TMP in an effort to prevent other partners and tax practitioners from being caught unaware.

Overview of TEFRA Procedures

Partnership 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.[1] The partnership must file an annual Form 1065 (*U.S. Return of Partnership Income*) indicating the partners to which certain items flowed, but the entity itself has no federal tax liability. In other words, a partnership is a conduit, not a taxable entity. 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.

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This dramatically changed in 1982 when Congress passed the Tax Equity and Fiscal Responsibility Act (TEFRA).[2] This legislation introduced partnership-level audit procedures, which permitted the IRS to audit the entity, 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.[3] In short, TEFRA enabled the IRS to focus its audits on the partnership, not the partners themselves. This change made administrative sense: many of the audited partnerships, particularly those involving "tax shelters," had numerous partners, the IRS had trouble locating and coordinating the income tax returns of each partner to ensure that they 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.

This article analyzes the importance of understanding which partners can act on behalf of a TEFRA partnership during the judicial phase. To grasp this issue, it is first necessary to be familiar with three key players: the TMP, notice partners and five-percent groups.

Normally, the TMP is the general partner designated by the partnership as its "front man" with the IRS on tax issues. This designation can be made on the partnership's Form 1065 for the tax year. It also can be made at any time thereafter by filing a statement with the IRS Service Center where the partnership's Form 1065 was filed.[4] Selecting the proper TMP is pivotal because the TMP has special rights to conduct the partnership audit, extend the partnership assessment period, file a refund claim on behalf of the partnership, and settle the proposed partnership adjustments with the IRS.[5] More importantly for purposes of this article, the TMP has the initial opportunity to select the forum for litigating disputes between the IRS and the partnership.[6]

The term "notice partner" is derived from a partner's right to receive important documents from the IRS about the partnership, including those related to an audit. Generally, in partnerships with 100 or fewer partners, all partners are considered notice partners. In partnerships with more than 100 partners, only those partners who have at least a one percent interest in the profits of the partnership are deemed notice partners.[7]

> The problem is not the breadth of the TMP's powers, but rather the potential ignorance of such powers by those most directly affected, *i.e.*, the other partners.

A five-percent group is a collection of partners whose aggregate profits interests in the partnership are five percent or higher during the relevant tax year.[8] Provided that they satisfy this ownership threshold, the group can appoint one of the partners to be treated as a "notice partner."[9]

The procedures of a TEFRA partnership audit vary considerably from those utilized in a traditional audit of individuals or non-TEFRA entities. Despite the procedural differences, the concepts are similar. The IRS notifies the taxpayer that it has been selected for audit with respect to certain years, it gathers information and documentation in the course of the audit, and it eventually issues a notice explaining the adjustments or changes that it plans to make to the returns filed by the taxpayer. These proposed adjustments normally include increased taxes, penalties and interest. If the taxpayer disagrees, it 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, 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). The IRS is required to mail it first to the TMP, followed by a copy to the notice partners and representatives of any five-percent group.[10] Within 90 days of the day on which the IRS mailed the FPAA, the TMP has the exclusive right under Code Sec. 6226(a) to file a petition with the Tax Court, proper U.S. District Court or the Court of Federal Claims asking the court to determine that the IRS's proposed adjustments are incorrect.[11]

If the TMP does not file a petition within the 90-day period, then any notice partner or five-percent group may file a petition with any of the three specified courts within the next 60 days pursuant to Code Sec. 6226(b)(1).[12] Multiple petitions may be filed because there often numerous notice partners and five-percent groups, particularly in large partnerships serving as investment vehicles. To account for this, there is a series of priority rules. If more than one petition is filed in the Tax Court within the 60-day period with respect to the same partnership for the same year, then the

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first petition filed with go forward.[13] If no petition is filed in the Tax Court during this 60-day period, then the first petition filed in either the proper U.S. District Court or the Court of Federal Claims will proceed.[14] All other petitions will be dismissed.[15]

Barbados and Its Progeny

Seminal Case–Barbados

The preceding tax provisions regarding which partners may seek judicial review, and when, seem fairly straightforward at first blush. However, additional analysis of the relevant case law reveals that these provisions are anything but clear. Indeed, they are downright murky, which can lead to potential problems for uninformed partners and their representatives. This murkiness stems from a controversial decision by the Tax Court in 1985, *Barbados #6 Ltd.*[16]

The relevant facts in *Barbados* are as follows. The IRS audited Barbados #6 Ltd. Upon conclusion of the audit, the IRS disallowed approximately $1.8 million in partnership interest expense and increased the partnership's income by $10,000. On June 18, 1984, the IRS issued an FPAA to the TMP proposing such adjustments. The TMP mailed its petition to the Tax Court on September 21, 1984, which was 95 days after the FPAA was issued. In response, the IRS filed a motion to dismiss based on the theory that the TMP failed to timely file its petition within the 90-day period set forth in Code Sec. 6226(a). Soon thereafter, the TMP submitted a motion for leave to file an amended petition and to change the caption in the case. In support of its motion, the TMP argued that it had the right to file a petition within 150 days of the issuance of the FPAA pursuant to Code Sec. 6226(b) because it was *both* the TMP of, and a notice partner in, the partnership. In essence, the TMP contended that it wore "two hats," and while it may have missed the 90-day deadline to file as a TMP, it was still entitled to file within the subsequent 60-day period as a notice partner.[17]

The Tax Court held in favor of the TMP. In justifying its decision, the court explained that the thrust of the statutory scheme is to get the partnership and all interested parties into court in one proceeding so that time and resources are not wasted in repetitive litigation.[18] The court went on to explain that this scheme allows "extra leeway" in cases where the TMP is also a notice partner, thereby ensuring that the partnership will have "its prepayment day in the Tax Court."[19] In a footnote, the court expanded on this notion:

> Indeed to hold otherwise would verge on the unconscionable in these circumstances for it would effectively deny any judicial review at the partnership level in these cases since a subsequent petition filed with the United States District Court or Claims Court would not be timely.[20]

A careful reading of *Barbados* would lead one to conclude that the Tax Court had the best of intentions in rendering its decision; it interpreted Code Sec. 6226(b)(1) liberally in order to protect the partners. In *Barbados*, the TMP did not file within the 90-day period provided in Code Sec. 6226(a), and no other eligible partner (*i.e.*, notice partner or five-percent group) filed within the following 60-day period. If the court in *Barbados* had strictly construed Code Sec. 6226(b)(1), the affected partners would never have had the opportunity to seek judicial review of the FPAA. By determining that the TMP-as-notice-partner petition was timely, the Tax Court ensured that it had jurisdiction over the case and permitted the remaining affected partners to participate in the litigation by filing the necessary "notices of election to participate out of time."[21]

The Evolution of Barbados

Since its issuance some two decades ago, *Barbados* has been cited in several cases. Sometimes *Barbados* was raised by the taxpayer; on other occasions, the Tax Court itself referenced the case. The relevant cases are surveyed below.[22]

Summerland P'ship, 56 TCM 759, Dec. 45,192(M), TC Memo. 1988-548

The IRS issued an FPAA. More than 90 days later, but within the 150-day period under Code Sec. 6226(b), the *alleged* TMP filed a petition in the Tax Court. In response, the IRS filed a motion to dismiss for lack of jurisdiction, arguing that the person who filed the petition was not, in fact, the TMP. The IRS claimed that it used the largest-profits-interest rule to designate the TMP because the relevant Form 1065 did not designate one.[23] The court denied the IRS's motion without prejudice because it did not contain many of the necessary supporting documents. The courted noted, though, that the petition should be regarded as that of a notice partner (instead of the TMP) because it was filed after the 90-day period provided in Code Sec. 6226(a). In doing so, the relied on *Barbados*:

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> We note, however, that because the petition [that the TMP] filed as tax matters partner appears to have been filed beyond the 90-day period provided in Section 6226(a)(1) it may be appropriate to regard his petition as that of a notice partner, filed within the 60-day period provided by Section 6226(b)(1). *Barbados #6 Ltd. v. Commissioner*, 85 T.C. 900, 904-905 (1985). If the petition was not filed within the 90-day period, the motion that perhaps should be filed by either [the TMP] or [the IRS] is a motion to change the caption on the instant joint petition to reflect that the document is to be treated as a petition filed by a notice partner pursuant to Section 6226(b)(1).

Modern Computer Games, Inc., 58 TCM 23, Dec. 46,002(M), TC Memo. 1989-483

The IRS issued an FSAA.[24] Within 90 days, a person filed a petition in the Tax Court as the TMP. Neither the person who filed the petition nor anybody else had been expressly appointed as the TMP. However, the board of directors had appointed the person who filed as the "representative" for dealing with the audit. The IRS presented a motion to dismiss based on the fact that the person who filed the petition was not the TMP. The court denied the IRS's motion, reasoning that the key issue was not whether the filing party was the TMP, but rather whether the filing party had the authority to file the petition. Although not directly related to its ultimate decision, the court noted the following:

> After the expiration of the 90-day period provided in Section 6226(a)(1), a TMP, who is also a notice partner, may file a petition as a notice partner within the 60-day period provided in Section 6226(b)(1). *Barbados #6 Ltd. v. Commissioner*, 85 T.C. 900, 904-905 (1985)

Amesbury Apartments, Ltd., 95 TC 227, Dec. 46,857 (1990)

The IRS issued an FPAA to a limited partnership with two general partners whose ownership interests were equal, Partner One and Partner Two. Ninety-two days later, Partner Two filed a petition in the Tax Court as TMP. Within 60 days after the close of the 90-day period, Partner Two filed another petition, this time as a notice partner. The partnership did not designate a TMP and the two general partners had equal ownership interests. Therefore, Partner One, whose name came first alphabetically, was the TMP.[25] Because Partner Two was not the TMP, his first petition as TMP was not valid. However, the court held that the second petition filed by Partner Two as a notice partner was timely under Code Sec. 6226(b). In rendering its decision, the court gave substantial credence to the seminal case:

> In *Barbados #6 Ltd. v. Commissioner*, 85 T.C. 900 (1985), we held in a Court-reviewed opinion that a petition which was not filed timely by a TMP since it was not filed within the 90-day period, could nevertheless be timely filed as a notice partner petition by the same taxpayer under Section 6226(b).
>
> Accordingly, although [Partner Two] failed to file a timely petition as TMP since that general partner was not the TMP, we hold that [Partner Two] as a notice partner, timely filed the petition . . . within the 60-day period provided in Section 6226(b)(1). *See Barbados #6 Ltd. v. Commissioner*, *supra* at 904.

A careful reading of *Barbados* would lead one to conclude that the Tax Court had the best of intentions in rendering its decision; it interpreted Code Sec. 6226(b)(1) liberally in order to protect the partners.

Triangle Investors Ltd. P'ship, 95 TC 610, Dec. 47,016 (1990)

The IRS issued an FPAA. The TMP then filed a petition in the Tax Court after both periods described in Code Secs. 6226(a) and (b) had expired. The IRS filed a motion to dismiss. In granting the IRS's motion, the court noted that, despite a certain amount of confusion regarding when and to whom the FPAA was sent, the TMP had another remedy. In particular, the TMP received a copy of the FPAA approximately 100 days after it was issued, thereby leaving 50 days in the period described in Code Sec. 6226(b) during which the TMP could have filed as a notice partner. The court referred to *Barbados* in pointing out the TMP's folly:

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Notwithstanding [the TMP's] failure to furnish the appropriate IRS office with information regarding the partnership's current address, resulting in his failure to receive the FPAA in time to file a petition as alleged TMP, we note that he had another remedy available, of which he failed to avail himself. [The TMP] acknowledges receiving a copy of the FPAA on or about September 4, 1989, 50 days prior to the expiration of the 60-day period for notice partners to file petitions for readjustment. Regardless of his status as TMP . . . [he] was also entitled to file a petition as a notice partner and had ample time to do so. *See Barbados #6 Ltd. v. Commissioner*, 85 T.C. 900 (1985). Such action if taken would have protected not only his own interest but that of the partnership.

***Thermal Energy Concepts, Inc.*, 66 TCM 1368, Dec. 49,413(M), TC Memo. 1993-541**

On December 29, 1989, the IRS issued an FSAA with respect to tax year 1983.[26] In May 1990, the TMP filed a petition in the Tax Court. In a footnote, the court simply indicated that it considered the petition to be timely filed by the TMP as a notice partner, not as the TMP. Without any further discussion on the issue, the note stated that "[p]ursuant to sec. 6226(b)(1), we consider the petition to be timely as filed by [the TMP] as a notice person, not TMP. *See Barbados #6 Ltd. v. Commissioner*, 85 T.C. 900 (1985)."

***Doctors Hospital Real Estate, Ltd.*, 67 TCM 2591, Dec. 49,761(M), TC Memo. 1994-143**

The IRS issued an FPAA. Approximately 98 days later, the TMP filed a petition with the Tax Court. Again, in a footnote, the court explained that the petition was timely under Code Sec. 6226(b) because the TMP was filing as a notice partner, in accordance with *Barbados*:

> The tax matters partner of a partnership has 90 days from the date the FPAA was mailed in which to file a petition. Sec. 6226(a)(1). If the tax matters partner does not file a petition within that 90-day period, any notice partner of the partnership may file a petition within 60 days after the close of the 90-day period. Sec. 6226(b)(1). The tax matters partner of a partnership may also be a notice partner. *Barbados # 6 Ltd. v. Commissioner,* 85 T.C. 900 (1985). Although petitioner filed the petition after the close of the 90-day period, it is nonetheless timely because petitioner filed the petition within the following 60 days and petitioner is a notice partner of [the partnership].

***Hoyt and Sons Ranch Properties, Ltd.*, 75 TCM 1850, Dec. 52,588(M), TC Memo. 1998-77**

The partnership declared bankruptcy. Some 14 months later, the IRS issued an FPAA related to tax year 1992. On April 2, 1997, the IRS issued another FPAA, this one related to tax year 1993. Approximately three months later, the bankruptcy court issued an order releasing the bankruptcy automatic stay so that the TMP could file a petition with the Tax Court. He did so on July 21, 1997, contesting each of the FPAAs. Based on *Barbados*, the IRS conceded at trial that the petition regarding 1993 was valid under Code Sec. 6226(b). The court stated the following on this issue:

> [The IRS] now concedes that the petition for readjustment is timely with respect to the FPAA for 1993 because the petition was filed by [the TMP], who is also a notice partner, within the 60-day period prescribed in section 6226(b)(1). *See Barbados # 6 Ltd. v. Commissioner,* 85 T.C. 900, 904, 1985 WL 15419 (1985). (Consistent with this concession, we shall deny respondent's Motion to Dismiss for Lack of Jurisdiction insofar as the taxable year 1993 is concerned.)

Seemingly Inconsistent Legal Authority

Most tax practitioners have many legal resources, including Tax Court reporters and electronic research services. Those who specialize in tax litigation also may have a good understanding of how to search for the decisions available on the Tax Court's website. By contrast, those who are not commonly embroiled in tax disputes may not have ready access to such tools. This category includes the enormous number of people who invest in limited partnerships, become notice partners, take no active role, and rely on the TMP to handle all the tax-related matters. It is also likely that taxpayers who represent themselves *pro se*, as they frequently do in Tax Court proceedings, will not have these items at their disposal. Therefore, these groups may turn to other sources in an attempt to comprehend where, when and how to file a petition in response to an FPAA. These sources,

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which are described below, could lead them to an inaccurate conclusion, especially when it comes to the function and rights of notice partners and five-percent groups.

If one were to examine the relevant provisions in the Internal Revenue Code, she would encounter the following:

> **Section 6226(a). Petition *by tax matters partner*.**
>
> Within 90 days after the day on which a notice of a final partnership administrative adjustment is mailed to the tax matters partner, *the tax matters partner* may file a petition for a readjustment of the partnership items for such taxable year with (1) the Tax Court, (2) the district court of the United States for the district in which the partnership's principal place of business is located, or (3) the Court of Federal Claims.[27]
>
> **Section 6226(b). Petition *by partner other than tax matters partner.***
>
> (1) In general. If the tax matters partner does not file a readjustment petition under subsection (a) with respect to any final partnership administrative adjustment, *any notice partner (and any 5-percent group)* may, within 60 days after the close of the 90-day period set forth in subsection (a), file a petition for a readjustment of the partnership items for the taxable year involved with any of the courts described in subsection (a).[28]

Reading these two provisions together, one may conclude that the TMP has the exclusive first opportunity to file a petition under Code Sec. 6226(a) and, if the TMP fails to do so within the allotted time, then any notice partner or five-percent group is authorized to file a petition under Code Sec. 6226(b)(1). This interpretation would be consistent with the plain meaning doctrine.[29] It would seem to give proper deference to the titles of the provisions, too.[30]

If one were to look further in Code Sec. 6226, she would come across Code Sec. 6226(b)(6), which states the following:

> **Tax matters partner may intervene.** The tax matters partner may intervene in any action brought under this subsection [*i.e.*, 6226(b)].[31]

If there were any lingering confusion after reading Code Sec. 6226(a) and Code Sec. 6226(b)(1), the aforementioned provision would seem to provide some clarity. A basic rule of statutory interpretation is that an entire provision should be read such that no clause, sentence or word is rendered superfluous or void.[32] Thus, Code Sec. 6226—including Code Secs. 6226(a), 6226(b)(1) and 6226(b)(6)—must be reviewed as a whole. Code Sec. 6226(b)(6) plainly states that the TMP may intervene in *any* action brought under Code Sec. 6226(b). If Code Sec. 6226(b)(1) were construed loosely to allow the TMP to file a petition during the 60-day period, then Code Sec. 6226(b)(6) would become invalid. One would find herself asking the following question: How could a TMP intervene in an action that it personally brought? Faced with this nonsequitur, one may conclude that Code Sec. 6226(b)(1) is not available to a TMP.

> The uncertainty caused by the apparent inconsistency between *Barbados*, on one hand, and the primary and secondary sources described [in this article], on the other, could be remedied by narrowly interpreting *Barbados*.

If matters were still uncertain, a thorough person may consult various secondary sources, such as the legislative history, bluebook, Internal Revenue Manual, language in the FPAA, and/or the Tax Court Rules. These items would likely lead to the same conclusions as those derived from examining Code Sec. 6226. The congressional conference report explains the following with respect to petition filing:

> The TMP, within 90 days after the mailing of the notice of FPAA, may file a petition for readjustment of partnership items in the Tax Court, the district court of the United States for the district in which the partnership's principal place of business is located, or the Claims Court. During such 90-day period, no other partner may file a petition for a judicial review. If the TMP does not file a petition, any notice partner or 5-percent group with an interest in the outcome may within 60 days following such 90-day period file a petition with any of the courts in which the TMP may file a petition.[33]

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The bluebook, which is a description of the legislation by the tax experts on the bipartisan U.S. Joint Committee on Taxation, is even clearer on this issue. It states the following:

> Within 90 days after notice of an FPAA, *the TMP* may file a petition for judicial review. *Other partners* may not file suit during the 90-day period. Upon expiration of the 90 days, if the TMP does not file a petition, *any other partner* may file.[34]

The Internal Revenue Manual serves as the single, official source of IRS instructions to staff.[35] As a testament to its relevance, the U.S. Supreme Court has cited the Internal Revenue Manual as authority.[36] Like the legislative history and bluebook, the Internal Revenue Manual appears to draw a distinction between the types of partners that may file petitions under Code Sec. 6226(a) and Code Sec. 6226(b)(1):

> If *the TMP* does not file a petition within the first 90 days after the FPAA was mailed, a petition may be filed within 60 days from the close of the 90 day period by *any notice partner or 5 percent group*.[37]

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The FPAA itself explains the relevant rules in clear terms, focusing on the order in which petitions may be filed. It provides the following guidance:

> If you are the TMP of the partnership and want to contest the adjustments in court, you must file a petition within 90 days of the date of this letter. During this 90-day period, no other partner may file a petition for judicial review . . . . If the TMP doesn't file a petition by the 90th day from the date the FPAA was mailed, any partner or any 5 percent group entitled to receive this notice may petition of these courts.[38]

Finally, the Tax Court Rules of Practice and Procedure contain various rules that delineate between the types of actions filed. For instance, Rule 240(c)(1) states that the Tax Court does not have jurisdiction over a partnership action unless the IRS has issued a valid FPAA and a petition is filed "*by the tax matters partner* within the period specified in Code Sec. 6226(a), or *by a partner other than the tax matters partner* subject to the conditions and within the period specified in Code Sec. 6226(b)." Moreover, Tax Court Rule 241(d)(3) sets forth special rules for petitions filed by "a partner other than a tax matters partner." In addition to the standard requirements, these types of petitions must contain separate numbered paragraphs (1) stating that the petitioner is a notice partner or a representative of a five-percent group, (2) setting forth the facts establishing that the petitioner has an interest in the outcome of the case, (3) providing the name and current address of the TMP, and (4) confirming that the TMP has not filed a petition within the specified in Code Sec. 6226(a).

A Possible Solution and Existing Complications

Limiting Barbados to Specific Situations

The uncertainty caused by the apparent inconsistency between *Barbados*, on one hand, and the primary and secondary sources described above, on the other, could be remedied by narrowly interpreting *Barbados*. In that case, the TMP did not file a petition within the 90-day period provided in Code Sec. 6226(a). No notice partner or five-percent group filed within the following 60-day period. If the court had not construed the law such that the TMP was entitled to don his notice-partner hat, the result would have been devastating: the affected partners would never have had an opportunity to seek judicial review of the FPAA. A careful reading of the decision reveals that the court may have intended for *Barbados* to have limited applicability. The biggest clue in this regard is the following statement:

> [T]o hold otherwise would verge on the unconscionable *in these circumstances* for it would effectively deny any judicial review at the partnership level in these cases since a subsequent petition filed with the United States District Court or Claims Court would not be timely.[39]

Let's re-examine the precise circumstances in *Barbados*. The TMP filed its petition outside the initial 90-day period, no other partner or group filed a petition in any court, and the partnership faced the prospect of having no forum in which to dispute the IRS's proposed adjustments. If the courts were to rely on *Barbados* only under similar circumstances, few problems would flow.

Complications arise, though, when *Barbados* is applied more broadly, particularly in situations where the TMP fails to file within the 90-day period under Code Sec. 6226(a), and then the TMP and at least one notice partner or five-percent group files a petition

during the subsequent 60-day period under Code Sec. 6226(b)(1). Three principal complications are described below.

Confined to a Unfavorable Forum

Selecting the most advantageous forum is paramount in all types of litigation, and tax disputes are no exception. Under Code Sec. 6226, a petition contesting an FPAA may be filed with the Tax Court, the U.S. District Court for the district in which the partnership's principal place of business is situated, or the Court of Federal Claims. No jury is available in any of these courts for TEFRA cases; therefore, whether or not a case has "jury appeal" is not a consideration.[40] However, it is important to analyze which court has the most favorable precedent, discovery procedures, trial calendar, etc. The ability to present a TEFRA case in the most desirable forum may be undermined if *Barbados* is broadly applied.

Say the TMP does not file a petition within the 90-day period under Code Sec. 6226(a). Believing that they thus had the right to essentially choose the forum in which to file under Code Sec. 6226(b)(1), the notice partners invest considerable time and effort in researching the precedent in each potential court, drafting the petition, and making various initial strategic decisions. For reasons germane only to their particular case, the notice partners decide that the U.S. District Court represents the most advantageous place to conduct the partnership litigation. Accordingly, one of the notice partners files a petition in the proper U.S. District Court on day 58 of the 60-day period under Code Sec. 6226(b)(1). Unaware of this petition, the TMP files a separate petition with the Tax Court on day 59 of the 60-day period. Although the notice partner filed first, the priority rules dictate that the TMP's petition will go forward since it was the first action brought in the Tax Court.[41] The result is that the case is now before a court not selected by the notice partners after careful analysis.

What's more, the case cannot be transferred from the Tax Court to the U.S. District Court, even if the TMP and the notice partners later all agree that this would be preferable. Code Sec. 6226(h) generally provides that a dismissal of an action shall be considered a decision by the court that the IRS's proposed adjustments in the FPAA are correct, and the court shall enter an order to this effect.[42] Lest there be any doubt on this issue, the legislative history states that "[d]ismissal of an action other than a dismissal for lack of jurisdiction shall be considered a decision that the FPAA is correct."[43] The courts have held that involuntary dismissals of actions brought under Code Sec. 6226 lead to a court order that the FPAA was correct.[44] The courts also have applied this rule in cases where taxpayers voluntarily dismissed certain TEFRA actions.[45] This rule can lead to harsh results for taxpayers. Take, for example, *H.D. Nunez*.[46] In that case, together two petitioners, Mr. Nunez, as a notice partner in Cle-Jo Records Partnership, and Cle-Jo Records Partnership itself, filed a petition for readjustment of the FPAA. Approximately two years later, Mr. Nunez and the IRS filed a stipulation with the court indicating that the petition shall be dismissed under Code Sec. 6226(h). The stipulation was entitled "Stipulation for Dismissal of Petition for Redetermination *on Behalf of Henry D. Nunez Only* and Order Thereon." The court approved the stipulation and issued an order stating that, pursuant to Code Sec. 6662(h), the FPAA was deemed correct. The case then continued until it reached the pre-trial stage. At the pre-trial conference, both the IRS and the District Court questioned whether the case had already been resolved by the voluntary dismissal. The District Court held that nothing in the TEFRA rules provides that a partnership (such as the Cle-Jo Records Partnership) is a proper party to an action. It further held that, because the voluntary stipulation for dismissal was entered into by Mr. Nunez as a notice partner, "the stipulation and the order effectively dismissed *the entire action* pursuant to Code Sec. 6226(h)."[47]

Notice Partners Dissuaded from Filing Petitions

Interpreting *Barbados* broadly could lead to other complications, too. For instance, if the TMP of a partnership were to file a petition in the Tax Court during the 60-day period under Code Sec. 6226(b)(1) ostensibly in its capacity as a notice partner, and if the (other) notice partners were aware of *Barbados*, such partners likely would be disinclined to file another petition. This is because the priority rules dictate that, in the case of multiple petitions, only the first action brought in the Tax Court goes forward, while the others are dismissed.[48] Instead of incurring the costs to prepare and file another petition, the partners may be more apt to simply file a "notice of election to participate" in the existing case pursuant to the Tax Court rules.[49] If it later turns out that the TMP was not a notice partner as it alleged, the court would not have jurisdiction over the matter and the deadline for filing petitions would have lapsed.

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An illustration of this scenario is found in *Government Arbitrage Trading Co.*, whose facts are as follows.[50] On October 24, 1991, the IRS issued the FPAA. Approximately 140 days later, the TMP filed a petition with the Tax Court, supposedly as a notice partner. It subsequently was discovered that the TMP only had a one-half percent ownership interest in the partnership. The court explained that, in order to file within the 60-day period described in Code Sec. 6226(b)(1), the person must be a notice partner. Because the TMP's ownership interest was less than the requisite one percent, the TMP was not a notice partner. As a result, the action was dismissed and none of the partners who disagreed with the FPAA had a remedy. The Tax Court was cognizant of the severe consequences, yet unwilling to rewrite the Internal Revenue Code:

> Congress has provided for limited access to the courts to raise any and all issues based upon an adjustment to a partnership return within the 90 days after mailing of the FPAA to the tax matters partner, plus a 60-day period for any notice partner. This court is one of limited jurisdiction. Our jurisdiction is created by statute and we cannot expand that jurisdiction. If any inequity results as a consequence of petitioner's failure to timely file a petition, it is his own fault. This court cannot extend the explicit statutory authority to acquire jurisdiction. Only Congress can revise the law.[51]

All Partners Forced to Pay In Advance

As mentioned above, a broad interpretation of *Barbados* could result in other partners not filing a petition once the TMP, as a notice partner, files an initial petition. Unbeknownst to many partners, such inaction could have a serious financial impact on them. Code Sec. 6226 allows a petition to be filed in the Tax Court, the proper U.S. District Court, or the Court of Federal Claims. The first does not necessitate a deposit; it is a pre-payment forum. The latter two require a toll charge, so to speak. A TEFRA action may be brought in the proper U.S. District Court or the Court of Federal Claims only if the partner filing the petition deposits with the IRS, on or before the day the petition is filed, the amount by which such partner's tax liability would increase if the adjustments in the FPAA were deemed to be correct.[52] In the case of a petition filed by a five-percent group, the deposit requirement applies to each member of the group.[53]

Code Sec. 6225(a) generally provides that the IRS may not assess a deficiency attributable to any partnership item and may not take collection actions until the court decision becomes final, provided that the TEFRA proceeding was brought "in the Tax Court" under Code Sec. 6226. The absence of the U.S. District Court and the Court of Federal Claims from this provision is significant. In essence, the restriction on assessments related to partnership adjustments against *all partners* applies only if the petition is filed in the Tax Court. If it is filed in either of the other two courts, Code Sec. 6225(a) does not serve to protect all partners. Thus, the IRS may proceed to assess the deficiency in the FPAA against all the partners, even if a timely petition was filed in the U.S. District Court or Court of Federal Claims and the appropriate deposit was paid by the partner filing the petition.[54]

As explained previously, there is a series of priority rules applicable to petitions filed under Code Sec. 6226(b). If more than one petition is filed in the Tax Court within the 60-day period, then the first petition filed will go forward.[55] If no petition is filed in the Tax Court during this period, then the first petition filed in either the proper U.S. District Court or the Court of Federal Claims will proceed.[56] Thanks to these priority rules, knowledgeable partners should be able to control their financial destiny to a certain degree. To avoid payment of the jurisdictional deposit, a notice partner or five-percent group could simply file a petition in the Tax Court, even if the TMP already filed in the U.S. District Court or Court of Federal Claims. A timely Tax Court petition trumps the others. However, those partners wrongly discouraged by *Barbados* and/or unacquainted with the priority rules could expose themselves to an immediate and unnecessary financial burden.

Conclusion

Dispute resolution under the TEFRA partnership rules can be a complicated affair, even for those who are familiar with normal audit procedures applicable to individuals and non-TEFRA entities. This complexity is exacerbated by the obscure fact that the TMP, in accordance with *Barbados*, can act as a chameleon. The TMP can file a petition for judicial review of the proposed partnership adjustments within 90 days of the issuance of the FPAA under Code Sec. 6226(a). Then, if this deadline passes, the TMP can change colors and file a petition within the following 60 days as a notice

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partner under Code Sec. 6226(b)(1). As this article demonstrates, the complications generated by these dual roles can be significant. To avoid such hitches, partners and their representatives should be mindful of *Barbados* and keep their eyes open for TMPs sporting two hats.

Endnotes

1 Code Sec. 6231(a)(3) and Reg. §301.6231(a)(3)-1.
2 Tax Equity and Fiscal Responsibility Act of 1982 (P.L. 97-248).
3 Code Secs. 6221 through 6234.
4 Code Sec. 6231(a)(7); Reg. §301.6231(a)(7)-1. In certain situations, the TMP can be designated by the IRS or the U.S. Tax Court.
5 Armand Grunberger, *Appointing the Right Tax Matters Partner Benefits All Partners,* 24 Tax'n for Law. 1 (July/Aug. 1995).
6 Code Sec. 6226(a).
7 Code Sec. 6231(a)(8); Code Sec. 6223(b).
8 Code Sec. 6231(a)(11); Reg. §301.6223(b)-1.
9 Code Sec. 6223(b)(2); Reg. §301.6223(b)-1.
10 Code Sec. 6223(a)(2); Code Sec. 6223(d).
11 Code Sec. 6226(a).
12 Code Sec. 6226(b).
13 Code Sec. 6226(b)(2).
14 Code Sec. 6226(b)(3).
15 Code Sec. 6226(b)(4).
16 *Barbados #6 Ltd.,* 85 TC 900, Dec. 42,522 (1985). This was a reviewed opinion from which four judges dissented. *Id.* at 910-914.
17 *Id.* at 905.
18 *Id.* at 906.
19 *Id.* at 906.
20 *Id.* at fn. 12.
21 *Id.* at 909; Tax Court Rule of Practice and Procedure 245(b), (c).
22 One relevant case, *Government Arbitrage Trading Co.,* 67 TCM 2551, Dec. 49,754(M), TC Memo. 1994-136, is discussed later in this article. Therefore, it is not addressed here.
23 Code Sec. 6231(a)(7)(A) and the regulations thereunder generally provide that the TMP is the general partner designated as such on the partnership's Form 1065 or on a separate statement filed with the proper IRS Service Center. If no such designation is made, Code Sec. 6231(a)(7)(B) provides that the general partner with the largest profits interest at the end of the relevant taxable year shall be the TMP. Reg. §301.6231(a)(7)-1(m)(2) clarifies that where there is more than one such partner, the partner whose name would appear first in an alphabetical listing shall be the TMP.
24 The acronym "FSAA" refers to a notice of final S corporation administrative adjustment. The Small Business Job Protection Act of 1996 made S corporations and their shareholders subject to non-TEFRA procedures for tax periods beginning after December 31, 1986.
25 *See* note 23, *supra.*
26 *See* note 24, *supra*, for an explanation of "FSAA."
27 Emphasis added.
28 Emphasis added.
29 *See, e.g., Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., et al.,* SCt, 467 US 837, 104 SCt 2778 (1984), 842-843 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.").
30 One canon of statutory construction is that a title or heading of a provision cannot limit plain meaning, but it can be used to interpret ambiguity in the provision. *See, e.g., FTC v. Mandel Bros., Inc.*, SCt, 359 US 385, 79 SCt 818, 1959 Trade Cas. (CCH) ¶69,342 (1959); *Emery Worldwide Airlines, Inc. v. United States*, Fed. Cl., 49 Fed. Cl. 211 (2001), *aff'd*, 264 F3d 1071 (Fed. Cir. 2001); *Montero-Martinez v. Ashcroft*, CA-9, 277 F3d 1137 (2001), n.6.
31 Emphasis added.
32 *Crawford v. United States*, Ct. Cl., 179 Ct. Cl. 128, 376 F2d 266, 272 (1967) ("it is a cardinal principle to give effect to every clause, sentence, and word of a statute, if possible, rather than to distort language so as to defeat plain intent of congress"); *TRW Inc. v. Andrews,* SCt, 534 US 19, 32, 122 SCt 441 (2001) ("it is a cardinal principle of statutory construction that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant'").
33 H.R. Conf. Rep. No. 97-760, 97th Cong., 2d Sess. (1982), pg. 603.
34 Staff of the Joint Committee on Taxation, Summary of the Revenue Provisions of H.R.4961 (The Tax Equity and Fiscal Responsibility Act of 1982), JCS-31-82 (Aug. 24, 1982) (emphasis added).
35 I.R.M. §1.11.2.1 (10-01-2005).
36 *United States v. Boyle*, SCt, 469 US 241, 105 SCt 687, 85-1 ustc ¶13602, fn. 1.
37 I.R.M. §4.31.1.4 (June 1, 2004) (emphasis added).
38 IRS letter 1830 (DO) (Rev. 3-2001).
39 *Barbados #6 Ltd., supra* note 16 at n. 12 (emphasis added).
40 Neither the Tax Court nor the Court of Federal Claims offers jury trials. By contrast, jury trials generally are available for refund actions in U.S. District Courts. 28 USC §§1396 and 1491. There is no pre-payment requirement to file a TEFRA petition in the Tax Court, but a person must deposit a specified amount in order to file in a U.S. District Court. Code Sec. 6226(e)(1). This deposit is not treated as a payment of tax under Code Sec. 6226(e)(3). Therefore, no refund jurisdiction exists.
41 Code Sec. 6226(b)(2).
42 This is similar to the rule in non-TEFRA proceedings. *See* Code Sec. 7459(d); U.S. Tax Court Rule of Practice and Procedure 123(d).
43 H.R. Conf. Rep. No. 97-760, 97th Cong., 2d Sess. 604 (1982).
44 *Treaty Pines Inv. P'ship,* CA-5, 92-2 ustc ¶50,418, 967 F2d 206; *J. Shapiro,* DC Fla., 96-2 ustc ¶50,667, 951 FSupp 1019.
45 *E.N. Callaway,* CA-2, 2000-2 ustc ¶50,744, 231 F3d 106; *H.D. Nunez,* DC Cal., 89-1 ustc ¶9304, 710 FSupp 745; *G.E. Miller,* 104 TC 378, 382-383, Dec. 50,555 (1995).
46 *H.D. Nunez, id.*
47 *Id.* at 746 (emphasis added).
48 Code Sec. 6226(b)(2).
49 Tax Court Rule of Practice and Procedure 245(b).
50 *Government Arbitrage Trading Co.,* 67 TCM 2551, Dec. 49,754(M), TC Memo. 1994-136.
51 *Id.* (internal citations omitted).
52 Code Sec. 6226(e)(1).
53 *Id.*
54 Although empowered to make such assessments, the IRS may decide against this course of action because the statute of limitations is suspended. Under Code Sec. 6229(d), if an FPAA is mailed to the TMP, the general three-year assessment period is halted for the 150-day period during which an action may be brought under Code Sec. 6226 (and, if a petition is filed, until the court decision becomes final), and for one year thereafter.
55 Code Sec. 6226(b)(2).
56 Code Sec. 6226(b)(3).

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