

UNITED STATES TAX COURT
 WASHINGTON, DC 20217

HUBERT OXFORD, III & CYNTHIA)	
OXFORD,)	
)	
Petitioners,)	
)	
v.)	Docket No. 16916-15.
)	
COMMISSIONER OF INTERNAL REVENUE,)	
)	
Respondent.)	

ORDER

On August 21, 2015, petitioners filed a Motion To Restrain Assessment or Collection or To Order Refund of Amount Collected. On September 16, 2015, respondent filed an Opposition to petitioners’ motion to restrain. On October 9, 2015, petitioners filed a Response to respondent’s opposition.

On September 17, 2015, respondent filed a Motion To Dismiss and To Strike Penalty. On October 9, 2015, petitioners filed an Opposition to respondent’s motion to dismiss as to penalty

In our Order dated December 7, 2015, the Court directed petitioners and respondent each to file a response to that order setting forth and discussing fully their/his position as to: (1) whether this Court in this case lacks jurisdiction as to the I.R.C. section 6662 penalty determined in the affected item deficiency notice upon which this case is based; and (2) whether this Court has jurisdiction to enjoin assessment or collection or to order refund as to the deficiency and/or penalty in that affected item deficiency notice. On January 4, 2016, respondent filed his Response to Order Dated 12/07/2015. On January 4, 2016, petitioners filed their Response to Order Dated 12/07/15.

On January 21, 2016, respondent filed a Motion for Partial Summary Judgment seeking judgment in respondent’s favor as to whether a \$16,974,686 loss reported by Mr. Hubert is barred by I.R.C. section 165(c). Among other things, in his motion respondent asserts/indicates that: (1) during 2000 Mr. Oxford was a partner in AD Investments 2000 Portfolio, LLC (AD Investments 2000), a Delaware limited liability company subject to the TEFRA partnership provisions. On June 6, 2014, this Court entered an Order and Decision in the partnership-level proceeding at docket No. 12609-05. See AD Investments 2000, LLC, Hubert Oxford, III, a Partner Other Than the Tax Matters Partner, docket No. 12609-05. Among other things, that

Order and Decision determined that: (1) AD Investments 2000 was a sham properly disregarded for tax purposes so that the transactions in which it purportedly engaged are deemed to have been engaged in directly by its purported partners without profit motive; and (2) various penalties under I.R.C. section 6662 apply to (a) underpayments of tax related to contributions to, and distributions of property other than money from, AD Investments 2000, and (b) additional underpayments attributable to the partnership item adjustments. On February 12, 2016, petitioners filed an Opposition to respondent's motion. On March 2, 2016, respondent filed a Response to petitioners' opposition.

Outside basis may be an affected item required to be properly determined in a partner-level deficiency proceeding. Thompson v. Commissioner, 729 F.3d 869, 873 (8th Cir. 2013); Jade Trading, LLC ex rel. Ervin v. United States, 598 F.3d 1372, 1380 (Fed. Cir. 2010); Petaluma FX Partners, LLC v. Commissioner, 591 F.3d 649, 655 (D.C. Cir. 2010); Greenwald v. Commissioner, 142 T.C. 308, 314-317 (2014); see I.R.C. secs. 6213(a), 6230(a)(2) (A)(i). Cf. United States v. Woods, 571 U.S. ___, 134 S.Ct. 557 (2013); see also Thompson v. Commissioner, T.C. Memo. 2014-154, at *2 n. 4, aff'd ___ F.3d ___, 2016 WL 170436 (8th Cir. 2016).

The parties' above motions raise issues that resemble those in Thompson v. Commissioner, 137 T.C. 220 (2011), rev'd and remanded 729 F.3d 869 (8th Cir. 2013); T.C. Memo. 2014-154; aff'd ___ F.3d ___, 2016 WL 17043046 (May 3, 2016).¹ In our supplemental memorandum opinion on remand in Thompson (T.C. Memo. 2014-154, at *2 n. 4), we explained, in pertinent part:

This case constitutes a partner-level proceeding under the unified partnership audit and litigation procedures of the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA) * * *. In this Supplemental Memorandum Opinion, we respond to the Court of Appeals' mandate and respondent's motion for entry of decision. We incorporate our factual findings in Thompson v. Commissioner, 137 T.C. 220 * * *

In our previous Opinion, we held that we lacked jurisdiction to consider * * * [Mr. Thompson's income tax deficiency and related accuracy penalty. *Id.* at 236, 239. That holding rested on our 2006 decision in the partnership-level proceeding. RJT Invs. X, LLC v. Commissioner, docket No. 11769-05 (June 6, 2006), aff'd 491 F.3d 732 (8th Cir. 2007), that: (1) the partnership was a sham and lacked economic substance; (2) the partnership had been "formed and/or availed to overstate artificially the basis of the interest of * * * [Mr. Thompson] in * * * [the partnership] in the amount of \$22,006,759 for purposes of tax avoidance"; and (3) the 40 percent gross valuation misstatement penalty under section 6662 would apply. * * *

We thought that these determinations in a decision that had become final, led inexorably to the conclusion that any flowthrough income, loss, or deduction from

¹In their first appeal the taxpayers conceded the accuracy penalty issue. See 729 F.3d 872 n. 3.

the partnership, as well as any loss claimed by Mr. Thompson on liquidation of his partnership interest, must be disallowed. See Thompson v. Commissioner, 137 T.C. at 231-235. No further, partner-level determination within the meaning of section 6230(a)(2) and section 301.6231(a)(6)-1(a)(2), Proced. & Admin. Regs., was necessary. Id. at 231. Hence, section 6230(a)(1) left this Court without jurisdiction over the petition. See id. at 236, 239. * * * [the Commissioner's erroneous issuance of a notice of deficiency to * * * [the taxpayers] could not confer jurisdiction absent the need for a partner-level determination. See id. at 225-226.

The Court of Appeals reached a somewhat different conclusion. It noted * * * [the taxpayers'] concession that our 2006 decision as to the penalties' applicability was res judicata. See Thompson v. Commissioner, 729 F.3d at 872 n. 3. As to the underlying deficiency, however, the Court of Appeals agreed with other Courts of Appeals that have addressed the issue and held that "outside basis is an affected item that must be determined at the partner level." Id. at 873 (citing Jade Trading, LLC v. United States, * * * , and Petaluma FX Partners, LLC v. United States, * * *). It read this Court's 2006 decision in the partnership-level proceeding to say Mr. Thompson's outside basis was overstated, but not that it was overstated in its entirety - in other words, that he had a zero basis. * * * See Thompson v. Commissioner, 729 F.3d at 872-873. The Court of Appeals reasoned that because Mr. Thompson's exact outside basis remained to be determined, this Court could and should have made that partner-level determination. See id. at 874 (Gruender, J., concurring in the judgment) (opining that the "tax court clearly determined Thompson's outside basis to be zero", but that the Court nevertheless had jurisdiction over the petition).⁴

The Court of Appeals found that we have jurisdiction to determine Mr. Thompson's outside basis in his partnership interest. We need not make such a determination, however, because the parties have stipulated the deficiency. See Thompson v. Commissioner, 137 T.C. at 223-224. Our task on remand is, therefore, limited to entry of a decision formalizing that agreement.

⁴After the Court of Appeals issued its opinion, the Supreme Court decided another TEFRA case, United States v. Woods, 571 U.S. ___, 134 S.Ct 557 * * *

* * * * *

Woods thus confirms that we properly exercised jurisdiction in applying the valuation misstatement penalty in the partnership-level proceeding here. Before the penalty can be imposed, Woods cautions, "[e]ach partner's outside basis still must be adjusted at the partner-level. Id. But once the court handling the partnership-level proceeding has concluded that the partnership is a sham, such

that each partner must have a zero outside basis, these partner-level adjustments of outside basis incident to imposition of the penalty should be merely computational. See id. at ___, 134 S.Ct. at 566 & n. 2.

As to whether partner-level adjustment of outside basis incident to a deficiency determination should also be merely computational, Woods provides no direct answer. In dicta, however, the Court addresses the amici's suggestion that its decision will permit the Internal Revenue Service to directly assess a penalty on a tax underpayment that cannot itself be assessed without deficiency procedures. See id. Noting that "an underpayment attributable to an affected item [such as outside basis] is exempt" from deficiency procedures where partner-level determinations are unnecessary, the Court observes that "it is not readily apparent why additional partner-level determinations would be required before adjusting outside basis in a sham partnership." Id.

In the sham partnership at issue here, the Court of Appeals concluded that such additional determinations were required, and we proceed in accordance with that mandate.

Upon due consideration, it is

ORDERED that, on or before July 6, 2016, petitioners and respondent each shall file a Response to this order. In such Response petitioners/respondent shall set forth and discuss fully their/his position as to: (1) whether additional partner-level determinations of outside basis are required in this case; (2) if so, what specifically are those additional partner-level determinations of outside basis; and (3) to what extent, if any, this Court has jurisdiction in this partner-level proceeding over petitioners' income tax deficiency and related accuracy penalty for 2000.

**(Signed) L. Paige Marvel
Chief Judge**

Dated: Washington, D.C.
June 20, 2016