Pursuant to Tax Court Rule 50(f), orders shall not be treated as precedent, except as otherwise provided.
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UNITED STATES TAX COURT
WASHINGTON, DC 20217

BCP TRADING AND INVESTMENTS, LLC, WILLIAM T. ESREY TRADING PARTNERS, LP, A PARTNER OTHER THAN THE TAX MATTERS PARTNER, ET AL.,

Petitioner(s),

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent

Docket No. 10200-08, 10201-08.

O R D E R

The Court released its opinion in these TEFRA cases, 114 T.C.M. 151 (2017), and the parties subsequently agreed on the language of the decisions. There was an estate that turned out to be an indirect partner, and thus a party, but which wasn't a participant in the litigation. When participating parties settle, Rule 248[1] requires the Commissioner to move for entry of decision and the Court to wait 60 days from the filing of such a motion to see if any nonparticipating party objects. But the parties didn't settle, they litigated; and our rules don't tell us what to do with nonparticipating parties when the participating parties litigate and subsequently agree on the decision language.

The Commissioner and the petitioners agreed that a procedure analogous to Rule 248(b)(4) -- giving notice to the nonparticipating partner and waiting 60 days for him to decide whether to file a motion for leave to file a notice of election to intervene -- would work here. We accordingly arranged for the estate to receive

[1] Unless otherwise indicated, all section references are to the Internal Revenue Code in effect at all relevant times, and all Rule references are to the Tax Court Rules of Practice and Procedure.

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the proposed decision and issued an order to show cause why we shouldn't enter the proposed decision. The estate objected on the entirely reasonable ground that it had no idea what liability it faced under the proposed decision. As a result, we ordered the Commissioner to estimate the effect of the proposed decision on the estate to determine whether it wanted to object and seek intervention.

On August 6, 2018, David Marshall on behalf of Virginia Simpson, the surviving spouse of Singleton "Garry" Simpson (collectively, the estate), filed a motion for leave to intervene. The reason for this motion is to preserve a statute of limitations defense for the estate against any attempt by the Commissioner to assess liability for the 2000 and 2001 tax years. Petitioners don't object to the motion, but the Commissioner does. According to the Commissioner, the estate's motion is 10 years too late. The Commissioner cites Rule 245 to suggest that the estate was required to either file a notice of election to participate within 90 days from the date of service of the petition on the Commissioner way back in 2008, or show good cause for late filing. *See* Rule 245(b), (c). Because the estate did neither, according to the Commissioner, it cannot be allowed to intervene. The Commissioner also argues that even if the estate's motion is timely, it must be denied because its statute of limitations argument fails for the same reason the petitioners' arguments failed in the original case. We address each of the Commissioner's contentions.

Timeliness

Before considering the statute of limitations issue, we must first decide whether the estate's motion is timely. As discussed, no rule directly addresses what to do when a nonparticipating party objects to the participating parties' proposed decision following litigation. However, in the absence of an express Rule, the Court "may prescribe the procedure, giving particular weight to the Federal Rules of Civil Procedure to the extent that they are suitably adaptable to govern the matter at hand." Rule 1(b); *see Guralnik v. Commissioner*, 146 T.C. 230, 247-48 (2016); *Estate of Proctor v. Commissioner*, 67 T.C.M. 2943, 2944 (1994). As a result, we look to Federal Rule of Civil Procedure (FRCP) 24 for guidance. *Amazon.com, Inc. v. Commissioner*, 112 T.C.M. 30, 32-33 (2016).

Under FRCP 24 a motion to intervene, whether sought permissively or as of right, must always be timely. *See* Fed. R. Civ. P. 24(a), (b); *see also United Airlines, Inc. v. McDonald*, 432 U.S. 385, 387 (1977); *NAACP v. New York*, 413 U.S. 345, 366 (1973). FRCP 24, however, does not define what makes a motion to

intervene timely. As a result, we created rules to address this inexactitude. *See, e.g.*, Rules 245 and 248(b).

Pursuant to the parties' request, we adapted the procedure under Rule 248(b)(4) to permit the estate to file a motion for leave to file a notice of election to intervene within 60 days of receiving the proposed decision document. This issue proceeded along a status-report track during which the estate received the decision document and mulled it over. On July 2, 2018, we ordered the parties to file a status report stating their position on the proposed decision. Just over a month later, on August 6, 2018, the estate responded by filing its motion for leave to intervene.

The Commissioner argues we should deny the estate's motion because it is untimely under Rule 245. However, in making his argument, the Commissioner seems to forget that he too agreed to the adapted procedure under Rule 248(b)(4). It is this procedure, and not that under Rule 245, which therefore determines the timeliness of the estate's motion. And under this procedure, the estate's motion, filed just over a month after our July 2 order, is timely.

I. Intervention and the Statute of Limitations

FRCP 24 recognizes both intervention of right and permissive intervention. The estate doesn't tell us which of these pigeonholes it hopes to nest in. But we do know from the text of FRCP 24 that a person's intervention of right depends in part on whether the existing parties adequately represent its interests, and that permissive intervention is not appropriate when it would unduly delay the adjudication of the existing parties' rights.

To test whether intervention in this case would be appropriate, we begin by peeking at the estate's arguments on the merits. These arguments focus entirely on a statute of limitations defense against assessment. If the estate's statute of limitations defense is without merit, there's no reason to hold up the proposed decision any longer. "It is easy enough to see what are the arguments against intervention where . . . the intervenor merely underlines issues of law already raised by the primary parties." *Bush v. Viterna,* 740 F.2d 350, 359 (5th Cir. 1984) (quoting *Crosby Steam Gage & Valve Co. v. Manning, Maxwell & Moore, Inc.*, 51 F. Supp. 972, 973 (D. Mass. 1943)).

According to the estate, the Commissioner missed his opportunity to adjust its 2000 and 2001 individual income taxes. The reason for this is that the Forms 872-I (Consent to Extend the Time to Assess Tax As Well As Tax Attributable to Items of a Partnership) and 872-IA (Special Consent to Extend the Time to Assess Tax As Well As Tax Attributable to Items of a Partnership), extending the 2000 and 2001 statutory assessment window, were signed by Virginia and S. Garry Simpson between 2008 and 2009, well after the three-year statute of limitations on assessment.[2] *See* § 6501(a). As such, the estate argues, those extensions "are invalid and unenforceable against the [estate] for any additional tax liability sought to be assessed by the Commissioner for 2000 and/or 2001."

In addition to its own arguments, the estate also requests permission to "adopt and incorporate by reference . . . the legal arguments and supporting authorities previously made and submitted by the [participating partners] regarding the assertion of their statute of limitations defenses."

Let it be so. As we stated in our opinion:

> We now turn to the statute-of-limitations issue. A partnership is required to file a return by the fifteenth day of the fourth month (generally April 15) after the end of the taxable year of the partnership. Sec. 6031; sec. 1.6031(a)-1(e)(2), Income Tax Regs. The Commissioner then has three years to assess income tax attributable to partnership items. Sec. 6229(a). The clock starts either on the date (1) the partnership return is filed or (2) the last day for filing the return (again, usually April 15), whichever is later. *Id.* BCP filed its 2000 tax return in March 2001 and its 2001 tax return in April 2002. That means that under the general rules the Commissioner had to issue the 2000 FPAA [final partnership administrative adjustment] by April 16, 2004; and the 2001 FPAA by April 15, 2005. *Id.* The FPAAs weren't issued until January 31, 2008.
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> But there are *two* ways to extend the three-year window. The first is for the Commissioner to get permission from the partner whose return

[2] According to the estate, the Simpsons filed their 2000 and 2001 tax returns on September 9, 2002 and June 29, 2003, respectively. Therefore, the last day for the IRS to assess the Simpsons' 2000 and 2001 tax liabilities, absent extensions, was September 10, 2005 and June 30, 2006, respectively. *See* sec. 6501(a).

> would be affected. *Id.* subsec. (b)(1)(A). *Or if the Commissioner wants to deal with a question that affects the partnership itself, he may ask the [tax matters partner (TMP)] to sign an agreement extending the period for all the partners*. *Id.* subpara. (B); *Transpac Drilling Venture 1982-12 v. Commissioner*, 147 F.3d 221, 224 (2d Cir. 1998), *rev'g* T.C. Memo. 1994-26. Both types of agreements must be signed before the original three-year statute of limitations runs out. Sec. 6229(b)(1). The statute of limitations is an affirmative defense, so taxpayers start with the burden of proof. Rule 142(a); *Amesbury Apartments, Ltd. v. Commissioner*, 95 T.C. 227, 240 (1990); *Adler v. Commissioner*, 85 T.C. 535, 540 (1985).

114 T.C.M. 151, 163 (2017) (emphasis added).

We had previously discussed how the Commissioner obtained numerous extensions for assessing BCP's 2000 and 2001 tax years from the TMP.[3] *Id.* at 160. The first extensions for BCP's 2000 and 2001 tax years were signed by its TMP on January 6 and November 1, 2004, respectively -- within the three-year limit. *Id.* Thereafter, additional extensions were signed that extended the assessment period for both years until June 30, 2008. *Id.* In January 2008, the Commissioner finished his audit of BCP and issued notices of FPAAs within the statutory period for 2000 and 2001. *Id.* at 162.

The Commissioner asserted that the TMP's extensions bound both the direct partners of BCP and any other person whose income tax liability was determined in whole or in part by the partnership items of the partnership. The petitioners responded by arguing that the TMP's extensions were invalid for a whole host of reasons. *See id.* at 164-65. We need not dive back into each of the petitioners' arguments. Suffice it to say we disagreed and held that the TMP's valid extensions binding both the direct and indirect partners were "enough . . . to find that the statute of limitations was still open when the Commissioner sent the FPAAs in 2008." *Id.* at 165.

So where does that leave the estate? It argues that, because the Simpsons signed their individual consents after the three-year assessment period for 2000 and

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[3] Charles Bolton signed the extensions in his capacity as the managing director of Bolton Capital, which was the TMP of KP1, which was the TMP for BCP. 114 T.C.M. at 160 n.12.

2001, the consents had no legal effect and did not extend the statute of limitations. However, this argument fails to acknowledge that the statute of limitations could be extended by *either* the Simpsons *or* BCP's TMP. *See* § 6229(b)(1)(A)-(B). The estate's incorporation by reference of the petitioners' failed statute of limitations arguments challenging the validity of the TMP's extensions preserves the argument for any appeal, but doesn't help them here. Because we held that the extensions filed by BCP's TMP were valid and bound both BCP's direct and indirect partners, it follows that the estate, an indirect partner of BCP, is also bound by those extensions.

This in turn leads us to conclude that the TMP has adequately represented the estate by making the best of what was in the end an unsuccessful argument, which defeats intervention of right. *See* Fed. R. Civ. P. 24(a)(2). Intervention would also merely duplicate the TMP's efforts at a very late stage in the case, which would serve only to further delay its conclusion. *See, e.g.*, *Ingebretsen v. Jackson Pub. Sch. Dist.*, 864 F. Supp. 1473, 1485 (D. Miss. 1994), *aff'd*, 88 F.3d 274 (5th Cir. 1996).

It is therefore

ORDERED that the estate's motion for leave to intervene by David Marshall on behalf of Virginia Simpson is denied. It is also

ORDERED that, in addition to regular service, the Clerk of the Court shall serve a copy of this order on David Russell Marshall, 109 Court Row, Nicholasville, KY 40356.

The parties' proposed decision documents will be entered as our decisions in the cases pursuant to Tax Court Rule 248(b).

(Signed) Mark V. Holmes
Judge

Dated: Washington, D.C.
February 6, 2019