No. 09-871

In The
Supreme Court of the United States

CURR-SPEC PARTNERS, L.P.,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF SRK WILSHIRE PARTNERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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February 22, 2010

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QUESTION PRESENTED

This brief addresses the question that undermines, if not destroys, the partnership/partner distinction on which every Unified Partnership Proceeding depends:

> The Unified Partnership Proceedings (26 U.S.C. §§ 6221-6234) require that all partnership items be determined in a streamlined single partnership proceeding, with the varying partner-specific affected items deferred to subsequent partner-level proceedings, thus ensuring the consistent tax treatment of all partners in a given partnership. In *Weiner v. United States,* 389 F.3d 152, 156-57 (5th Cir. 2004), the Fifth Circuit found that the separate partnership limitations of Section 6229 was a partnership item that could not be raised in the partner-level refund case "because the FPAA limitations issue affects the partnership as a whole . . . ." Five years later, in *Curr-Spec Partners, L.P. v. Commissioner,* 579 F.3d 391 (5th Cir. 2009), that same court held that the partnership limitations period varied between partners depending upon their partner-specific facts, such as when they filed their individual returns. By basing the partnership limitations period on the varying individual partners' limitations periods, did *Curr-Spec* misstate the rule of law under Section 6226(f), which limits partnership proceedings to the determination of "partnership items"?

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INTEREST OF AMICUS CURIAE[1]

SRK Wilshire Partners ("SRK") is one of thousands of partnerships facing the jurisdictional quagmire in partnership proceedings under 26 U.S.C. §§ 6221-6234[2] ("Unified Partnership Proceedings").[3] SRK is pressing such a "TEFRA" partnership proceeding in the United States Tax Court, Docket No. 29903-08. Like virtually all TEFRA partnerships involved in Unified Partnership Proceedings, SRK faces wasting the resources of the trial court, the Internal Revenue Service ("IRS"), and itself in litigating issues over which partnership jurisdiction may or may not exist. On behalf of itself and those similarly situated, SRK files this *amicus* brief encouraging the Court to grant the writ of certiorari sought by *Curr-Spec*.

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[1] Counsel of record for all parties consent to the filing of this *amicus* brief. Counsel either received notice at least 10 days prior to the due date of the *amicus curiae's* intention to file this brief or Counsel waived their right to receive at least 10 days notice. The parties' consent to the filing of this brief and the 10-day waivers of notice (where applicable) are being filed concurrently with this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution of any sort. No person or entity other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

[2] Unless otherwise indicated, "Section" references are to 26 U.S.C., the Internal Revenue Code of 1986 (as amended).

[3] The Tax Equity and Fiscal Responsibility Act of 1982 ("TEFRA") added the relevant sections to the Internal Revenue Code that apply only to partnerships. These partnership provisions are commonly referred to by the acronym, "TEFRA."

INTRODUCTION AND SUMMARY OF ARGUMENT

SRK asks the Court to consider the following two points in deciding whether to grant the writ of certiorari:

1. *Curr-Spec* personifies the problem that continues to disrupt the jurisdiction of virtually every Unified Partnership Proceeding in the country, as a recent opinion by the United States Court of Appeals for the D.C. Circuit confirms. Contrary to the statutory scheme designed to ensure consistent treatment of all partners in a given partnership, *Curr-Spec* promotes inconsistent treatment by prescribing the partnership treatment based on the varying circumstances of different partners, such as when a given partner filed his or her individual return. That destroys the mechanism Congress enacted to promote consistency through Sections 6221[4] and 6226(f):[5] a single separate

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[4] Section 6221 provides:

> Except as otherwise provided in this subchapter, the tax treatment of any partnership item . . . shall be determined at the partnership level.

[5] Section 6226(f) states:

> SCOPE OF JUDICIAL REVIEW. – A court with which a petition is filed in accordance with this section shall have jurisdiction to determine all partnership items of the partnership for the partnership taxable year to which the notice of final partnership administrative adjustment relates, the proper allocation of such items among the

partnership proceeding to render one consistent result for the partnership as a whole, followed by separate partner-level proceedings to address their respective varying circumstances. *Curr-Spec* eliminates the dividing line.

2. Over three million private companies conduct their business through limited liability companies, limited partnerships, general partnerships, and the recent trend of limited liability partnerships which file U.S. partnership returns.[6] Sections 6221-6234 subject the overwhelming majority of those businesses to the Unified Partnership Proceedings. By crossing the partnership versus partner dividing line between partnership proceedings and the subsequent partner-level affected item proceedings, *Curr-Spec* and a handful of other cases create potential jurisdictional disputes for virtually every business subject to the Unified Partnership Proceedings.

By comparison to petitioner's brief, this brief focuses upon the broader impact of altering uniform partnership determinations based on varying partner-

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partners, and the applicability of any penalty, addition to tax, or additional amount which relates to an adjustment to a partnership item.

[6] According to the IRS Commissioner Annual Report for the most recent reported period, the IRS received 3,307,000 partnership returns for 2008 alone. IRS Data Book Table 2, Number of Returns Filed, by Type of Return, Fiscal Years 2007 and 2008, http://www.irs.gov/pub/irs-soi/08db02nr.xls.

specific facts and the negative reaction by partnership taxation treatises and commentators.

For almost 20 years, taxpayers and the government relied on Section 6229 as the exclusive statute of limitations for partnership items. *See* William S. McKee et al., *Federal Taxation of Partnerships and Partners* ¶ 10.06[2], at 10-51 (3d ed. 2004). All parties understood that the Section 6501 statute of limitations applied exclusively to individuals and entities other than partnerships governed by the Uniform Partnership Procedures. This separation of Section 6229 from Section 6501 advanced the equal and identical treatment of all partners through one partnership level proceeding. It also mirrored the jurisdictional bar embraced in refund litigation that prohibited a court from examining the partnership statute of limitations in an individual partner refund proceeding, exemplified by *Weiner*, 389 F.3d 152. And it harmonized with the majority of cases that respected the jurisdictional limitation established by Section 6226(f), that elements of an individual partner's return could not be considered in a partnership proceeding. *E.g., Petaluma FX Partners, LLC v. Commissioner*, 591 F.3d 649 (D.C. Cir. 2010).

When the IRS let a partnership statute of limitations expire, the IRS asserted a novel theory. In *Rhone-Poulenc Surfactants & Specialties, L.P. v. Commissioner*, 114 T.C. 533 (2000), the IRS argued that the partnership Section 6229 limitations statute was only a minimum period and that Section 6501 was the controlling statute for individuals and all entities (including partnerships). Without examining the jurisdictional restraint of Section 6226(f) that limits partnership level litigation to "partnership items," the

Tax Court in *Rhone-Poulenc*[7] adopted the argument of the IRS, and in so doing, rent the fabric of the Unified Partnership Proceedings.

The prospect that an open statute of limitations for one partner could force open the limitations of a partnership (and either ensure inconsistent treatment of the partners or open the partnership period for all other partners) was the most startling implication of that novel reasoning. In an effort to protect the IRS from a partner who does not file his own tax return, the courts foisted uncertainty on all partners in all partnerships forever. Consider this colloquy between the Tax Court and IRS counsel in a subsequent case:

> At the hearing on the motion, the Commissioner's counsel took an extreme view of the application of *Rhone-Poulenc*:
>
> > The Court: The Kligfelds, they take the life-enhancing serum, they don't get rid of their distributed partnership property until 2100. They got the property in 1999. The IRS says inflated basis, partnership item, we're going to issue an FPAA for 1999, even though now its January of 2100. Kosher?
> >
> > IRS Counsel: Yes, I believe that is the case, your Honor.

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[7] *GAF Corp. v. Commissioner*, 114 T.C. 519, 521 (2000) was a companion case to *Rhone-Poulenc*.

Kligfeld Holdings v. Commissioner, 128 T.C. 192, 203 n.20 (2007). That is, one partner's actions can keep the partnership period open 101 years.

The IRS itself publicly admits that it only advances the overlapping statute theory of Section 6229 (partnership) with Section 6501 (individual) as an expedient litigating position and that the separate partnership statute of limitations set out in Section 6229 should generally be relied on (unless that is inconvenient). In a recent Internal Revenue Service Chief Counsel Advice, the IRS took this position:

> In Rhone-Poulenc v. Commissioner, 114 T.C. 533 (2000) the Tax Court held that, rather than providing a separate statute for partnership items, section 6229 extends the period of limitations under section 6501. For protective purposes, however, the Service will continue to treat section 6229 as a separate statute of limitations for assessment from section 6501.

IRS CCA 200951035, 2009 WL 4884136. That CCA explained that where the partnership limitations under Section 6229 had already expired, but the nonpartnership statute under Section 6501 remained open for one or more partners, "we will consider arguing the 'statute extension' approach on a case-by-case basis." *Id.* The tentative rejection by the IRS of a position it has litigated and won in a series of cases[8] is understandable only if the IRS knows it to be wrong.

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[8] *AD Global Fund, LLC v. United States*, 67 Fed.Cl. 657, 662 (Fed. Cl. 2005), *aff'd*, 481 F.3d 1351 (Fed. Cir. 2007); *Andantech LLC v. Commissioner*, 331 F.3d 972, 975 (D.C. Cir. 2003).

ARGUMENT

I. *CURR-SPEC* SHOULD BE REVERSED BECAUSE IT CONFLICTS WITH ALL OTHER LINES OF CASES HOLDING THAT THE JURISDICTIONAL BAR OF SECTION 6226(f) PREVENTS ELEMENTS OF AN INDIVIDUAL PARTNER'S TAX RETURN FROM BEING CONSIDERED IN A PARTNERSHIP PROCEEDING.

The cornerstone of any court opinion, whether written or unwritten, is that court's right to deliver the opinion. Without jurisdiction, the reasoning and ultimate holding amounts to little more than an advisory opinion carrying no force of law. This Court has long expressed its disproval of such a practice, saying "the statutory and (especially) constitutional elements of jurisdiction are an essential ingredient of separation and equilibration of powers, restraining the courts from acting at certain times, and even restraining them from acting permanently regarding certain subjects." *Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 101 (1998). The Tax Court has also declined to presume jurisdiction in order to reach the merits of a party's claim. Citing *Steel Co.*, the Tax Court noted, "[w]e cannot avoid the jurisdictional issue by assuming hypothetical jurisdiction and disposing of the case on the merits." *Blonien v. Commissioner,* 118 T.C. 541, 551 (2002). *Curr-Spec* erred in assuming hypothetical jurisdiction over an individual partner's statute of limitations.

At least three lines of cases have developed independently, generally without recognition that their respective approaches to jurisdiction clash: (i) the

Rhone-Poulenc notice of partnership adjustment[9] line of statute of limitations cases, of which *Curr-Spec* is the latest; (ii) the *Weiner* refund[10] line of statute of limitations cases, of which *Keener v. United States*, 551 F.3d 1358, 1362-63 (Fed. Cir.), *cert. denied*, 130 S.Ct 153 (2009) is the latest; and (iii) multiple strands of cases that considered whether nonpartnership items may be determined in a partnership proceeding, with the D.C. Circuit's decision in *Petaluma* being not only the latest, but the clearest in approach to the jurisdictional question of whether a court may examine elements of an individual partner's tax return to reach a decision in that partnership proceeding.

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[9] A notice of final partnership administrative adjustment, commonly referred to as an "FPAA" is issued to a partnership at the conclusion of an audit. It is a necessary prerequisite generally to partnership litigation. Section 6226(a).

[10] A refund suit may be brought by an individual or an entity on behalf of itself under Section 7422. These suits are distinct from partnership proceedings and must not involve "partnership items." Section 7422(h).

A. By Ignoring The Jurisdictional Restraint of Section 6226(f) In *Curr-Spec*, The Fifth Circuit Misstated The Rule Of Law And Clashed With Refund Cases Of Its Own And Of Other Circuits.

Five years after drawing a sharp line between partnership and nonpartnership items in *Weiner*, the Fifth Circuit obliterated any distinction in *Curr-Spec*. Because the *Curr-Spec* and the *Weiner* lines of cases addressed the same subject matter jurisdiction rule but reached diametrically opposed conclusions, one of the two has misstated the rule of law. For reasons stated herein, that case is *Curr-Spec*.[11]

By way of background, before the Fifth Circuit decided *Weiner*, the United States District Court for the Southern District of Texas wrestled with two cases concerning the jurisdictional limits of refund actions. In *Kraemer*, the court determined, in an individual tax refund suit, that it lacked jurisdiction to determine a partnership statute of limitations. *Kraemer v. United States*, No. CIV. H-002948, 2002 WL 575791, at *11 (S.D. Tex. Feb. 13, 2002). Since the issue of the partnership statute of limitations was a partnership item, the only forum available to raise the issue was in a partnership level proceeding. *Id.*[12] On essentially the

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[11] The Federal Circuit has also manifested the same ambivalence toward jurisdiction in *AD Global*, following *Curr-Spec's* logic.

[12] *See Kaplan v. United States*, 133 F.3d 469, 473 (7th Cir. 1998) (holding that the statute of limitations issue is a partnership item for which jurisdiction is barred by Section 7422(h)); *Barnes v. United States*, No. 97-57CIV-ORL-22, 1997 WL 732594, at *3 (M.D. Fla. July 25, 1997), *aff'd*, 158 F.3d 587 (11th Cir. 1998)

same facts, a different judge concluded in *Weiner* that it did have jurisdiction. *Weiner v. United States*, 255 F.Supp 2d 673 (S.D. Tex. 2002).

Weiner and *Kraemer* were consolidated on appeal to the Fifth Circuit. That court held that district courts lack jurisdiction to consider the taxpayers' statute of limitations arguments. "[B]ecause the FPAA limitations issue affects the partnership as a whole, it should not be litigated in an individual partner proceeding, as such result would contravene the purpose of TEFRA." *Weiner*, 389 F.3d at 156-57.

In *Weiner*, the Fifth Circuit drew a clear distinction between individual partner refund actions and TEFRA partnership proceedings adding it to an unbroken line of cases refusing to allow a partnership limitations issue to be heard in an individual refund suit. Because the limitations claim "might be said to affect the amount, timing, and characterization of income, etc., at the partnership level," the issue was a partnership item excluded by Section 7422(h) from a partner-level refund suit. *Keener*, 551 F.3d at 1362-63 (internal citations omitted); *Kaplan*, 133 F.3d at 473-74; *Prati v. United States*, 81 Fed.Cl. 422 (2008); *Chimblo v. Commissioner*, 177 F.3d 119 (2d Cir. 1999); *Williams v. United States*, 165 F.3d 30 (6th Cir. 1998) (unpublished table decision); *Slovacek v. United States*, 36 Fed.Cl. 250 (1996).

In *Curr-Spec*, the Fifth Circuit came to the opposite conclusion as it did in *Weiner*. While it prohibited the

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(holding that whether a partnership had extended the limitations period was a partnership item under TEFRA).

consideration of partnership items in an individual case in *Weiner*, the Fifth Circuit allowed the IRS to use individual partner items (*i.e.*, nonpartnership items) in a partnership proceeding to establish the timeliness of its FPAA in *Curr-Spec*. In a rather brief opinion, the Fifth Circuit took pains to explain how its *Curr-Spec* decision did not contradict its decision in *Weiner*: "We decided that case on the dissimilar issue whether district courts have jurisdiction to decide the FPAA statute of limitations question in [individual] refund actions." *Curr-Spec*, 579 F.3d. at 396 n.20 (internal citations omitted). The Fifth Circuit continued:

> *Weiner* involved multiple partners who had commenced *partner-level refund suits,* arguing that IRC § 6229(a) statutorily barred an FPAA. There we had no need to consider the merits of the taxpayers' argument because we determined that IRC § 7422(h) *deprived us of jurisdiction*. IRC § 7422(h) provides that "[n]o action may be brought for a refund attributable to partnership items."

Id. at 399-400 (footnotes omitted) (emphasis added).

That dismissal defines the danger. If partner-specific facts may or may not be considered in the partnership proceeding (*i.e., Curr-Spec*), and if those matters that could have been considered in the partnership proceeding are barred from the partner-level proceeding (*i.e., Weiner*), then partners can easily be forever barred from litigating their partner-specific facts. *Weiner* remains the flip side of the *Curr-Spec* coin. Heads is partnership jurisdiction, tails is nonpartnership jurisdiction. Indeed, heads the IRS wins, tails the citizen loses.

Importing individual partners' varying statutes of limitations into a Unified Partnership Proceeding invariably requires an examination of the partner's return, its filing date, its reported income to see whether there was a 25% omission that would justify a six year rather than a three year statute, the existence of any individual extensions, and more.[13] Yet Section 6226(f) decidedly prohibits these considerations and limits partnership proceedings to "partnership items"[14] -- those items "required to be taken into account for the partnership's taxable year" and "more appropriately determined at the partnership level." Section 6231(a)(3).

Curr-Spec creates a circular argument that "required by the partnership" encompasses all the varying individual partners' limitations periods. What then becomes of the separation between "partnership" and "nonpartnership items"? That logic destroys the core partnership/nonpartnership item distinction, confuses when a partner-specific item must and must not be considered in a partnership proceeding, and contradicts the lines of cases that bar importation of partner-specific items into partnership proceedings.

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[13] In her dissent in *Rhone-Poulenc*, Judge Parr warned of this precise result. *Rhone-Poulenc*, 114 T.C. at 568-69.

[14] A nonpartnership item must be litigated in a proceeding of a particular partner. That proceeding must be initiated with a different sort of notice, is governed by different jurisdictional grants, and is conducted under different procedures with different periods of limitations. Section 6512.

B. *Curr-Spec* Fails To Account For Other Cases That Draw A Clear Jurisdictional Boundary Between Partnership And Non-Partnership Items.

Imagine a *lengthy* and costly partnership trial proceeding that an appellate court then declares null because the proceeding focused on nonpartnership items. That was the situation in *Petaluma.* At the trial level, the IRS urged that elements of "outside basis," an admittedly nonpartnership item, could be determined in a partnership proceeding. The Tax Court agreed: its determination that *Petaluma* was a sham perforce meant that the partners had no basis in their partnership interests. This reasoning was used to bootstrap a 40% valuation penalty onto the partnership. On appeal, the D.C. Circuit rejected these approaches. First as to basis, the court said:

> We have already rejected the Tax Court's conclusion that outside basis was a partnership item in this case, and we likewise reject the Commissioner's contention that outside basis, although it is an affected item, could nonetheless be determined in the partnership-level proceeding. The fact that a determination seems obvious or easy does not expand the court's jurisdiction beyond what the statute provides. *In other words, it does not matter how low the fruit hangs when one is forbidden to pick it.*

Petaluma, 591 F.3d at 655 (emphasis added). While the determination of the *bona fides* of *Petaluma* was a partnership item, the appeals court concluded that it

had no jurisdiction over a penalty based on outside basis:

> The Tax Court held that its determination that Petaluma should be disregarded for tax purposes sufficed to give it jurisdiction over accuracy-related penalties. *Petaluma*, 2008 WL 4682543, at * 12. We disagree. True, the determination that Petaluma should be disregarded for tax purposes is a partnership item, but the outside bases of the partners are affected items to be resolved at the partner level.

Id.

The essence of a partnership item is that it affects all partners. If it has "no effect on either the partnership's aggregate or *each* partner's share of income, gain, loss, deductions, or credits of the partnership [it] is not a partnership item." *Russian Recovery Fund v. United States*, 81 Fed.Cl. 793, 800 (2008). With the exception of the *Rhone-Poulenc / Curr-Spec* line of limitations cases, courts have steadfastly refused to draw even the simplest partner-specific factual conclusions during a partnership proceeding.

In *Grigoraci*, the Tax Court determined that it did not have jurisdiction to determine the identity of the true partner because whether an individual or his S corporation was the actual partner "depends on factors that cannot be determined at the corporate [partnership] level and requires participation of the allegedly true owner of the shares." *Grigoraci v. Commissioner*, T.C. Memo 2002-202, 2002 WL 1835711, at *5 (2002). *Accord Alpha I, L.P. v. United*

States, 86 Fed.Cl. 126 (2009) (identity of true partner a nonpartnership item). Courts have similarly refused to determine a partner's amount at risk or a partner's basis because such items were nonpartnership items. *Hambrose Leasing 1984-85 Ltd. P'ship v. Commissioner*, 99 T.C. 298, 308-09 (1992); *Roberts v. Commissioner,* 94 T.C. 853 (1990); *see also Russian Recovery Fund*, 81 Fed.Cl. at 796 (no adjustment allowed for partner's at risk amount because in a partnership proceeding a court may "not adjust individual partner-level items"). And in the context of "outside basis," most courts have held (as did *Petaluma*) that a partner's interest in his or her partnership interest was beyond the jurisdiction of a court in a partnership proceeding. *See Dial USA, Inc. v. Commissioner*, 95 T.C. 1, 3 (1990) (holding that the amount of a shareholder's basis in an S corporation was not a subchapter S item because the corporation was not "*required*" to make the determination of shareholder's basis); *Gustin v. Commissioner*, T.C. Memo 2002-64, 2002 WL 359999, at *5 ("a partner's basis in a partnership interest may require determinations at the partner level . . . ."); *accord Gemini Twin Fund III v. Commissioner*, T.C. Memo 1991-315, *aff'd*, 8 F.3d 26 (9th Cir. 1993) (unpublished opinion); *University Heights at Hamilton Corp. v. Commissioner*, 97 T.C. 278, 282 (1991); *Desmet v. Commissioner*, 581 F.3d 297, 304 (6th Cir. 2009).

The cases holding that items affecting only one partner are beyond the scope of a partnership proceeding are supported by the words of Section 6226(f), as well as its legislative history and purposes.

II. SIGNIFICANT REASONS OF POLICY AND FAIRNESS SUPPORT THE GRANTING OF THE PETITION FOR CERTIORARI.

As commentators observe, the *Rhone-Poulenc* line of cases culminating in *Curr-Spec* sacrifices the purposes for the Unified Partnership Proceedings:

> The Tax Court's ruling seems to disregard the central purpose for the enactment of the TEFRA partnership rules, namely, uniform treatment of partnership items. Under the Tax Court majority's opinion, uniformity is sacrificed, and the resolution of partnership items once again hinges on each contesting partner's situation, in this case, the partner's statute of limitations.

Adam Gropper and Roger Pies, *TEFRA Partnership Statute of Limitations*, Tax Analysts Tax Notes Today Special Report 2001. Other commentators agree:

> The most notable omission in the IRS's argument and the Tax Court's opinion is the failure to fully consider the legislative history of the TEFRA partnership provisions. . . . The legislative history, however, shows that Congress intended that the unified partnership audit and litigation provisions of Subchapter C of Chapter 63 provide for a completely new and parallel, but separate, framework with respect to partnership items that Chapter 66 provides with respect to nonpartnership items. Thus, under the TEFRA provisions, the partnership, not the individual partner, is the touchstone for determining the effect of partnership items (internal citations omitted).

Matthew A. White, *Rhone-Poulenc: New Tension Between Entity and Aggregate Theories of Partnership Taxation*, 3 No. 3 Bus. Ent. 14, 20, May/June 2001.

Those authors believe that *Rhone-Poulenc* "effectively reinstates pre-TEFRA law with respect to assessment of partnership items by looking at the period of limitation applicable to each individual partner." *Id.* They speculate that the Tax Court was "reaching for what it considers to be a just result," but in so doing "it ignores the clear language of Section 6229 and the legislative history underlying the TEFRA unified partnership and audit procedures." *Id.* Most disturbing was *Rhone-Poulenc's* "undoing a significant legislative step toward simplification of partnership taxation." *Id.*

Perhaps the most respected partnership treatise is equally critical. Speaking through its extensive discussion of the dissents in *Rhone-Poulenc,* McKee, Nelson and Whitmire, *supra* at 10-53, give voice to reservations about the result in the *Rhone-Poulenc* line of cases. As recounted by McKee, Judge Foley summarized his objection as follows:

> In essence, the majority's holding rests on the Supreme Court's pronouncement that a statute of limitations receives strict construction in favor of the Government. [Citation omitted.] Strict construction is a "close or rigid reading and interpretation of a law" and "refuses to expand the law by implications or equitable considerations." [Citation omitted.] *The majority, however, stretches the applicability of the statute to ensure that the Government*

> *prevails. That is reconstruction, and not strict construction.*

Id. (emphasis added).

Although only briefly mentioned by McKee, Judge Parr was also a critical dissenter. She recognized that the court both reversed an often relied upon position it had maintained for over a decade, and "disregard[ed] the policy concerns that served as the impetus for the TEFRA partnership provisions." *Rhone-Poulenc*, 114 T.C. at 565. The Court's actions "cause[d] nonpartnership items to be adjudicated in TEFRA partnership-level proceedings, which result is inconsistent with TEFRA policy." *Id.* at 567. Moreover, the court's blending of nonpartnership subject matter jurisdiction into a partnership proceeding "require[s] the court to adjudicate items that have no relevance to the partnership." *Id.* at 568. Judge Parr advocated that Section 6501 was beyond the reach of a court during a partnership proceeding:

> [I]f section 6229 is the only assessment period for TEFRA partnership items, the only relevant facts will be the partnership-related facts. This will result in adjustments in the tax treatment of partnership items in one proceeding at the partnership level, rather than in separate proceedings with the partners.

Id. at 569. Otherwise, a partnership proceeding will result in "inconsistent treatment of partnership items." *Id.* at 568.

Thus, while some judges have been persuaded by the IRS litigating position, most commentators remain

skeptical that the position is correct or is faithful to the history and purposes of the Unified Partnership Proceedings. Given the troublesome conflicts between *Rhone-Poulenc / Curr-Spec* and remaining jurisprudence, this skepticism is warranted.

CONCLUSION

On behalf of SRK (and all partnerships facing these problems), we ask this Court to review the *Rhone-Poulenc / Curr-Spec* position that imports partner-specific items into Uniform Partnership Proceedings. This breach of the partnership/ nonpartnership barrier leaves courts questioning their jurisdiction, litigants uncertain as to their forum, and all parties confused as to the statute of limitations for both refund and assessment. Specifically, we ask the Court to cure the conflict *Curr-Spec* creates both within the jurisprudence of the Fifth Circuit and between the Fifth and other circuits.

Respectfully submitted,

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