



Chief Counsel

Disclosures in Syndicated Conservation Easement (SCE) Cases



Agenda

- Part 1
 - General rule of Internal Revenue Code (I.R.C.) section 6103
 - Definitions of key terms contained in section 6103
 - Whose return information is at issue
 - Exceptions to section 6103: Sections 6103(h)(1) and (4)
 - Q&A
- Part 2
 - Overview of TEFRA
 - Overview of BBA
 - Q&A
- Part 3
 - Example
 - Q&A



Section 6103

- Section 6103 is a confidentiality statute.
- **Returns and return information are confidential** except as authorized by the I.R.C.
- Section 6103 applies to federal and state employees and to persons who receive information under specific sections of section 6103.



Section 6103 Definitions

“Return” I.R.C. § 6103(b)(1):

- Tax or information returns (e.g., Forms 1040, 1120, 941, 1099, W-2), estimated tax declarations, or refund claims, and any amendments or supplements, including supporting schedules, attachments, or lists that are supplemental to, or part of, the return;
- That are required by, provided for, or permitted by Title 26; and
- That are filed with the IRS by, on behalf of, or with respect to any person.



Section 6103 Definitions

“Return information” I.R.C. § 6103(b)(2):

- Return information includes all information received by, recorded by, prepared by, furnished to, or collected by the IRS in connection with determining a person’s liability or possible liability under the I.R.C.
- Courts have interpreted “return information” very broadly.
- Return information with taxpayer identifiers (name, SSN, etc.) removed is *still return information!*



Section 6103 Definitions

“Tax Administration” I.R.C. § 6103(b)(4):

- Encompasses the administration, direction, and supervision of the internal revenue laws.
- Includes assessment, collection, enforcement, and litigation.



Whose Return Information Is It?

- The key factor is whose tax liability is under investigation by the IRS at the time the information is created or received by the IRS.
- Important Points:
 - Neither who the IRS obtained the information from nor whose name appears on the information necessarily tells you whose return information it is.
 - The same information can be the return information of more than one taxpayer.



Section 6103 Exceptions

- **Remember:** Returns and return information are confidential unless an exception applies.
- Section 6103(h) is a commonly used exception in SCE cases.
 - Section 6103(h)(1): Disclosures to Treasury Department Officers and Employees
 - Section 6103(h)(4): Disclosures in Judicial and Administrative Tax Proceedings



Section 6103(h)(1)

- Treasury officers and employees have access to returns and return information needed to perform officially assigned tax administration duties.
- Written request is not required.
- Two requirements:
 - An official need to know the return or return information.
 - Cannot be for gratuitous reasons.
 - For purposes of tax administration.
 - Definition of tax administration is very broad.



Section 6103(h)(4)

- Provides rules regarding the disclosure of returns and return information in judicial and administrative tax proceedings.
- The tax proceedings may be at the federal or state level.
- Audits are administrative tax proceedings for purposes of the statute.



Purpose of Section 6103(h)(4)

- To regulate sensitive returns and return information that is disclosed in proceedings, many which are public.

Section 6103(h)(4)(A)

- Disclosures of a party's return and return information
- Rules are less stringent

Sections 6103(h)(4)(B) and (C)

- Disclosures of third parties' returns and return information
- Rules are more stringent

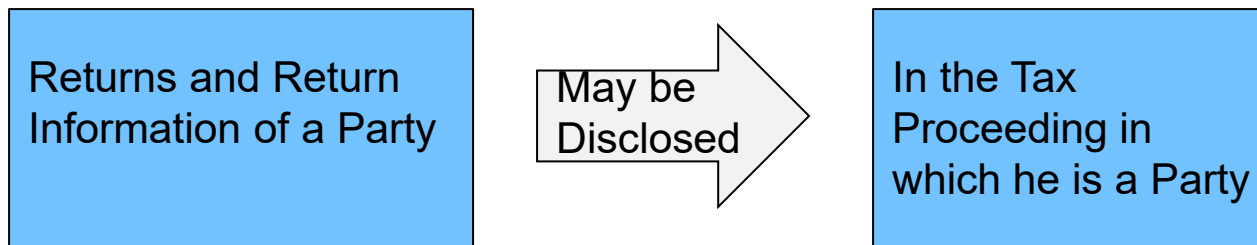


Section 6103(h)(4)(A)

Party to the Proceeding

Returns and return information may be disclosed in a judicial or administrative proceeding pertaining to tax administration if –

- the taxpayer is a party to the proceeding.

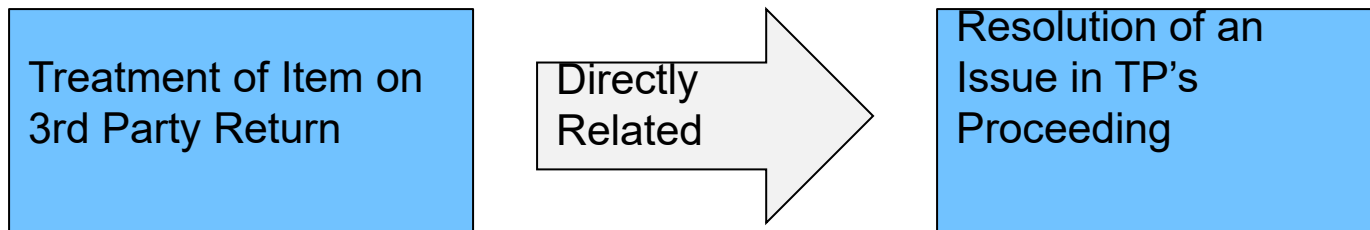


Section 6103(h)(4)(B)

The “Item” Test

A third party’s returns and return information may be disclosed in a judicial or administrative proceeding pertaining to tax administration if –

- the treatment of an item reflected on the third party’s return is **directly related** to the resolution of an issue in the proceeding.





Section 6103(h)(4)(B)

The “Item” Test

1. Identify an item on the third party’s return (must be on the return).
2. Is that item on the third party’s return directly related to resolving an issue in the proceeding?
3. If yes, then the return information about that item may be disclosed in the proceeding.
 - Only the return information that is directly related to resolving the issue may be disclosed.



Directly Related

- More than relevant (e.g., germane) to proving an element of the substantive tax issue at issue in the case
 - What are the elements of the substantive issue?
 - How do you prove those elements?
 - How does the item on the third party return go to proving the element(s)?
- Must have a direct relationship to the resolution of the issue in the proceeding
 - Used to directly prove one or more elements
- It is not directly related if the information is being used to show that the third party is similarly situated to the taxpayer
 - For example, proving the item through an indirect inference
 - Corp 1 pays its CEO \$1 million in compensation. Corp 2 pays its CEO \$100k in compensation. Corp 1's return information cannot be used to establish that Corp 2's compensation is unreasonable.



Section 6103(h)(4)(B)

In re United States, 669 F.3d 1333 (Fed. Cir. 2012)

Issue: At issue was liability for excise taxes arising from use of certain chemicals in manufacturing of imported products. Taxpayer sought information regarding the IRS contractor's testing for these chemicals in other taxpayer's similar products.

Holding: The IRS cannot be required to disclose return information of unrelated but similarly situated third parties pursuant to section 6103(h)(4)(B).



Section 6103(h)(4)(B)

In re United States, 669 F.3d 1333 (Fed. Cir. 2012) cont'd

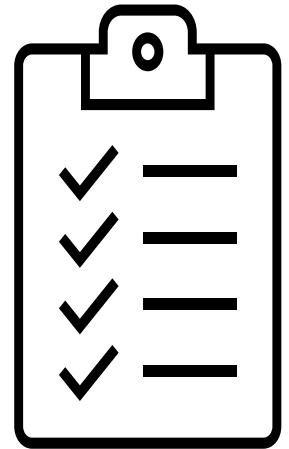
Rationale:

- The treatment of an item on a third party's return is NOT directly related to the resolution of an issue when the only link between the third party and the taxpayer is the treatment of a similar item on the return.
- The requirement that information be “directly related” is much narrower than when a court assesses if evidence is relevant.

Section 6103(h)(4)(B)

Requirements for Disclosure:

1. Item on third party return must be germane to an element of the taxpayer's claim.
 - Must be more than relevant to resolving an issue.
 - Not required to be "necessary" to or dispositive of the issue.
2. The third party returns and return information must apply to the specific taxpayer's liability.
 - Not that of unrelated, similarly situated third parties.
 - If test is met, return information about the item on the return may also be disclosed provided that information is also direct related to resolving an issue in the proceeding





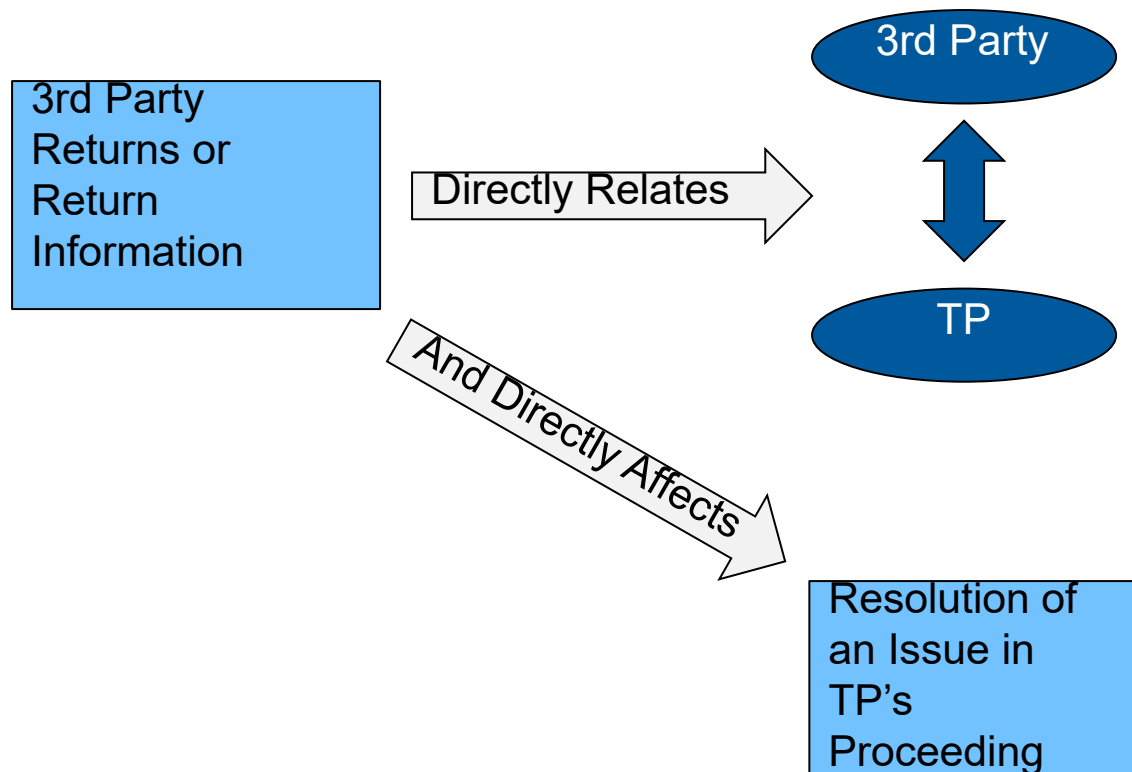
Section 6103(h)(4)(C)

The “Transactional Relationship” Test

A third party’s returns and return information may be disclosed in a judicial or administrative proceeding pertaining to tax administration if –

- the third party’s returns or return information **directly relates** to a transactional relationship between the third party and the taxpayer whose liability is at issue; **and**
- the third party’s returns or return information pertaining to that transaction **directly affects** the resolution of an issue in the proceeding.
 - Directly affects is the same as directly related under the item test

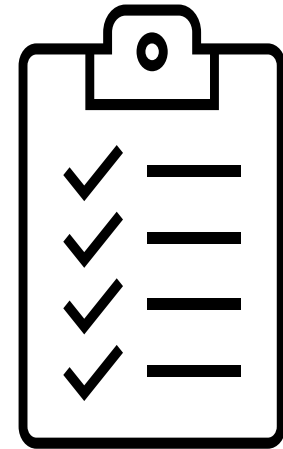
Section 6103(h)(4)(C)



Section 6103(h)(4)(C)

Requirements for Disclosure:

1. There must be a transactional relationship between the third party and the taxpayer whose liability is at issue.
2. The third party returns and return information must directly relate to that transactional relationship.
3. The third party returns and return information pertaining to that transaction must directly affect the resolution of an issue in the proceeding.
 - Must be germane to an element of the taxpayer's claim.
 - Must apply to the specific taxpayer's liability, not that of unrelated, similarly situated third parties.
 - Only return information pertaining to the transaction may be disclosed.





Sections 6103(h)(4)(B) and (C)

Additional Points:

- Third party returns and return information cannot be used to impeach the credibility of a witness unless either the item or transactional relationship test is met.
- Third party returns and return information that can be disclosed under the tests is limited to only the information meeting the tests.

Questions





Overview - TEFRA

- Audit at the partnership level
- Under TEFRA, the partners, and not the partnership are the parties to the proceeding.
 - See Chef's Choice Produce Ltd. v. Comm'r, 95 T.C. 388, 392-94 (1990)
 - As the partners are the parties and any adjustments made at the partnership level flow-through to the ultimate taxpayers, the partners' liability is at issue in the proceeding.
 - Therefore, all return information is return information of the partners, not the partnership
 - Partners can request return information, not partnership
- I.R.C. § 6231(a)(2) defines "partner" as—
 - A partner in the partnership, and
 - Any other person whose income tax liability is determined in whole or in part by taking into account, directly or indirectly, partnership items of the partnerships.
 - This includes all direct and indirect partners of the partnership.
- All partners all the way up the chain are the parties to the TEFRA proceeding and all information in the TEFRA exam is their return information.



Overview - BBA

- Audit at the partnership level
- The default rule is that the partnership is liable for a tax, called the imputed underpayment, calculated on any adjustments made at the partnership level.
 - The exam is about determining the partnership's liability.
- Return information – because the liability being determined in a BBA audit is the liability of the partnership (push out happens after the determination, if at all), all return information is of the partnership, not the partners.
 - Partners from the year at issue may request the partnership's return information under section 6103(e)(1)(C). Because it is the partnership's return information, the partnership can also request its return information.
- Partnership is the only party to the BBA proceeding. The partners are not parties.

Questions

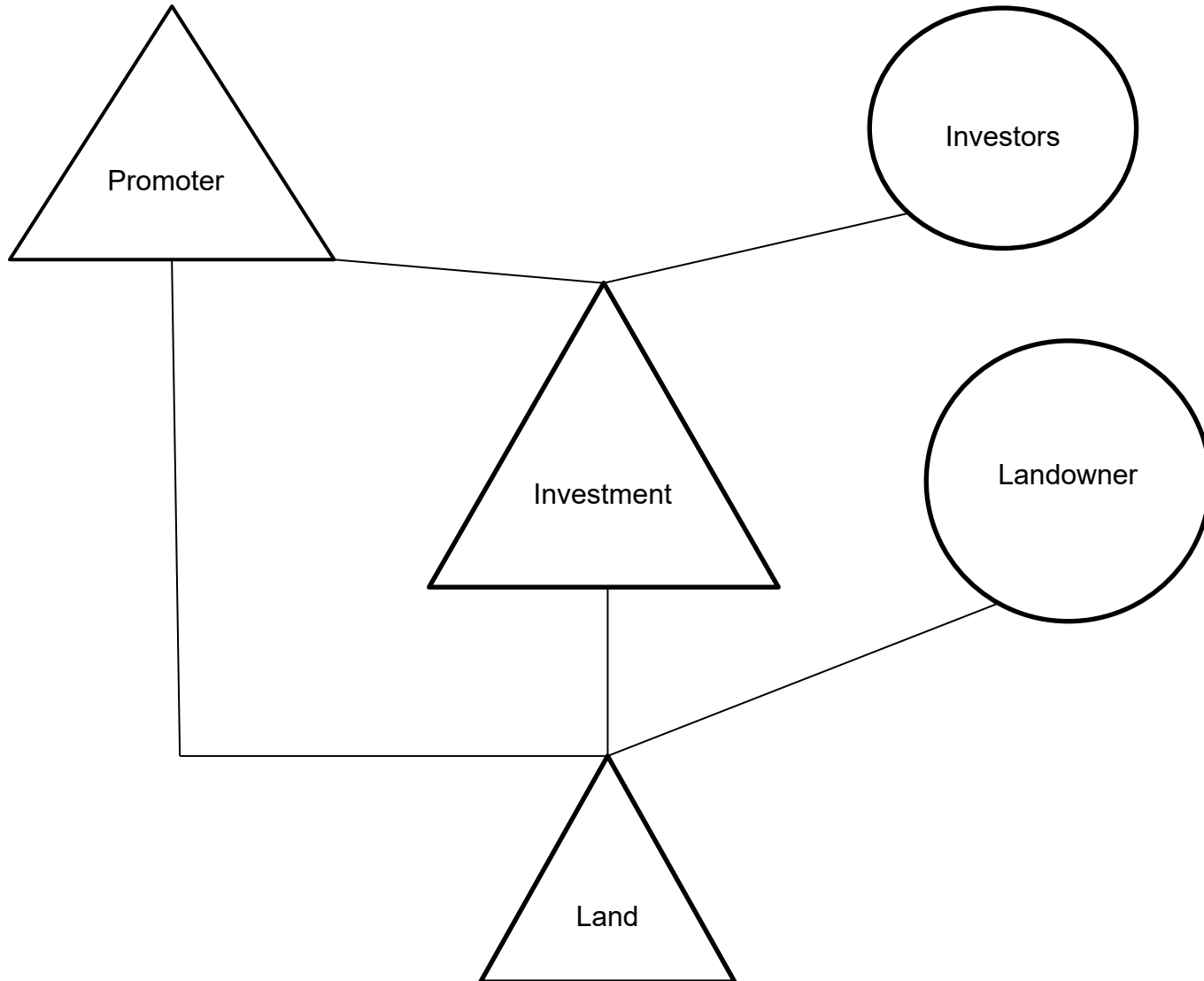




Example

- Land Partnership 1, LLC
 - Land Partnership 1, LLC is owned 5% by Landowner, 93% by Investment 1, LLC, and 2% by Promoter.
 - Land Partnership 1, LLC owns Land 1.
 - Land Partnership 1, LLC contributes an easement on Land 1 to Charity, claiming a large charitable deduction based on the assumption that Land 1 could be a Thing.
 - Investment 1, LLC is owned 2% by Promoter and 98% by Investors 1.
- Land Partnership 2, LLC
 - Land Partnership 2, LLC is owned 5% by Landowner, 93% by Investment 2, LLC, and 2% by Promoter.
 - Land Partnership 2, LLC owns Land 2
 - Land Partnership 2, LLC contributes an easement on Land 2 to Charity, claiming a large charitable deduction based on the assumption that Land 2 could be a Thing.
 - Investment 2, LLC is owned 2% by Promoter and 98% by Investors 2.

Example





Example, Questions 1 and 2

1. Pursuant to section 6103, how much information can Agent A, who is auditing Land Partnership 1, and Agent B, who is auditing Land Partnership 2, share with each other?

Answer: Agent A and Agent B can share any return information of Land Partnership 1 and Land Partnership 2 with each other for purposes of their tax administrative duties under section 6103(h)(1).

2. Pursuant to section 6103, how much information can Agent C, who worked an audit 3 years ago of a partnership engaged in an SCE transaction similar to the transactions engaged in by Land Partnership 1 and 2, share with Agents A and B?

Answer: Agent C can share any return information with Agents A and B for their tax administrative duties under section 6103(h)(1).



Example, Question 3

3. The same promoter organized 4 other SCE transactions in the same state 3 years ago. These 4 cases were audited by Agent D. Pursuant to section 6103, can any of the information from those 4 audits be included in an 886-A with respect to Land Partnership 1 or 2?

Answer:

- TEFRA - If all of the entities at issue are TEFRA partnerships and there is at least one common direct or indirect partner between those partnerships (ex. the promoter is a partner in all of the partnerships), then all of the information may be included in the 886-A under 6103(h)(4)(A) because the return information generated in the other audits was the return information of the promoter, who is also a party to Land Partnership 1 and 2 audits.
 - Without a common partner, you must meet the item or transactional relationship test.



Example, Question 3 cont.

Answer:

- BBA – under BBA, the partnership is the taxpayer so all of the partnerships are considered third parties to one another even if they have common ownership. Therefore, in order to disclose any return information of one BBA partnership to another, we would have to meet the item or transactional relationship test.
 - Transactional relationship test – the facts do not indicate there is any transactions between the partnerships, so this test is inapplicable.
 - Item test – this will apply if there is an item on the return (ex. a charitable contribution deduction) of the other 4 partnerships that is directly related to resolving an issue in the Land Partnership 1 and 2 audits and the return information to be disclosed is about that item.



Example, Question 4

4. Can the following items of information obtained by Agent A in the audit of Land Partnership 1 be included in the 886-A with respect to Land Partnership 2?
 - a. Appraisal of Land 1
 - b. Promotional materials provided by Promoter to Land Partnership 1
 - c. Information that Promoter has engaged in multiple similar transactions
 - d. An expert's statement regarding whether the highest and best use of Land 1 is a viable option for the area Land 1 is in, if the appraisal for Land 2 had the same highest and best use.

Answer:

The answer is the same as Question 3. Note that, under the item test, if an item on a third party return is directly related to resolving an issue in the proceeding, then the return information related to that item may also be disclosed in the proceeding if that information is also directly related. Also note that an item can be return information even if it does not contain a taxpayer name if it was gathered as part of a determination of liability under the Code.



Example, Questions 5 and 6

Agent C also has Landowner under exam for his personal income tax return.

5. May Agent C share information obtained in Landowner's personal exam with Agents A and B?

Answer:

Yes, Agent C can share any return information to Agents A and B for purposes of their tax administrative duties under section 6103(h)(1).

6. Can any of the return information from Landowner's exam be included in the 886-As for Land Partnership 1 and 2?

Answer:

The answer is the same as Question 3. However, there would be a transactional relationship between Landowner and Land Partnership 1 and 2 because Landowner contributed property to the partnerships and is a partner in those partnerships. Therefore, any return information that directly relates to that transaction and directly affects the resolution of an issue in the audits of Land Partnership 1 and 2 may be included in the 886-As.

Questions

For additional information and examples,
see CC Notice 2020-008.





Appendix



Overview - TEFRA

- Tax Equity and Fiscal Responsibility Act of 1982 (“TEFRA”)
 - Applies to all entities required to file a partnership return that have more than 10 partners, or who have 10 or fewer partners if one of those partners is a partner other than a U.S. individual, a C corp, or an estate of a deceased partner.
- Repealed for partnership tax years beginning after December 31, 2017





Overview - TEFRA

- Under TEFRA
 - Audit at the partnership level
 - I.R.C. § 6221 states that “the tax treatment of any partnership item (and the applicability of any penalty, addition to tax, or additional amount which relates to an adjustment to a partnership item) shall be determined at the *partnership* level.”
 - Adjustments flow-thru through chains of ownership to reach ultimate taxpayers who are assessed the tax attributable to the adjustments
 - Interaction with a Tax Matters Partner (TMP) with rights of notice and participation by partners
 - Statute of limitations began with the statute at the partner level and provided suspensions and extensions with respect to partnership items determined at the partnership level

Overview - BBA

- Bipartisan Budget Act of 2015 (“BBA”)
 - Applies to all entities required to file a partnership return unless an eligible partnership makes an election out of BBA for a taxable year.
 - Year-by-year election
- Applicable to taxable years beginning on or after January 1, 2018
 - Ability to elect into BBA for taxable years beginning after November 2, 2015 and before January 1, 2018.





Overview - BBA

- Under BBA
 - Audit at the partnership level
 - I.R.C. § 6221 states that the following occurs at the partnership level:
 - Any adjustment to a partnership-related item
 - The assessment and collection of any tax on those adjustments (except as otherwise provided)
 - Any penalties, additions to tax, or additional amounts on the adjustments
 - The default rule is that the partnership is liable for a tax, called the imputed underpayment, calculated on any adjustments made at the partnership level.
 - Assessed and collected as if it was an income tax.
 - Partners may be liable if the partnership does not pay.
 - The partnership may be able to make an election to push out the adjustments to the partners, who will then pay any applicable tax.





Overview - BBA

- Interaction with a Partnership Representative (PR) with no rights of notice and participation by partners
 - The PR has the sole authority to act on behalf of the partnership under BBA.
 - The partnership and the partners are bound by any action taken by the PR.
- Separate period of limitations on making adjustments (not assessments) to the partnership.
 - Any extensions of the partners' period of limitations on making assessments has no impact on the period of limitations on making adjustments to the partnership.
- Return information – because the liability being determined in a BBA audit is the liability of the partnership (push out happens after the determination, if at all), all return information is of the partnership, not the partners.