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There is no conversion. See page 5 et seq of the attached.

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CHAPTER 21

BANKRUPTCY AND TEFRA

I. Background and Purpose of TEFRA

In the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), Congress added sections 6221 through 6232 to the Internal Revenue Code. This subchapter revolutionized the procedures used for both examining partnership returns and resolving disputes arising over partnership items.

Prior to the enactment of the TEFRA partnership procedures, each partner's tax liability with respect to an investment in a partnership was determined independently of any other partner's tax liability with respect to the same partnership. A settlement in which one partner agreed with the Internal Revenue Service (IRS) was not binding on any other partner or on the Service in dealing with other partners. A judicial determination of an issue relating to items flowing from a partnership was not binding on any partner other than those partners who were parties to the judicial proceeding. Therefore, any number of separate proceedings brought by various partners, yet involving the same partnership and issues, might go forward and end with disparate and inconsistent results.

In enacting the TEFRA partnership audit and litigation procedures, Congress contemplated that the tax consequences of "partnership items" would be determined at the partnership level through a unified administrative or judicial proceeding, even though the tax liability that results from such a determination is imposed on the individual partners. Partnership items include any item that the partnership is required to determine under subtitle A, to the extent the Service has determined by regulation that the item is more appropriately determined at the partnership level than at the partner level. See I.R.C. § 6231(a)(3) and regulations thereunder.

II. The Need for a Chapter on TEFRA

Pursuant to I.R.C. § 6231(c), the Service has the authority to determine, by regulation, that certain items that would otherwise be treated as partnership items may be treated as nonpartnership items to the extent that their treatment as partnership items will interfere with the effective and efficient enforcement of the tax laws. The Internal Revenue Code and the temporary regulations have identified bankruptcy as one of the special enforcement areas that allow the Service to proceed separately against a partner with respect to converted partnership items.

I.R.C. § 6231(c)(1)(E); Treas. Reg. § 301.6231(c)-7(a).1/ When a partner in a TEFRA partnership files for bankruptcy, questions arise regarding the timing and scope of this "conversion" of partnership items to nonpartnership items, its effect on the TEFRA proceeding, and on the statute of limitations. The provisions of Bankruptcy Code sections 362 and 505 also come into play. Similar questions arise when it is the partnership itself, rather than a partner, which files a petition in bankruptcy.

III. Effect of Bankruptcy on Partnership Items

A. As mentioned above, it has been determined that the treatment of items as partnership items with respect to a partner named as a debtor in a bankruptcy proceeding will interfere with the effective and efficient enforcement of the internal revenue laws. Treas. Reg. § 301.6231(c)-7(a).

B. The regulation provides:

Accordingly, partnership items of such a partner arising in any partnership taxable year ending on or before the last day of the latest taxable year of the partner with respect to which the United States could file a claim for income tax due in the bankruptcy proceeding shall be treated as nonpartnership items as of the date the petition naming the partner as debtor is filed in bankruptcy.

C. There are, therefore, two overlapping requirements that must be met before partnership items will convert:

1. the government must be able to file in the bankruptcy proceeding a claim (secured, administrative, priority, or general unsecured) for income tax; and (2) the items must arise in a taxable year of the partnership which ended on or before the last day of the latest taxable year of the partner for which a claim could be filed. This can be further reduced to a simple three part test: If

a. The partnership taxable year has ended;

b. The partner's (or estate's) taxable year in which the partnership

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1/ In Computer Programs Lambda, Ltd. v. Commissioner, 89 T.C. 198 (1987), the Tax Court ruled that the Secretary's determination that bankruptcy presents special enforcement considerations was manifestly reasonable and upheld the validity of the temporary regulation. Id. at 204.

items are reported has ended; and

c. The bankruptcy proceeding is still open at the time the partner's or estate's year ends so that a claim could be filed, then the partnership items for the partnership year will convert.

D. Within the meaning of the temporary regulation the term "claim" is broadly interpreted as meaning both a proof of claim filed pursuant to 11 U.S.C. § 501 and a request for administrative expenses (administrative claim) filed pursuant to section 503. Since administrative expenses arise postpetition, items relating to both prepetition and postpetition years can convert.

E. Also, in any bankruptcy case a claim "could be filed." In other words, the Service does not read into the word "could" a requirement that the debtor's taxable years be examined on their merits to determine whether an actual liability exists. Rather, the Service's position is that a claim can always be filed and that conversion is automatic.

F. Given the foregoing, perhaps the key to determining which partnership items convert is to determine the latest taxable year of the partner for which the Service could file a claim for income tax in the partner`s bankruptcy proceeding. 2/ In doing so it is logical to look to the latest year during which the bankruptcy estate is in existence and it retains the partnership interest. Once this period is ascertained, work back from there. 3/

2/ In a Chapter 7 or 11 proceeding the term "partner" would, within the meaning of Treas. Reg. § 301.6231(c)-7(a) presumably mean the bankruptcy estate since property of the estate would include the debtor's partnership interest. See I.R.C. § 6231(a)(2) (the term "partner" includes other persons whose tax liability is determined by taking partnership items into account).

3/ In a Chapter 7 case, the bankruptcy estate does not cease to exist upon the granting or denial of a discharge even though these acts lift the automatic stay. The rule for determining when a partnership interest terminates with respect to a Chapter 7 estate is that it terminates on the date on which the partnership interest was liquidated by the trustee, abandoned under B.C. § 554 or the estate was closed under B.C. § 350, whichever event occurs first. In a Chapter 11 proceeding the estate terminates upon dismissal, or, unless otherwise provided in the plan or confirmation order, upon confirmation. In a Chapter 13 case, the bankruptcy estate arguably remains in existence until the case is dismissed or closed. See Barbosa v. Soloman, 235 F.3d 31 (1st Cir. 2000). The Service may file a section 1305(a) claim for post-petition taxes, so it is possible that the partnership items will be subject to the bankruptcy proceeding.

G. Miscellaneous provisions:

1. At the time a bankruptcy petition is filed, the taxpayer may elect pursuant to I.R.C. § 1398(d)(2) to split his taxable year into two short years.

2. Pursuant to Bankruptcy Code § 1305, the Service may file a claim for post-confirmation liabilities.

H. Examples:

EXAMPLE 1. A partner files a Chapter 11 bankruptcy on December 1, 1986. The plan is confirmed on May 15, 1988. The partnership's taxable year ends on December 31, 1988. As of May 15, 1988, the 1987 taxable years and prior years have converted. The partnership items for the 1988 taxable year would not convert, as neither of the two requirements set forth in Treas. Reg. § 301.6231(c)-7(a) have been satisfied:

a. Upon confirmation, the Chapter 11 bankruptcy estate ceased to exist and therefore no claims could be filed after May 15, 1988; 4/ and

b. the partnership's taxable year has not ended by May 15, 1988, i.e., there is no tax due and owing for the 1988 tax year for which a claim could be filed.

We next look to 1987. It is clear that the bankruptcy estate was in existence throughout 1987 and that a claim for the estate's 1987 income tax liability (an administrative claim) could be filed. Also, the partnership's taxable year has ended for 1987. Therefore, 1987 is the latest year for which a claim could be filed by the government in the partner's bankruptcy proceeding. Accordingly, all partnership items for 1987 and the earlier years convert.

In certain situations, partnership items arising in the year the partner files bankruptcy may not convert until some time in the future.

EXAMPLE 2. A partner files a Chapter 11 bankruptcy on September 15,

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4/ Example 1 assumes the estate's inability to determine its liability with respect to its partnership interest as the partnership's taxable year would not have ended by May 15, 1988.

1990. The 1990 partnership items will not convert on the petition date because absent an election by an individual debtor to split the year of bankruptcy into two short taxable years pursuant to I.R.C. § 1398(d)(2), no claim could be filed in the bankruptcy proceeding and (again assuming a calendar year partnership) the partnership's taxable year had not ended on or before September 15, 1990.

If, however, the bankruptcy estate is in existence throughout 1991, then 1991 becomes the latest year for which a claim could be filed and all prior years, including 1990, will convert.

Thus, additional years may convert during the pendency of a bankruptcy proceeding, even after a plan has been confirmed. For instance, in Chapter 13 proceedings the Service may file claims under section 1305 of the Bankruptcy Code for post-confirmation liabilities during the pendency of the case.

IV. Effect of Bankruptcy on TEFRA Proceeding

A. Partnership in Bankruptcy

1. The automatic stay does not prevent the Service from issuing a notice of final partnership administrative adjustments (FPAA), since in a deficiency proceeding the Service is permitted to issue a statutory notice of deficiency. See 11 U.S.C. § 362(b)(9).

2. Nor, in the Service's view, does the bankruptcy of a partnership stay the commencement or continuation of a TEFRA partnership proceeding. See 1983 Western Reserve Oil and Gas Co. v. Commissioner, 95 T.C. 51 (1990), and Chef's Choice Produce Ltd. v. Commissioner, 95 T.C. 388 (1990).

3. In 1983 Western Reserve, the Tax Court addressed the question of whether 11 U.S.C. § 362(a) applied to prevent the individual partners of a bankrupt partnership from filing petitions for redetermination of the partnership adjustments determined by the respondent in the final partnership administrative adjustment (FPAA).

   In answering that question, the court pointed out that, although the purpose of a partnership proceeding is to redetermine the adjustments made in an FPAA, it was the tax liability of the individual partners which was ultimately affected by the proceeding.

The court then stated:

> To argue that the partnership proceeding requires the Tax Court to make determinations with respect the items of income, gain, loss, or credit of the partnership, rather than the individual partners, and that the proceeding involving a bankrupt partnership thus "concerns" the partnership, not the partner, is to exalt form over substance.

4. The rationale behind the 1983 Western Reserve opinion is as follows:

   a. Even under pre-TEFRA law, the starting point in reviewing a deficiency determined against an individual partner was adjustments made at the partnership level.

   b. Under pre-TEFRA law, the bankruptcy of the partnership would not preclude the individual partner from filing a petition to redetermine a deficiency which included partnership adjustments.

   c. The Tax Court, therefore, saw "no reason for a different rule simply because adjustments to a partnership return are now redetermined in a unified proceeding binding on all partners who are parties."

   d. Partners whose tax liabilities will be affected by the outcome of a partnership proceeding continued to be the real parties in interest in any partnership audit or litigation proceeding. The partnership proceeding is simply a conglomeration or aggregation of the affected parties.

   e. Underlying these reasons is the Service’s position that it is not the partnership, but rather the partner filing the petition in Tax Court, who is the petitioner. See Barbados # 6 Ltd. v. Commissioner, 85 T.C. 900 n.1 (1985); I.R.C. § 6226; T.C. Rule 241.

   Conclusion: The partnership bankruptcy proceeding involved a different party (i.e., the partnership) than the TEFRA partnership proceeding in Tax Court and, therefore, the automatic stay did not prevent the individual partners from filing a petition in the Tax Court for the partnership under the TEFRA provisions.

In 1983 Western Reserve the Tax Court also dismissed petitions filed by the receiver of the debtor\partnership for lack of jurisdiction on grounds that (1) the order appointing the receiver, while empowering him to perform the duties of a TMP in proceedings before the Service or other tax or administrative agency, did not specifically grant the receiver the authority to file a Tax Court petition, (2) the receiver, who was never a partner could not qualify as TMP under I.R.C. § 6231(a)(7)(A) or (B), and (3) the Commissioner never purported to select the receiver as TMP.

Generally, a bankruptcy trustee would likewise be ineligible to serve as TMP.

f. The continuing validity of this rationale was questioned in Third Dividend v. Commissioner, T.C. Memo. 1994-412, rev'd, 88 F.3d 821 (9th Cir. 1996) which held that this rationale does not apply to a partnership that is itself a pass-thru partner. The Service follows 1983 Western Reserve.

5. In Chef's Choice Produce, Ltd., Judge Scott explicitly adopted the reasoning of 1983 Western Reserve in holding that the continued existence of the partnership entity (Chef's Choice was liquidated through Chapter 7 bankruptcy) is not essential to the operation of the TEFRA partnership procedures.

6. The rationale for the decision is Chef's Choice is as follows:

   a. I.R.C. § 701 provides that for income tax purposes partnerships are not taxable entities. Instead, a partnership is a conduit, in which the items of partnership income, deduction, and credit are allocated among the partners for inclusion in their respective income tax returns.

   b. When enacting the partnership audit and litigation procedures, Congress contemplated the use of a unified proceeding in which all items of partnership income, loss, deduction, or credit that affect each partner's tax liability would be uniformly adjusted at the partnership level.

   c. Therefore, in spite of the fact that a partnership is not a taxable entity, "in the litigation context, Congress adopted the so-called 'entity theory' of partnership jurisprudence." I.R.C. §

6221. Chef's Choice, 95 T.C. at 393 citing Tempest Assoc., Ltd. v. Commissioner, 94 T.C. 794, 802 (1990).

Conclusion: Adoption of the above-described entity theory does not cause a proceeding with respect to readjustment of partnership items to be a proceeding of the partnership rather than a proceeding of the partners.

7. While it is becoming clear, given 1983 Western Reserve and Chef's Choice, that a TEFRA partnership proceeding should not be stayed simply because the partnership is in bankruptcy, there is also the question of whether a redetermination of items set forth in an FPAA can be made by the Bankruptcy Court pursuant to 11 U.S.C. § 505.

8. In American Principals Leasing Corp. v. United States, No. 88-0101-GT(M) (S.D.Cal. July 13, 1988), aff'd,904 F.2d 477 (9th Cir. 1990) the district court (sitting as a bankruptcy court) held that (1) section 505(a) of the Bankruptcy Code only confers jurisdiction to determine the tax liability of the debtor or the debtor's estate, and thus, the court lacked jurisdiction to determine the tax liability of the nondebtor partners in the debtor partnerships; (2) the court lacked jurisdiction to determine the tax consequences of the partnership activities engaged in by the debtor partnerships because such a determination would be tantamount to determining the tax liability of the nondebtor partners since partnerships are not taxable entities for federal income tax purposes; and (3) the court had jurisdiction under section 505(a) to determine the tax liability, if any, of the flow through entity.

   The Ninth Circuit affirmed, relying in part on the Second Circuit's opinion In re Brandt-Airflex Corp., 843 F.2d 90 (2nd Cir. 1988). It is also noteworthy that the Ninth Circuit reached the conclusion that section 505 of the Bankruptcy Code should be interpreted narrowly, notwithstanding the claim of the debtor that a determination of the tax consequences of the partnerships' activities was essential to its Chapter 11 reorganization.

9. The Tax Court also cited American Principals Leasing for the proposition that a bankruptcy court lacks jurisdiction to determine the tax liability of nondebtor partners for the activities of a debtor partnership or to determine the tax consequences of the partnership's activities.

10. The Service likewise believes that section 505(a)(1) should be

interpreted narrowly to limit the authority of the bankruptcy courts to determine only the tax liability of the debtor and the bankruptcy estate.

11. Notice under the Uniform Partnership Act. Partnerships are governed by the laws of the state where they are formed. In states which have enacted the Uniform Partnership Act, the bankruptcy of a partnership or a partner dissolves the partnership, except for the winding up of partnership affairs, and the completion of transactions begun but not yet finished. Uniform Partnership Act 31 (5); Barbados #7 v. Commissioner, 92 T.C. 804, 812 (1989); In re Minton Group, Inc., 27 B.R. 385, 390 (Bankr. S.D.N.Y. 1983), aff'd, 46 B.R. 222 (S.D.N.Y. 1985); contra In re Safren, 65 B.R. 566, 568-571 (Bankr. C.D. Cal. 1986). Thus, in addition to the notice requirements of the Internal Revenue Code, the bankruptcy of a partnership may require notice to a state official. State law should be consulted to determine the official to notice for legal proceedings concerning a dissolved partnership. Typically, the official will be the Secretary of State. 5/

B. Partner in Bankruptcy

1. To the extent that a partner's partnership items convert to nonpartnership items, that partner/debtor will, pursuant to I.R.C. § 6226(d)(1)(A), no longer have an interest in the outcome of the partnership proceeding and will no longer be a party thereto, nor be allowed to participate therein. If the partner is a TMP, his status as such is terminated. Computer Programs Lambda, Ltd. v. Commissioner, 89 T.C. 198 (1987); Treas. Reg. § 301.6231(a)(7)-1(l)(1)(iv).

2. The partner/debtor would also be ineligible to file a petition commencing a partnership proceeding in any court. I.R.C. § 6226(d)(2).

3. The partner/debtor's partnership items will covert to nonpartnership items on the date of the filing of a petition in bankruptcy, and the period for assessment will be extended for one year after the date of conversion as long as the period under section 6229(a) is open on the date of conversion. Harvey v. Commissioner, T.C. Memo. 1992-67 and Fein v. Commissioner, T.C. Memo. 1994-370.

5/ The Tax Court in Chef's Choice, supra, indicated that it might not be necessary to provide notice to state officials.

4. Consequently, the TEFRA partnership proceeding will, without the partner/debtor, continue in normal fashion. If the TMP's bankruptcy leaves the partnership without a TMP, the Service is not required to appoint a new TMP. Seneca v. Commissioner, 92 T.C. 363 (1989), aff'd without pub. op., 899 F.2d 1225 (9th Cir. 1990). But if the partnership has non-notice partners it is advisable to a appoint a TMP since the non-notice partners get their notice of the proceedings through the TMP.

5. Treatment of Spouses.

   i. If a spouse files a joint return with a partner, she becomes a "partner" whose tax liability will be determined pursuant to the TEFRA proceeding. I.R.C. § 6231(a)(2)(B). The bankruptcy of a partner will cause his partnership items to convert, and the spouse, who is treated as a partner solely because of section 6231(a)(2)(B) will no longer be treated as a partner. See Callaway v. Commissioner, 231 F.3d 106 (2d Cir. 2000).

   ii. On the other hand, the bankruptcy of a spouse who owns a separate or jointly held partnership interest will convert partnership items on the joint return for her but not for her spouse who is not in bankruptcy. Dublin v. Commissioner, 99 T.C. 325 (1992).

   iii. Further, a spouse that files for bankruptcy, who does not own a separate partnership interest will no longer be treated as a partner as of the filing of the bankruptcy petition.

   iv. The Service has adopted the above holdings through final regulations. Treas. Reg. § 301. 6231(a)(2)-1(a)(4). The new regulations also create special rules for spouses holding joint interests in a partnership. In general, spouses with a joint interest in a partnership (e.g., due to community property laws) are treated as holding separate interests in the partnership unless a partner's spouse is not identified. Treas. Reg. § 301.6231(a)(12)-1(a)(2) and (c).

6. In Gillilan v. Commissioner, T.C. Memo. 1993-366, the Tax Court held that the bankruptcy stay prohibited the Service from signing a settlement agreement after a partner filed for bankruptcy even though the partner signed the agreement before he filed for bankruptcy. Not only did the agreement not bind the partner, the court held it also did

not bind the co-signing nonbankrupt spouse. The Service does not agree with this decision, but did not appeal it.

7. The partner/debtor can have his income tax liability attributable to converted partnership items determined by the bankruptcy court. 11 U.S.C. § 505. Alternatively, pursuant to I.R.C. § 6230(a)(2)(A)(ii), the normal deficiency procedures (requiring the issuance of a statutory notice instead of an FPAA) will apply. 6/

8. In light of the pivotal role of the TMP in a TEFRA partnership proceeding, a partner's status as TMP is terminated upon the filing of a petition naming the partner as a debtor in a bankruptcy proceeding. Treas. Reg. § 301.6231(a)(7)-(l)(1)(iv).

9. The termination of the tax matters partner's representative status does not affect the validity of any action taken by the partner as a tax matters partner before his representative status was terminated. Treas. Reg. § 301.6231(a)(7)-1(l)(5)(iii). An agreement to extend the statute of limitations signed by a tax matters partner before the date of his personal bankruptcy remains valid. I.R.C. 6229(b)(1)(B). However, an agreement to extend the statute of limitations signed by a tax matters partner whose representative status has been terminated because of bankruptcy is of no effect and will not extend the assessment statute if the agreement was executed on or before August 5, 1997. Barbados #7 v. Commissioner, 92 T.C. 804, 812 (1989). Barbados #7 has been statutorily overruled, however, by section 6229(b)(2) effective for extensions signed after August 5, 1997. A bankrupt TMP can sign a statute extension which binds partners if the TMP has not notified the Service of his bankruptcy in accordance with regulations.

C. Bankruptcy of a Tiered Partnership

1. In many large partnerships, at least one of the partners is a pass-thru partner. The term "pass-thru partner" is defined in I.R.C. § 6231(a)(9) as a partnership, estate, trust, S Corporation, nominee, or other similar person through whom other persons hold an interest in the partnership with respect to which unified proceedings are conducted. The pass-thru partner is commonly referred to as a tier and the

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6/ For liabilities which may be assessed immediately pursuant to I.R.C. § 6871(b), See discussion in Section V infra.

partnership in which it holds an interest is called the source partnership.

2. In the Service's opinion, the bankruptcy of a tier should generally be treated the same as the bankruptcy of a partnership. Since a partnership is separate and distinct from its partners, the indirect partners should not be affected by the bankruptcy of the tier. (The term "indirect partner" is defined in section 6231(a)(10) as a person holding an interest in a partnership through one or more pass-thru partners.)

3. Therefore, in spite of the fact that a tier is a partner and the bankruptcy of a partner will normally convert the partner/debtor's partnership items into nonpartnership items, we believe that the tier should be ignored under the circumstances and that the bankruptcy of a tier will not convert the partnership items of the indirect partners into nonpartnership items. Accordingly, it is the Service's position that only the occurrence of an event personal to an indirect partner will convert the indirect partner's partnership items relating to the source partnership into nonpartnership items. Therefore, the bankruptcy of a tier should not adversely affect the TEFRA partnership proceeding regarding the source partnership.

4. However, in <u>Third Dividend/Dardanos Assoc. v. Commissioner</u>, T.C. Memo. 1994-412, <u>rev'd</u>, 88 F.3d 821 (9th Cir. 1996), the Tax Court held that the bankruptcy of the tier TEFRA entity (an S corporation) resulted in the conversion of the partnership items of its shareholders, the indirect partners. The court reasoned that the indirect partners received their notice of the proceedings through the tier and concluded that the bankruptcy terminated the tier's right to notice of the proceedings. Since, in the court's view, the indirect partners were cut off from the source TEFRA proceeding, the court held that the partnership items of the indirect partners should be treated as having converted. We disagree with these conclusions. In fact, the tier remains entitled to notice of the proceedings which it can forward to the indirect partners. <u>See</u> I.R.C. § 6223(c)(1). Furthermore, conversion only occurs under statutory criteria which were not met. <u>See</u> I.R.C. § 6231(b). The Ninth Circuit reversed, holding that the status of the tier partner did not affect the applicability of the TEFRA proceeding against the indirect partners.

V. Effect of Bankruptcy on Statute of Limitations.

A. Prepetition Partnership Years

1. I.R.C. § 6501, which requires the assessment of a tax within three years after the filing of a tax return, is the general statute of limitations for the assessment of federal taxes.

2. It is generally our position (for protective purposes only), however, to make assessments attributable to partnership items within the time set forth in section 6229. This period of limitations generally runs three years from the date the partnership return is filed.

3. The tax matters partner's bankruptcy will not toll the period of limitations. Tempest Associates v. Commissioner, 94 T.C. 794 (1990).

4. Section 6229(f) provides an extension of the period of limitations for partnership items which have converted to nonpartnership items. The period of limitations for assessment of converted partnership items "shall not expire before" one year from the date of conversion. See Harvey v. Commissioner, T.C. Memo. 1992-67, and Fein v. Commissioner, T.C. Memo. 1994-370. Furthermore, as a result of a change made by the Technical and Miscellaneous Revenue Act of 1988 (TAMRA), Pub. L. No. 100-647, 102 Stat. 3342, 3585, this one year period may be extended by an agreement entered into between the Secretary and the debtor. The questions remains, however, whether the one year period under section 6229(f) can shorten the time otherwise available under sections 6501 or 6229(a). As a result, it is preferable that the statutory notice be issued within the unextended one year period. The Service arguably does not get the benefit of a longer period of limitations which may exist under sections 6229(a) or 6501 after an item has converted. But see Rhone-Poulenc v. Comm’r, 114 T.C. 533 (2000) (discussed below).

5. In a normal deficiency proceeding in a non-TEFRA context, the statute of limitations on assessment under section 6501 is suspended under section 6503(h) for the period during which the Service is prohibited from making an assessment by reason of a bankruptcy case, and for 60 days thereafter.

6. Section 6503(h), which suspends the period of limitations on assessment under section 6501, does not suspend the period of limitations on assessment under section 6229 (unless section 6229 is interpreted as an extension of section 6501). Consequently,

Congress enacted section 6229(h), as part of the Tax Reform Act of 1997, which suspends the periods under section 6229 for a partner in bankruptcy for the period during which the Service is prohibited from making an assessment by reason of a bankruptcy case, and for 60 days thereafter (effective for periods open as of the date of enactment, August 5, 1997). Since the Service is no longer barred from assessing partnership items under the 1995 amendment to 28 U.S.C. § 362(b)(9)(D), however, section 6229(h) has no practical effect.

7. The period of limitations under section 6229(f) can be suspended pursuant to section 6503(a)(1) through the issuance of a notice of deficiency. Upon issuance of the notice of deficiency, the period for filing a petition (and, hence, the period of limitations pursuant to section 6503(a)(1)) will be suspended pursuant to section 6213(f) for the period during which the debtor is prohibited by reason of the bankruptcy from filing a petition in the Tax Court and for 60 days thereafter. I.R.C. § 6503(a)(1).

8. The period of limitations under section 6229(f) can also be suspended by agreement using Form 872-F, *Consent to Extend Time to Assess Tax Attributable to Items of a Partnership or S Corporation That Have Converted Under Section 6231(b) of the Internal Revenue Code* .

B. Postpetition Partnership Years

1. I.R.C. § 6871(b)(1) allows the immediate assessment of a tax incurred by the bankruptcy estate without prior issuance of a statutory notice of deficiency. Treas. Reg. §§ 301.6871(a)-1 and (b)-1. Resyn Corp. v. United States, 851 F.2d 660, 665-669 (3d Cir. 1988); Cohen v. Gross, 316 F.2d 521, 522-523 (3d Cir. 1963).

2. Section 6871(b)(2) provides for the immediate assessment of any deficiency (including all interest, additional amounts and additions to tax) imposed by subtitle A on the debtor, but only if the liability for such tax has become res judicata pursuant to a determination in a case under title 11, i.e., a section 505(a) determination.

3. Where the deficiency attributable to the converted partnership items (or any items affected by such items) may be immediately assessed pursuant to section 6871(b), the period for assessment under section 6229(f) is not suspended by section 6503(a)(1) since the Service is

not prohibited from making such assessments by reason of the bankruptcy proceeding.

4. Accordingly, except as provided below, the deficiency must be assessed within the period provided by section 6229(f), regardless of whether a notice of deficiency has been issued.

    a. Where it is impracticable to comply with the literal requirements of section 6229(f) with respect to certain postpetition partnership years because the income tax for a particular year does not become legally due and owing until after the expiration of the one year assessment period under 6229(f), it is our position that the assessment should be made within one year from the date that the income tax liability for that year becomes legally due and owing.

5 If the TEFRA partnership proceeding is completed and the decision is final when the partner goes into bankruptcy, but the assessment has not yet been made, the debtor's partnership items will not convert to nonpartnership items. Treas. Reg. § 301.6231(c)-3.

    a. Under these circumstances, the deficiency procedures will not apply and the Service will not have to issue a statutory notice.

    b. <u>Statute of Limitations</u>

        i. Since the debtor's partnership items do not convert to nonpartnership items, the statute of limitations for assessment under section 6229(a) pertaining to partnership and affected items controls.

        ii. The period for assessment will expire one year from the date that the FPAA was defaulted or the decision of the court became final, whichever is applicable. I.R.C. § 6229(d).

            a) With the addition/amendment of 28 U.S.C. 362(b)(9)(D) in 1995 the Service may assess within this one year period without having to ask the bankruptcy court to lift the stay of Section 362(a)(6) under Section 362(d) and (f) of the Bankruptcy Code.

b) Furthermore, new section 6229(h) suspends the period for assessment under section 6229(a) for the period during which any assessment is barred by reason of the pendency of the bankruptcy, and for 60 days thereafter. Since the Service is no longer barred from assessing determined partnership items under the amendment to 28 U.S.C. § 362(b)(9)(D), however, section 6229(h) has no practical effect.

C. Statute of Limitations, Generally

In Rhone-Poulenc v. Commissioner, 114 T.C. 533 (2000), the Tax Court held that, rather than providing a separate statute for partnership items, section 6229 extends the period of limitations under section 6501. For protective purposes, however, the Service will continue to treat section 6229 as a separate period for assessment from section 6501. Where the period of limitations has already expired under section 6229, but the period under section 6501 remains open for one or more partners, we will consider arguing the "statute extension" approach on a case by case basis. The APJP Division must approve all statute extension arguments.