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INTERNAL REVENUE SERVICE  
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INTERNAL REVENUE SERVICE NATIONAL OFFICE FIELD SERVICE ADVICE

MEMORANDUM FOR

FROM: Deborah A. Butler  
Assistant Chief Counsel (Field Service) CC:DOM:FS

SUBJECT: Appointment of TMP of Bankrupt Partnership

This Field Service Advice responds to your memorandum dated June 9, 1999. Field Service Advice is not binding on Examination or Appeals and is not a final case determination. This document is not to be cited as precedent.

LEGEND

A	=
B	=
Partnerships	=
Partnership Business	=
Investor Partnerships	=
Sales Partnership	=
Management Partnership	=
Operational Partnership	=
X	=
Y	=
Date 1	=
Date 2	=

Date 3 =

### ISSUES

1. Whether the bankruptcy court has jurisdiction to appoint a tax matters partner (TMP).
2. Whether a TMP must be appointed or designated in the instant case.

### CONCLUSIONS

1. The bankruptcy court does not have the authority to appoint a TMP for a debtor partnership under the facts in the instant case, because it is not necessary or appropriate, and to do so would be an overly expansive application of the bankruptcy court's jurisdiction.
2. A TMP need not be appointed or designated in the instant case.

### FACTS

A group of related partnerships is presently before the bankruptcy court. The partnerships are engaged in a series of tax shelters involving Partnership Business. The shelter includes Investor Partnerships, which purchased Partnership Business from Sales Partnership. The Investor Partnerships also pay management fees to Management Partnership. Lastly, money flowed to Operational Partnership, which operated the facilities for the Partnership Business. There are over X investors in a total of Y Investor Partnerships. The Sales, Management, and Operational Partnerships are essentially comprised of the founders and promoters of the tax shelter.

Operational Partnership filed a Chapter 11 petition and a plan has been confirmed. The Sales and Management Partnerships were forced into involuntary bankruptcy by a group of investors, and those cases are pending. A United States Trustee was appointed to monitor the Sales and Management Partnerships' cases. The trustee initiated a declaratory judgment action in the Bankruptcy Court requesting that the court collapse all Partnerships (including the Investor Partnerships that were not before the court) into a single entity. The basis for collapsing such entities is that all of the entities have shared common accounts and books and records. From a bookkeeping standpoint, the partnerships have made no meaningful distinctions among themselves, and from a

practical standpoint, have operated as a single enterprise. On Date 1, the Bankruptcy Court granted the trustee's motion to consolidate into one entity the two debtor partnerships with all of the Investor Partnerships as of Date 2, the date the involuntary bankruptcies were filed. The motion was based on the inability to determine the relative ownership of the assets and liabilities of each partnership.

Nearly all of the partnerships are subject to the TEFRA unified audit and litigation procedures and are either currently under examination or docketed before the Tax Court. Cases generally fall into four categories: under exam; docketed but not yet tried; docketed and awaiting opinion; and decided. These TEFRA proceedings consistently have resulted in deficiencies in the income tax liabilities of the partners (and we believe they will continue to do so). Also, several of the Investor Partnerships have been assessed late filing penalties, which are liabilities of the partnerships.

The founder and lead promoter of the partnerships is a general partner in all of the partnerships and also serves as the Tax Matters Partner (TMP) for nearly all of the partnerships. On Date 3, the tax matters partner resigned as TMP but such resignation was Aconditioned upon the substitution of a suitable TMP.@ Counsel for the TMP has stated that the TMP will resign and that he intends to file a motion with the bankruptcy court asking for the appointment of a new TMP.

## LAW AND ANALYSIS

As a preliminary issue, we must first address whether the former tax matters partner (TMP) has made a valid resignation. In response to our T.C. Rule 250 motion asking the Tax Court to remove the TMP and appoint a new TMP in his place, the former TMP submitted a conditional resignation to the Tax Court. We believe that the resignation is not effective because it was conditional. As a result, Mr. A continues to be the TMP in all docketed cases until an order removing the TMP is issued by the Tax Court. Furthermore, the resignation is unclear on its face whether it is intended to apply to nondocketed years; however, because the document was lodged with the Tax Court, we interpret the resignation as limited to docketed tax years. Accordingly, Mr. A is the TMP for all docketed and nondocketed years, and we must determine whether the bankruptcy court has the authority to appoint a new TMP.

### Authority of the Bankruptcy Court

The jurisdiction of the bankruptcy court is generally limited to matters Aconcerning the debtor.@ 11 U.S.C. ' 505. The power of the bankruptcy court is, however, sweeping in

that it may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this [bankruptcy] title. 11 U.S.C. § 105(a).

In 1982, Congress enacted the TEFRA<sup>1</sup> unified audit and litigation procedures to simplify and streamline the partnership audit, litigation and assessment process. Despite the creation of a unified procedure for audit and litigation, the manner of tax reporting and assessment is not affected by the TEFRA partnership provisions and it is the partners that are the true subject of a TEFRA partnership proceeding. The Conference Report to TEFRA expressly notes that “[f]or 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.”<sup>2</sup> For example, a partnership files a Form 1065 U.S. Partnership Return of Income; however, this form is merely an informational return that sets forth the amounts of partnership items and includes schedules allocating such items among the partners. The enactment of the TEFRA partnership provisions merely set forth rules as to the administrative procedures for making adjustments to these items: taxes continue to be assessed against the partners and the partnership continues to be a mere conduit for tax purposes.

The issue of the interplay between a partnership in bankruptcy and a TEFRA partnership proceeding has been addressed in numerous cases. Most notably, in 1983 Western Reserve Oil & Gas Ltd. v. Commissioner, 95 T.C. 51 (1990), the Tax Court addressed the impact of the bankruptcy stay on a TEFRA partnership proceeding when the partnership was in bankruptcy. The court noted that for bankruptcy purposes, a partnership is an entity separate and distinct from its partners. Id. at 56. Most importantly, the court noted that, although a TEFRA partnership proceeding determines the treatment of partnership items, “[u]ltimately, however, it is the tax liability of the individual partners which is affected by the redetermination of the adjustments as to the return of the partnership.” Id. at 57. In reaching its conclusion, the Tax Court relied heavily on American Principles Leasing Corp. v. United States, 904 F.2d 477 (9th Cir. 1990), which expressly held that Section 505 does not permit the bankruptcy court to determine the tax liabilities of the non-debtor partners. Id. at 481.

Most recently, this issue was addressed in Hoyt and Sons Ranch Properties, Ltd. v. Commissioner, T.C. Memo. 1998-77, in which the court succinctly stated that:

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<sup>1</sup>Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248.

<sup>2</sup>H.R. Conf. Rep. No. 97-760, at 599, 1982-2 C.B. 600, 662.

because a TEFRA partnership proceeding ultimately concerns the tax liability of the partnership's individual partners, and recognizing that a partnership in bankruptcy is an entity separate and distinct from its partners, we conclude that a partnership level proceeding may be commenced and concluded in this Court without violating the automatic stay.

The courts have repeatedly recognized that a bankruptcy court cannot exercise jurisdiction over the tax matters of nondebtor partners of a partnership in bankruptcy. In the instant case, however, the court has expanded its jurisdiction to cover all related partnerships. Furthermore, though jurisdiction of the bankruptcy court cannot be extended to include the tax liabilities of the partners, the power of the bankruptcy court is much broader. Section 105(a) of the Bankruptcy Code authorizes the court to issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.<sup>6</sup> The inquiry thus becomes whether it is necessary or appropriate to issue an order appointing a new tax matters partner.

#### The Role of the TMP

The position of Tax Matters Partner (TMP) is statutorily created and does not exist outside the TEFRA partnership context. Specifically, I.R.C. ' 6231(a)(7) establishes the position of TMP and the TMP is imbued with certain rights and responsibilities that are set forth throughout the TEFRA partnership provisions. As the Tax Court observed in Computer Programs Lambda, Ltd. v. Commissioner, 89 T.C. 198 (1987):

The tax matters partner is the central figure of partnership proceedings. During both administrative proceedings and litigation, the tax matters partner serves as the focal point for service of all notices, documents, and orders on the partnership. . . . The tax matters partner must also perform important functions within the partnership. He is required to keep all partners informed of the status of administrative and judicial proceedings involving the partnership. Sec. 6223(g). Moreover, the tax matters partner may, under some circumstances, bind partners who are not notice partners by entering into a settlement agreement with respondent. Sec. 6224(c)(3).

In the execution of these responsibilities, a tax matters partner acts as a fiduciary. His personal interest, if any, is beside the point.  
Id. at 205.

In docketed cases, the TMP has the authority to bind partners to stipulated decisions. T.C. Rule 248(a) and (b). Further, the TMP is responsible for forwarding information to the other partners who are parties to the action. See, e.g., T.C. Rules 241(f), 241(g) and 248(c); Temp. Treas. Reg. ' 301.6223(g)-1T(b). While the participating

partners collectively control the litigation, it is the TMP who serves as the liaison between the participating partners and the nonparticipating partners. T.C. Rule 247. As this court stated in a second opinion in Computer Programs Lambda, Ltd. v. Commissioner, 90 T.C. 1124 (1988):

The presence of a tax matters partner during litigation is essential to the operation of the statutory procedures of sections 6221 et seq., and to the fair, efficient, and consistent disposition of partnership proceedings before us. The tax matters partner must keep each partner informed of all judicial proceedings relating to the adjustment of partnership items at the partnership level. Sec. 6223(g). He must furnish to all partners information not only on the filing of the petition for judicial review, but also on the progress of the litigation, settlement negotiations and offers, trial preparation, discovery, motions, and trial, and also on the filing of any appeal from our decision. The tax matters partner serves as the focal point for service of all notices, documents, and orders on the partnership during litigation. Under some circumstances he may bind partners who are not notice partners by entering into settlement agreements with respondent. Sec. 6224(c)(3). His initiative during the proceeding as well as the execution of his statutory duties will have a substantial effect upon the rights of all partners in the partnership.

Id. at 1126.

These opinions focus on the important role served by the TMP; however, that role is limited to matters regarding the determination of the tax treatment of partnership items, and as a result, the income tax liabilities of the partners. The TMP has no authority beyond what is set forth in the Internal Revenue Code and the regulations promulgated thereunder.

We have been unable to locate any cases in which a bankruptcy court has appointed a TMP; however, in cases in which the bankruptcy court has extended its jurisdiction to cover nondebtors, there was a direct impact on the bankruptcy proceeding. For example, under the broad grant of authority of 11 U.S.C. § 105(a), a bankruptcy court has enjoined proceedings against nondebtors “[w]here the identity of the debtor and the third party are inexorably interwoven so that the debtor may be said to be the real party.” In re F.T.L., Inc., 152 B.R. 61 (E.D. Va. Bankr. 1993). Furthermore, the bankruptcy court has the authority to order the employment of professionals and agents to act on behalf of the debtor. See, e.g., Federated Department Stores, Inc., 114 B.R. 501 (S.D. Oh. Bankr. 1990); In re Jorgensen, 66 B.R. 104 (9<sup>th</sup> Cir. B.A.P. 1986). In the instant case, however, the TMP is neither an employee of the debtor (as in Federated), nor inexorably interwoven with the debtor.<sup>3</sup> Consequently, the bankruptcy court does not have the

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<sup>3</sup>If the TMP were so interwoven so as to be the real party in interest, the TMP would

authority to appoint a TMP. This view is bolstered by the fact that the appointment of a TMP will have no bearing on the bankruptcy proceeding; only on the Tax Court and administrative proceedings. With regard to Tax Court proceedings, the Tax Court has the authority to remove and appoint a TMP. See T.C. Rule 250. With regard to the administrative proceedings, we do not believe it is necessary that a TMP be appointed in the instant case, as discussed below.

### Necessity of TMP

As a secondary question, you have inquired whether it is necessary to have a partner identified as the TMP for the nondocketed years. As noted above, the TMP fills a necessary role in docketed Tax Court cases. In nondocketed cases, the role of the tax matters partner differs slightly from the role in docketed cases. The TMP is responsible for providing notice to the partners; has the authority to enter into settlements to bind some partners; may execute consents to bind the partners to extensions of the period for assessment; may file requests for administrative adjustment; and may petition the Tax Court for a redetermination of partnership items. See I.R.C. ' ' 6223(g), 6224(c)(3), 6229(b)(1)(B), 6227(c) and 6226(a), respectively.

In the present matter, the records are in the possession of the U.S. Trustee for the bankrupt partnerships, so a TMP is not needed for purposes of obtaining records. It is expected that notices of final partnership administrative adjustment (FPAA) will be issued within three years of the filing of the partnership return, so that consents to extend the period of assessment most likely will not be required.<sup>4</sup> Lastly, the Secretary is required to mail an FPAA to each notice partner and any notice partner may petition the Tax Court. Thus, a TMP is not needed for this purpose either. In this regard, for purposes of issuing notices pursuant to section 6223, courts have consistently held that a Ageneric notice<sup>5</sup> is sufficient. Chomp v. Commissioner, 91 T.C. 71 (1989).

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also be a debtor in bankruptcy, thus terminating the partner=s status as TMP. Temp. Treas. Reg. ' ' 301.6231(a)(7)-1(l)(1)(iv) and 301.6231(c)-7T.

<sup>4</sup>Furthermore, the execution of a consent would be primarily for the benefit of the Service=s continued examination of the partnerships. Appointing a TMP to enable the Secretary to obtain a consent pursuant to I.R.C. ' 6229(b)(1)(B) would not meet the necessary or appropriate standard required for the bankruptcy court to take action.

<sup>5</sup>By Ageneric notice,@ we mean a notice addressed to ATax Matters Partner@ at the address of the partnership.

In the instant case, the absence of a TMP would have no adverse consequences on the partners, and as such, we do not believe a TMP needs to be appointed in the nondocketed cases. Note that the Tax Court has previously held that when the partners receive adequate notice of the proceedings in time to protect their interests, the presence of a TMP is not a necessary condition to the issuance of a valid FPAA. Seneca Ltd. v. Commissioner, 92 T.C. 363 (1989). As in Seneca, we believe notice will be statutorily sufficient so long as a generic FPAA is issued and the partners are timely mailed notice thereof. Lastly, if a petition is filed from an FPAA issued to one of these partnerships, the Tax Court will, at that time, have the authority to appoint a TMP to fulfill the obligations that arise in the course of the Tax Court proceedings. If the partners identify a need to have a TMP during the administrative proceeding, the partners may designate a TMP pursuant to the regulations.

#### CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS:

It is recognized that counsel for the debtor would like to have the same person appointed as TMP for all of the partnerships. The Service would prefer this, as well. Unfortunately, there may not be any one person who meets the statutory requirements for appointment as TMP for all of the partnerships. We note, however, that there is no requirement that the same person serve as TMP for all of the partnerships, and that these cases may require the appointment of several different persons to serve as TMP of the different partnerships. While we acknowledge that the appointment of one person to represent the interests of all of the partners of all of the partnerships would be an administrative convenience, that is not a sufficient reason to acquiesce in any action that does not satisfy the statutory requirements regarding the appointment of a TMP.

If you have any further questions, please call (202) 622-7860.

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By:

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