Current Federal Tax Developments

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SECTION: OPR
IRS UNVEILS VOLUNTARY TAX PREPARER REGISTRATION PROGRAM DESPITE COMPLAINTS OF AICPA AND NAEA, AICPA FILES SUIT TO BLOCK WHILE NATIONAL TAXPAYER ADVOCATE PRAISES THE PROGRAM

Citation: Revenue Procedure 2014-42, 6/30/14, AICPA Lawsuit Filing, 7/15/14 and Dismissal 10/28/14 (114 AFTR 2d ¶2014-5386) with later reversal of dismissal (CA DC, No. 14-5309), 10/30/15, again dismissed on remand 8/3/16, National Taxpayer Advocate's Objectives Re

The IRS unveiled a new voluntary Annual Filing Season Program in response to the Service's loss in the case of *Loving v. IRS,* 742 F.3d 1013,113 AFTR 2d 2014-867, (D.C. Cir. 2014) in its attempt to provide a mandatory preparer licensing program. The details of the new program are found in Revenue Procedure 2014-42, http://www.irs.gov/pub/irs-drop/rp-14-42.pdf. The program has drawn both praise and criticism (including the filing of a lawsuit to block its implementation).

However, despite initially having a suit filed by the AICPA to block the program thrown out at the District Court level, the IRS now faces having to defend the AICPA challenge as the Court of Appeals for the District of Columbia ruled the AICPA did have standing to bring suit and returned the case to the District Court for a trial.

The program is designed for preparers who not attorneys, CPAs or enrolled agents—what are referred to as "unenrolled preparers" generally. The ruling revokes, effective for returns and claims for refunds signed after December 15, 2015, Revenue Procedure 81-38.

That Revenue Procedure allowed unenrolled preparers to represent taxpayers in examination if they had prepared and signed the return under examination. Such individuals could not represent taxpayers beyond that level, including at appeals.

The new program will restrict this limited representation only to those unenrolled preparers who have an "Annual Filing Season Program Record ofCompletion" for calendar year in which the return was prepared and signed and for the year in which representation occurs. Thus, unenrolled preparers who wish to appear with their clients for exams will need to enter into this program and remain qualified under it.

The ruling notes that it "does not in any way affect or limit the ability of attorneys, CPAs, or EAs to represent taxpayers before the IRS. The rules governing the practice of such persons before the IRS are set forth in Circular 230." Or, to put it more directly, such individuals will not need to complete the Annual Filing Season Program in order to represent individuals in examinations.

The program will require individuals who wish to obtain the "Annual Filing Season Program Record of Completion" to complete an approved 6 hour federal tax refresher course each year and pass a written exam on the material in the course, scoring at least 70% on such an exam. Some individuals are exempted from having to take the exam. Those include:

- CPAs, EAs and attorneys;
- Individuals that passed the original RRTP examination;
- Tax return preparers licensed by a state or territory

As well, applicants must complete 18 hours of approved continuing education courses in the year prior to the application. This education must consist of 2 hours of ethics, 10 hours of federal tax law topics and 6 hours of federal tax updates. Those exempt from the 6 hour refresher course requirement must complete 15 hours of approved continuing education, with the main difference being that the tax update component is reduced to 3 hours.

Individuals entering this program must consent to the applicability of the provisions of Circular 230 governing representation before the IRS for the entire period covered by the Record of Completion.

Certain individuals are barred from the program (those not current in their filing obligations, those disbarred, suspended or disqualified from practice under Circular 230, etc.).

Individuals who obtain the Record of Completion are limited in how they advertise their achievement. Specifically the ruling holds:

> A tax return preparer who receives a Record of Completion may not use the term "certified," "enrolled," or "licensed" to describe this designation or in any way imply an employer/employee relationship with the IRS or make representations that the IRS has endorsed the tax return preparer. A tax return preparer who receives a Record of Completion for a calendar year may represent that the tax return preparer holds a valid Annual Filing Season Program Record of Completion for that calendar year and that he or she has complied with the IRS requirements for receiving the Record of Completion.

The program garnered an immediate negative response from the AICPA (http://www.aicpa.org/press/pressreleases/2014/pages/irs-proposed-voluntary-program-for-tax-preparers-is-unlawful-and-improper-says-aicpa.aspx). The AICPA called the program "unlawful and improper" in their news release.

The new release, citing a letter the AICPA sent to the IRS, makes the following points:

- First, no statute authorizes the proposed program;
- Second, the program will inevitably be viewed as an end-run around Loving v. IRS, (a federal court ruling rejecting an earlier IRS attempt to regulate tax return preparers);
- Third, the IRS has evidently concluded, in developing the proposed program, that it need not comply with the notice and comment requirements of the Administrative Procedure Act. This is incorrect; and
- Finally, the current proposal is arbitrary and capricious because it fails to address the problems presented by unethical tax return preparers, runs counter to evidence presented to the IRS, and will create market confusion.

The National Association of Enrolled Agents (NAEA) is also similarly unhappy with the program, also sending negative comments to the IRS about the program (http://www.naea.org/advocacy/comments-letters/Koskinen-voluntary-annual-preparer-certificate-program).

The use of the term "unlawful" caused many to believe that AICPA was going to file suit—and that belief was proved to be correct on July 15, 2014. On that date the AICPA filed suit, based on the points outlined in its letter, in the United States Federal District Court for the District of Columbia—a court that has dealt the IRS's tax return regulation apparatus two recent losses (the *Loving* case noted above and a later ruling on the issue of contingent fees in the *Ridgely* case the day after the AICPA filed its suit). The AICPA complaint was posted on their we bsite at http://www.aicpa.org/Advocacy/Legal/DownloadableDocuments/AICPA_v_IRS.pdf.

The IRS initially was successful in having the AICPA lawsuit dismissed. The ruling (*American Institute of Certified Public Accountants v. IRS, et al.*, DC Dist Col, 114 AFTR 2d ¶2014-5386) held that the AICPA did not have standing to challenge the program. However the ruling was overturned on appeal to the DC Circuit (Docket No. 14-5309) with the appellate Court finding that the AICPA had shown the issuance of this registration could cause an actual or imminent increase in competition from CPAs due to the new government program, with the listing allowing them to compete more effectively against CPAs and potentially take business away. Thus, the panel found, the AICPA had competitor standing to challenge the program.

The return to the District Court did not turn out favorably for the AICPA, as the case was again dismissed, but this time because the AICPA claim failed the "zone-of-injury" test for the statute under which they filed the suit. (*American Institute of Certified Public Accountants v. IRS et al.*; No. 1:14-cv-01190, USDC DC, 8/3/16)

As the opinion explains:

> As the Supreme Court articulated in Lujan v. National Wildlife Federation, 497 U.S. 871 (1990), the grievance or interest relevant to the "zone of injury" inquiry is a precise one: "[T]he plaintiff must establish that the injury he complains of (his aggrievement, or the adverse effect upon him) falls within the [relevant statute's] 'zone of interests.'" Id. at 883 (emphasis in original). Elaborating on this point, the D.C. Circuit has clarified that "on any given claim[,] the injury that supplies constitutional standing must be the same as the injury within the requisite 'zone of interests.'" *Mountain States Legal Found. v. Glickman*, 92 F.3d 1228, 1232 (D.C. Cir. 1996) (emphasis added); accord *Texas v. United States*, 809 F.3d 134, 163 (5th Cir. 2015) ("Texas satisfies the zone-of-interests test not on account of a generalized grievance but instead as a result of the same injury that gives it Article III standing."), aff'd by equally divided court sub nom. *United States v. Texas*, 136 S. Ct. 2271 (2016). This limitation is quite important here, as the only injury that currently supplies AICPA with constitutional standing -- competitive injury by way of brand dilution -- is a narrow one indeed.

The District Court on remand noted that the Court of Appeals had only granted the AICPA standing based on a "brand dilution" possibility under the program, even though the AICPA had primarily argued for "consumer confusion" as a harm under the program. The Court of Appeals had rejected the idea that "consumer confusion" had any impact on this case.

The District Court rejected the AICPA's arguments of harm via consumer confusion and the requirement to supervise unenrolled preparers, finding the Court of Appeals had not found issue with the Court's original conclusion that those do not give rise to a harm. Rather, the Court looks solely at the "dilution of the brand" concept for CPAs.

The Court held that the only valid theory would be that AICPA members are protected against unenrolled preparers by 5 USC §330(a). The Court then found that Congress's primarily goal in enacting the limitations on practice before the IRS found in 5 USC §330(a) was to protect consumers and not the preparers allowed to practice.

The Court continues:

> On the surface, it seems difficult to square AICPA's interest in dismantling the IRS's program with Congress's goal of safeguarding consumers. In creating the AFS Program, the IRS aimed to improve unenrolled preparers' knowledge of federal tax law, thereby "protecting taxpayers from preparer errors." Rev. Proc. 2014-42, § 2. This objective appears closely aligned with Congress's goal of ensuring taxpayers are provided "valuable service." 31 U.S.C. § 330(a)(2)(C). AICPA does not impugn the IRS's motive in creating the program or otherwise argue that, apart from the risk of "consumer confusion" -- i.e., that consumers might confuse a more-qualified but higher-priced CPA with a less-qualified but cheaper unenrolled preparer -- the AFS program does not flow logically from Congress's objective of protecting consumers. Rather, it seeks to eliminate the Program notwithstanding its potential benefit to consumers precisely because the program's "'government-backed credential[ ]'" renders "unenrolled preparers . . . 'better able to compete against other credentialed preparers,' 'uncredentialed employees of [AICPA] members,' and 'CPAs and their firms.'" Opp. at 10 (quoting AICPA II, 804 F.3d at 1197-98).
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> …AICPA has not offered "the slightest reason to think that [its members'] interest in getting more revenue by" eliminating the brand-diluting effect of the government's credential "will serve [§ 330(a)'s] purpose of protecting [consumer welfare]." HWTC IV, 885 F.2d at 924.

This may not be the final word on this issue, as the AICPA seems likely to attempt to return to the Court of Appeals with this matter one more time. As well, the Court indicated that, due to how the IRS moved, it is possible other parties with consumer protection standing might be able to challenge the program—but it's not clear who that party would be—and certainly not how the AICPA could craft an objection that would allow that organization to move forward if relief does not come on appeal.

Not all parties are complaining about the program. In her mid-year National Taxpayer Advocate's Objectives Report issued the same week the AICPA filed suit, the Taxpayer Advocate praised the IRS's attempts to impose standards on unenrolled preparers (http://www.taxpayeradvocate.irs.gov/userfiles/file/FY15-Full-Report/IRS-Steps-to-Create-a-Voluntary-Program-for-Tax-Return-Preparer-Standards.pdf). This isn't surprising as the Taxpayer Advocate had called for just such a voluntary program in her report last year.

However the Taxpayer Advocate continues to call for Congressional action to require regulation of all tax preparers under a system similar to the one thrown out by U.S. District Court for the District of Columbia in the *Loving* case.

SECTION: 162
DESPITE BEING UNEMPLOYED FOR THE LAST PART OF THE PROGRAM, DEDUCTION ALLOWED FOR EXPENSES RELATED TO MBA PROGRAM

Citation: Kopaigora v. Commissioner, TC Summary Opinion 2016-35, 8/2/16

One of the trickier areas to understand is when a taxpayer may or may not claim a trade or business deduction for education related expenses. In the case of *Kopaigora v. Commissioner*, TC Summary Opinion 2016-35 the IRS believed the taxpayer had not incurred deductible education expenses—but the Tax Court disagreed.

While ordinary and necessary expenses related to a trade or business are generally deductible under IRC §162, education expenses pose a couple of concerns. First, they must be expenses incurred once one is actually engaged in the trade or business in question (otherwise they won't meet the general §162 requirements) and they cannot be personal in nature (which would run afoul of the prohibition of deducting such expenses found in IRC §262).

To deal with these issues the IRS has issued regulations specifically related to education expenses as a business deduction found at Reg. §1.162-5. That regulations provides a general rule found at Reg. §1.162-5(a):

> (a) General rule. Expenditures made by an individual for education (including research undertaken as part of his educational program) which are not expenditures of a type described in paragraph (b) (2) or (3) of this section are deductible as ordinary and necessary business expenses (even though the education may lead to a degree) if the education -
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> > (1) Maintains or improves skills required by the individual in his employment or other trade or business, or
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> > (2) Meets the express requirements of the individual's employer, or the requirements of applicable law or regulations, imposed as a condition to the retention by the individual of an established employment relationship, status, or rate of compensation.

The two "barred" type of education deductions found in §1.162-5(b)(2) and (3) cited above are those that meet the minimum education requirements for a trade or business or those that qualify the taxpayer to enter a new trade or business (whether or not the taxpayer actually enters that new trade or business).

This case involves a taxpayer who took courses that would lead to a master's degree in business administration degree (MBA). At the time he originally enrolled in the program he was working as senior assistant controller for a hotel located near Los Angeles International Airport. The Court described his responsibilities as follows:

> Petitioner's duties included preparing financial reports, creating budgets, analyzing financial data, producing forecasts to enable reaction to business changes, and monitoring different departments' performances. Additionally, petitioner conducted audits, prepared an accounting of taxes, prepared financial reports according to generally accepted accounting principles (GAAP), enforced internal controls, reconciled balance sheets, and ensured compliance with reporting requirements.

He originally enrolled in the MBA program to improve his leadership skills in corporate finance and management. However, in April of 2011 his employment at the hotel was terminated. While he sought employment following his termination, he did not actually obtain new employment until September of 2012, just after he received his MBA.

His new position was vice president of finance at a small financing company. The Court described his duties there as follows:

> As vice president, petitioner was responsible for overseeing department managers, managing and leading a team of employees, supervising employees in daily issues of accounting, cash, risk, and business operations, and participating in hiring and training. Additionally, petitioner was responsible for auditing, accounting for taxes, setting up monthly reporting according to GAAP, and enforcing internal controls.

The IRS challenged his deduction of educational expenses on his 2011 income tax returns, putting forward three reasons for disallowance:

- He did not carry on a trade or business as he was unemployed for an indefinite period;
- The MBA degree was a general degree that did not maintain or improve the specific skills required for his trade or business; and
- The MBA degree qualified him for a new trade or business.

The Court disagreed with the IRS on all counts.

With regard to the challenge that he wasn't carrying on a trade or business, the court noted:

> ...[P]etitioner's unemployment did not prevent him from continuing his trade or business as a finance and accounting business manager for purposes of section 162. After petitioner's employment at Marriott LAX was terminated he actively sought employment within the corporate finance and accounting field for the remainder of his time at BYU, and his active job search paid off. Soon after he graduated from the EMBA degree program, petitioner was hired by another company to perform duties that were substantially similar to the duties of his former job.

As far as the IRS's final two complaints that the education was too general to be useful in his trade or business and that it qualified him for a new trade or business, the Court found:

> When his employment was abruptly terminated, he continued to take courses at BYU that improved his managerial and leadership skills--skills that were appropriate and helpful to his position as a business manager. The courses petitioner chose to fulfill his degree requirements did not qualify him for a new trade or business because he was not qualified to perform new tasks or activities with the conferral of his degree. Instead, petitioner chose courses in a line of study that he was familiar with--management and finance. Even though petitioner took a few courses that were outside this scope, we do not believe that these courses by themselves could have prepared him to enter a new trade or business.

It is important for the reader not to read too much into this ruling, but understand that it was a fact based determination applying the general rules found in the regulations. Certainly had Mr. Kopaigora not held a position for which MBA training would be helpful before he began his degree program it would have been unlikely he would have prevailed. Similarly, the case also reminds us that a mantra mistakenly learned that you can't claim the deduction if you obtain the degree clearly wasn't what prevailed here—nor should it have (note the regulation specifically allows that the attainment of a degree or failure to do so isn't what determines deductible status).

Rather each situation requires a consideration about whether the taxpayer's education relates to an existing trade or business and whether it would qualify the taxpayer for a trade or business he/she could not otherwise enter without the education.

SECTION: 163
HOME MORTGAGE DEBT AMOUNT LIMITATION APPLIES ON A PER TAXPAYER BASIS

Citation: Charles Sophy v. Commissioner and Bruce Voss v. Commissioner, 138 TC No. 8, 3/5/12, reversed, CA9, 116 AFTR 2d ¶ 2015-5128, 8/7/15, IRS Acquiesence AOD 2016-02, 8/1/16

In the consolidated cases of *Charles Sophy v. Commissioner* and *Bruce Voss v. Commissioner*, 138 TC No. 8, the Tax Court concluded that the $1,000,000 and $100,000 debt limitation on the deduction of home mortgage interest applies on a per residence, and not per taxpayer, basis. However, on appeal a divided Ninth Circuit Court of Appeals reversed the Tax Court's decision (Docket Nos. 16421–09, 16443–09).

That created a question regarding how the IRS would proceed outside the Ninth Circuit, especially given the split decision on the panel. However, in Action on Decision 2016-02 (AOD 2016-02; 2016-31 IRB 193) the IRS has decided to accept the application of this test on a per taxpayer basis, rather than applying a per residence test.

Original Tax Court Decision

Charles and Bruce jointly owned two residences they both occupied and on which mortgages existed. Each one claimed home mortgage interest deductions on the entire amounts paid on the mortgages. The mortgages in question totaled more than $1.1 million, but each taxpayer's ½ of the debt was less than the limitation.

The Tax Court disagreed with the taxpayer's view that the limitations in IRC §163(h)(3) applied on a per taxpayer basis, rather holding that if a property has multiple owners, the deductible interest is limited to $1.1 million of the overall debt, with each taxpayer then further limited to only being able to deduct his/her share of that reduced interest deduction.

Ninth Circuit Disagrees

On appeal two of three judges on the Ninth Circuit panel hearing the case disagreed with the Tax Court's view in this area.

The majority opinion notes that the statute doesn't explain how to handle this matter, noting:

> Discerning an answer from § 163(h) requires considerable effort on our part because the statute is silent as to how the debt limits should apply in co-owner situations.

And, in a footnote to this sentence the panel notes that the regulations don't help in this regard either:

> The relevant Treasury regulation, 26 C.F.R. § 1.163-10T, is also silent in this regard. The regulation provides a method of calculating qualified residence interest when the home debt exceeds the applicable debt limits in the statute, see id. § 1.163-10T(e), but it says nothing about how qualified residence interest should be calculated when there are multiple co-owners, whether married or unmarried.

The panel notes the Tax Court came to the same conclusion and, like this panel, had to search for an answer:

> The Tax Court rejected a per-taxpayer reading of the debt limit provisions because it discerned in § 163(h)(3) a general "focus" on the qualified residence, Sophy, 138 T.C. at 210, and a "conspicuous[ ] absen[ce]" of "any reference to an individual taxpayer," id. at 211. Because the debt limit provisions do not speak directly to the situation of unmarried co-owners, it was reasonable for the Tax Court to look beyond those provisions in an effort to understand how the provisions should be applied. Ultimately, however, these other provisions of the statute do not sway us.

Rather the Ninth Circuit majority concentrated on a parenthetical reference in the statute itself.

> The statute is mostly silent about how to deal with co-ownership situations, but it is not entirely silent. Both debt limit provisions contain a parenthetical that speaks to one common situation of co-ownership: married individuals filing separate returns. See id. § 163(h)(3)(B)(ii), (C)(ii). The parentheticals provide half-sized debt limits "in the case of a married individual filing a separate return." Congress's use of the phrase "in the case of" is important. It suggests, first, that the parentheticals contain an exception to the general debt limit set out in the main clause, not an illustration of how that general debt limit should be applied. At the same time, the phrase "in the case of" also suggests a certain parallelism between the parenthetical and the main clause of each provision: other than the debt limit amount, which differs, we can expect that in all respects the case of a married individual filing a separate return should be treated like any other case. It is thus appropriate to look to the parentheticals when interpreting the main clauses' general debt limit provisions.

Thus, the panel found, rather than being illustrative, that language outlined a treatment that is different from the norm for a married couple filing a joint return. The panel noted that Congress had specifically called out a special treatment for joint ownership when it created the first time homebuyer credit of §36 following the real estate crises.

Thus the panel found:

> As § 36 makes clear, Congress knows how to treat a group of unmarried taxpayers as a single taxpayer for purposes of a particular tax benefit or burden. Congress could have done so here, but tellingly it did not. Instead, Congress did what it has done many times before, using the same language it has used before: It eliminated what would otherwise be a significant discrepancy between separately filing and jointly filing married couples by expressly reducing the debt limits for spouses filing separately.
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> In sum, the married-person parentheticals' language, purpose, and operation all strongly suggest that § 163(h)(3)'s debt limit provisions apply per taxpayer, not per residence. Absent some contrary indication in the statute, then, we shall read the debt limit provisions as applying on a per-taxpayer basis.

So the panel allowed each taxpayer the full deduction.

One important item to note about this view is that it does serve to create a marriage penalty for this item, something the Tax Court's view did not create. The dissent actually points this out, noting that the majority became concerned with odd results for those who were not married, but ignored a similarly odd result for getting married (though, to be fair, the majority is correct that Congress has often done this).

What Practitioners Should Do

Originally this case created uncertainty for taxpayers outside the Ninth Circuit, since it was not clear that the IRS would accept this view. But just less than a year after the Ninth Circuit rendered its decision the IRS decided to accept the majority's decision as the proper one to be used nationwide.

Advisers with taxpayers who applied a per residence limit on mortgage interest deductions in prior years should consider suggesting those taxpayers file claims for refund on those prior years where the statute of limitations remains open.

SECTION: 1401
INDIVIDUAL, NOT BANKRUPTCY, ESTATE LIABLE FOR SELF-EMPLOYMENT TAX ON INCOME CHAPTER 11 BANKRUPTCY ESTATE ENTITLED TO

Citation: Sisson v. Commissioner, TC Memo 2016-143

We revisit a situation with an employee of the International Monetary Fund and self-employment taxes in the case of *Sisson v. Commissioner*, TC Memo 2016-143—but in this case the employee is not facing confirmation of a nomination for U.S. Treasury Secretary.

Mr. Sission, like former Treasury Secretary Timothy Geither, was an employee of the International Monetary Fund—and even though he is an employee, his payments for services as subject to self-employment tax rather than FICA and Medicare tax. As the opinion explains:

> The self-employment tax also has a special rule for services performed for international organizations in the United States by a United States citizen. Sec. 1402(c)(2)(C). Self-employment income is defined as the net earnings from self-employment derived by an individual. Sec. 1402(b). The net earnings from self-employment are defined as the gross income derived by an individual from any trade or business carried on by the individual, minus deductions. Sec. 1402(a). The term "trade or business" generally excludes the performance of service by an individual as an employee, but includes the performance of service in the United States by an individual United States citizen in the employ of an international organization. Sec. 1402(c), (c)(2). Because of this special rule of inclusion regarding service for international organizations, Charles Sisson's earnings from the IMF are considered self-employment income.

Mr. Sission was aware of this fact, but his issue involved a more general interaction of self-employment taxes, bankruptcy and provisions the Congress added to the IRC to clarify when the bankruptcy estate is liable for taxes.

Mr. Sission had filed for Chapter 11 bankruptcy and for the year in question his earnings were property of the bankruptcy estate. IRC §1398 governs the tax treatment of individuals in a Chapter 7 or Chapter 11 bankruptcy. IRC §1398(c)(1) provides that:

> (1) Computation and payment of tax
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> Except as otherwise provided in this section, the taxable income of the estate shall be computed in the same manner as for an individual. The tax shall be computed on such taxable income and shall be paid by the trustee.

The Court goes on to explain other relevant parts of §§1398 and 1399 as follows:

> Section 1398(e)(1) provides that the gross income of the estate includes the gross income of the debtor to which the estate is entitled under the Bankruptcy Code. Section 1398(e)(2) provides that the gross income of the debtor does not include any item to the extent the item is included in the gross income of the estate by reason of section 1398(e)(1). Section 1398(g) provides that the bankruptcy estate succeeds to and takes into account various tax attributes of the debtor, such as net operating loss carryovers. Section 1399 provides: "Except in any case to which section 1398 applies, no separate taxable entity shall result from the commencement of a case under title 11 of the United States Code."

Mr. Sission concluded that this meant that he would owe no Form 1040 style taxes on the IMF income, as the estate was entitled to the entire income from the IMF for the year.

However the Tax Court notes that the references above are to taxes computed on "taxable income" of the individual. The regular income tax, found in Chapter 1 of Subtitle A of the Internal Revenue Code, is based on

taxable income. But the self-employment tax is found in Chapter 2 and, as the Court notes, isn't computed on taxable income:

> By contrast to the tax under section 1, the self-employment tax is a tax on self-employment income. Sec. 1401(a). Self-employment income is defined as the net earnings from self-employment derived by an individual. Sec. 1402(b). The net earnings from self-employment are defined as the gross income derived by an individual from a trade or business, less deductions. Sec. 1402(a). Thus, the self-employment tax is not a tax on taxable income. It is therefore not the tax imposed on the bankruptcy estate by section 1398(c)(1). Section 1398 includes no other provision, apart from section 1398(c)(1), imposing tax liability on a bankruptcy estate. Because section 1398(c)(1) imposes the section 1 tax on the bankruptcy estate, but not the self-employment tax, we infer that Congress did not [*14] intend a bankruptcy estate to be subject to the self-employment tax. We conclude that a bankruptcy estate is not liable for the self-employment tax.

Thus, Mr. Sission is personally liable for payment of the self-employment taxes, and such payments would not be made out of the assets of the bankruptcy estate.

SECTION: 2704
IRS PROPOSES CHANGES TO REGULATIONS UNDER §2704 MEANT TO REVERSE KERR DECISION

Citation: REG-163113-02, 8/3/16

The IRS has issued proposed regulations governing limiting the use of certain liquidation restrictions in reducing the value of property for gift and estate purposes in REG-163113-02. These regulations attempt to breathe life back into IRC §2704 that was part of the "Chapter 14" provisions Congress added in 1990s.

The "Chapter 14" provisions were Congress's attempt in 1990 to eliminate the use of what they viewed as "artificial" valuation discounts by taxpayers in estate planning—effectively looking at items such as family limited partnerships. However the law and the implementing regulations proved rather ineffective in practice, as planners, taxpayers and state legislatures combined to make the provisions effectively toothless.

IRC Section 2704 is the focus of these regulations, which looks at "applicable restrictions" which will be effectively ignored for valuation purposes. IRC §2704(b)(2) provides:

> (2) Applicable restriction. For purposes of this subsection, the term "applicable restriction" means any restriction—
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> (A) which effectively limits the ability of the corporation or partnership to liquidate, and
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> (B) with respect to which either of the following applies:
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> (i) The restriction lapses, in whole or in part, after the transfer referred to in paragraph (1).
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> (ii) The transferor or any member of the transferor's family, either alone or collectively, has the right after such transfer to remove, in whole or in part, the restriction.

In Reg. §1.2704-2(b) the IRS defined an "applicable restriction" as follows:

> (b) Applicable restriction defined.
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> An applicable restriction is a limitation on the ability to liquidate the entity (in whole or in part) that is more restrictive than the limitations that would apply under the State law generally applicable to the entity in the absence of the restriction. A restriction is an applicable restriction only to the extent that either the restriction by its terms will lapse at any time after the transfer, or the transferor (or the transferor's estate) and any members of the transferor's family can remove the restriction immediately

> after the transfer. Ability to remove the restriction is determined by reference to the State law that would apply but for a more restrictive rule in the governing instruments of the entity. See section 25.2704-1(c)(1)(B) for a discussion of the term "State law." An applicable restriction does not include a commercially reasonable restriction on liquidation imposed by an unrelated person providing capital to the entity for the entity's trade or business operations whether in the form of debt or equity. An unrelated person is any person whose relationship to the transferor, the transferee, or any member of the family of either is not described in section 267(b) of the Internal Revenue Code, provided that for purposes of this section the term "fiduciary of a trust" as used in section 267(b) does not include a bank as defined in section 581 of the Internal Revenue Code. A restriction imposed or required to be imposed by Federal or State law is not an applicable restriction. An option, right to use property, or agreement that is subject to section 2703 is not an applicable restriction.

One of the IRS's key losses occurred in the case of *Kerr v. Commissioner*, 113 TC No. 30 (1999), *aff'd*, 292 F.3rd 490 (5th Cir. 2002) where the estate escaped the impact of IRC §2704 and the regulation based on the following:

- The rule only applies to the ability to liquidate the entire entity and not an individual equity holder's ability to force a redemption of his/her interest by the entity;
- The rule, as provided for in an exception found only in the regulation, only applies to a restriction that is more onerous than applies under state law (in *Kerr* the Court found the IRS wasn't looking to the correct state law provision in running this test);
- The application of default state law meant that a transfer to an assignee rather than to a partner is tested under the limitations a law imposes on an assignee; and
- The inclusion of a nonfamily member (a charity in the case of *Kerr*) meant that the family acting alone could not remove the restriction.

These regulations seek to reverse the *Kerr* holding in its entirety. The IRS, after 17 years, seems to have taken up the Tax Court on the invitation it gave in towards the end of the *Kerr* decision where the Court noted:

> We are mindful that the Secretary has been vested with broad regulatory authority under section 2704(b)(4). However, the regulations in place do not support a conclusion that the disputed provisions in the KFLP and KILP partnership agreements constitute applicable restrictions.

Normally we don't spend much time on proposed regulations that are not issued simultaneously as temporary regulation or contain a provision allowing taxpayers to rely on the regulations prior to their issuance as final regulations. But since these regulations affect estate planning which, by its nature, will be greatly impacted by any changes these proposed regulations deserve some study.

In this case, the proposed effective date would have these regulations apply to the lapse of any right created on or after October 8, 1990 that occurs on or after the date these rules are published as final in the *Federal Register*. Thus, a family limited partnership created today would have these apply when they are issued as final—and the nature of the planning in this area could mean it would be very difficult or even impossible to revise the plan to take these rules into account.

The proposed regulations would create three categories of entities that would be tested for application of "state law" restrictions. As the preamble notes:

> As a result, for purposes of the test to determine control of an entity and to determine whether a restriction is imposed under state law, the proposed regulations would provide that in the case of any business entity or arrangement that is not a corporation, the form of the entity or arrangement would be determined under local law, regardless of how it is classified for other federal tax purposes, and regardless of whether it is disregarded as an entity separate from its owner for other federal tax purposes. For this purpose, local law is the law of the jurisdiction, whether domestic or foreign, under

which the entity or arrangement is created or organized. Thus, in applying these two tests, there would be three types of entities: corporations, partnerships (including limited partnerships), and other business entities (which would include LLCs that are not S corporations) as determined under local law.

For purposes of "control" tests the proposed regulations provide:

> The proposed regulations would clarify, in § 25.2701-2, that control of an LLC or of any other entity or arrangement that is not a corporation, partnership, or limited partnership would constitute the holding of at least 50 percent of either the capital or profits interests of the entity or arrangement, or the holding of any equity interest with the ability to cause the full or partial liquidation of the entity or arrangement. Cf. section 2701(b)(2)(B)(ii) (defining control of a limited partnership as including the holding of any interest as a general partner). Further, for purposes of determining control, under the attribution rules of existing § 25.2701-6, an individual, the individual's estate, and members of the individual's family are treated as holding interests held indirectly through a corporation, partnership, trust, or other entity.

The current Reg §1.2704-1(c)(1) provides a special rule that applies if the transfer of the interest results in the lapse of a liquidation right. For instance, the transferor may have held a sufficient interest in the entity prior to the gift to unilaterally have forced liquidation, but the gift might serve to reduce the transferor's interest below that magic level. Thus the regulation as currently written provides:

> Except as otherwise provided, a transfer of an interest that results in the lapse of a liquidation right is not subject to this section if the rights with respect to the transferred interest are not restricted or eliminated.

The IRS now wants to impose a "three year" rule on the relief—that is, if the transferor doesn't survive the gift date by three years, the exception would no longer apply. The revised regulation would add the following language:

> The lapse of a voting or liquidation right as a result of the transfer of an interest within three years of the transferor's death is treated as a lapse occurring on the transferor's date of death, includible in the gross estate pursuant to section 2704(a).

The regulations also greatly modify the "local law" exception, effectively removing the current rule. Proposed Reg. §1.2704-2(b) would be revised to add the following at §1.2704-2(b)(2):

> (2) Source of limitation. An applicable restriction includes a restriction that is imposed under the terms of the governing documents (for example, the corporation's by-laws, the partnership agreement, or other governing documents), a buy-sell agreement, a redemption agreement, or an assignment or deed of gift, or any other document, agreement, or arrangement; and *a restriction imposed under local law regardless of whether that restriction may be superseded by or pursuant to the governing documents or otherwise.* For this purpose, local law is the law of the jurisdiction, whether domestic or foreign, that governs the applicability of the restriction. For an exception for restrictions imposed or required to be imposed by federal or state law, see paragraph (b)(4)(ii) of this section.

Reg. §1.2704-2(b)(4)(ii) provides a new, more nuanced, provision with regard to a restriction imposed under local law.

It retains a general local law rule, as Proposed Reg. §1.2704-2(b)(4)(ii) begins:

> (ii) Imposed by federal or state law. An applicable restriction does not include a restriction imposed or required to be imposed by federal or state law. For this purpose, federal or state law means the laws of the United States, of any state thereof, or of the District of Columbia, but does not include the laws of any other jurisdiction. A provision of law that applies only in the absence of a contrary provision in the governing documents or that may be superseded with regard to a particular entity (whether by the

shareholders, partners, members and/or managers of the entity or otherwise) is not a restriction that is imposed or required to be imposed by federal or state law.

All well and good so far—but the regulation goes on to then remove certain restrictions that the IRS appears to believe are created solely by state legislatures to enable estate tax reductions. The proposed regulation continues:

> A law that is limited in its application to certain narrow classes of entities, particularly those types of entities (such as family-controlled entities) most likely to be subject to transfers described in section 2704, is not a restriction that is imposed or required to be imposed by federal or state law. For example, a law requiring a restriction that may not be removed or superseded and that applies only to family-controlled entities that otherwise would be subject to the rules of section 2704 is an applicable restriction. In addition, a restriction is not imposed or required to be imposed by federal or state law if that law also provides (either at the time the entity was organized or at some subsequent time) an optional provision that does not include the restriction or that allows it to be removed or overridden, or that provides a different statute for the creation and governance of that same type of entity that does not mandate the restriction, makes the restriction optional, or permits the restriction to be superseded, whether by the entity's governing documents or otherwise. For purposes of determining the type of entity, there are only three types of entities, specifically, the three categories of entities described in § 25.2701-2(b)(5): corporations; partnerships (including limited partnerships); and other business entities.

The proposed regulations will add a list of specifically disregarded restrictions. The preamble describes these as follows:

> Under § 25.2704-3 of the proposed regulations, in the case of a family-controlled entity, any restriction described below on a shareholder's, partner's, member's, or other owner's right to liquidate his or her interest in the entity will be disregarded if the restriction will lapse at any time after the transfer, or if the transferor, or the transferor and family members, without regard to certain interests held by nonfamily members, may remove or override the restriction. Under the proposed regulations, such a disregarded restriction includes one that: (a) limits the ability of the holder of the interest to liquidate the interest; (b) limits the liquidation proceeds to an amount that is less than a minimum value; (c) defers the payment of the liquidation proceeds for more than six months; or (d) permits the payment of the liquidation proceeds in any manner other than in cash or other property, other than certain notes.

The preamble discusses the definition of “minimum value” as follows:

> “Minimum value” is the interest's share of the net value of the entity on the date of liquidation or redemption. The net value of the entity is the fair market value, as determined under section 2031 or 2512 and the applicable regulations, of the property held by the entity, reduced by the outstanding obligations of the entity. Solely for purposes of determining minimum value, the only outstanding obligations of the entity that may be taken into account are those that would be allowable (if paid) as deductions under section 2053 if those obligations instead were claims against an estate. For example, and subject to the foregoing limitation on outstanding obligations, if the entity holds an operating business, the rules of § 20.2031-2(f)(2) or 20.2031-3 apply in the case of a testamentary transfer and the rules of § 25.2512-2(f)(2) or 25.2512-3 apply in the case of an inter vivos transfer. The minimum value of the interest is the net value of the entity multiplied by the interest's share of the entity. For this purpose, the interest's share is determined by taking into account any capital, profits, and other rights inherent in the interest in the entity.

The preamble goes on to discuss additional disregarded restrictions, noting:

> A disregarded restriction includes limitations on the time and manner of payment of the liquidation proceeds. Such limitations include provisions permitting deferral of full payment beyond six months or permitting payment in any manner other than in cash or property.

The proposed rules provide special provisions related to notes, as the preamble continues:

> An exception is made for the note of an entity engaged in an active trade or business to the extent that (a) the liquidation proceeds are not attributable to passive assets within the meaning of section 6166(b)(9)(B), and (b) the note is adequately secured, requires periodic payments on a non-deferred basis, is issued at market interest rates, and has a fair market value (when discounted to present value) equal to the liquidation proceeds. A fair market value determination assumes a cash sale. See Section 2 of Rev. Rul. 59-60, 1959-1 C.B. 237 (defining fair market value and stating that "[c]ourt decisions frequently state in addition that the hypothetical buyer and seller are assumed to be able, as well as willing to trade . . ."). Thus, in the absence of immediate payment of the liquidation proceeds, the fair market value of any note falling within this exception must equal the fair market value of the liquidation proceeds on the date of liquidation or redemption.

Generally a "passive asset" under IRC §6166(b)(9)(B) is "any asset other than an asset used in carrying on a trade or business."

The proposed regulations note that exceptions to "applicable restrictions" apply to the new disregarded restrictions. The preamble notes:

> One of the exceptions applicable to the definition of a disregarded restriction applies if (a) each holder of an interest in the entity has an enforceable "put" right to receive, on liquidation or redemption of the holder's interest, cash and/or other property with a value that is at least equal to the minimum value previously described, (b) the full amount of such cash and other property must be paid within six months after the holder gives notice to the entity of the holder's intent to liquidate any part or all of the holder's interest and/or withdraw from the entity, and (c) such other property does not include a note or other obligation issued directly or indirectly by the entity, by one or more holders of interests in the entity, or by a person related either to the entity or to any holder of an interest in the entity.

The preamble goes on to note a special rule for operating entities in this case:

> However, in the case of an entity engaged in an active trade or business, at least 60 percent of whose value consists of the non-passive assets of that trade or business, and to the extent that the liquidation proceeds are not attributable to passive assets within the meaning of section 6166(b)(9)(B), such proceeds may include a note or other obligation if such note is adequately secured, requires periodic payments on a non-deferred basis, is issued at market interest rates, and has a fair market value on the date of the liquidation or redemption equal to the liquidation proceeds. A similar exception is made to the definition of an applicable restriction in proposed § 25.2704-2(b)(4).

The preamble goes on to describe the new test to be applied to determine if a non-family member equity holder will actually be considered as removing the family's ability to unilaterally remove a restriction, something that *Kerr* had allowed for a relatively minor interest held by a charity:

> In determining whether the transferor and/or the transferor's family has the ability to remove a restriction included in this new class of disregarded restrictions, any interest in the entity held by a person who is not a member of the transferor's family is disregarded if, at the time of the transfer, the interest: (a) has been held by such person for less than three years; (b) constitutes less than 10 percent of the value of all of the equity interests in a corporation, or constitutes less than 10 percent of the capital and profits interests in a business entity described in § 301.7701-2(a) other than a corporation (for example, less than a 10-percent interest in the capital and profits of a partnership); (c) when combined with the interests

> of all other persons who are not members of the transferor's family, constitutes less than 20 percent of the value of all of the equity interests in a corporation, or constitutes less than 20 percent of the capital and profits interests in a business entity other than a corporation (for example, less than a 20-percent interest in the capital and profits of a partnership); or (d) any such person, as the owner of an interest, does not have an enforceable right to receive in exchange for such interest, on no more than six months' prior notice, the minimum value referred to in the definition of a disregarded restriction. If an interest is disregarded, the determination of whether the family has the ability to remove the restriction will be made assuming that the remaining interests are the sole interests in the entity.

The regulation goes on to note that "disregarded restrictions" are ignored for purposes of determining the fair market value of the asset, noting:

> Finally, if a restriction is disregarded under proposed § 25.2704-3, the fair market value of the interest in the entity is determined assuming that the disregarded restriction did not exist, either in the governing documents or applicable law. Fair market value is determined under generally accepted valuation principles, including any appropriate discounts or premiums, subject to the assumptions described in this paragraph.

The proposed regulations also note an issue regarding a different treatment for the value of assets subject to IRC §2704 for purposes of a charitable or marital deduction. The preamble notes:

> Section 2704(b) applies to intra-family transfers for all purposes of subtitle B relating to estate, gift and GST taxes. Therefore, to the extent that an interest qualifies for the gift or estate tax marital deduction and must be valued by taking into account the special valuation assumptions of section 2704(b), the same value generally will apply in computing the marital deduction attributable to that interest. The value of the estate tax marital deduction may be further affected, however, by other factors justifying a different value, such as the application of a control premium. See, e.g., *Estate of Chenoweth v. Commissioner*, 88 T.C. 1577 (1987).
>
> Section 2704(b) does not apply to transfers to nonfamily members and thus has no application in valuing an interest passing to charity or to a person other than a family member. If part of an entity interest includible in the gross estate passes to family members and part of that interest passes to nonfamily members, and if (taking into account the proposed rules regarding the treatment of certain interests held by nonfamily members) the part passing to the decedent's family members is valued under section 2704(b), then the proposed regulations provide that the part passing to the family members is treated as a property interest separate from the part passing to nonfamily members. The fair market value of the part passing to the family members is determined taking into account the special valuation assumptions of section 2704(b), as well as any other relevant factors, such as those supporting a control premium. The fair market value of the part passing to the nonfamily member(s) is determined in a similar manner, but without the special valuation assumptions of section 2704(b).

Or, to put more directly, the preamble continues:

> Thus, if the sole nonfamily member receiving an interest is a charity, the interest generally will have the same value for both estate tax inclusion and deduction purposes. If the interest passing to nonfamily members, however, is divided between charities and other nonfamily members, additional considerations (not prescribed by section 2704) may apply, resulting in a different value for charitable deduction purposes. See, e.g., *Ahmanson Foundation v. United States*, 674 F.2d 761 (9th Cir. 1981).

As was noted earlier, the IRS wishes to apply these regulations to all transfers of property subject to restrictions that took place after the original effective date of IRC §2704 where the lapse takes place after the date the regulations are published as final in the *Federal Register*. Thus, unless the IRS were to add a "grandfathering" exception in the final regulations (something that would be risky to count on happening), these regulations impact

all existing arrangements and certainly must be considered when undertaking any new estate or gift planning for a taxpayer.

Be aware that these are proposed regulations—for now they do not affect any current lapses of restrictions and they have to be adopted as final regulations to ever have such an effect. The IRS could modify the regulations before they go final—which seems likely since these regulations are likely to draw numerous comments from the estate planning community—or they could be withdrawn and never become final.

SECTION: 6221
IRS RELEASES TEMPORARY AND PROPOSED REGULATIONS FOR ELECTING EARLY APPLICATION OF BBA PARTNERSHIP EXAM RULES

Citation: TD 9780, REG-105005-16, 8/4/16

The IRS has released temporary regulations (TD 9780) implementing the revised partnership examination procedures adopted as part of the Bipartisan Budget Reconciliation Act of 2016 (BBA). While the rules are not mandatory until years beginning on or after January 1, 2018, partnerships may elect to come under the rules for tax years beginning after November 2, 2015 and before January 1, 2018. [Section 1101(g)(4) of the BBA]

The proposed regulations are meant to provide information on making the election to come under the rules early.

The proposed regulations do answer one question that some had wondered about. Under the new rules, some partnerships that currently are required to have any examinations conducted under the older TEFRA examination rules will be able to elect out of the new BBA rules, and instead be examined under the "pre-TEFRA" rules. Such partnerships are ones that issue fewer than 100 K-1s (up from the 10 partner limit for escaping TEFRA status) and the partners must all be individuals, corporations (including certain types of foreign entities), or estates (with S corporations now joining the list of "acceptable" partners. [IRC §6221(b)(2)(C)]

Some had wondered if an entity that did not qualify as exempt from TEFRA exam status could elect to apply the new rules and the "opt-out" of the consolidated examination provisions found in BBA. Temporary Reg. §301.9100-22T(a) provides that an election opens up all of the BBA provisions except the "opt-out" rule found at IRC §6221(b). Thus, such partnerships will only be able to choose between TEFRA and the new BBA provisions for years beginning before January 1, 2018. After that point an eligible partnership would be able to "opt-out".

The temporary regulations require that an election to have the BBA rules apply early must be made in accordance with the temporary regulations and an election can only be revoked with the consent of the IRS. [Temporary Reg. §301.9100-22T(a)]

The regulation provides that an election is not valid if it "frustrates the purposes of Section 1101 of the BBA." The regulation also provides that an extension of time to file the election will be available under the late election relief provisions found at Reg. §301.9100-3. [Temporary Reg. §301.9100-22T(a)]

The regulations do provide some provisions to eliminate the possibility of having both BBA and non-BBA provisions apply to the same year. The preamble notes:

> Section 301.9100-22T(d)(2)provides exceptions to the definition of an eligible taxable year to avoid proceedings under both the TEFRA partnership procedures and the new partnership audit regime for the same partnership taxable year. To avoid these multiple proceedings, an election under these temporary regulations does not apply if the partnership has taken the affirmative step to apply the TEFRA partnership procedures with respect to the partnership return for that taxable year. This occurs when the tax matters partner has filed a request for an administrative adjustment for the partnership taxable year under section 6227(c) of the TEFRA partnership procedures with respect to a partnership taxable year. Similarly, an election under these temporary regulations also does not apply if a

partnership that is not subject to the TEFRA partnership procedures has filed an amended return of partnership income for the partnership taxable year.

The election under the regulation must be made within 30 days of the date of notification to the partnership, in writing, that the return of the partnership for an eligible tax year has been selected for examination. [Reg. §301.9100-22T(b)(1)] The fact that the IRS is allowing the election to be deferred until a return is actually selected for exam gives the IRS additional time to issue regulations that would govern such an exam.

Reg. §301.9100-22T(b)(2)(i) provides in general that "[t]he partnership makes an election under this section by providing a written statement with the words 'Election under Section 1101(g)(4)' written at the top that satisfies the requirements of paragraph (b)(2) of this section to the individual identified in the notice of selection for examination as the IRS contact regarding the examination."

The regulation continues to describe the election at Reg. §301.9100-22T(b)(ii) by noting:

> A statement making an election under this section must be in writing and be dated and signed by the tax matters partner, as defined under section 6231(a)(7) (prior to amendment by the BBA), and the applicable regulations, or an individual who has the authority to sign the partnership return for the taxable year under examination under section 6063, the regulations thereunder, and applicable forms and instructions. The fact that an individual dates and signs the statement making the election described in this paragraph (b) shall be prima facie evidence that the individual is authorized to make the election on behalf of the partnership.

Specific items to be included in the election include the following:

> (A) The partnership's name, taxpayer identification number, and the partnership taxable year for which the election is being made;
>
> (B) The name, taxpayer identification number, address, and daytime telephone number of the individual who signs the statement;
>
> (C) Language indicating that the partnership is electing application of section 1101(c) of the BBA for the partnership return for the eligible taxable year identified in the notice of selection for examination;
>
> (D) The information required to properly designate the partnership representative as defined by section 6223 as amended by the BBA, which must include the name, taxpayer identification number, address, and daytime telephone number of the partnership representative and any additional information required by applicable regulations, forms and instructions, and other guidance issued by the IRS;
>
> (E) The following representations--
>
> > (1) The partnership is not insolvent and does not reasonably anticipate becoming insolvent before resolution of any adjustment with respect to the partnership taxable year for which the election is being made;
> >
> > (2) The partnership has not filed, and does not reasonably anticipate filing, voluntarily a petition for relief under title 11 of the United States Code;
> >
> > (3) The partnership is not subject to, and does not reasonably anticipate becoming subject to, an involuntary petition for relief under title 11 of the United States Code; and
> >
> > (4) The partnership has sufficient assets, and reasonably anticipates having sufficient assets, to pay a potential imputed underpayment with respect to the partnership taxable year that may be determined as part of the BBA exam; and
> >
> > (F) A representation, signed under penalties of perjury, that the individual signing the statement is duly authorized to make the election and that, to the best of the individual's knowledge and

belief, all of the information contained in the statement is true, correct, and complete. [Temporary Reg. §301.9100-22T(b)(2)(ii)]

One a partnership files this election, the IRS will issue a Notice of Administrative Proceeding as required under IRC §6231(a)(1) "promptly" at some time 30 days after the receipt of the election. [Temporary Reg. §301.9100-22T(b)(2)(iii)]

While the BBA provisions also provide a revised method of filing requests for administrative adjustments, the temporary regulations provide that the IRS will not accept an election to use that mechanism for an eligible year beginning prior to January 1, 2018 until January 1, 2018. [Temporary Reg. §301.9100-22T(c)(2)]

After that date a partnership can elect to use the "new" system to file an administrative adjustment request for years beginning after November 2, 2018 and before January 1, 2018. The form and manner of making that election will be announced by the IRS, presumably sometime around January 1, 2018. [Temporary Reg. §301.9100-22T(c)(1), (3)]

However, if the partnership has previously filed either an administrative adjustment request under the TEFRA rules or an amended partnership return (for a partnership not subject to TEFRA) for the year in question, the partnership may not elect to use the BBA provisions for any Administrative Adjustment Request for that year. [Temporary Reg. §301.9100-22T(c)(2).

At the same time the temporary regulations were issued, the IRS issued identical proposed regulations. [REG-105005-16]