Tax Court Issues Two Opinions on BBA Partnership Audit Regime Procedures[1]

by Robert S. Horwitz

The 2015 Balanced Budget Act (BBA) instituted a new partnership audit regime under which, like the Tax Equity and Fiscal Responsibility Act (TEFRA) partnership audit regime, the IRS conducts audits of partnerships at the partnership level but, unlike the TEFRA audit regime, imposes liability on the partnership rather than directly on the partners. The BBA partnership audit regime applies to returns filed for tax years beginning on and after January 1, 2018. The IRS issued complex regulations under the BBA partnership regime. Last July, the Tax Court issued an opinion invalidating one of the regulations regarding the time for issuing a Notice of Final Partnership Adjustment (FPA) after a partnership makes a modification request. *J. M. Assets v. Commissioner*, 165 T.C. No. 1 (2025).

In March 2026, the Tax Court issued two additional opinions discussing procedural issues under the BBA partnership audit regime: *Mammoth Cave Property LLC v. Commissioner*, 166 T.C. No. 4 (March 9, 2026), and *Jones Bluff, LLC v. Commissioner*, 166 T.C. No. 6 (March 19, 2026). Like *J. M. Assets*, *Mammoth Cave* addressed whether an FPA issued after a modification request was timely. *Jones Bluff* addressed whether the partnership could raise its members' due process rights under the BBA. In both cases, a syndicated conservation easement partnership moved for summary judgment. In both cases, the Tax Court denied the motion, ruling in favor of the IRS. Both cases involve the notice provisions of the BBA.

The BBA has three statutorily required notices. First, the IRS is required to send the partnership and the partnership representative a Notice of Administrative Proceeding (NAP) that an administrative proceeding has commenced. Second, after the audit is completed the IRS sends the partnership a Notice of Proposed Partnership Adjustments. ("NOPPA") that contains the proposed adjustments to the partnership return and the "imputed underpayment," which is the amount that the partnership would pay if the adjustments are upheld. Third, the IRS sends a Notice of Final Partnership Adjustment ("FPA"), after which the partnership can file a petition challenging the proposed adjustments with the Tax Court, the Court of Federal Claims, or a district court. Once the

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FPA is issued the partnership can make a "push out" election, in which case the final adjustments, if any, will be pushed out to the "reviewed year" partners.

Mammoth Cave LLC v. Commissioner

a. Background

Mammoth Cave LLC claimed a charitable contribution deduction for donation of a conservation easement on its 2018 partnership return. The return designated Mammoth Cave JV LLC (MCJV) as its partnership representative and Timothy Pollock as the designated individual. The return listed an address in Welsh, Louisiana for Mammoth Cave LLC, the partnership representative and the designated individual.

On October 22, 2020, the IRS issued an NAP to the Welsh address. On December 17, 2020, Mammoth Cave submitted Form 8979 to revoke MCJV as partnership representative and designate Mammoth Cave Manager LLC (MCML) as partnership representative, whose address was listed as Welsh, LA, and Matthew Mills as the designated individual, whose address was listed as Dexter, Missouri. The Form 8979 was rejected because it did not contain Mammoth Cave's EIN. Mammoth Cave submitted a new Form 8979 on March 26, 2021, which was received by the IRS on April 2, 2021. On October 28, 2021, the IRS notified Pollock and Mills that the resignation and designation were effective as of April 2, 2021.

The IRS sent to MCML a Form 872-M, consent to extend time to make partnership adjustments. Mills signed a change of address form for Mammoth Cave listing its new address as Dexter, MO. The form was mailed to the IRS Ogden Service Center by an attorney for Mammoth Cave on January 9, 2022, with 31 other change of address forms for other entities the attorney's firm represented. The change of address form was not provided to the revenue agent auditing Mammoth Cave. Due to the backlog caused by the Covid pandemic, the change of address form was not processed until August 24, 2022.

On May 20, 2022, the Preliminary Partnership Examination Changes was mailed addressed to MCML at the Welsh address. The NOPPA was issued on July 11, 2022, and mailed to Mammoth Cave, two of its attorneys, and to MCJV, attention Mills, at the Welsh address. The NOPPA was not mailed to MCML. On March 30, 2023, Mammoth Cave filed Form 8984, Extension of the Taxpayer Modification Period to the IRS. The extension form listed Welsh, LA, as the address for both Mammoth Cave and MCML even though the IRS confirmed receipt of the change of address form more than six months earlier.

On June 6, 2023, Mammoth Cave submitted Form 8980, Partnership Request for Modification of Imputed Underpayment. Mills signed the Form 8980, which listed the Welsh address for MCMO and Mammoth Cave. On January 5, 2024, the IRS issued the FPA to Mammoth Cave at the Dexter address. On April 4, 2024, Mammoth Cave filed its petition, affirmatively alleging that the FPA was barred by the statute of limitations because the NOPPA was sent to the incorrect address. It moved for summary judgment on this ground. The Tax Court, in a unanimous reviewed opinion, denied the motion.

b. Discussion

After outlining the standard for summary judgement, the Tax Court discussed the three statutorily required notices under the BBA; the NAP, the NOPPA, and the FPA. A BBA partnership is required to designate in its tax return a partnership representative who has a "substantial presence" in the United States. If the partnership representative is an entity, a designated individual has to be identified. The partnership representative has the sole authority to represent and act on behalf of the partnership. There was no dispute that Mammoth Cave followed proper procedures to designate a partnership representative and designated representative and to revoke the designation and designate successors.

After the NOPPA is issued a partnership may request modification of the imputed underpayment within 270 days from the date the NOPPA is mailed. Section 6235(a) sets out the period of limitations for issuing the FPA. It provides that "no adjustment for any partnership taxable year may be made after the later of:"

> (1) the date which is 3 years after the latest of—
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> (A) the date on which the partnership return for such taxable year was filed,
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> (B) the return due date for the taxable year, or
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> (C) the date on which the partnership filed an administrative adjustment request with respect to such year under section 6227, or
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> (2) in the case of any modification of an imputed underpayment under section 6225(c), the date that is 270 days (plus the number of days of any extension consented to by the Secretary under paragraph (7) thereof) after the date on which everything required to be submitted to the Secretary pursuant to such section is so submitted… .

The period of limitation can be extended by agreement between the partnership and the IRS. The period for submitting a modification case is 270 days after mailing of the NOPPA unless an extension is granted.

Since there was a modification request, whether the FPA was timely is determined under sec. 6235(a)(2). The modification request deadline was April 7, 2023, extended to June 6, 2023. Since the FPA was mailed on January 5, 2024, within 270 days of the modification request extension, it was timely. According to the Court "Petitioner has not explained why the submitted modification here would not have triggered an extension of the limitation period under 6235(a)(2), notwithstanding any flaws in the NOPPA."

Mammoth Cave argued that the NOPPA was sent to MCJV as partnership representative rather than to MCML, the successor partnership representative and, as a result, the statute of limitations expired before the FPA was issued. The Court rebuffed this argument. The NOPPA was sent to Mills, the designated individual of MCML and two of Mammoth Cave's attorneys and the NOPPA identified Mammoth Cave as the partnership to which it applied. Mammoth Cave requested an extension to file a modification. In cases decided under the TEFRA partnership procedures, the courts had held that notice was valid as long as "minimal notice" was provided. Errors in FPAAs were analyzed in the same manner as errors in statutory notices of deficiency. As long as the partnership actually received notice of any proposed or determined adjustments, any defects in the notice were excused. In the case before it, Mammoth Cave had not shown prejudice. The NOPPA named the incorrect partnership representative, but Mammoth Cave timely submitted a request for extension to submit a modification request and submitted modification which resulted in a timely FPA.

Addressing the claim that the NOPPA was sent to the incorrect address, the Court stated that the designated individual and the attorneys continued to list and use the Welsh address as Mammoth Cave's address more than a year after sending the change of address form. Actual receipt and Mammoth Cave's actions "would cure any defect in mailing." The Tax Court concluded that the NOPPA issued was valid and the FPA was timely.

Jones Bluff LLC v. Commissioner

a. Background

This was a BBA partnership proceeding involving the 2019 tax year. Jones Bluff argued that the FPA was invalid because the BBA audit regime violates its members' due process rights. This was because the BBA audit regime rules deprived its individual members of notice and an opportunity to be heard before they were deprived of property in violation of due process. According to the Court, the issue was whether the partnership

had standing to raise a due process claim on behalf of its members to invalidate an FPA. The Tax Court held the partnership did not have standing.

The Court provided an overview of the TEFRA and BBA audit regimes and the changes brought about by BBA, which streamlined the audit procedure. Under TEFRA, a tax matters partner represented the partnership during proceeding and was required to keep partners apprised of the status of the proceedings. Certain partners were entitled to notice of the beginning of proceedings and the FPAA and had the right to initiate judicial proceedings if the tax matters partner fails to do so and to intervene and participate in judicial proceedings if the tax matters partner commences judicial proceedings. The final adjustments were allocated to the partners, who would be assessed any additional tax for the year that was audited. This contrasts with the BBA, where audits, adjustments and payments are at the partnership level. The partnership is represented at all stages by the partnership representative and notices are not sent to the individual partners, who can neither commence nor participate in judicial proceedings.

Under the BBA, unlike TEFRA, the liability from adjustments is the partnership's liability as an entity and it is obligated to pay any imputed underpayment. If the partnership fails to pay the liability, it is reduced by any amount the partners pay "with respect to which the partner is made liable." The partners who pay the liability are the partners in the year the adjustment becomes final.

b. Analysis

The Tax Court began its analysis noting that it is an Article I court, but the case and controversy requirement for Article III courts presumptively applies to its judicial power. Standing requires (a) an "injury in fact," i.e., an invasion of a legally protected right that is "concrete and particularized" not conjectural or hypothetical; (b) causation; and (c) redressability, i.e., the injury is likely to be redressed by a favorable ruling of the court.

Jones Bluff has standing to challenge the FPA on its own behalf; the issue was whether it has standing to assert the claim that the BBA violated its members' rights. "Normally a party cannot rest its claim for relief on legal rights or interests of third parties" but this rule is not absolute. To assert the rights of a third party, a plaintiff must establish two additional factors:

a) That there is a close relationship between the party asserting the right and the person possessing the right;
b) There is a hinderance to the ability of the possessor of the right to protect its right.

Courts have been forgiving in the context of First Amendment rights and where the enforcement of the challenged restriction against the litigant would indirectly violate the third party's rights. Beyond this courts "have not looked favorably upon third party standing."

The liability in issue is that of Jones Bluff, not of its individual members. To the extent that liability passes to its members, it will result from Jones Bluff making an election under IRC sec. 6236 [a push out election] and not from the enforcement of a restriction against its members. The case therefore did not belong to the class of cases where courts have traditionally allowed third party standing.

As to whether there is a close relationship between Jones Bluff and its members, this focuses on the litigant's ability to effectively advocate for the rights of the third-party litigant and sharply present the issue. While Jones Bluff's members have an interest in the partnership, in the context of litigation it does not always share a unity of interest with its members.

Note: The Tax Court is correct in holding that there was not a close relationship. There are two groups of partners who could be affected by a BBA partnership proceeding, those who were partners during the year under review and those who are partners when the final adjustment occurs. A push out election by a partnership would impose liability on reviewed year partners and relieve the partnership of liability based on the adjustments. Failure to make a push out election would adversely impact the adjustment year partners, since the value of their interests in the partnership would decline and, if the partnership did not pay the imputed underpayment, they would personally be liable for the imputed underpayment. Similarly, if there is a push-out election a reallocation adjustment that reallocates an item from one member to another would potentially increase the tax liability of one partner and decrease that of another.

The Tax Court also held that even if there was a close relationship the individual members were free to raise their rights in future litigation.

The Tax Court then turned to another issue: ripeness. For the issue to be ripe, the court would need to decide the case in favor of the IRS and Jones Bluff would either have to make a push out election or fail to pay the imputed underpayment, in which case its reviewed year members would be liable for the imputed underpayment. The liability at issue was that of Jones Bluff, not that of its individual members, who would only be liable due to Jones Bluff's actions, not the IRS's. These are contingent events that make the third-party claims not ripe at this time.

[Note: a push out election has to be made within 45 days of the mailing of the FPA, while a petition has to be filed within 90 days of mailing of the FPA, so Jones Bluff would have made the election before it filed the petition. Typically, a push out election would be made prior to filing of the petition; the adjustments are not taken into account by individual partners until after the adjustments become final and the partnership sends them statements showing the partner's individual share of the adjustments.]

Judge Buch wrote a concurring opinion noting that courts of appeal held that the notice provisions of TEFRA did not violate due process even though under TEFRA notice was not required for partners with less than a 1% interest in a partnership with more than 100 partners and notice was not required for indirect partners.

Takeaway

Based on *Mammoth Cave* and *Jones Bluff,* we can expect that the Tax Court will take a commonsense approach to the BBA procedural rules and will look for guidance to its jurisprudence on analogous TEFRA rules and procedures governing deficiency cases. Nonetheless, to fulfill their obligation to zealously advocate for their clients, practitioners must look for any potential foot fault by the IRS in contesting cases under the BBA partnership audit regime.

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