No. 23-

IN THE

Supreme Court of the United States

GAIL GOLDBERG and RONALD M. GOLDBERG,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Has the ruling of the Seventh Circuit rendered mandatory statutory notice requirements not relevant, with a consequence being that the protections provided by such notice provisions have been erased? Has the Seventh Circuit's ruling that is being appealed created a notice requirement that is different from the statutory notice requirement, and eliminated due process protections?

2, If the IRS proves that a spouse received a letter or another document, does it mean that it has proven without any further evidence that the other spouse knew about that document in question, and that knowledge of one spouse is imputed upon the other spouse automatically?

3. When the IRS has the burden of proving mailing (or if any other party has that burden), how is that proven? Can the Commissioner of the Internal Revenue Service meet its burden of proving that it mailed Notice of Beginning of Administrative Proceeding (NBAP) 26 U.S.C. § 6223(a)(1) and/or "Notice of a Final Partnership Administrative Adjustment," or FPAA. *See id.* § 6223(a)(2) when the nationally used U.S. Postal Service forms submitted to prove mailing are incomplete and therefore invalid? Is there a consistent rule?

PARTIES TO THE PROCEEDING AND RELATED CASES

Gail Goldberg and Ronald M. Goldberg brought the case against the United States of America regarding the Commissioner of Internal Revenue.

A list of proceedings in other courts directly related to the case in this Court are:

(1) *Goldberg v. Comm'r*, Nos. 22-1084 & 22-1085, United States Court of Appeals for the Seventh Circuit. Opinion filed July 14, 2023 and Petition for Rehearing denied on August 9, 2023.

(2) *Gail Goldberg v. Commissioner of Internal Revenue*, No. 13148-18L, United States Tax Court. Judgment entered October 28, 2021.

(3) *Ronald M. Goldberg v. Commissioner Of Internal Revenue,* No. 12871-18L, United States Tax Court. Judgment entered on October 19, 2021.

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BASIS OF JURISDICTION

This Court has jurisdiction, pursuant to 28 USC § 2101 and 28 U.S.C. § 1254(1), as this Petition is being filed within 90 days of the August 9, 2023 denial of the Petition for Rehearing ruling by the United States Court of Appeals for the Seventh Circuit . (See App. E, 66a-67a).

STATUTORY PROVISIONS INVOLVED

26 U.S.C. §6223 (2002). Notice to partners of proceedings, App. F, 68a-73a

REGULATION INVOLVED

26 CFR 301.6223 (e)-2 Elections if Internal Revenue Service fails to provide timely notice, App. F, 74a-77a

STATEMENT OF THE CASE

Gail Goldberg ("Gail") and Ronald M. Goldberg ("Ronald") (collectively, "Goldberg" or "Goldbergs") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case. (See App. A, 1a-17a).

A. Statutory Background.

Congress enacted the Tax Equity and Fiscal Responsibility Act of 1982 ("TEFRA"), 26 U.S.C. §§ 6221-6234, in order to create a unified procedure for determining partnership tax items, including audits, at the partnership level. *Adams v. Johnson*, 355 F.3d 1179, 1186-87 (9th Cir. 2004).

While a partnership does not itself pay federal income tax, all individual partners report their distributive shares on their federal income tax returns. 26 U.S.C. §§ 701, 702.

TEFRA requires that each partnership designate a general partner as the partnership's Tax Matters Partner ("TMP"). See 26 U.S.C. § 6231(a)(7). Although the TMP has primary responsibility for handling the partnership's relationship with the IRS, TEFRA has notice provisions intended to protect the rights of all partners.

TEFRA permits individual partners independently to settle their tax liabilities with the IRS. TEFRA requires that the TMP be a general partner, with an ownership in the partnership, a capital account, and be at risk.

26 U.S.C. § 6224(c), entitles later-settling partners to gain settlement terms consistent with those achieved by partners who have already settled, *id*., and excludes partners entitled to notice and partners properly objecting to the TMP's authority from tax settlements entered into by the TMP. Id.

For partnerships with 100 or fewer partners, TEFRA requires that the IRS mail to each partner a notice of the beginning of a partnership audit ("NBAP"), and a Notice of Final Partnership Administrative Adjustment ("FPAA"), explaining the reasons for any adjustments or determinations made by the IRS, resulting from the audit. 26 U.S.C. § 6223(a). This is a mandatory requirement.

Indeed, Section 6223(a) provides that the Secretary (the "IRS Commissioner" or "Commissioner") must give notice of the beginning and completion of administrative proceedings under TEFRA to partners who have furnished their names and addresses to the Secretary at least 30 days before the notice is mailed to the tax matters partner, and, again, this notice requirement is mandatory. *Id.*

Notification is to be made to the partner's last known address and if the partner is not notified, the underlying liability is subject to a three-year statute of limitations. 26 U.S.C. § 6229(a), unless extended. 26 U.S.C. § 6229(b). See also 26 U.S.C. § 7502 and 26 U.S.C. § 6212.

With respect to the limitations period, the statutory assessment period during which the IRS may conduct an assessment expires either three years from the date on which the partnership filed its tax return under section 6229, or three years from the date on which the individual partners filed their tax returns under section 6501. 26 U.S.C. §§ 6229(a), 6501.

However, the IRS and a taxpayer may agree to extend the three-year period for making an assessment. 26 U.S.C. § 6501(c)(4)(A).

B. Issues Background.

This Court should grant this Petition for several reasons. This Court should grant this petition to answer the question as to whether the Commission can get away with not sending required statutory formal notices by sending a letter instead. Here, the Seventh Circuit essentially held that because the tax payer husband Ronald wrote a letter to the Commissioner referencing TEFRA proceedings and the Commissioner wrote him back and told him that if he disagreed with the Commissioner's position he could challenge the position in the TEFRA proceedings, he had an opportunity to participate in the proceedings, even though the letter was not a statutory Notice of Beginning of Administrative Proceeding ("NBAP") pursuant to 26 U.S.C. § 6223(a)(1) and/or a "Notice of a Final Partnership Administrative Adjustment" ("FPAA"). *See id.* § 6223(a)(2). The Commissioner's letter did not include the contents of such NBAP and/or FPAA notices, nor did the letter mention the words NBAP or FPAA. There are no other cases holding that the Commission could simply replace statutory notice requirements with a letter or letters.

Allowing the precedent of allowing the Commission to do so could have broad implications by erasing notice and due process protections. There is now a Court of Appeals opinion changing the mandatory statutory notice requirement and it will be cited and used until reversed. Without this Court's intervention, a meaningful protection will be lost.

In addition, this Court's review is warranted to provide a holding as to whether knowledge of the receipt of an IRS correspondence can be imputed to both spouses when a couple is married but the letter is addressed to only one spouse. An answer to this question by this Court will have a broad impact throughout the United States.

Finally, there is no Supreme Court case addressing what the Commissioner for the Internal Revenue Service (the "Commissioner") specifically needs to show in order to prove that it mailed the required statutory notices at the beginning and at the end of proceedings brought under the Tax Equity and Fiscal Responsibility Act ("TEFRA") to determine a partner's tax liability. There are non-precedential Tax Court cases, and a few Court of Appeals cases on this issue from various circuits which do not address this issue consistently. This issue has ramifications for any time that the Commission or anyone else has the burden to prove that it mailed documents. The IRS uses a national modified post-office form (Form 3877) to prove mailing, and the question is how much of the form needs to be filled out to prove mailing, and if the IRS presents an incomplete Form 3877, what type of other evidence must be presented for the IRS to prove mailing. In this case, the Commission argued that it proved mailing with incomplete postal forms. Without this Court's review, an

important protection—the Commissioner's requirement to prove mailing—will be restricted.

C. Factual Background

Ronald M. Goldberg ("Ronald") and Gail Goldberg ("Gail") are husband and wife. (collectively, "Goldberg" or the "Goldbergs"). The Goldbergs timely filed their 1998 and 2000 income tax returns, and the Goldbergs filed joint tax returns for the 1998 and 2000 taxable years. (Gail ER22-3).

During the 1998 taxable year, Ronald was a partner in Matador Arch Program ("Matador"). Matador was an oil and gas exploration investment program and a Tax Equity and Fiscal Responsibility Act ("TEFRA") partnership. During the 2000 taxable year, Ronald was a partner in Alpha Oil Program ("Alpha"). Alpha was an oil and gas exploration investment program and a TEFRA partnership. (Ronald ER46-3). Gail Goldberg was never a partner in the oil and gas partnerships, but liability is sought against her by the Commissioner due to the fact that she filed a joint tax returns with Ronald on the applicable two tax years.

Unbeknownst to the Petitioner, the Internal Revenue Service ("IRS") initiated a criminal audit of the aforementioned Oil and Gas programs within the statute of limitations of three years from the date of the filing of the partnership tax returns (the "TEFRA Proceedings") (Gail ER27-2). Petitioner was not notified of the criminal audit.

The Commissioner claims that it issued on September 4, 2001 a Notification of Beginning of Administrative Proceeding ("NBAP") to Ronald for Matador's TEFRA Proceedings for the 1998 tax year. (Gail ER21-3). The Commissioner also claims that it issued on October 8, 2002 a NBAP to Ronald for Alpha's TEFRA Proceedings for the 2000 tax year. (Gail ER21-3).

The Commissioner also claims that on November 27, 2007, it issued a Final Partnership Administrative Adjustment ("FPAA") to Ronald for Matador's TEFRA Proceedings for the 1998 tax year and that on December 3, 2007, it issued a FPAA to Ronald for Alpha's TEFRA Proceedings for the 2000 tax year. (Gail ER22-3).

The Goldbergs argue that the Commissioner lacks the required proof of mailing (and the Goldbergs claim they never received any of the documents), and it is the Commissioner's burden to prove mailing (Gail ER27-2; Gail ER31-2). The IRS was supposed to give the notices, not just to the Tax Matters Partner, but also to the Goldbergs, because there were 100 or less partners in the oil and gas partnerships. The Goldbergs have always maintained that because Ronald was not mailed the NBAP and FPAA statutory notices, the underlying tax liability is barred by a three-year statute of limitations (Gail ER31-7).

The U.S. Postal Service form used to show proof of mailing is a fully completed U.S. Postal Service Form 3877 ("Form 3877") (Gail ER31, Ex. D), which the IRS has modified and called a Certified Mailing List ("CML").

On the CML form relied upon by the IRS to show proof of mailing of the NBAP (CML B, (Gail ER31, Ex. I), there was no number written on the line that is supposed to indicate the total piece count received by the United States Postal Service for both tax years (Gail ER27-3; Gail ER31: Exhibits I). Also absent was the required signature of a postal service employee and a written declaration of the piece count verified by the United States Postal Service for both tax years in question. (Gail ER31:12,14; Ex. E). In addition, while the Commissioner claims that it mailed two FPAAs on November 27, 2007 and December 3, 2007, both the FPAA Certified Mail Listing, dated November 27, 2007 and the FPAA Certified Mail Listing, dated December 3, 2007, do not list the number of items received at the post office and are not signed by a United States Postal Service employee. They are therefore are incomplete and insufficient to show mailing.

On October 5, 2010, Ronald wrote Mr. Halvor Adams, District Counsel for the Internal Revenue Service and referenced TEFRA proceedings for the Matador and Alpha programs. Ronald argued that any tax assessments were barred by the statute of limitations because the tax matter partner who agreed to extend the statute of limitations did so without proper authority and was not a qualified Tax Matter Partner to do so. Ronald's letter to the Attorney Adams does not mention Gail at all and Gail is not copied on that letter. While the letter mentions "I believe that my partner Sherwin Geitner and I", Gail is not mentioned at all. *See* GG Doc. 23, Ex. L. The word "Gail" does not appear on the face of Ronald's letter. In addition, Gail is not carbon copied to the letter. The letter states in the bottom-left corner that the only individual who was carbon copied was Sherwin Geitner, not Gail Goldberg. *See* GG Doc. 23, Ex. L.

On October 8, 2010, Mr. Adams wrote Ronald back stating that the Commissioner did not agree with Ronald's position, but that if Ronald continued to disagree, that he should pursue it further in the Alpha and Matador TEFRA proceedings. Similarly, the October 8, 2010 letter by Attorney Adams is addressed only to Ronald, not Gail. The word "Gail" does not appear in either Ronald's letter or Attorney Adams' response letter. In addition, Attorney Adams' letter does not state in that letter that it constituted a NBAP or FPAA notice under 26 U.S.C. §6223. *See* GG Doc. 23, Ex. M.

On December 2, 2015, the Commissioner issued Ronald a levy notice for the 1998 and 2000 taxable years, which was challenged by requesting a collection due process (CDP) hearing on December 20, 2015. (Ronald ER48-4). The CDP was assigned to a settlement officer in the IRS' Office of Appeals. (Ronald ER48-5). The settlement officer did not give the Goldbergs an opportunity to discuss the notice challenges that they have raised, even though they tried to raise them and the IRS documented in writing that the Goldbergs tried to do so.

The Tax Court

In or about late June and early July 2018, the Goldbergs filed Petitions with the United States Tax Court (Gail and Ronald ER1), challenging the underlying tax liability as being barred by the three-year statute of limitations. During the proceedings, the Goldbergs issued discovery requests relating to the notice and proof of mailing issues. The Goldbergs filed motions to compel production, which were denied. (Goldberg ER41).

Both parties moved for Summary Judgment and the Tax Court denied the Goldbergs' Motion for Summary Judgment and granted the Commissioner's Motion for Summary Judgment. (See App. B, 18a-35a and App. C, 36a-57a). As part of its Motion for Summary Judgment, the Commissioner attached copies of FPAA certified mailing lists in an attempt to prove mailing, but those CMLs were incomplete. Notwithstanding this, the Tax Court found that the Commissioner met its burden of proving mailing of the FPAA notices. (See App. B, 18a-35a and App. C, 36a-57a).

Notices of Appeal were timely filed and the appeal to the Seventh Circuit followed.

The Appellate Court Opinion

After oral argument, on July 14, 2023, the United States Court of Appeals for the Seventh Circuit affirmed the Tax Court's rulings . (See App. A, 1a-17a). The Seventh Circuit affirmed that the Goldbergs had actual notice and had a prior opportunity to contest the partnership tax liabilities, independent of any alleged failing on the IRS's part. It affirmed the Tax Court's decision to sustain the IRS's lien and levy on the Goldbergs' property to collect the outstanding tax liabilities.

The Seventh Circuit consolidated Ronald and Gail's Tax Court cases for appeal on its own motion. In its opinion, it held that Ronald's 2010 correspondence with the Commissioner and the Commissioner's response to it meant that *both Goldbergs* had actual notice of the ongoing TEFRA proceedings while they were underway and that they had an actual opportunity to dispute the

tax liability in the TEFRA proceedings. The Seventh Circuit made that ruling notwithstanding the fact that the Commissioner's response letter did not state that it was in lieu of a NBAP or an FPAA, and actual notice is not the notice standard, by statute. The Seventh Circuit also affirmed the finding that the IRS mailed the FPAA even though the US Postal form needed to prove mailing of the FPAA in the Record was incomplete and did not show that the FPAA was mailed. The Seventh Circuit affirmed the Tax Court decisions relating to Ronald and Gail. The Seventh Circuit denied the Goldbergs' petition for rehearing on August 9, 2023. (See App. E, 66a-67a).

REASONS FOR GRANTING THE PETITION

I. This Court Should Grant This Petition To Decide Whether The Seventh Circuit Decision Eliminates The Express Requirement That The Required FPAA and NBAP Notices Be Sent To Tax Payers. If A Letter Can Be Substituted To Give Actual Notice In Lieu Of The Required Notices, That Is Contrary To Congress' Requirement That Formal Notice Be Sent.

The Seventh Circuit found that Ronald had actual notice and therefore had an opportunity to make his statute of limitation arguments at the TEFRA proceedings. However, "actual notice is not the standard; the standard is whether the Commissioner met the requirements of sending proper notice." *See Bedrosian v. Comm'r,* 143 T.C. 83, 98 (T.C. 2014).

The TEFRA statute at the time required that a notice be mailed at the beginning of the partnership audit

("NBAP") (in 2001 for Matador and in 2002 for Alpha) and that a Notice of Final Partnership Administrative Adjustment ("FPAA") be also mailed to Goldberg. It is the Commissioner's burden to show this. *See* 26 U.S.C. § 6223 (2002); (a)*; White v. Commissioner*, T.C. Summary Opinion 2012-53; *See also Dorsey v. Commissioner*, T.C. Memo 1993-182. As argued later below, the Commissioner did not produce any record evidence to meet its burden of showing that it mailed the FPAAs to the Goldbergs.

While the notice provisions of TEFRA has since been repealed (in 2015), they had not been repealed at the time that these notices were supposed to be sent to Goldberg. That TEFRA provision provided the following (emphasis added):

> "26 U.S.C. § 6223 (2002). Notice to partners of proceedings.
>
> (a) Secretary **must** give partners notice of beginning and completion of administrative proceedings. The Secretary **shall** mail to each partner whose name and address is furnished to the Secretary notice of--
>
> (1) the **beginning of an administrative proceeding at the partnership level** with respect to a partnership item, **and**
>
> (2) the **final partnership administrative adjustment** resulting from any such proceeding.

The word "must" is a mandatory term. *Roberts v. Fed. Hous. Fin. Agency*, 889 F.3d 397, 401 (7th Cir 2018). Yet,

the statute provides that if such mandatory notices are not timely sent, 26 U.S.C. § 6223(e) there is an "election" remedy. However, the election remedy of subsection (e) only applies if the requisite notices were not timely mailed, not if they were never mailed by the Commissioner at all. Specifically, section (e) is applicable when it is found that "the Secretary mails the partner notice of the proceeding . . ." and not before then. Proving mailing is a condition precedent.

Therefore (e) only addresses the timeliness of the required NBAP and FPAA notices from section (a), and does not provide that notices do not need to be sent, which would invalidate 26 U.S.C. § 6223(a). Indeed, there are no cases stating that the NBAP and FPAA notice requirements were only aspirational or mere suggestion, rather than mandatory and that the statute of limitations would not be triggered if they were not issued.

Similar to section 6223(e)(1)(2) and (3), the Regulation 26 CFR 301.6223 (e)-2(b) and (c) only addresses the situations of where "if at the time the Internal Revenue Service mails the partner an FPAA", the proceedings are finished or the proceedings are still going on. The statute and the regulation do not address what happens if the Commissioner never mailed the FPAA at all.

The Regulation provides that, the tax payer is supposed to file "a statement with the Internal Revenue Service office mailing the FPAA within 45 days after the date on which the FPAA *was mailed* to the partner making the election." 26 CFR 301.6223 (e)-2 (d)(2)) (emphasis added).

It is clear that from the plain language of section 6223(e) and the Regulation that mailing is the condition precedent of the election requirement. The FPAA is the jurisdictional notice that permits the partner to challenge the Commissioner's adjustments. *See Taurus FX v. Comm'r*, TC Memo 2013-168, *6-8. The Commissioner may not assess a delinquency in tax until a valid FPAA is mailed. *Genesis Oil v. Comm'r*, 93 T.C. 562, 563 (T.C. 1989).

There are no cases that the undersigned could find supporting any position that a letter from the Commissioner's attorney is somehow the equivalent of a statutory and jurisdictional FPAA notice. *See Taurus FX v. Comm'r*, TC Memo 2013-168. The letter itself does not say that it was an FPAA notice. GG Doc. 23, Ex. M.

Similarly, there is no evidence supporting the argument that the response letter from Attorney Adams was actually a jurisdictional FPAA notice mailed pursuant to 26 U.S.C. §6223, especially since Attorney Adams' letter does not state that it was an FPAA Notice mailed pursuant to §6223, or a NBAP. See GG Doc. 23, Ex. M.

The Seventh Circuit's holding in *Goldberg v. Comm'r*, 73 F.4th 537, 544 (7th Cir. 2023) that the October 2010 letter from the Commissioner to Ronald had legal significance because it "provided the Goldbergs with a chance to participate in the proceedings" (App. A, 15a), changes the statutory notice requirements. That correspondence was not a mandatory NBAP of FPAA of § 6223(a), and it did not state that it was in any way given as a substitute for the statutorily required NBAP and/or FPAA. There is nothing in § 6223 that provides that the Commissioner could replace or substitute the statutory

notice requirements. Indeed, the Commissioner's counsel admitted at oral argument that the letters do not have any legal significance. There are no other cases that allow the Commissioner to replace statutory notice requirements with a letter or letters, which are deemed to be notices such as a NBAP of FPAA notice. Allowing such letters to have legal significance sets a precedent with broad implications. The *Goldberg v. Comm'r* opinion is now precedent that will be cited by parties arguing that that statutory notice requirements can be changed and do not need to be strictly adhered. Without this Court's intervention, the meaningful protections provided by Congress in the notice requirements will be erased for tax cases, as well as potentially in other cases in which there are strict mandatory notice requirements.

II. This Court Should Grant This Petition To Decide Whether It Is Correct To Automatically Impute Actual Notice To A Spouse When There Is No Record Evidence That The Spouse Had Actual Notice

This Court's review is warranted to provide a holding as to whether knowledge of the receipt of an IRS correspondence can be automatically imputed to both spouses when spouses are married but the letter is addressed to only one spouse.

Here, even if Ronald's letter to the Commissioner and the Commissioner's response somehow provided Ronald with a previous opportunity to challenge in the TEFRA proceedings, the same cannot be said about Gail, looking at the two letters in question.

The October 5, 2010 letter that Ronald wrote to the Commissioner's attorney Halvor Adams is found in GG Doc. 23, Ex. L and the October 8, 2010 response letter by Attorney Adams, marked sent by U.S. Mail, is found in GG Doc. 23, Ex. M.

Ronald Goldberg's letter to the Attorney Adams does not mention Gail Goldberg at all and she is not carbon copied on that letter. While the letter states "I believe that my partner Sherwin Geitner and I", Gail Goldberg is not mentioned at all. GG Doc. 23, Ex. L.

The letter states in the bottom-left corner that the only individual who was carbon copied was Sherwin Geitner, not Gail Goldberg.

Similarly, the October 8, 2010 response by Attorney Adams is addressed only to Ronald Goldberg, not Gail Goldberg. The word "Gail" does not appear in either Ronald Goldberg's letter or Attorney Adams' response letter. In addition, Attorney Adams' letter does not state in that letter that it was sent as a FPAA Notice under 26 U.S.C. §6223.

There simply is no document in the Record that is addressed to Gail Goldberg and instructing her that "If you continue to disagree with respondent regarding this matter and wish to pursue it further, you should pursue it formally in the Alpha Program and Matador Program cases," as Attorney Adams wrote Ronald Goldberg. See GG Doc. 23, Ex. M.

Thus, there is nothing in the Record supporting any conclusion that Gail Goldberg had actual notice of the

TEFRA proceedings to give her any opportunity to lodge a challenge. There is no testimony or evidence in the Record that Gail Goldberg was even aware of that letter to the Commissioner's lawyer to support any notion that Gail Goldberg had actual notice and/or an opportunity to participate in the TEFRA proceedings. Indeed, the Tax Court made no such finding regarding Gail Goldberg and clearly Summary Judgment should not have been entered as to Gail, as there is a genuine issue of material fact as to her.

Even though on January 21, 2022, the Seventh Circuit on its own Motion consolidated Ronald Goldberg and Gail Goldberg's cases on the Tax Court's two separate rulings, that does not automatically mean that the Commissioner has proven that Gail Goldberg somehow knew about Ronald Goldberg's letter in question. There is no evidence in the Record supporting this conclusion. This Court should accept this case because this issue of whether one spouse's knowledge should or should not be imputed to the other is one of national importance and an answer to this question by this Court will have a broad impact throughout the United States.

III. This Court Should Grant This Petition Because There Is No Supreme Court Decision Resolving What Is Required for the Commissioner To Meet Its Burden of Proving Mailing

There is no Supreme Court decision clarifying specifically what the Commissioner needs to show in order to meet its burden of proving that it mailed the NBAP and FPAA Notices at the beginning and end of proceedings brought under TEFRA to determine a partner's tax liability.

The Commissioner bears the burden of establishing mailing and date of mailing of the FPAA, and it was required to introduce evidence as part of its Motion for Summary Judgment showing that the FPAA was properly delivered to the United States Postal Service for mailing. *Dorsey v. Comm'r*, T.C. Memo 1993-182 (T.C. 1993).

The U.S. Postal Service form that is used to show proof of mailing is a fully completed PS Form 3877 ("Form 3877") (Gail ER31, Ex. D), which the IRS has modified and called CML. While it is the Commissioner's burden to show that the NBAPs and FPAAs were properly mailed to the Goldbergs, the CML/Form 3877s, which are supposed to be proof of mailing are grossly deficient and incomplete. *See* GG Doc. 23, Exhibits P and Q.

As the Tax Court stated in to *White v. Commissioner*, T.C. Summary Opinion 2012-53:

> "**In the instant case, the Form 3877 respondent submitted is incomplete because there is no indication of the number of items received by the Postal Service and because it does not bear the signature or initials of a Postal Service employee. Accordingly, the Form 3877 is insufficient to provide respondent with the presumption of mailing.** Because respondent failed to produce any other admissible evidence to prove that the notice of deficiency was mailed, he has failed to carry his burden of proving that the notice was properly mailed. Accordingly, we lack jurisdiction because **the record does not establish that a notice of deficiency was mailed to petitioner** in accordance with section

> 6212. Consequently, we will dismiss the instant case for lack of jurisdiction."

(emphasis added)

Courts of Appeals of several circuits have inconsistently addressed what is to occur when a Form 3877 provided by the IRS to meet its burden of proving mailing is incomplete. There is no definitive consistent rule between the circuits for when the burden for proving mailing is met. For example, in *Cropper v. Comm'r*, 826 F.3d 1280, 1286, (10th Cir 2016), an incomplete Form 3877 was produced, but the Court stated that it could still meet its burden by providing evidence that is "otherwise sufficient", without any explanation as to what "otherwise sufficient" means. In contrast, in *Welch v. United States*, 678 F.3d 1371, 1378-79, (Fed. Cir. 2012), the Court identified a "standard" for determining mailing:

> "We structure the following standard for determining whether the evidence submitted by the IRS is sufficient to demonstrate timely mailing of a notice of deficiency. First, we find that the government bears the burden of proving proper mailing of a notice of deficiency by competent and persuasive evidence. Next, where the IRS has (1) established the existence of a notice of deficiency and (2) produced a properly completed PS Form 3877 certified mail log it is entitled to a presumption of mailing, and the burden shifts to the taxpayer to rebut that presumption by clear and convincing evidence. In the absence of a properly completed PS Form 3877, where the existence of a notice of

> deficiency is not in dispute, the government must come forward with evidence corroborating an actual timely mailing of the notice of deficiency. The evidence presented to prove timely mailing may include documentary evidence as well as evidence of mailing practices corroborated by direct testimony. But that evidence must directly corroborate the mailing of the specific notice of deficiency at issue on a date certain."

The above standard has not been uniformly cited or applied.

During the proceedings against the Commissioner the Goldbergs have demanded that the Commissioner prove that it had mailed them the NBAP and FPAAs and have challenged the contention that the Commissioner made a showing that it properly mailed the FPAAs when the FPAA certified mailing lists that the Commissioner provided as its proof of mailing were incomplete in the Commissioner's Motion for Summary Judgment and did not show mailing. Plus, the Commissioner has not shown any other documentary evidence of mailing as part of its Motion for Summary Judgment.

While the Seventh Circuit stated that the Commissioner met it burden of proving that the FPAA was mailed, the Commissioner has never met its burden of proof to show mailing because the FPAA Certified Mail Listings submitted by the Commissioner to prove mailing as part of its Motion for Summary Judgment in the Record are incomplete—no piece count, no signature, and no postal stamp. All requirements of the Certified Mail List are absent, similar to what the Tax Court stated in to *White*

v. Commissioner, T.C. Summary Opinion 2012-53. *See* GG Doc. 23, Exhibits P and Q.

Here, there is not even a postal service stamp in the FPAA Certified Mail Listings contained in GG Doc. 23, Ex P and Q. Therefore, these FPAA Certified Mail lists are an insufficient proof of mailing and without value. *See White v. Comm'r,* T.C. Summary Opinion 2012-53. The Commissioner has brought forth no evidence as part of its Motion for Summary Judgment that it ever mailed the FPAAs to meet its burden of proof.

While the Commissioner claims that it mailed two FPAAs on November 27, 2007 and December 3, 2007, both the FPAA Certified Mail Listing, dated November 27, 2007 and the FPAA Certified Mail Listing, dated December 3, 2007 do not list the number of items received at the post office and are not signed by a United States Postal Service employee. *See* GG Doc. 23, Exhibits P and Q. They are therefore are incomplete and insufficient to show mailing.

Where the Commissioner relies upon imprecise mailing procedures, such as an incomplete FPAA Certified Mail Listing, the presumption of official regularity does not apply. *See Welch v. United States,* 678 F.3d 1371, 1375, (Fed. Cir. 2012); *White v. Commissioner, T.C. Summary Opinion* 2012-53 (where the Commissioner's Certified Mail Listing did not indicate the number of items received by the United States Postal Service or the initials of the United States Postal Service agent, it was insufficient proof of mailing); *Dorsey v. Commissioner*, T.C. Memo 1993-182; *Kearse v. Commissioner*, T.C. Memo 2019-53; *Hoyle v. Commissioner*, 131 T.C. 197, 200-204 (2008); *Pietanza v. Commissioner*, 92 T.C. 729, 739 (1989).

The only evidence in the Record that the Commissioner mailed the FPAAs are two incomplete FPAA Certified Mail Listings presented by the Commissioner as part of the Motion for Summary Judgment briefings before the Tax Court, which do not indicate the number of items received by the United States Postal Service or include the initials of a United States postal agent, and therefore the Commissioner never met its burden of proof to show that the FPAA was mailed. *See White v. Commissioner*, *infra*. There is nothing in the Record proving that the Goldbergs were mailed either of the FPAAs claimed to have been mailed, and there is a genuine issue of material fact as to the mailing of the November 27, 2007 and December 3, 2007 FPAAs.

This issue of how to meet the burden of proving mailing has ramifications for any time that the Commission has the burden to prove that it mailed documents. In this case, the Commission argued that it proved mailing with incomplete US Postal forms. Without this Court's review, an important protection—the Commissioner's requirement to prove mailing—will be restricted.

Accordingly, due to the issues of national importance of the issues raised, this Court should grant this Petition for Certiorari.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, FILED JULY 14, 2023

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 22-1084 & 22-1085

RONALD M. GOLDBERG and GAIL GOLDBERG,

Petitioners-Appellants,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee.

Appeals from the United States Tax Court.
Nos. 12871-18L & 13148-18L.

Argued January 11, 2023 — Decided July 14, 2023

Before Wood, Brennan, and Scudder, *Circuit Judges.*

Scudder, *Circuit Judge.* Ronald and Gail Goldberg owe more than $500,000 in federal taxes stemming from their interests in two partnerships. The Goldbergs believe the statute of limitations for the IRS's assessment of these taxes has passed, and they assert that the IRS's failure to mail them adequate notice when it started auditing

their partnerships excuses their own failure to raise this challenge in earlier tax proceedings. Because the Goldbergs received notice and had a prior opportunity to contest the partnership tax liabilities—independent of any alleged failing on the IRS's part—we affirm the Tax Court's decision to sustain the IRS's lien and levy on the Goldbergs' property to collect the outstanding tax liabilities.

I. Partnership Taxation Under the Tax Equity and Fiscal Responsibility Act

Reviewing the Tax Court's decision requires some background in partnership taxation. Bear with us as we parse the provisions governing the calculation of partnership taxes, the collection of those taxes from individual partners, and the administrative proceedings where calculation and collection occur. As with many areas of tax law, technical jargon and acronyms abound, but we try to unpack everything in plain English.

The Tax Equity and Fiscal Responsibility Act, or TEFRA, governed partnership tax liability determinations until the 2017 tax year, including the audits at issue in this appeal. See 26 U.S.C. §§ 6221-6234 (2012). Because partnerships are not themselves taxable entities, a partnership's tax liabilities are assessed on individual partners in proportion to their ownership interest. Individual partners report their share of a partnership's income on their individual tax returns, usually on a Form 1040, and the partnership itself supplies that information on another form, referred to as a Schedule K-1.

Appendix A

In enacting TEFRA, Congress sought to streamline the overarching liability calculation process by requiring partnership tax determinations to occur in a single proceeding followed by separate collections from individual partners, rather than having multiple ongoing proceedings for each partner. See Arthur Willis, Philip Postlewaite & Jennifer Alexander, *Partnership Taxation* ¶ 20.01 (2023) (describing TEFRA's centralized partnership-level process).

To ensure uniformity, Congress provided that determinations made at the partnership level would be final and binding on all partners. See 26 U.S.C. § 6223. Under TEFRA, partners could opt out of the partnership-level proceeding—and the binding partnership-level determinations—by settling separately or electing to convert their items into nonpartnership items for individual review. See *id.* §§ 6221, 6223(e)(3). Partners also reserved the right to challenge partnership-level determinations during the ongoing proceedings through the tax matters partner chosen by the partnership to represent the interests of all other partners. See *id.* § 6224(c)(3)(A); see also *id.* § 6231(a)(7) (defining "tax matters partner").

TEFRA included several safeguards to ensure partners received adequate notice of the partnership-level proceedings before the liability determinations became final. See *id.* § 6223. Partners were first entitled to receive a "notice of beginning of administrative proceedings," commonly shorthanded as an NBAP. As its name implies, the NBAP signaled that the IRS had started reviewing

the partnership's tax liabilities. See *id.* § 6223(a)(1). If the IRS made any tax adjustments to partnership-level items, the Service next had to furnish notice of a "final partnership administrative adjustment," or FPAA, that communicated these final, binding adjustments to the partners. See *id.* § 6223(a)(2). TEFRA authorized notice by mail using the partners' addresses listed in the partnership's tax return. See *id.* § 6223(c)(1).

Before the taxes could be assessed, partners had one final chance for review. The tax matters partner had 90 days to file a petition with the Tax Court, see *id.* § 6226(a), and upon such a filing, all partners became parties to the subsequent proceedings, see *id.* § 6226(c)(1). If the tax matters partner did not file a petition, then the other partners had an additional 60 days to file their own petition. See *id.* § 6226(b)(1). Once this review period ended, the partnership-level liability determinations bound all partners who had not opted out. See *id.* § 6230(c)(4); see also *Kaplan v. United States*, 133 F.3d 469, 471 (7th Cir. 1998) ("Section 6226(c) binds all partners to the result obtained by a legal challenge brought by one partner, thereby preventing numerous [duplicative] lawsuits.").

The IRS also had to play by certain rules. Indeed, TEFRA provided relief when the IRS failed to timely mail the NBAP notifying partners that an audit had commenced. A partner's available recourse depended on the status of the partnership-level proceedings at the time the partner received either the FPAA or actual notice of the tax adjustments. If the IRS's audit had concluded at the time the partner received notice, the partner could opt

out of the final determination and convert the partnership items to nonpartnership items for individual consideration. See 26 U.S.C. § 6223(e)(2). If the IRS's partnership-level audit was still ongoing at the time of notice, however, the Tax Code provided that the partner "shall be a party to the proceeding" unless the partner settled or converted the relevant partnership items into nonpartnership items—the two options already available to partners receiving timely notice. *Id.* § 6223(e)(3).

II. Factual Background

These provisions of the Tax Code apply to the case before us. The IRS would like to collect taxes from Ronald and Gail Goldberg stemming from Ronald's partnership in the Matador Arch Program and the Alpha Oil Program—two entities in the oil and gas industry. Gail is liable for these taxes and penalties because she filed joint tax returns with Ronald in 1998 and 2000, the tax years that Ronald was a partner at the firms. See *id.* § 6231(a)(2); 26 C.F.R. § 301.6231(a)(2)-1(a) (explaining spousal tax liability).

A. The Goldbergs' Partnership Tax Liabilities

The IRS began auditing the Matador and Alpha partnerships in 2001 and 2002. In connection with those proceedings, the IRS believes it timely sent the required NBAPs to Ronald by certified mail to notify him the audits had started. The Goldbergs later denied receiving an NBAP for either audit, and they also disputed the IRS's proof that these NBAPs were mailed to them. For both the

Matador and Alpha proceedings, the IRS further believes it timely sent Ronald the required FPAAs via certified mail to notify him of the final tax adjustments. Prior to filing their petition in this court, the Goldbergs did not dispute the IRS's evidence showing that the Service had mailed the FPAAs to Ronald's address.

In early 2008, after the audits concluded, the tax matters partners for both Alpha and Matador petitioned for readjustment of the partnership item determinations listed in their respective FPAAs. The tax matters partners' petitions proceeded to the Tax Court for review.

On October 5, 2010, while the Tax Court's review of the FPAAs was underway, Ronald sent a letter to the IRS Commissioner challenging his tax liability for both the Alpha and Matador partnership items. In his letter, Ronald stated that he believed the three-year statute of limitations for the tax assessments had expired, so the IRS could not collect any overdue and unpaid taxes from him. The Commissioner responded in a letter explaining that the limitations period had not expired given the ongoing review of the tax matters partners' petitions in the Tax Court. The Commissioner invited Ronald to raise his statute-of-limitations challenges directly in the Tax Court proceedings before the adjustments became final. The Goldbergs took no action, however.

In June 2013 the Tax Court concluded its review of the Matador and Alpha tax adjustments and entered judgment. No further challenges—by the tax matters partners or by any partners—were brought to contest the Tax Court's

orders. The resulting liability determinations became final and binding on all partners in September 2013. The IRS then notified the Goldbergs of the adjustments and, after they refused to pay, initiated collection proceedings.

B. The IRS's Partnership Tax Collection Authority

We pause to address the IRS's collection authority before introducing the facts of its attempt to collect from the Goldbergs.

When a taxpayer fails to pay the IRS following a tax assessment, the Service can take legal action to collect the overdue taxes. One option is to file a Notice of Federal Tax Lien publicly establishing the IRS's claim to the taxpayer's property. See 26 U.S.C. § 6321. If a taxpayer refuses to pay within 10 days after the IRS's initial notice and demand, the Service can issue a levy notice and seize the taxpayer's property in satisfaction of the unpaid tax liability. See *id.* § 6331. After receiving notice from the IRS, and before the lien or levy is enforced, taxpayers can seek review from the IRS Office of Appeals in a proceeding known as a Collection Due Process, or CDP, hearing. See *id.* §§ 6320(a)(3)(B), 6330(a)(3)(B). The Office of Appeals must entertain any hearing request for a review of a lien or levy if the taxpayer makes a timely written request and states the grounds for the challenge. See *id.* §§ 6320(b)(1), 6330(b)(1).

In reviewing the taxpayer's petition at the CDP hearing, the settlement officer must consider the Secretary's evidence verifying "the requirements of any

applicable law or administrative proceeding have been met," see *id.* § 6330(c)(3)(A), (1); the matters raised by the taxpayer, see *id.* § 6330(c)(3)(B); and the balance of interests between the collection and its intrusiveness on the taxpayer, see *id.* § 6330(c)(3)(C). The officer then issues a notice of determination declaring whether the tax assessment is sustained and, if so, whether an alternative collection process will be followed instead of the lien or levy.

At the CDP hearing, the taxpayer generally may raise "any relevant issue" to the IRS's collection action, including collection alternatives and spousal defenses. *Id.* § 6330(c)(2)(A). But taxpayers cannot contest the tax liability underlying the levy or lien if the taxpayer previously had an opportunity to lodge a challenge. See *id.* § 6330(c)(2)(B). By its terms, § 6330(c)(4)(C) of the Tax Code expressly precludes taxpayers from raising an issue if "a final determination has been made with respect to such issue in a proceeding brought under subchapter C of chapter 63," which refers to TEFRA—the chapter concerning the tax treatment of partnership items. So a taxpayer cannot challenge final and binding partnership-item liability determinations in a CDP hearing.

A taxpayer wishing to contest the decision of the Office of Appeals can petition the Tax Court for review. See *id.* § 6330(d). But the Tax Court can consider only those issues properly raised in the CDP hearing. See *Our Country Home Enters., Inc. v. Comm'r*, 855 F.3d 773, 780 (7th Cir. 2017).

Putting the administrative review process together, then, we see that a partner who fails to challenge the IRS's adjustments to partnership-level items during a TEFRA proceeding cannot later challenge their partnership tax liabilities in a CDP hearing. And because the partner cannot raise the issue of liability in a CDP hearing, the partner also loses the ability to bring that challenge before the Tax Court. Put differently, the TEFRA proceeding is the proper—and when notice is properly furnished, only—venue for partners to challenge partnership-tax liabilities.

C. The IRS's Assessment of Taxes on the Goldbergs

These administrative processes apply to the Goldbergs' situation.

1. Collection Due Process Hearing

In 2014 the Commissioner assessed taxes and penalties on the Goldbergs to collect the outstanding taxes stemming from the adjustments the IRS made to the Matador and Alpha liabilities in the partnership-level proceedings, which were finalized in the Tax Court's 2013 decision. The Commissioner explained in a letter to the Goldbergs that they could not challenge the assessments because they had failed to object during the partnership-level TEFRA proceedings. When the Goldbergs did not pay the overdue and adjusted taxes in response to the assessment notice, the IRS filed a notice of a lien and then a levy to collect the outstanding partnership taxes. The

Goldbergs did not respond to the IRS's Notice of Federal Tax Lien, but they did respond to the later levy notice and requested a CDP hearing to challenge the collection.

In June 2016 the IRS Office of Appeals heard the Goldbergs' petition. The Goldbergs challenged their underlying tax liability on statute-of-limitations grounds—the same argument Ronald raised to the Commissioner in his October 2010 letter. The Goldbergs also argued that they could lawfully bring this post-audit challenge because they believed that the IRS failed to send the statutorily required notices of beginning of administrative proceedings—the so-called NBAPs. The IRS's failure to mail the NBAPs, the Goldbergs insisted, excused their own failure to object while TEFRA proceedings were ongoing. The Goldbergs took this position even though they had received actual notice of the TEFRA proceedings from another partner.

Two years later, in 2018, the settlement officer issued her decision sustaining the IRS's proposed lien and levy. The officer found that the Goldbergs had failed to challenge their underlying tax liabilities during the TEFRA proceedings despite being "advised of the beginning of the TEFRA audit and the final audit findings" through mailing of NBAPs and FPAAs. Because the Goldbergs' challenge to the lien was untimely, the officer issued an unappealable decision letter sustaining the lien. The officer issued an appealable notice of determination for the levy because that challenge was timely. The Goldbergs then petitioned the Tax Court for review.

2. Tax Court Decision

The Tax Court dismissed the petition for review of the lien because the Office of Appeals properly issued an unappealable decision letter given the Goldbergs' petition on that matter was time-barred.

In considering the Goldbergs' statute-of-limitations challenge to the levy, the Tax Court rejected their argument that they lacked notice to properly raise the issue in the TEFRA proceedings. The Tax Court determined the Office of Appeals correctly concluded that the IRS mailed the final partnership administrative adjustment notices, or FPAAs, based on the Service's evidentiary showing during the CDP hearing—a finding the Goldbergs did not dispute before the Tax Court. The Tax Court also noted Ronald Goldberg's 2010 correspondence with the Commissioner during the Tax Court's earlier review of the partnerships' tax adjustments.

All of this meant that the Goldbergs had actual notice of the ongoing TEFRA proceedings while they were underway, notwithstanding their allegations that the IRS failed to mail them NBAPs at the start of the proceedings. The Tax Court therefore concluded that TEFRA required the Goldbergs to raise these challenges during the partnership-level audit. See 26 U.S.C. § 6223(e)(3). But they never did so. The Goldbergs' statute-of-limitations challenge thus amounted to an improper attempt to appeal their underlying tax liability, one that the Tax Court could not entertain. See *id.* §§ 6230(c)(4), 7422(h).

Finding no legal errors in the Office of Appeals' review of the Goldbergs' petition, the Tax Court went on to hold that the settlement officer properly accounted for the considerations required by § 6330(c)(3) and did not abuse her discretion in sustaining the IRS's levy on the Goldberg's property. The Tax Court therefore affirmed the settlement officer's decision.

The Goldbergs now appeal.

III. Analysis

The Tax Court got this right. A straightforward application of TEFRA and its implementing provisions to the facts leads us to conclude that the Goldbergs cannot escape their partnership tax liabilities by asserting that the IRS failed to mail the NBAPs when the IRS did mail the FPAAs and the Goldbergs had actual notice of the partnership-level proceedings.

A. The IRS Met Its Statutory Requirements by Mailing the FPAAs

The Goldbergs' biggest hurdle in demonstrating that they did not have an opportunity to object during the TEFRA proceedings is the IRS's showing that it properly mailed the FPAAs. The Goldbergs never challenged the Office of Appeals' or the Tax Court's finding that the FPAAs were mailed—and that the Goldbergs therefore received the FPAAs—until they filed suit in this court. Regardless, we see no error in the Tax Court's review of the Office of Appeals' determination.

The Office of Appeals reviewed the IRS's internal records and mailing lists to establish that that the FPAAs were validly sent via certified mail in 2007. The Goldbergs did not object, leaving the Office of Appeals entitled to take the IRS's showing as substantial evidence to demonstrate proper mailing—and thus adequate notice to the Goldbergs—of the FPAAs. See, *e.g.*, *Keado v. United States*, 853 F.2d 1209, 1213-19 (5th Cir. 1988) (affirming a settlement officer's finding based on similar evidence); see also 26 U.S.C. § 6330(c)(3)(A) (giving the settlement officer authority to verify that notices were sent based on the IRS's evidence). In reviewing the Office of Appeals' decision, the Tax Court observed that the Goldbergs had not challenged the settlement officer's FPAA finding, and concluded there were otherwise no errors with that determination.

Given the Tax Court's proper finding that the IRS mailed the FPAAs, our legal conclusion flows directly from the Tax Code. When the IRS fails to mail an NBAP—as the Goldbergs allege here—the relief is statutory. Section 6223(e) provides remedies based on the status of the partnership-level determination at the time the "Secretary mails the partner notice of the proceeding"—here, the FPAAs that the IRS mailed to the Goldbergs in 2007.

Because the FPAAs were mailed in 2007 but the partnership tax adjustment amounts were not finalized by the Tax Court until 2013, the Goldbergs' relief is provided under § 6223(e)(3), titled "Proceedings still going on." When partners receive an FPAA after having failed to

receive an NBAP, they can opt for an individual settlement or conversion to nonpartnership items. Although the Goldbergs qualified for this relief, they never elected to pursue either of these remedies. That was their fatal mistake because the statute affords no other relief. The Tax Code makes clear that partners who fail to opt out of the partnership-level proceedings are bound to the final FPAA determinations. See *id.* § 6221 ("[T]he tax treatment of any partnership item ... shall be determined at the partnership level.").

And because the Goldbergs had this opportunity to challenge the underlying tax liability given the IRS's valid FPAA mailings before the partnership proceedings ended, they were expressly precluded from bringing this challenge in a CDP hearing. See *id.* § 6330(c)(2)(B), (4)(C). The Tax Court did not err in affirming the Office of Appeals' decision to disallow such a challenge in the Goldbergs' CDP hearing.

B. The Goldbergs Received Actual Notice of the TEFRA Proceedings

The Tax Court correctly identified a second reason supporting denial of the Goldbergs' petition: Ronald had actual notice of the TEFRA proceedings, in addition to the notice provided by the FPAAs.

Remember what happened in October 2010. It was then that Ronald corresponded by letter with the IRS Commissioner while the TEFRA proceedings were ongoing. In that letter, Ronald contended that the IRS

could not collect taxes for adjustments made to the Alpha and Matador partnership items because he believed the three-year statute of limitations had expired. At no time—in this appeal or in the administrative proceedings before the IRS—has Ronald contested the authenticity of his October 2010 letter. Nor has he ever suggested, let alone demonstrated, that he did anything beyond sending the letter. At oral argument, he explained that he received notice in 2010 from another partner, and not the IRS, so he contended that the IRS's failed NBAP mailing affords him separate statutory relief. But he offers no satisfactory explanation for why he did not accept the Commissioner's invitation to participate in the TEFRA proceedings by challenging the tax assessment on statute-of-limitations grounds.

Ronald's inaction brought with it a legal consequence. The Tax Code is clear that taxpayers may challenge their underlying tax liability in a CDP hearing only when they "did not otherwise have an opportunity to dispute such tax liability." *Id.* § 6330(c)(2)(B). This limitation applies here. Ronald Goldberg had an actual opportunity to dispute his tax liability in 2010 while the Tax Court reviewed the Alpha and Matador FPAAs, and he declined to take that opportunity to raise the statute-of-limitations challenge he now brings to a third tribunal (our court) more than a decade later.

Nor can the Goldbergs show that the partnership adjustment proceedings violated their due process rights. The Commissioner provided the Goldbergs with a chance to participate in the proceedings—through valid mailing

of an FPAA and by specific invitation in the October 2010 correspondence—and they declined. We see no due process issues here, where the Goldbergs had notice and opportunity to be heard.

To be sure, we do not conclude that Ronald's actual notice alone supports a finding that he is precluded from challenging his liability. We recognize that § 6223(e)'s provision of relief seems predicated on the IRS's valid mailing of at least one of the NBAP or FPAA. See *id.* § 6223(e)(2) (providing relief when "the Secretary mails the partner notice of the proceeding" and proceedings are finished); see also *id.* § 6223(e)(3) (providing relief when § 6223(e)(2) "does not apply" and proceedings are ongoing). In a situation where the IRS failed to properly mail both the NBAP and FPAA, we are less certain of the statutory relief afforded to that tax partner. But those are not the facts here, so we save that issue for another day.

C. The Goldbergs' Remaining Arguments

The Goldbergs urge a different conclusion and ask us to dismiss the case or remand for reconsideration of their statute-of-limitations challenge to the underlying tax liability. But we find no basis for doing so.

The Goldbergs have spilled much ink on the IRS's alleged failure to mail the NBAPs. They may be right that the IRS never mailed the notices. The IRS insists that it did but cannot tell us with certainty. For our part, we are confident that we do not have to resolve this factual dispute to resolve the Goldbergs' appeal. The IRS's mailing of the

NBAPs is not controlling because the Tax Code authorized two forms of notice: the notice that proceedings had begun (the NBAP) and the notice that proceedings had concluded (the FPAA). Under the remedies provided in § 6223(e), either type of notice suffices to give partners the opportunity to participate in the TEFRA proceedings, and the mailing of both is not necessary for them to do so. The Goldbergs can point to no provision of the Tax Code that provides them with relief beyond that which the statute afforded them here.

One final matter warrants mention. The Goldbergs insist that the Tax Court erred by denying their motion to compel discovery for additional information about the IRS's NBAP mailings. Given the deferential standard of review and our determination that the Tax Court's decision did not depend on additional evidence of the IRS's mailings, we reject the Goldbergs' argument. The Tax Court did not abuse its discretion in denying the Goldbergs' motion to compel discovery for evidence that the court deemed irrelevant.

For these reasons we AFFIRM.

APPENDIX B — ORDER AND DECISION OF THE UNITED STATES TAX COURT, DATED AUGUST 28, 2021

UNITED STATES TAX COURT
WASHINGTON, DC 20217

Docket No. 13148-18L.

GAIL GOLDBERG,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ORDER AND DECISION

This case is before the Court on a petition for review of a Notice of Determination Concerning Collection Action(s) under Section 6320 and/or 6330 dated June 1, 2018, sustaining a notice of intent to levy for petitioner's 1998 and 2000 tax years (notice of determination).[1] Petitioner, Gail Goldberg, filed a joint return with her husband, Ronald Goldberg. Mr. Goldberg was a partner in two oil and gas partnerships. The partnerships were both subject to audit and litigation procedures under the Tax Equity

1. Unless otherwise indicated, all Rule references are to the Tax Court Rules of Practice and Procedure, and all section references are to the Internal Revenue Code in effect at all relevant times.

and Fiscal Responsibility Act of 1982 (TEFRA), Pub. L. No. 97-248, sec. 402(a), 96 Stat. at 648, which resulted in administrative adjustments to the partnerships' informational tax returns. Mrs. Goldberg's status as a partner for TEFRA purposes is solely derived from the joint income tax returns she filed with Mr. Goldberg. Sec. 6231(a)(2); *Greenberg Bros. Pshp. #12 v. Commissioner*, T.C. Memo. 1998-147; sec. 301.6231(a)(2)-1T(a)(1), Temporary Proced. & Amin. Regs., 52 Fed. Reg. 6790 (Mar. 5, 1987). Because partnerships are not themselves taxable entities, the notice of determination sought to enforce Mrs. Goldberg's share of the partnership-level adjustments against her in her individual capacity as a jointly liable taxpayer.

Mrs. Goldberg and the Commissioner have both filed motions for summary judgment. The central issue is whether Mrs. Goldberg is prohibited from now challenging her underlying tax liabilities because of her failure to challenge an earlier Notice of Federal Tax Lien Filing and Your Right to a Hearing under section 6320 (NFTL filing) or because of her nonparticipation in the even earlier TEFRA proceedings.

This case is ripe for summary judgment because there are no genuine issues of material fact; the only questions remaining before the Court are questions of law. For the reasons set forth below, the Court will deny Mrs. Goldberg's motion and grant the Commissioner's motion.

Appendix B

Background

The following facts are derived from the parties' pleadings and motion papers, including exhibits and affidavits. *See* Rule 121(b). Mrs. Goldberg resided in Illinois when she timely filed her petition.

Mrs. Goldberg's husband was an investor and partner in two oil and gas partnerships: (1) Matador Arch Program (Matador) and (2) Alpha Oil Program (Alpha). The Goldbergs timely filed joint income tax returns for their 1998 and 2000 taxable years.[2] Both Matador and Alpha were subject to the audit and litigation procedures found at sections 6221 through 6234, commonly referred to as TEFRA. The Commissioner timely assessed the tax and penalties related to the TEFRA proceedings for 1998 (Matador) on September 9, 2014, and for 2000 (Alpha) on April 28, 2014.

On April 7, 2015, the Commissioner issued Mrs. Goldberg an NFTL filing informing her that a notice of Federal tax lien was filed for her 1998 and 2000 income tax liabilities. Mrs. Goldberg did not timely challenge the NFTL filing by requesting a 6320 hearing or submitting Form 12153, Request for a Collection Due Process or Equivalent Hearing.[3]

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2. Mrs. Goldberg filed a joint return with her spouse, Ronald Goldberg, who was a partner in the oil and gas partnerships. This matter relates only to Mrs. Goldberg; Mr. Goldberg has a separate action before this Court. *See Goldberg v. Commissioner*, T.C. Memo. 2021-119.

3. In response to the NFTL filing, the Goldbergs made an untimely request for a collection due process hearing. The Commissioner granted the Goldbergs an equivalent hearing and

Appendix B

Levy and CDP Hearing

On December 2, 2015, the Commissioner issued Mrs. Goldberg a Letter 1058, Final Notice of Intent to Levy and Notice of Your Right to a Hearing, for her 1998 and 2000 taxable years (levy notice). The Goldbergs timely challenged the levy notice by submitting Form 12153 on December 20, 2015, requesting, among other things, a collection due process (CDP) hearing.

The Goldbergs' CDP hearing was assigned to a settlement officer in the Internal Revenue Service (IRS) Office of Appeals (Appeals). Before the CDP hearing, the settlement officer verified that all applicable laws and procedures had been met. This included verifying that she had no prior involvement with the Mrs. Goldberg and reviewing the case transcripts to confirm that the assessment for each tax period listed on the CDP notice was valid and proper and that notice had been mailed to Mrs. Goldberg's last known address. On April 14, 2016, the settlement officer issued a letter to the Goldbergs confirming that the IRS received their request for a CDP hearing; in return, the letter asked the Goldbergs to provide their legal grounds for raising the liability issue, as well as any information pertaining to an alternative collection method. Lastly, the settlement officer reviewed

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then issued a decision letter. A decision letter arising from an equivalent hearing is not a notice of determination sufficient to invoke this Court's jurisdiction under sec. 6320 or 6330. *Kennedy v. Commissioner*, 116 T.C. 255, 262-263 (2001). By order dated October 11, 2018, this Court dismissed for lack of jurisdiction Mrs. Goldberg's petition inasmuch as it challenged the merits of the equivalent hearing.

the prior Tax Court partnership decisions relating to Mr. Goldberg's partnership interests.

The CDP hearing was held on June 8, 2016, and the settlement officer had additional discussions with the Goldbergs' representative through December 2017. The Goldbergs did not propose any collection alternatives during the hearing or any of the additional discussions; instead, they challenged the underlying income tax liabilities, which included the underlying TEFRA adjustments. The settlement officer informed the Goldbergs during a December 1, 2017, telephone conference that they could no longer challenge their underlying income tax liabilities because they were litigated at the partnership level in the Tax Court and thus could not be challenged at the partner level in collections. As a result, Appeals sustained the proposed collection action in a notice of determination dated June 1, 2018, and addressed to both Ronald and Gail Goldberg. On June 29, 2018, the Goldbergs each timely mailed separate petitions, based on the notice of determination, which the Court filed on July 3, 2018.

Previous TEFRA Proceedings

Long before the NFTL filing, levy notice, and CDP hearing, both partnerships--Matador and Alpha--were the subjects of separate TEFRA proceedings. The Commissioner examined Matador's 1998 information return and Alpha's 2000 information return. He then issued Mr. Goldberg a notification of beginning of administrative proceeding (NBAP) on September 4, 2001, for Matador's 1998 tax year. The Commissioner similarly

issued Mr. Goldberg an NBAP on October 8, 2002, for Alpha's 2000 tax year. The Goldbergs maintain that Mr. Goldberg never received the respective NBAPs. Because Mrs. Goldberg was a non-owner of the partnerships, her name did not appear on the partnerships' informational returns.

On November 27, 2007, the Commissioner issued a notice of final partnership administrative adjustment (FPAA) to Ronald Goldberg and Gail Goldberg for Matador's 1998 tax year. On December 3, 2007, the Commissioner issued an FPAA to Ronald Goldberg and Gail Goldberg for Alpha's 2000 tax year.[4] Matador's tax matters partner (TMP), Ogden Drilling Management, Inc., a Utah corporation, timely petitioned this Court on February 19, 2008, for readjustment of the partnership items set forth in Matador's FPAA. *See Matador Arch Program, Ogden Drilling Mgmt., Inc., Tax Matters Partner v. Commissioner*, T.C. Dkt. No. 4192-08. Carthage Oil Management Corporation, a Utah corporation, as Alpha's TMP, also timely petitioned this Court on February 19, 2008, for readjustment of the partnership items set forth in Alpha's FPAA. *See Alpha Oil Program, Carthage Oil Mgmt. Corp., Tax Matters Partner v. Commissioner*, T.C. Dkt. No. 4113-08.

During the pendency of the TEFRA proceedings for Alpha and Matador in the Tax Court, Mrs. Goldberg never formally pursued her statute of limitations argument by

4. The record includes certified mailing lists for the Matador and Alpha FPAAs. Furthermore, Mrs. Goldberg makes no allegation that she failed to receive either FPAA.

raising it in the TEFRA proceedings as an affirmative defense under Rule 39. This Court entered final decisions regarding Matador's and Alpha's TEFRA proceedings, pursuant to Rule 248(b), on June 12 and June 13, 2013, respectively. None of Matador's or Alpha's partners filed any objections to the settlements. The Court's decisions became final without appeal 90 days after the decisions were entered on September 10, 2013, for Matador, and September 11, 2013, for Alpha, pursuant to Rule 190.

Assessment of Partnership Item Adjustments

The Commissioner sent a letter to Mrs. Goldberg on February 13, 2014, along with Form 4549-A, Income Tax Examination Changes, explaining the adjustments to Mrs. Goldberg's 2000 income tax return flowing from the partnership-level adjustments in this Court's final decision in the Alpha case. Mr. Goldberg filed a protest on March 14, 2014, arguing his disagreement with the adjustments. In a letter dated August 20, 2014 and addressed to both Mr. and Mrs. Goldberg, the Commissioner responded that Mr. Goldberg's protest would not be considered because it raised substantive issues which should have been raised during the TEFRA proceedings. *See* sec. 6230(c)(4).

On September 9, 2014, the Commissioner sent Mrs. Goldberg a Letter 4735, Notice of Computational Adjustment,[5] along with Form 4549-A, setting forth the

5. The term "computational adjustment" means "the change in the tax liability of a partner which properly reflects the treatment under this subchapter of a partnership item." Sec. 6231(a)(6).

adjustments to Mrs. Goldberg's 1998 income tax return flowing from the partnership-level adjustments in this Court's final decision in the Matador case. The Letter 4735 was sent via the regular mail service of the U.S. Postal Service (USPS). *See* Internal Revenue Manual pt. 4.31.3.13.6.1(8) (June 11, 2013).

Regarding the partnership-level proceedings, Mrs. Goldberg alleges that she never received an NBAP for either Matador or Alpha and cites the certified mailing list for Matador's 1998 tax year, which neither was signed by a USPS employee nor included a count of the number of pieces of mail which the USPS received from the Commissioner. Before the Goldbergs' CDP hearing, Mr. Goldberg made Freedom of Information Act (FOIA) requests for the certified mailing list for the Matador and Alpha NBAPs. Mrs. Goldberg alleges that the certified mailing list for Alpha's 2000 tax year was never produced and that the settlement officer did not properly consider all the FOIA requests because some were still in process during the CDP hearing. Ultimately, none of Mrs. Goldberg's allegations regarding the certified mailing lists affect the· outcome of this case.

The Commissioner filed a motion for summary judgment under Rule 121. Along with his motion, the Commissioner filed account transcripts, a declaration of the IRS supervisory tax examining technician who maintains certified mail listing records, and a declaration of the settlement officer. The Commissioner also filed a first supplement to the motion for summary judgment. Mrs. Goldberg filed a response, and the Commissioner

filed a reply. Mrs. Goldberg also filed her own motion for summary judgment, to which the Commissioner filed a response.

Discussion

A. Summary Judgment

Summary judgment serves to "expedite litigation and avoid unnecessary and expensive trials." *Fla. Peach Corp. v. Commissioner*, 90 T.C. 678, 681 (1988). It is not, however, a substitute for trial and should not be used to resolve genuine disputes over issues of material fact. *E.g., Vallone v. Commissioner*, 88 T.C. 794, 801-805 (1987). The Court may grant summary judgment when there is no genuine dispute as to any material fact and a decision may be rendered as a matter of law. Rule 121(b); *Sundstrand Corp. v. Commissioner*, 98 T.C. 518, 520 (1992), *aff'd*, 17 F.3d 965 (7th Cir. 1994). The moving party has the burden of showing the absence of a genuine issue of material fact. *FPL Grp., Inc. v. Commissioner*, 115 T.C. 554, 559 (2000); *Bond v. Commissioner*, 100 T.C. 32, 36 (1993); *Naftel v. Commissioner*, 85 T.C. 527, 529 (1985). For these purposes, the Court affords the party opposing the motion the benefit of all reasonable doubt, and the Court views the material submitted by both sides in the light most favorable to the opposing party. That is, the Court resolves all doubts as to the existence of an issue of material fact against the movant. *Sundstrand Corp. v. Commissioner*, 98 T.C. at 520; *see, e.g.*, *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). However, where the moving party properly makes and supports a motion

for summary judgment, the opposing party "may not rest upon the mere allegations or denials of such party's pleading" but must set forth specific facts showing that there is a genuine dispute for trial. Rule 121(d); *see also Naftel v. Commissioner*, 85 T.C. at 529.

B. Analysis

1. Mrs. Goldberg's Motion for Summary Judgment

Section 6330(d)(1) grants this Court jurisdiction to review determinations made by Appeals in a levy case. Where the underlying tax liability is properly at issue, the Court reviews the determination of liability de novo. *E.g.*, *Goza v. Commissioner*, 114 T.C. 176, 181-182 (2000). A de novo review means that the Court reviews "without deferring to any prior administrative adjudication" and "entirely independent of the administrative proceedings". *See, e.g.*, *Morris v. Rumsfeld*, 420 F.3d 287, 292, 294 (3d Cir. 2005) (citing *Timmons v. White*, 314 F.3d 1229 (10th Cir. 2003)).

Mrs. Goldberg's motion for summary judgment seeks to void the Commissioner's deficiency determination (a) by collaterally attacking the underlying TEFRA proceedings as untimely, *see* sec. 6501(a) (imposing a three-year limitations period for assessing taxes), and (b) for failure to give adequate notice by untimely issuing the NBAPs. The gravamen of Mrs. Goldberg's period of limitations argument is that the TMPs' consents to extensions of the

period of limitations in the TEFRA actions were invalid[6] and that the Commissioner's failure to timely deliver an NBAP precluded Mrs. Goldberg from obtaining remedies.

Mrs. Goldberg's arguments are identical to the arguments which Mr. Goldberg made in his related case. *See supra* note 2. In Mr. Goldberg's case, this Court found it unnecessary to address the merits the Mr. Goldberg's period of limitations argument because the Court held that Mr. Goldberg could not now raise a challenge to the period of limitations; for that reason, the Court denied Mr. Goldberg's motion.

The pertinent facts of Mrs. Goldberg's case differ from Mr. Goldberg's case only in this respect: Mr. Goldberg was an owner of Matador and Alpha. There is nothing in the record indicating that Mrs. Goldberg was, individually, an owner of either Matador or Alpha. As the Court stated *infra*, Mrs. Goldberg's status as a partner for TEFRA purposes is solely derived from the joint income tax returns she filed with Mr. Goldberg. Sec. 6231(a)(2); *Greenberg Bros. Pshp. #12 v. Commissioner*, T.C. Memo. 1998-147 sec. 301.6231(a)(2)-1T(a)(1), Temporary Proced. & Amin. Regs., 52 Fed. Reg. 6790 (Mar. 5, 1987). Mr. Goldberg, as an owner of Matador and Alpha, argued that he was entitled to receive NBAPs but did not. This Court held that even if Mr. Goldberg failed to receive NBAPs, the Commissioner's failure only gave rise to certain

6. Under Rule 250, this Court may remove a TMP for cause and appoint another partner as TMP if the partnership fails to designate a successor, but Mrs. Goldberg did not seek to have the TMPs removed during the TEFRA proceedings.

election rights under section 6223(e) (of which rights Mr. Goldberg did not avail himself) and did not invalidate otherwise valid FP AAs. In this case, Mrs. Goldberg was a non-owner of the partnerships and therefore not entitled to receive NBAPs. Sec. 6223(a); 301.6223(a)-1, Income Tax Regs.

Beyond that difference, the Court finds it unnecessary to re-litigate the same arguments. The Court will hold—just as it did in Mr. Goldberg's case— that Mrs. Goldberg cannot now demand a de novo review of her underlying liabilities for timely assessed partnership liabilities for multiple reasons. First, she failed to raise her underlying liabilities by timely challenging the earlier NFTL filing. Second, the FPAAs were validly issued, and Mrs. Goldberg had actual notice of the TEFRA litigation but neither participated in nor made a section 6223(e) election to convert the proceeding to a partner-level challenge (nor did she seek to remove, pursuant to Rule 250, the TMPs to whom she now objects).

2. Commissioner's Motion for Summary Judgment, As Supplemented

The Commissioner's motion for summary judgment, as supplemented, argues that a challenge to the period of limitations in a TEFRA proceeding is a challenge to the underlying liability which Mrs. Goldberg should have raised during the partnership item adjustment TEFRA proceedings rather than in a partner assessment of adjustment items CDP proceeding. The Commissioner's motion then argues that without the underlying liability

being at issue, this Court should review for abuse of discretion and affirm the decision of Appeals to sustain the levy notice. This Court will grant the Commissioner's motion, as supplemented, because the Court agrees that Mrs. Goldberg's period of limitations argument had to be raised during the TEFRA proceedings and because this Court will find no abuse of discretion by Appeals in sustaining the levy notice.

a. Standard of Review

Having decided that the underlying tax liabilities are not properly at issue in this case, this Court will review for abuse of discretion Appeals' determination to sustain the levy action. *E.g.*, *Goza v. Commissioner*, 114 T.C. at 182. In reviewing for abuse of discretion, the Court must uphold the settlement officer's determination unless it is arbitrary, capricious, or without sound basis in fact or law. *See Murphy v. Commissioner*, 125 T.C. 301, 320 (2005), *aff'd*, 469 F.3d 27 (1st Cir. 2006); *see also Keller v. Commissioner*, 568 F.3d 710, 716-718 (9th Cir. 2009), *aff'g in part* T.C. Memo. 2006-166, and *aff'g in part, vacating in part* decisions in related cases. The Court does not conduct an independent review or substitute our own judgment for that of the settlement officer. *Murphy v. Commissioner*, 125 T.C. at 320.

b. Appeals did not abuse its discretion in sustaining the levy action

Sections 6320 and 6330 provide taxpayers the opportunity for notice and a hearing upon the filing of an NFTL (section 6320) and before a levy to collect unpaid tax

(section 6330). If a taxpayer requests a CDP hearing, the settlement officer conducting the hearing must verify that the requirements of any applicable law or administrative procedure have been met. Secs. 6320(c), 6330(c)(1). The taxpayer may raise at a hearing any relevant issue relating to the unpaid tax or the collection action, including challenges to the appropriateness of collection actions and offers of collection alternatives. *See* sec. 6330(c)(2)(A). The taxpayer may also raise at the hearing challenges to the existence or amount of the underlying tax liability for any period if the person did not receive a statutory notice for such liability or did not otherwise have an opportunity to dispute such liability. *See* sec. 6330(c)(2)(B). A taxpayer who may raise the underlying liability during a CDP hearing must properly raise the merits of the underlying liability as an issue during the hearing to preserve the issue for judicial review. *See Giamelli v. Commissioner*, 129 T.C. 107, 112-116 (2007); secs. 301.6320-l(t)(2), Q&A-F3, 301.6330-l(t)(2), Q&A-F3, Proced. & Admin. Regs. The merits are not properly raised if the taxpayer challenges the underlying tax liability but fails to present Appeals with any evidence with respect to that liability after having been given reasonably opportunity to present such evidence. *See LG Kendrick, LLC v. Commissioner*, 146 T.C. 17, 34 (2016), *aff'd*, 684 F. App'x 744 (10th Cir. 2017); secs. 301.6320-l(t)(2), Q&A-F3, 301.6330-1(f)(2), Q&A-F3, Proced. & Admin. Regs.

The Commissioner issued Mrs. Goldberg an NFTL filing on April 7, 2015, for Mrs. Goldberg's 1998 and 2000 income tax liabilities. A taxpayer has 30 days to challenge an NFTL filing by requesting a section 6320 hearing or

submitting a Form 12153, but Mrs. Goldberg failed to make a timely challenge. *See* sec. 6320(b).

The Commissioner then issued Mrs. Goldberg a levy notice, dated December 2, 2015, for Mrs. Goldberg's 1998 and 2000 income tax liabilities. A taxpayer has 30 days to challenge a levy notice by requesting a section 6330 hearing or submitting a Form 12153. Sec. 6330. The Goldbergs did timely file a Form 12153 on December 20, 2015, requesting, among other things, a CDP hearing.

As the Court stated *supra*, section 6330(c)(2)(B) provides that the existence and amount of the underlying tax liability can only be contested at a CDP hearing if the taxpayer did not receive a notice of deficiency for the tax in question or did not otherwise have an earlier opportunity to dispute such tax liability. *See Goza v. Commissioner*, 114 T.C. at 180-181; *see also Our Country Home Enters., Inc. v. Commissioner*, 855 F.3d 773, 787 (7th Cir. 2017). The NFTL filing was a prior opportunity of which Mrs. Goldberg did not avail herself. *See Inv. Research Assocs., Inc. v. Commissioner*, 126 T.C. 183, 189-191 (2006) (holding that the right to a hearing applies only to the first NFTL filing regarding each tax liability); *see also Gray v. Commissioner*, 723 F.3d 790, 793 (7th Cir. 2013). Therefore, the underlying liabilities are not properly at issue and the Court will review for abuse of discretion.[7]

7. The Commissioner's motion for summary judgment further argues that Mrs. Goldberg was required to raise her period of limitations argument as a challenge to the underlying liabilities in the TEFRA proceedings. The Court does not address that argument here because the Court has already addressed Mrs. Goldberg's

Appendix B

In reviewing whether Appeals properly sustained the levy notice to facilitate collection of Mrs. Goldberg's unpaid 1998 and 2000 income tax liabilities, the Court reviews the record to determine whether the settlement officer: (1) properly verified that the requirements of applicable law or administrative procedure have been met; (2) considered any relevant issues petitioner raised; and (3) considered whether "any proposed collection action balances the need for the efficient collection of taxes with the legitimate concern of * * * [petitioner] that any collection action be no more intrusive than necessary." *See* sec. 6330(c)(3).

Our review of the record establishes that the settlement officer properly verified assessments of Mrs. Goldberg's share of the partnership level adjustments for each tax period, verified that all legal and procedural requirements had been met, *see CreditGuard of Am., Inc. v. Commissioner*, 149 T.C. 370, 379 (2017), and determined that the proposed levy appropriately balances the need for the efficient collection of taxes with petitioner's legitimate concern that the action be no more intrusive than necessary. Mrs. Goldberg failed to propose any collection alternative before or during her CDP hearing. It is not an abuse of discretion for a settlement officer to sustain a collection action and not consider collection alternatives when the taxpayer has proposed none. *See McLaine v. Commissioner*, 138 T.C. 228, 242-243 (2012); *Kendricks v. Commissioner*, 124 T.C. 69, 79 (2005); *see also* sec.

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arguments *supra*. Presumably, had Mrs. Goldberg timely challenged the NFTL filing, the same analysis would apply.

301.7122-l(d)(1), Proced. & Admin. Regs. (requiring that offers to compromise a tax liability must be made in writing and include all the information prescribed or requested by the IRS).

Because Mrs. Goldberg cannot now challenge the underlying liabilities, and because the Court finds no abuse of discretion, the Court will sustain the collection action and grant the Commissioner's motion for summary judgment, as supplemented.

C. Conclusion

The Court has considered all of the arguments made by the parties and, to the extent they are not addressed herein, they are considered unnecessary, moot, irrelevant, or without merit. No genuine issue of material fact exists regarding the Commissioner's determination in this collection action. *See Naftel v. Commissioner*, 85 T.C. at 529.

Upon due consideration, it is

ORDERED that respondent's August 21, 2019, motion for summary judgment, as supplemented, is granted. It is further

ORDERED that petitioner's September 11, 2019, motion for summary judgment is denied. It is further

ORDERED and DECIDED that respondent may proceed with collection action as determined in the

Appendix B

Notice of Determination Concerning Collection Action(s) under Section 6320 and/or 6330, dated June 1, 2018, for petitioner's 1998 and 2000 tax years.

(Signed) Elizabeth Crewson Paris
Judge

APPENDIX C — OPINION OF THE UNITED STATES TAX COURT, FILED OCTOBER 19, 2021

UNITED STATES TAX COURT

T.C. Memo 2021-119

RONALD M. GOLDBERG,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Docket No. 12871-18L. Filed October 19, 2021

MEMORANDUM OPINION

PARIS, *Judge*: This case is before the Court on a petition for review of a Notice of Determination Concerning Collection Action(s) under Section 6320 and/or 6330 dated June 1, 2018, sustaining a notice of intent to levy for petitioner's 1998 and 2000 tax years (notice of determination).[1] Petitioner, Ronald Goldberg, was a partner in two oil and gas partnerships. The partnerships were both subject to audit and litigation procedures under the Tax Equity and Fiscal Responsibility Act of

1. Unless otherwise indicated, all Rule references are to the Tax Court Rules of Practice and Procedure, and all section references are to the Internal Revenue Code in effect at all relevant times.

1982 (TEFRA), Pub. L. No. 97-248, sec. 402(a), 96 Stat. at 648, which resulted in administrative adjustments to the partnerships' informational tax returns. Because partnerships are not themselves taxable entities, the notice of determination sought to enforce the assessment of Mr. Goldberg's share of the partnership-level adjustments against him in his individual capacity as a tax-paying partner.

Mr. Goldberg and the Commissioner have both filed motions for summary judgment. The central issue is whether Mr. Goldberg is prohibited from now challenging his underlying tax liabilities because of his failure to challenge an earlier Notice of Federal Tax Lien Filing and Your Right to a Hearing under section 6320 (NFTL filing) or because of his nonparticipation in the even earlier TEFRA proceedings and Tax Court litigation.

This case is ripe for summary judgment because there are no genuine disputes of material fact; the only questions remaining before the Court are questions of law. For the reasons set forth below, the Court will deny Mr. Goldberg's motion and grant the Commissioner's motion.

Background

The following facts are derived from the parties' pleadings and motion papers, including exhibits and affidavits. *See* Rule 121(b). Petitioner resided in Illinois when he timely filed his petition.

Mr. Goldberg was an investor and partner in two oil and gas partnerships: (1) Matador Arch Program

(Matador) and (2) Alpha Oil Program (Alpha). Mr. Goldberg timely filed joint income tax returns for his 1998 and 2000 taxable years.[2] The salient facts are as follows.

Both Matador and Alpha were subject to the audit and litigation procedures found at sections 6221 through 6234, commonly referred to as TEFRA. The Commissioner timely assessed the tax and penalties related to the TEFRA proceedings for tax year 1998 (Matador) on September 9, 2014, and for tax year 2000 (Alpha) on April 28, 2014. On April 7, 2015, the Commissioner issued Mr. Goldberg an NFTL filing informing him that a notice of Federal tax lien was filed for his 1998 and 2000 income tax liabilities.

Mr. Goldberg did not timely challenge the NFTL filing by requesting a section 6320 hearing or submitting Form 12153, Request for a Collection Due Process or Equivalent Hearing.[3]

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2. Mr. Goldberg filed a joint return with his spouse, Gail Goldberg. This matter relates only to Mr. Goldberg; Mrs. Goldberg has a separate action pending before this Court. *See Goldberg v. Commissioner*, T.C. Dkt. No. 13148-18L. For simplicity, and since Mr. and Mrs. Goldberg have separate pending actions, the Court will refer to Mr. Goldberg's tax returns and taxable years in the singular throughout, despite the Goldbergs' having filed joint returns.

3. In response to the NFTL filing, Mr. Goldberg made an untimely request for a collection due process hearing. The Commissioner granted Mr. Goldberg an equivalent hearing and then issued a decision letter. A decision letter arising from an equivalent hearing is not a notice of determination sufficient to invoke this Court's jurisdiction under sec. 6320 or 6330. *Kennedy v. Commissioner*, 116 T.C. 255, 262-263 (2001). By order dated

Appendix C

Levy and CDP Hearing

On December 2, 2015, the Commissioner issued Mr. Goldberg a Letter 1058, Final Notice of Intent to Levy and Notice of Your Right to a Hearing, for his 1998 and 2000 taxable years (levy notice). Mr. Goldberg timely challenged the levy notice by submitting Form 12153 on December 20, 2015, requesting, among other things, a collection due process (CDP) hearing.

Mr. Goldberg's CDP hearing was assigned to a settlement officer in the Internal Revenue Service (IRS) Office of Appeals (Appeals). Prior to the CDP hearing, the settlement officer verified that all applicable laws and procedures had been met. This included verifying that she had no prior involvement with Mr. Goldberg and reviewing the case transcripts to confirm that the assessment for each tax period listed on the CDP notice was valid and proper and that notice had been mailed to Mr. Goldberg's last known address. On April 14, 2016, the settlement officer issued a letter to Mr. Goldberg confirming that the IRS received his request for a CDP hearing; in return, the letter asked Mr. Goldberg to provide his legal grounds for raising the liability issue, as well as any information pertaining to an alternative collection method. Lastly, the settlement officer reviewed the prior Tax Court partnership decisions relating to Mr. Goldberg's partnership interests.

October 9, 2018, this Court dismissed for lack of jurisdiction Mr. Goldberg's petition inasmuch as it challenged the merits of the equivalent hearing.

The CDP hearing was held on June 8, 2016, and the settlement officer had additional discussions with Mr. Goldberg's representative through December 2017. Mr. Goldberg did not propose any collection alternatives during the hearing or any of the additional discussions; instead, he challenged his underlying income tax liabilities, which included the underlying TEFRA adjustments. The settlement officer informed Mr. Goldberg during a December 1, 2017, telephone conference that Mr. Goldberg could no longer challenge his underlying income tax liabilities because they were litigated at the partnership level in the Tax Court and thus could not be challenged at the partner level in collections. As a result, Appeals sustained the proposed collection action in a notice of determination dated June 1, 2018.

Previous TEFRA Proceedings

Long before the NFTL filing, levy notice, and CDP hearing, both partnerships--Matador and Alpha--were the subjects of separate TEFRA proceedings. The Commissioner examined Matador's 1998 information return and Alpha's 2000 information return. He then issued Mr. Goldberg a notification of beginning of administrative proceeding (NBAP) on September 4, 2001, for Matador's 1998 tax year. The Commissioner similarly issued Mr. Goldberg an NBAP on October 8, 2002, for Alpha's 2000 tax year. Mr. Goldberg maintains that he never received the respective NBAPs.

On November 27, 2007, the Commissioner issued a notice of final partnership administrative adjustment

(FPAA) to Mr. Goldberg for Matador's 1998 tax year. On December 3, 2007, the Commissioner issued an FPAA to Mr. Goldberg for Alpha's 2000 tax year.[4] Matador's tax matters partner (TMP), Ogden Drilling Management, Inc., a Utah corporation, timely petitioned this Court on February 19, 2008, for readjustment of the partnership items set forth in Matador's FPAA. *See Matador Arch Program, Ogden Drilling Mgmt., Inc., Tax Matters Partner v. Commissioner*, T.C. Dkt. No. 4192-08. Carthage Oil Management Corp., a Utah corporation, as Alpha's TMP, also timely petitioned this Court on February 19, 2008, for readjustment of the partnership items set forth in Alpha's FPAA. *See Alpha Oil Program, Carthage Oil Mgmt. Corp., Tax Matters Partner v. Commissioner*, T.C. Dkt. No. 4113-08.

During the pendency of the TEFRA proceedings in the Tax Court, Mr. Goldberg sent the Commissioner a letter, dated October 5, 2010, stating Mr. Goldberg's position that the period of limitations had expired with respect to the TEFRA proceedings. The Commissioner's counsel responded on October 8, 2010, and explained why the Commissioner took the position that the period of limitations had not expired: "Indeed, the * * * [TMPs] in both the Alpha Program and Matador Program cases have challenged and are continuing to challenge the Service's determinations. If you continue to disagree with respondent regarding this matter and wish to pursue it further, you should pursue it formally in the Alpha

4. The record includes certified mailing lists for the Matador and Alpha FPAAs. Furthermore, Mr. Goldberg makes no allegation that he failed to receive either FPAA.

Program and Matador Program cases." However, Mr. Goldberg never formally pursued his period of limitations argument by raising it in the TEFRA proceedings as an affirmative defense under Rule 39.

This Court entered final decisions regarding Matador's and Alpha's TEFRA proceedings, pursuant to Rule 248(b), on June 12 and June 13, 2013, respectively. None of Matador's or Alpha's partners filed any objections to the settlements. The Court's decisions became final without appeal 90 days after the decisions were entered on September 10, 2013, for Matador, and September 11, 2013, for Alpha, pursuant to Rule 190.

Assessment of Partnership Item Adjustments

The Commissioner sent a letter to Mr. Goldberg on February 13, 2014, along with Form 4549-A, Income Tax Examination Changes, explaining the adjustments to Mr. Goldberg's 2000 income tax return flowing from the partnership-level adjustments in this Court's final decision in the Alpha case. Mr. Goldberg filed a protest on March 14, 2014, arguing his disagreement with the adjustments. The Commissioner responded to Mr. Goldberg in an August 20, 2014, letter in which the Commissioner stated that Mr. Goldberg's protest would not be considered because it raised substantive issues which should have been raised during the TEFRA proceedings. *See* sec. 6230(c)(4).

On September 9, 2014, the Commissioner sent Mr. Goldberg a Letter 4735, Notice of Computational

Adjustment,[5] along with Form 4549-A, setting forth the adjustments to Mr. Goldberg's 1998 income tax return flowing from the partnership-level adjustments in this Court's final decision in the Matador case. The Letter 4735 was sent via the regular mail service of the U.S. Postal Service (USPS). *See* Internal Revenue Manual pt. 4.31.3.13.6.1(8) (June 11, 2013).

Regarding the partnership-level proceedings, Mr. Goldberg alleges that he never received an NBAP for either Matador or Alpha and cites the certified mailing list for Matador's 1998 tax year, which neither was signed by a USPS employee nor included a count of the number of pieces of mail which the USPS received from the Commissioner. Before the CDP hearing, Mr. Goldberg made Freedom of Information Act (FOIA) requests for the certified mailing list for the Matador and Alpha NBAPs. Mr. Goldberg further alleges that the certified mailing list for Alpha's 2000 tax year was never produced and that the settlement officer did not properly consider all the FOIA requests because some were still in process during the CDP hearing. Ultimately, none of Mr. Goldberg's allegations regarding the certified mailing lists affects the outcome of this case.

The Commissioner filed a motion for summary judgment under Rule 121. Along with his motion, the Commissioner filed account transcripts, a declaration of the IRS supervisory tax examining technician who

5. The term "computational adjustment" means "the change in the tax liability of a partner which properly reflects the treatment under this subchapter of a partnership item." Sec. 6231(a)(6).

maintains certified mail listing records, and a declaration of the settlement officer. Mr. Goldberg filed a response, and the Commissioner filed a reply. Mr. Goldberg also filed his own motion for summary judgment, to which the Commissioner has filed a response.

Discussion

I. Summary Judgment

Summary judgment serves to "expedite litigation and avoid unnecessary and expensive trials." *Fla. Peach Corp. v. Commissioner*, 90 T.C. 678, 681 (1988). It is not, however, a substitute for trial and should not be used to resolve genuine disputes over issues of material fact. *E.g., Vallone v. Commissioner*, 88 T.C. 794, 801-805 (1987). The Court may grant summary judgment when there is no genuine dispute as to any material fact and a decision may be rendered as a matter of law. Rule 121(b); *Sundstrand Corp. v. Commissioner*, 98 T.C. 518, 520 (1992), *aff'd*, 17 F.3d 965 (7th Cir. 1994). The moving party has the burden of showing the absence of a genuine dispute of material fact. *FPL Grp., Inc. v. Commissioner*, 115 T.C. 554, 559 (2000); *Bond v. Commissioner*, 100 T.C. 32, 36 (1993); *Naftel v. Commissioner*, 85 T.C. 527, 529 (1985). For these purposes, the Court affords the party opposing the motion the benefit of all reasonable doubt, and the Court views the material submitted by both sides in the light most favorable to the opposing party. That is, the Court resolves all doubts as to the existence of an issue of material fact against the movant. *Sundstrand Corp. v. Commissioner*, 98 T.C. at 520; *see, e.g., Adickes v. S.H.*

Kress & Co., 398 U.S. 144, 157, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970). However, where the moving party properly makes and supports a motion for summary judgment, the opposing party "may not rest upon the mere allegations or denials of such party's pleading" but must set forth specific facts showing that there is a genuine dispute for trial. Rule 121(d); *see also Naftel v. Commissioner*, 85 T.C. at 529.

II. Analysis

Mr. Goldberg's motion for summary judgment seeks to void the Commissioner's deficiency determination (a) by collaterally attacking the underlying TEFRA proceedings as untimely, *see* sec. 6501(a) (imposing a three-year limitations period for assessing taxes), and (b) for failure to give adequate notice by untimely issuing the NBAPs. The gravamen of Mr. Goldberg's period of limitations argument is that the TMPs' consents to extensions of the period of limitations in the TEFRA actions were invalid[6] and that the Commissioner's failure to timely deliver NBAPs precluded Mr. Goldberg from obtaining remedies. The Court finds it unnecessary to address the merits of Mr. Goldberg's period of limitations argument because this Court will hold that Mr. Goldberg cannot now raise a challenge to the period of limitations; for that reason, this Court will also deny his motion.

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6. Under Rule 250, this Court may remove a TMP for cause and appoint another partner as TMP if the partnership fails to designate a successor, but Mr. Goldberg did not seek to have the TMPs removed during the TEFRA proceedings.

Specifically, Mr. Goldberg cannot now demand a de novo review of his underlying liabilities for timely assessed partnership liabilities for multiple reasons. First, he failed to raise his underlying liabilities by timely challenging the earlier NFTL filing. Second, the FPAAs were validly issued, and Mr. Goldberg had actual notice of the TEFRA litigation but neither participated in nor made section 6223(e) elections to convert the proceedings to partner-level challenges (nor did he seek, pursuant to Rule 250, to remove the TMPs to whom he now objects).

The Commissioner's motion for summary judgment argues that a challenge to the period of limitations in a TEFRA proceeding is a challenge to the underlying liability which Mr. Goldberg should have raised during the partnership item adjustment TEFRA proceedings rather than in a partner assessment of adjustment items CDP proceeding. The Commissioner's motion then argues that without the underlying liability being at issue, this Court should review for abuse of discretion and affirm the decision of Appeals to sustain the levy notice. This Court will grant the Commissioner's motion because the Court agrees that Mr. Goldberg's period of limitations argument had to be raised during the TEFRA proceedings and because this Court will find no abuse of discretion by Appeals in sustaining the levy notice.

Appendix C

A. Mr. Goldberg's Motion for Summary Judgment

1. Standard of Review

Section 6330(d)(1) grants this Court jurisdiction to review a determination made by Appeals in a levy case. Where the underlying tax liability is properly at issue, the Court reviews the determination of liability de novo. *E.g., Goza v. Commissioner*, 114 T.C. 176, 181-182 (2000). De novo review means that the Court reviews "without deferring to any prior administrative adjudication" and "entirely independent of the administrative proceedings." *Morris v. Rumsfeld*, 420 F.3d 287, 292, 294 (3d Cir. 2005) (citing *Timmons v. White*, 314 F.3d 1229 (10th Cir. 2003)).

2. A Challenge to the Period of Limitations in a TEFRA Proceeding Is a Challenge to the Underlying Liability That Requires De Novo Review

Mr. Goldberg's motion for summary judgment seeks to void the Commissioner's FPAA deficiency determination by asserting that the underlying TEFRA proceedings were untimely. *See* sec. 6501(a) (imposing a three-year limitations period for assessing tax). Mr. Goldberg's period of limitations argument is that the TMPs' consents to extend the periods of limitations in the TEFRA proceedings were invalid. The Court finds it unnecessary to address the merits of Mr. Goldberg's period of limitations argument because a challenge to the period of limitations is a challenge to the underlying liability which must be raised at the partnership level

and Mr. Goldberg cannot now raise such a challenge. *See infra* pp. 14-16.

TEFRA requires that all partnership items be determined in a single partnership-level proceeding unless a partner makes a timely election to opt out of the TEFRA proceeding by having his items converted to nonpartnership items. Secs. 6221, 6223(e)(3); *see also Randell v. United States*, 64 F.3d 101, 103 (2d Cir. 1995). In the absence of a timely election, the determination of partnership items in a TEFRA proceeding is binding on the partners and may not be challenged in a later partner-level proceeding. *See* secs. 6230(c)(4), 7422(h).

The issue before this Court then is whether a challenge to the period of limitations is a challenge to the underlying liability which must be raised at the partnership level (i.e., in a TEFRA proceeding). The U.S. Court of Appeals for the Seventh Circuit, the court to which an appeal of this case would presumably lie absent a stipulation to the contrary, *see* sec. 7482(b)(2); *Golsen v. Commissioner*, 54 T.C. 742, 757 (1970), *aff'd*, 445 F.2d 985 (10th Cir. 1971), has already considered this issue in *Kaplan v. United States*, 133 F.3d 469 (7th Cir. 1998).

In *Kaplan*, 133 F.3d 469, small-share partners[7] in a partnership brought a refund claim in which they challenged the period of limitations in an underlying

7. TEFRA required the IRS to send notice to each partner owning at least a 1% share of the partnership; it left the burden of providing notice to partners owning less than a 1% share (i.e., small-share partners) on the TMP. *See* sec. 6223(a), (b), (g).

TEFRA proceeding by arguing that the TMP's consents to extensions of time were invalid because the TMP did not properly provide them notice. The Court of Appeals observed that "[t]his is precisely the type of challenge prohibited by TEFRA in light of Congress's decision that such suits are better addressed in one fell swoop at the 'partnership level' than in countless suits by individual partners. Other courts share our view that this kind of statute of limitation challenge concerns a partnership item." *Id.* at 473; *see Bedrosian v. Commissioner*, 940 F.3d 467, 471-472 (9th Cir. 2019), *aff'g* 143 T.C. 83 (2014); *Keener v. United States*, 551 F.3d 1358, 1362-1363 & n.3 (Fed. Cir. 2009); *Weiner v. United States*, 389 F.3d 152, 156 (5th Cir. 2004); *Davenport Recycling Assocs. v. Commissioner*, 220 F.3d 1255, 1260 (11th Cir. 2000), *aff'g* T.C. Memo. 1998-347; *Chimblo v. Commissioner*, 177 F.3d 119, 125 (2d Cir. 1999), *aff'g* T.C. Memo. 1997-535; *Williams v. United States*, 165 F.3d 29, 165 F.3d 30 (6th Cir. 1998) (unpublished table decision).

This Court agrees with the Court of Appeals and concludes that Mr. Goldberg was required to raise his period of limitations challenge at the partnership level; because he did not, he is barred from raising such a challenge in this proceeding.

3. The FPAAs Were Validly Issued and Mr. Goldberg Had Actual Notice of the TEFRA Litigation

Section 6223(a) provides that the "Secretary must give partners notice of beginning and completion of administrative proceedings [(NBAP)]. The Secretary

shall mail to each partner whose name and address is furnished to the Secretary notice of * * * the beginning of an administrative proceeding at the partnership level with respect to a partnership item". *See Taurus FX Partners, LLC v. Commissioner*, T.C. Memo. 2013-168, at *17. The Commissioner is required to issue an NBAP at least 120 days before he issues an FPAA. Sec. 6223(d)(1).

Mr. Goldberg alleges that he did not receive an NBAP for either Matador's 1998 tax year or Alpha's 2000 tax year. He argues that he was therefore unable to participate in the partnership-level proceedings, in turn converting his partnership items to nonpartnership items, and that the period of limitations has expired with respect to the nonpartnership items. In support of his argument that he never received any NBAPs, Mr. Goldberg argues that the Commissioner failed to comply with procedures related to the certified mailing list. The gist of Mr. Goldberg's claim is that while the USPS stamped the certified mailing list, it neither was signed by a USPS employee nor included the total piece count (which should match the number of NBAPs the Commissioner recorded sending to USPS).

There are two problems with Mr. Goldberg's certified mailing list argument. First, even if he did not receive the NBAPs, the FPAAs were still valid and the operative notices which Mr. Goldberg should have challenged at the partnership level. Second, Mr. Goldberg had actual notice of the TEFRA litigation.

The Commissioner's failure to timely issue an NBAP does not automatically convert partnership items to nonpartnership items nor invalidate an otherwise valid

FPAA. *See Bedrosian v. Commissioner*, 143 T.C. at 95; *Pac. Mgmt. Grp. v. Commissioner*, T.C. Memo. 2018-131, at *35; *Taurus FX Partners, LLC v. Commissioner*, at *17. Such a failure by the Commissioner instead gives rise to certain statutory rights under section 6223(e). *Bedrosian v. Commissioner*, 143 T.C. at 95-96 ("[T]he [IRS'] failure [to issue certain notices within certain time constraints] gives rise to statutory rights under section 6223(e)."). That section allows taxpayers to whom the IRS untimely mails notice of a proceeding, or fails to mail such notice, to opt to have their partnership items treated as nonpartnership items, so long as the TEFRA proceeding is still ongoing. In this case the TEFRA proceedings were still ongoing at the time the FPAAs were issued.[8] Mr. Goldberg's remedy was to make an election under section 6223(e)(3), but he made no such election.[9]

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8. Mr. Goldberg has not disputed receipt of the FPAAs.

9. The Court presumes that the FPAA was, in this case, the operative notice which gave rise to Mr. Goldberg's election rights under sec. 6223(e). In *Bedrosian v. Commissioner*, 143 T.C. 83 (2014), *aff'd*, 940 F.3d 467 (9th Cir. 2019), this Court addressed the question of when election rights arise under sec. 6223(e). The temporary regulation at the time, sec. 301.6223(e)-2T, Temporary Income Tax Regs., 52 Fed. Reg. 6785 (Mar. 5, 1987), required that the election be made within 45 days after the date on which the notice is mailed. In *Bedrosian v. Commissioner*, 143 T.C. at 99, the Court stated that, "[a]lthough it is unclear whether the 'notice' refers to the NBAP or the FPAA, because the FPAA is the later notice in this case, we will presume the FPAA is the operative notice." This Court also added in a footnote: "The current regulation clarifies that the FPAA is the operative notice, but that regulation became effective on October 4, 2001, for partnership years beginning after that date. *See* sec. 301.6223(e)-2(e), Proced. & Admin. Regs. A temporary regulation was effective for the partnership years at issue, and the IRS took

Mr. Goldberg also had actual notice of the ongoing TEFRA proceedings regardless of whether he received NBAPs. First, the TEFRA proceedings were ongoing when he received the FPAAs. Second, the TEFRA proceedings were still ongoing when Mr. Goldberg sent his 2010 protest letter to the Commissioner. Nevertheless, he made neither elections under section 6223(e)(3) nor any filings in the TEFRA proceedings which sought to challenge the period of limitations. There is simply no way now for Mr. Goldberg to escape his repeated failures to pursue timely remedies to his partnership liability claims.[10]

B. Commissioner's Motion for Summary Judgment

1. Standard of Review

Having decided that the underlying tax liabilities are not properly at issue in this case, this Court will review for abuse of discretion Appeals' determination to sustain

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the same position even before the final regulations. Field Service Advisory 1993, 1993 WL 1469668." *Id.* at 99 n.11.

10. In *Davison v. Commissioner*, T.C. Memo. 2019-26, *aff'd*, 805 F. App'x 259 (5th Cir. 2020), this Court addressed whether a taxpayer may contest his underlying income tax liability in a CDP case to the extent that this liability was based on computational adjustments resulting from a TEFRA proceeding. *See also Hudspath v. Commissioner*, T.C. Memo. 2005-83, *aff'd*, 177 F. App'x 326 (4th Cir. 2006). This Court held that, pursuant to sec. 6330(c)(2)(B), a taxpayer is precluded from challenging the existence or amount of an underlying income tax liability where the taxpayer had the opportunity in a TEFRA proceeding to challenge the partnership items that were reflected on the FPAA. *Davison v. Commissioner*, at *13-*14.

the levy action. *E.g., Goza v. Commissioner*, 114 T.C. at 182. In reviewing for abuse of discretion, the Court must uphold the settlement officer's determination unless it is arbitrary, capricious, or without sound basis in fact or law. *See Murphy v. Commissioner*, 125 T.C. 301, 320 (2005), *aff'd*, 469 F.3d 27 (1st Cir. 2006); *see also Keller v. Commissioner*, 568 F.3d 710, 716-718 (9th Cir. 2009), *aff'g in part* T.C. Memo. 2006-166, and *aff'g in part, vacating in part* decisions in related cases. The Court does not conduct an independent review or substitute our own judgment for that of the settlement officer. *Murphy v. Commissioner*, 125 T.C. at 320.

2. Appeals Did Not Abuse Its Discretion in Sustaining the Levy Action

Sections 6320 and 6330 provide taxpayers the opportunity for notice and a hearing upon the filing of an NFTL (section 6320) and before a levy to collect unpaid tax (section 6330). If a taxpayer requests a CDP hearing, the settlement officer conducting the hearing must verify that the requirements of any applicable law or administrative procedure have been met. Secs. 6320(c), 6330(c)(1). The taxpayer may raise at a hearing any relevant issue relating to the unpaid tax or the collection action, including challenges to the appropriateness of collection actions and offers of collection alternatives. *See* sec. 6330(c)(2)(A). The taxpayer may also raise at the hearing challenges to the existence or amount of the underlying tax liability for any period if the person did not receive a statutory notice for such liability or did not otherwise have an opportunity to dispute such liability. *See* sec. 6330(c)(2)(B). A taxpayer

who may raise the underlying liability during a CDP hearing must properly raise the merits of the underlying liability as an issue during the hearing to preserve the issue for judicial review. *See Giamelli v. Commissioner*, 129 T.C. 107, 112-116 (2007); secs. 301.6320-1(f)(2), Q&A-F3, 301.6330-1(f)(2), Q&A-F3, Proced. & Admin. Regs. The merits are not properly raised if the taxpayer challenges the underlying tax liability but fails to present Appeals with any evidence with respect to that liability after having been given reasonably opportunity to present such evidence. *See LG Kendrick, LLC v. Commissioner*, 146 T.C. 17, 34 (2016), *aff'd*, 684 F. App'x 744 (10th Cir. 2017); secs. 301.6320-1(f)(2), Q&A-F3, 301.6330-1(f)(2), Q&A-F3, Proced. & Admin. Regs.

The Commissioner issued Mr. Goldberg an NFTL filing on April 7, 2015, for Mr. Goldberg's 1998 and 2000 income tax liabilities. A taxpayer has 30 days to challenge an NFTL filing by requesting a section 6320 hearing or submitting a Form 12153, but Mr. Goldberg failed to make a timely challenge. *See* sec. 6320(b).

The Commissioner then issued Mr. Goldberg a levy notice, dated December 2, 2015, for Mr. Goldberg's 1998 and 2000 income tax liabilities. A taxpayer has 30 days to challenge a levy notice by requesting a section 6330 hearing or submitting a Form 12153. Sec. 6330. This time, Mr. Goldberg did timely file a Form 12153 on December 20, 2015, requesting, among other things, a CDP hearing.

As the Court stated *supra*, section 6330(c)(2)(B) provides that the existence and amount of the underlying

tax liability can only be contested at a CDP hearing if the taxpayer did not receive a notice of deficiency for the tax in question or did not otherwise have an earlier opportunity to dispute such tax liability. *See Goza v. Commissioner*, 114 T.C. at 180-181; *see also Our Country Home Enters., Inc. v. Commissioner*, 855 F.3d 773, 787 (7th Cir. 2017). The NFTL filing was a prior opportunity of which Mr. Goldberg did not avail himself. *See Inv. Research Assocs., Inc. v. Commissioner*, 126 T.C. 183, 189-191 (2006) (holding that the right to a hearing applies only to the first NFTL filing regarding each tax liability); *see also Gray v. Commissioner*, 723 F.3d 790, 793 (7th Cir. 2013). Therefore, the underlying liabilities are not properly at issue and the Court will review for abuse of discretion.[11]

In reviewing whether Appeals properly sustained the levy notice to facilitate collection of Mr. Goldberg's unpaid 1998 and 2000 income tax liabilities, the Court reviews the record to determine whether the settlement officer: (1) properly verified that the requirements of applicable law or administrative procedure have been met; (2) considered any relevant issues petitioner raised; and (3) considered whether "any proposed collection action balances the need for the efficient collection of taxes with the legitimate concern of * * * [petitioner] that any collection action be no more intrusive than necessary." *See* sec. 6330(c)(3).

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11. The Commissioner's motion for summary judgment further argues that Mr. Goldberg was required to raise his period of limitations argument as a challenge to the underlying liabilities in the TEFRA proceedings. The Court does not address that argument here because the Court has already addressed Mr. Goldberg's arguments *supra*. Presumably, had Mr. Goldberg timely challenged the NFTL filing, the same analysis would apply.

Our review of the record establishes that the settlement officer properly verified assessments of Mr. Goldberg's share of the partnership level adjustments for each tax period, verified that all legal and procedural requirements had been met, *see CreditGuard of Am., Inc. v. Commissioner*, 149 T.C. 370, 379 (2017), and determined that the proposed levy appropriately balances the need for the efficient collection of taxes with petitioner's legitimate concern that the action be no more intrusive than necessary. Mr. Goldberg failed to propose any collection alternative before or during his CDP hearing. It is not an abuse of discretion for a settlement officer to sustain a collection action and not consider collection alternatives when the taxpayer has proposed none. *See McLaine v. Commissioner*, 138 T.C. 228, 242-243 (2012); *Kendricks v. Commissioner*, 124 T.C. 69, 79 (2005); *see also* sec. 301.7122-1(d)(1), Proced. & Admin. Regs. (requiring that offers to compromise a tax liability must be made in writing and include all the information prescribed or requested by the IRS).

Because Mr. Goldberg cannot now challenge the underlying liabilities, and because the Court finds no abuse of discretion, the Court will sustain the collection action and grant the Commissioner's motion for summary judgment.

III. Conclusion

The Court has considered all of the arguments made by the parties and, to the extent they are not addressed herein, they are considered unnecessary, moot, irrelevant, or without merit. No genuine dispute of material fact

exists regarding the Commissioner's determination in this collection action. *See Naftel v. Commissioner*, 85 T.C. at 529. Accordingly, the Court will grant the Commissioner's motion for summary judgment and will deny petitioner's motion for summary judgment.

To reflect the foregoing,

An appropriate order will be issued.

APPENDIX D — ORDER OF THE UNITED STATES TAX COURT, WASHINGTON, DC 20217, DATED OCTOBER 11, 2018

UNITED STATES TAX COURT
WASHINGTON, DC 20217

Docket No. 13148-18 L.

GAIL GOLDBERG,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent,

ORDER

The petition underlying the above-docketed proceeding was filed on July 3, 2018, and alleged disagreement with a notice or notices of deficiency and of determination concerning collection action. Taxable years 1998 and 2000 were referenced as the periods in issue, and two communications issued by the Internal Revenue, Service (IRS) were attached: (1) A Notice of Determination Concerning Collection Action(s) Under Section 6320 and/or 6330, dated June 1, 2018, issued to petitioner with respect to proposed levy action for the 1998 and 2000 years; and (2) a Decision Letter on Equivalent Hearing Under Internal Revenue Code Sections 6320 and/or 6330,

dated June 1, 2018, issued to petitioner with respect to the filing of a Notice of Federal Tax Lien for 1998 and 2000.

Subsequently, on September 14, 2018, respondent filed a Motion To Dismiss for Lack of Jurisdiction as to Notice of Federal Tax Lien. The motion sought to dismiss and to strike insofar as the case concerned the filing of a Notice of Federal Tax Lien for 1998 and 2000, on the ground that no notice of determination pursuant to section 6320 or 6330 of the Internal Revenue Code (I.R.C.) had been issued to petitioner with respect to lien filing for such tax years. Respondent explained, and attached supporting documentation, that although a Notice of Federal Tax Lien Filing and Your Right to a Hearing Under IRC 6320, dated April 7, 2015, had been sent to petitioner by certified mail on April6, 2015, the IRS had not received a Form 12153, Request for a Collection Due Process or Equivalent Hearing, from petitioner until December 22, 2015.

This Court is a court of limited jurisdiction. It may therefore exercise jurisdiction only to the extent expressly provided by statute. *Breman v. Commissioner*, 66 T.C. 61, 66 (197?? In a case seeking the redetermination of a deficiency, the jurisdiction of the Court depends, in part, on the issuance by the Commissioner of a valid notice of deficiency to the taxpayer. Rule 13(c), Tax Court Rules of Practice and Procedure; *Frieling v. Commissioner*, 81 T.C. 42,46 (1983). The notice of deficiency has been described as "the taxpayer's ticket to the Tax Court" because without it, there can be no prepayment judicial review by this Court of the deficiency determined by the Commissioner. *Mulvania v. Commissioner*, 81 T.C. 65,

67 (1983). The jurisdiction of the Court in a deficiency case also depends in part on the timely filing of a petition by the taxpayer. Rule 13(c), Tax Court Rules of Practice and Procedure; *Brown v. Commissioner*, 78 T.C. 215, 220 (1982). 1n this regard, section 6213(a), I.R.C., provides that the petition must be filed with the Court within 90 days, or 150 days if the notice is addressed to a person outside the United States, *after* the notice of deficiency is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the last day). The Court has no authority to extend this 90- day (or 150-day) period. *Joannou v. Commissioner*, 33 T.C. 868, 869 (1960). However, a petition shall be treated as timely filed if it is filed on or before the last date specified in such notice for the filing of a Tax Court petition (but after issuance), a provision which becomes relevant where that date is later than the date computed with reference to the mailing date. Sec. 6213(a), I.R.C. Likewise, if the conditions of section 7502, I.R.C., are satisfied, a petition which is timely mailed may be treated as having been timely filed.

Similarly, this Court's jurisdiction in a case seeking review of a determination concerning collection action under section 6320 or 6330, I.R.C., depends, in part, upon the issuance of a valid notice of determination by the IRS Office of Appeals under section 6320 or 6330, I.R.C. Sees. 6320(c) and 6330(d)(1), I.R.C.; Rule 330(b), Tax Court Rules of Practice and Procedure; *Offiler v. Commissioner*, I 14 T.C. 492 (2000). A condition precedent to the issuance of a notice of determination is the requirement that a taxpayer have requested a hearing before the IRS Office of Appeals within the 30-day period specified in section

6320(a) or 6330(a), I.R.C., and calculated with reference to an underlying Notice of Federal Tax Lien Filing and Your Right to a Hearing Under IRC 6320, Final Notice of Intent To Levy and Notice of Your Right to a Hearing (or the equivalent Notice CP90, Intent to seize your assets and notice of your right to a hearing, depending on the version of the form used), or analogous post-levy notice of hearing rights under section 6330(f), I.R.C. (e.g., a Notice of Levy on Your State Tax Refund and Notice of Your Right to a Hearing).

A late or untimely request for a hearing nonetheless made within a one-year period calculated with reference to one of the types of final notice of lien or levy just described will result only in a so-called equivalent hearing and corresponding decision letter, which decision letter is not a notice of determination sufficient to invoke this Court's jurisdiction under section 6320 or 6330, I.R.C. *Kennedy v. Commissioner*, 116 T.C. 255,262-263 (2001). A request for a hearing made after said one-year period will be denied, and neither a hearing under section 6320 or 6330, I.R.C., nor an equivalent hearing will be afforded. Sees. 301.6320-l(i)(2), Q&A-17, Ill; 301.6330-l(i)(2), Q&A-17, Ill, Proced. & Admin. Regs.

Where a hearing has been timely requested in response to one of the types of notices set forth supra, the IRS Office of Appeals is directed to issue a notice of determination entitling the taxpayer to invoke the jurisdiction of this Court. 1n that context, section 6330(d)(l), I.R.C., specifically provides that the petition must be filed with the Tax Court within 30 days of the

determination. The Court has no authority to extend this 30-day period. *Weber v. Commissioner*, 122 T.C. 258, 263 (2004); *McCune v. Commissioner*, 115 T.C. 114, 117-118 (2000). However, if the conditions of section 7502, I.R.C., are satisfied, a petition which is timely mailed may be treated as having been timely filed.

Other types of IRS notice which may form the basis for a petition to the Tax Court, likewise under statutorily prescribed parameters, include a Notice of Determination Concerning Your Request for Relief From Joint and Several Liability, a Notice of Final Determination Not To Abate Interest, and a Determination of Worker Classification. No pertinent claims involving section 6015, 6404(h), or 7436, I.R.C., respectively, have been implicated here.

Petitioner was served with a copy of respondent's motion and, on October 5, 2018, filed an objection. Therein, petitioner appeared generally to take the position that the circumstances underlying this proceeding should operate in lieu of a determination to confer jurisdiction on this Court, presumably implying that the June 1, 2018, decision letter attached to the petition should be treated as a determination with respect to the Notice of Federal Tax Lien. More specifically, statements by petitioner suggested an attempt to rely on an extensive, years-long history of interactions with the IRS regarding the 1998 and 2000 tax liabilities. The saga began with investments by petitioner's spouse in oil and gas TEFRA partnerships, which partnerships were subsequently examined and proposed adjustments litigated before the Tax Court

between 2008 and 2013. Corresponding proposed adjustments were then made to petitioner's joint returns, and the couple sought to challenge those changes via a protest submitted March 14, 2014, after learning about them through a Form 4549-A, Income Tax Discrepancy Adjustments, dated February 13, 2014. Petitioner thus contended: "Respondent cannot successfully argue that Petitioner did not respond to notices that were not timely responded to given that Petitioner's first notice was on h, February 13, 2014 and timely responded to on March 141 2014 as documented in the attachments." In a similar vein, petitioner added: "Respondent also cannot argue that the IRS has not received timely noticed for tax years 1998 and 2000 as this matter as a group of plaintiffs, which include the Petitioner, has been in litigation with the IRS in the United States District Court, Chicago, Illinois, known as case #16CV6130 over these same issues". Multiple documents pertaining to the protest and district court case were attached.

Conversely, however, petitioner did not at any point claim to have sent a Form 12153 to the IRS within the relevant 30-day statutory period *after* the April 7, 2015, Notice of Federal Tax Lien Filing and Your Right to a Hearing Under IRC 6320. The notice itself provided a deadline of May 14,2015, for purposes of the statutory computation. Unfortunately, whatever other proceedings and interactions petitioner may have had with the IRS cannot alter the necessity of complying with the definitive requirement to submit a Form 12153 (or an equivalent request) within the specified time frame. Regrettably, such confusion is not uncommon given that the IRS

frequently treats as separate processes or proceedings what taxpayers view as a single dispute.

Hence, the record herein at this juncture contains nothing that might suggest a timely request for a collection due process (CDP) hearing as to the Notice of Federal Tax Lien Filing and Your Right to a Hearing Under IRC 6320. Petitioner's attempts to rely on a protest sent more than a year earlier in response to an entirely different communication from the IRS and on other IRS-connected proceedings are unavailing for multiple reasons. In particular, the cited materials lacked the information required for a document to constitute a CDP request. *See* sec. 301.6330-l(c)(2), Q&A-Cl, Proced. & Admin. Regs.; sec 301.6330-l(c)(2), Q&A-Cl, Proced. & Admin. Regs. Moreover, insofar as the Notice of Federal Tax Lien Filing and Your Right to a Hearing Under JRC 6320 was dated April 7, 2015, only items submitted to the agency within the pertinent 30-day window ending in May 2015 would be germane.

In summary and applying the foregoing principles, the record in this litigation fails to establish that a notice determination was sent to petitioner pursuant to sections 6320 and 6330, I.R.C., with respect to the Notice of Federal Tax Lien for years 1998 and 2000. Critically, none of the communications reflected in the record of this matter constitutes, or can substitute for, a notice of determination issued pursuant to sections 6320 and/or 6330, I.R.C, regarding lien filing as of the date the petition herein was filed. Thus, the Court lacks jurisdiction in this case to review any lien filing by respondent in regard to

those taxable periods. Congress has granted the Tax Court no such authority in the circumstances evidenced by this proceeding, regardless of the merits of petitioner's complaints.

Accordingly, it is

ORDERED that respondent's Motion To Dismiss for Lack of Jurisdiction as to Notice of Federal Tax Lien is granted, and this case is dismissed for Jack of jurisdiction insofar as concerns the Notice of Federal Tax Lien for 1998 and 2000. References to the decision letter and lien filing in the petition are deemed stricken.

(Signed) Maurice B. Foley
Chief Judge

Dated: Washington, D.C.
October 11, 2018

APPENDIX E — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, FILED AUGUST 9, 2023

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

August 9, 2023

Before

DIANE P. WOOD, *Circuit Judge*

MICHAEL B. BRENNAN, *Circuit Judge*

MICHAEL Y. SCUDDER, *Circuit Judge*

Nos. 22-1084 & 22-1085

RONALD M. GOLDBERG and GAIL GOLDBERG,

Petitioners-Appellants,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee.

Appeals from the United States Tax Court.

Nos. 12871-18L & 13148-18L

Appendix E

ORDER

Petitioners-appellants filed a petition for rehearing and rehearing *en banc* on July 25, 2023. No judge in regular active service has requested a vote on the petition for rehearing *en banc*, and all members of the original panel have voted to deny panel rehearing. The petition for rehearing and rehearing *en banc* is therefore **DENIED.**

APPENDIX F — RELEVANT STATUTORY PROVISIONS

2001 26 USCS § 6223

§ 6223. Notice to partners of proceedings.

(a) Secretary must give partners notice of beginning and completion of administrative proceedings. The Secretary shall mail to each partner whose name and address is furnished to the Secretary notice of--

(1) the beginning of an administrative proceeding at the partnership level with respect to a partnership item, and

(2) the final partnership administrative adjustment resulting from any such proceeding.

A partner shall not be entitled to any notice under this subsection unless the Secretary has received (at least 30 days before it is mailed to the tax matters partner) sufficient information to enable the Secretary to determine that such partner is entitled to such notice and to provide such notice to such partner.

(b) Special rules for partnership with more than 100 partners.

(1) Partner with less than 1 percent interest. Except as provided in paragraph (2), subsection (a) shall not apply to a partner if--

(A) the partnership has more than 100 partners, and

(B) the partner has a less than 1 percent interest in the profits of the partnership.

(2) Secretary must give notice to notice group. If a group of partners in the aggregate having a 5 percent or more interest in the profits of a partnership so request and designate one of their members to receive the notice, the member so designated shall be treated as a partner to whom subsection (a) applies.

(c) Information base for Secretary's notices, etc. For purposes of this subchapter--

(1) Information on partnership return. Except as provided in paragraphs (2) and (3), the Secretary shall use the names, addresses, and profits interests shown on the partnership return.

(2) Use of additional information. The Secretary shall use additional information furnished to him by the tax matters partner or any other person in accordance with regulations prescribed by the Secretary.

(3) Special rule with respect to indirect partners. If any information furnished to the Secretary under paragraph (1) or (2)--

(A) shows that a person has a profits interest in the partnership by reason of ownership of an interest through 1 or more pass-thru partners, and

(B) contains the name, address, and profits interest of such person, then the Secretary shall use the name, address, and profits interest of such person with respect to such partnership interest (in lieu of the names, addresses, and profits interests of the pass-thru partners).

(d) Period for mailing notice.

(1) Notice of beginning of proceedings. The Secretary shall mail the notice specified in paragraph (1) of subsection (a) to each partner entitled to such notice not later than the 120th day before the day on which the notice specified in paragraph (2) of subsection (a) is mailed to the tax matters partner.

(2) Notice of final partnership administrative adjustment. The Secretary shall mail the notice specified in paragraph (2) of subsection (a) to each partner entitled to such notice not later than the 60th day after the day on which the notice specified in such paragraph (2) was mailed to the tax matters partner.

(e) Effect of Secretary's failure to provide notice.

(1) Application of subsection.

(A) In general. This subsection applies where the Secretary has failed to mail any notice specified in subsection (a) to a partner entitled to such notice within the period specified in subsection (d).

(B) Special rules for partnerships with more than 100 partners. For purposes of subparagraph (A), any partner described in paragraph (1) of subsection (b) shall be treated as entitled to notice specified in subsection (a). The Secretary may provide such notice--

(i) except as provided in clause (ii), by mailing notice to the tax matters partner, or

(ii) in the case of a member of a notice group which qualifies under paragraph (2) of subsection (b), by mailing notice to the partner designated for such purpose by the group.

(2) Proceedings finished. In any case to which this subsection applies, if at the time the Secretarymails the partner notice of the proceeding--

(A) the period within which a petition for review of a final partnership administrative adjustment under section 6226 may be filed has expired and no such petition has been filed, or

(B) the decision of a court in an action begun by such a petition has become final,

the partner may elect to have such adjustment, such decision, or a settlement agreement described in paragraph (2) of section 6224(c) with respect to the partnership taxable year to which the adjustment relates apply to such partner. If the partner does

not make an election under the preceding sentence, the partnership items of the partner for the partnership taxable year to which the proceeding relates shall be treated as nonpartnership items.

(3) Proceedings still going on. In any case to which this subsection applies, if paragraph (2) does not apply, the partner shall be a party to the proceeding unless such partner elects--

(A) to have a settlement agreement described in paragraph (2) of section 6224(c) with respect to the partnership taxable year to which the proceeding relates apply to the partner, or

(B) to have the partnership items of the partner for the partnership taxable year to which the proceeding relates treated as nonpartnership items.

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

(g) Tax matters partner must keep partners informed of proceedings. To the extent and in the manner provided by regulations, the tax matters partner of a partnership

shall keep each partner informed of all administrative and judicial proceedings for the adjustment at the partnership level of partnership items.

(h) Pass-thru partner required to forward notice.

(1) In general. If a pass-thru partner receives a notice with respect to a partnership proceeding from the Secretary, the tax matters partner, or another pass-thru partner, the pass-thru partner shall, within 30 days of receiving that notice, forward a copy of that notice to the person or persons holding an interest (through the pass-thru partner) in the profits or losses of the partnership for the partnership taxable year to which the notice relates.

(2) Partnership as pass-thru partner. In the case of a pass-thru partner which is a partnership, the tax matters partner of such partnership shall be responsible for forwarding copies of the notice to the partners of such partnership.

Appendix F

2002 26 CFR 301.6223(e)-2

§ 301.6223(e)-2 Elections if Internal Revenue Service fails to provide timely notice.

(a) In general. This section applies in any case in which the Internal Revenue Service fails to timely mail any notice described in section 6223(a) of the Internal Revenue Code to a partner entitled to such notice within the period specified in section 6223(d). The failure to issue any notice within the period specified in section 6223(d) does not invalidate the notice of the beginning of an administrative proceeding or final partnership administrative adjustment (FPAA). An untimely FPAA enables the recipient of the untimely notice to make the elections described in paragraphs (b), (c), and (d) of this section. The period within which to make the elections described in paragraphs (b), (c), and (d) of this section commences with the mailing of an FPAA to the partner. In the absence of an election, paragraphs (b) and (c) of this section provide for the treatment of a partner's partnership items.

(b) Proceeding finished. If at the time the Internal Revenue Service mails the partner an FPAA --

> **(1)** The period within which a petition for review of the FPAA under section 6226 may be filed has expired and no petition has been filed; or

(2) The decision of a court in an action begun by such a petition has become final, the partner may elect in accordance with paragraph (d) of this section to have that adjustment, that decision, or a settlement agreement described in section 6224(c)(2) with respect to the partnership taxable year to which the adjustment relates apply to that partner. If the partner does not make an election in accordance with paragraph (d) of this section, the partnership items of the partner for the partnership taxable year to which the proceeding relates shall be treated as having become nonpartnership items as of the day on which the Internal Revenue Service mails the partner the FPAA.

(c) Proceeding still going on. If at the time the Internal Revenue Service mails the partner an FPAA, paragraphs (b)(1) and (2) of this section do not apply, the partner shall be a party to the proceeding unless the partner elects, in accordance with paragraph (d) of this section, to have --

(1) A settlement agreement described in section 6224(c)(2) with respect to the partnership taxable year to which the proceeding relates apply to the partner; or

(2) The partnership items of the partner for the partnership taxable year to which the proceeding relates treated as having become nonpartnership items as of the day on which the Internal Revenue Service mails the partner the FPAA.

(d) Election --

(1) In general. The election described in paragraph (b) or (c) of this section shall be made in the manner prescribed in this paragraph (d). The election shall apply to all partnership items for the partnership taxable year to which the election relates.

(2) Time and manner of making election. The election shall be made by filing a statement with the Internal Revenue Service office mailing the FPAA within 45 days after the date on which the FPAA was mailed to the partner making the election.

(3) Contents of statement. The statement shall --

(i) Be clearly identified as an election under section 6223(e)(2) or (3);

(ii) Specify the election being made (that is, application of final partnership administrative adjustment, court decision, consistent settlement agreement, or nonpartnership item treatment);

(iii) Identify the partner making the election and the partnership by name, address, and taxpayer identification number;

(iv) Specify the partnership taxable year to which the election relates; and

(v) Be signed by the partner making the election.

(e) Effective date. This section is applicable to partnership taxable years beginning on or after October 4, 2001. For years beginning prior to October 4, 2001, see § 301.6223(e)-2T contained in 26 CFR part 1, revised April 1, 2001.