No. 09-871

In the Supreme Court of the United States

CURR-SPEC PARTNERS, L.P., PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

Partnerships are pass-through entities that do not themselves pay federal income tax, but nonetheless file annual information returns stating their income, gains, losses, deductions, and credits. Those items are then allocated among the individual partners, and any resulting income-tax liability is assessed against the individual partners. To adjust "partnership items," the Internal Revenue Service must issue a notice of final partnership administrative adjustment (FPAA). Adjustments in the FPAA may affect the tax liability of the individual partners, against whom additional income-tax liabilities arising from the adjustments will be assessed. Certain partners may (as was done here) challenge the FPAA in a partnership-level proceeding in the Tax Court. The questions presented are as follows:

1. Whether 26 U.S.C. 6229(a) provides only a minimum period for assessments attributable to partnership items and thus may extend, but not shorten, the statute of limitations in 26 U.S.C. 6501(a) for assessments against individual partners.

2. Whether the Tax Court has jurisdiction, in a partnership-level proceeding, to consider whether the statute of limitations for assessments attributable to partnership items remains open for a particular partner.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Constitution, statutes and regulations

Statutes and regulations—Continued: Page

Miscellaneous:

Miscellaneous—Continued: Page

Blank Page

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 579 F.3d 391. The opinion of the Tax Court (Pet. App. 23a-34a) is not reported but is reprinted in 94 T.C.M. (CCH) 314.

JURISDICTION

The judgment of the court of appeals was entered on August 11, 2009. A petition for rehearing was denied on October 16, 2009 (Pet. App. 35a). The petition for a writ of certiorari was filed on January 14, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reproduced in an appendix to this brief. App., *infra*, 1a-10a.

STATEMENT

1. Partnerships are pass-through entities that do not pay federal income tax but are required to file annual information returns. 26 U.S.C. 6031; 26 C.F.R. 1.701-1, 1.6031-1(a)(1); *United States* v. *Basye*, 410 U.S. 441, 448 (1973). All income, gains, losses, deductions, and credits are allocated among the individual partners, who must report the allocations on their individual income-tax returns. 26 U.S.C. 701-704; *Conway* v. *United States*, 326 F.3d 1268, 1271 (Fed. Cir. 2003). Income tax is thus assessed against the individual partners rather than against the partnership.

a. A unified procedure for determining the proper tax treatment of partnership items was established in Section 402(a) of the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), Pub. L. No. 97-248, 96 Stat. 324, 648.[1] Under TEFRA, the Internal Revenue Service (IRS or Service) must issue a notice of final partnership administrative adjustment (FPAA) in order to adjust items reported on a partnership return. See 26 U.S.C. 6223(a)(2) and (d)(2), 6225(a). The FPAA does not itself assess income tax, but once the FPAA becomes final, its adjustments to partnership items are allocated to the individual partners, and any resulting tax liability is assessed against them. See 26 U.S.C. 6201, 6225, 6230(a)(1).

Certain partners may contest the FPAA by filing a petition in (among other fora) the United States Tax

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[1] TEFRA has since been amended by, *inter alia*, the Tax Reform Act of 1984, Pub. L. No. 98-369, § 714(p), 98 Stat. 964, the Small Business Job Protection Act of 1996, Pub. L. No. 104-188, § 1307(c)(3)(B), 110 Stat. 1782, and the Taxpayer Relief Act of 1997, Pub. L. No. 105-34, §§ 1231-1243, 111 Stat. 1020-1029. TEFRA in its current form is codified at 26 U.S.C. 6221-6234.

Court. See 26 U.S.C. 6226(a)-(b). In that partnership-level proceeding, the Tax Court has "jurisdiction to determine all partnership items of the partnership for the partnership taxable year to which the [FPAA] relates, the proper allocation of such items among the partners, and [penalties]." 26 U.S.C. 6226(f). "Partnership item" is further defined by regulations promulgated by the Secretary of the Treasury at 26 C.F.R. 301.6231(a)(3)-1(b). In a partnership-level proceeding, the Tax Court is also authorized to determine whether a particular partner has no interest in the outcome of the proceeding because "the period of limitations for assessing any tax attributable to partnership items has expired with respect to [that partner]" 26 U.S.C. 6226(d)(1). The Tax Court's decision is subject to review in the court of appeals. 26 U.S.C. 7482.

b. The statute of limitations for tax assessments is set forth in 26 U.S.C. 6501. As relevant here, Section 6501(a) states that "the amount of any tax imposed by this title [26 U.S.C.] shall be assessed within 3 years after the return was filed." Section 6501(a) further provides that "the term 'return' means the return required to be filed by the taxpayer (and does not include a return of any person from whom the taxpayer has received an item of income, gain, loss, deduction, or credit)." Section 6501(n)(2) states: "For extension of period in the case of partnership items * * *, see section 6229." Section 6229(a), in turn, states that "the period for assessing any [income tax] with respect to any person which is attributable to any partnership item (or affected item) for a partnership taxable year shall not expire before the date which is 3 years after the later of—(1) the date on which the partnership return for such taxable year was filed, or (2) the last day for filing

such return for such year (determined without regard to extensions)."

2. Curr-Spec Partners, L.P., was the vehicle for an abusive "Son-of-BOSS" tax shelter scheme. Pet. App. 23a.[2] The IRS examined Curr-Spec's partnership return for the taxable year 1999 and determined, *inter alia*, that the partnership was a sham and should be disregarded for tax purposes. *Id.* at 24a. Accordingly, the Service issued an FPAA in 2004. *Ibid.* The Service recognized that although it was barred by the statute of limitations from assessing additional tax against the partners for 1999, the individual partners had claimed net operating losses attributable to partnership items, carried forward from 1999 to 2000 and later years, for which the assessment period remained open. *Id.* at 24a-25a.

3. J. Winston Krause filed a petition in the Tax Court challenging the FPAA, conceding all issues except the timeliness of the FPAA. Pet. App. 2a-3a, 14a n.6. Krause did not dispute that the FPAA was issued within three years after the dates on which Curr-Spec's indi-

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[2] The petition for a writ of certiorari names Curr-Spec Partners, L.P., as the petitioner. Although identified in the caption of the court of appeals' decision below, Curr-Spec was not a proper party to the proceedings. The partners, and not the partnership, are the parties in a proceeding challenging an FPAA. 26 U.S.C. 6226; *Chef's Choice Produce, Ltd.* v. *Commissioner*, 95 T.C. 388, 394-395 (1990). The Tax Court petition that commenced this case was filed by J. Winston Krause (counsel of record for Curr-Spec in this Court), who identified himself as "successor-in-interest" to Curr-Spec's tax matters partner, Curr-Spec Managers, LLC. Neither the partnership nor the LLC was still in existence at the time the Tax Court petition was filed, but Krause was a notice partner who could file a petition in his own right under 26 U.S.C. 6226(b). To avoid ambiguity, this brief will refer to "Curr-Spec" or "Krause" as appropriate.

vidual partners had filed returns for 2000 and 2001 claiming losses carried forward from 1999 partnership items. *Id.* at 25a, 27a-28a. Rather, Krause argued that, regardless of the date of filing of a partner's individual return reporting items passed through to him from the partnership, 26 U.S.C. 6229(a) requires an FPAA to be issued within three years after the date the partnership return was filed. Pet. App. 6a-7a.

The Tax Court disagreed, relying on uniform authority holding that Section 6229(a) does not "provide[] an assessment period that is independent of the period described in [S]ection 6501." Pet. App. 27a (citing *Andantech L.L.C.* v. *Commissioner*, T.C. Memo 2002-97, aff'd in part, 331 F.3d 972 (D.C. Cir. 2003); *Rhone-Poulenc Surfactants & Specialties, L.P.* v. *Commissioner*, 114 T.C. 533, 540-551 (2000) (en banc),[3] appeal dismissed, 249 F.3d 175 (3d Cir. 2001)). The court held that, although the assessment period for 1999 had expired for all partners, the period was still open for 2000 and 2001. Pet. App. 27a-29a. The Tax Court also rejected Krause's argument that it lacked jurisdiction to consider the dates on which the partners had filed their individual returns, explaining that its authority to do so was implicit in *Rhone-Poulenc*. *Id.* at 34a n.4. Following that decision, Krause and the government stipulated to entry of a Tax Court decision conforming to the FPAA. *Curr-Spec Partners, LP* v. *Commissioner*, No. 1350-05 (May 28, 2008).

4. The court of appeals affirmed. Pet. App. 1a-22a. The court held that 26 U.S.C. 6229(a) does not establish an independent three-year limitations period within

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[3] For simplicity, we refer to decisions that were reviewed by the entire Tax Court as having been decided "en banc." See Pet. App. 13a n.2.

which an FPAA must be issued, but merely provides a minimum time period that may extend, but can never shorten, the three-year statute of limitations for assessments contained in 26 U.S.C. 6501(a). Pet. App. 6a-10a. The court of appeals further held that the Tax Court had jurisdiction pursuant to 26 U.S.C. 6226(d)(1) to consider whether the partners' individual assessment periods under Section 6501(a) remained open. Pet. App. 5a-6a, 16a nn.19 & 20.

ARGUMENT

The court of appeals held that 26 U.S.C. 6229(a) provides only a minimum period for assessing tax attributable to partnership items. Under that reading, Section 6229(a) can extend the limitations period provided in Section 6501(a) but can never shorten the period for an assessment of tax against an individual partner. That holding is correct and consistent with the holding of every other court of appeals to consider the issue, as well as with the interpretation of Section 6229(a) adopted by the Tax Court sitting en banc.

The court of appeals further held that, under 26 U.S.C. 6226(d), the Tax Court had jurisdiction in this partnership-level proceeding to determine whether the Section 6501(a) limitations period had expired as to Curr-Spec's partners' 2000 tax year and thereafter. That holding is also correct. And even if Curr-Spec's contrary interpretation of Section 6226(d) were well-founded, neither Curr-Spec nor the individual partners could derive any advantage from a decision of this Court so holding. To the contrary, this Court's adoption of that reading would require dismissal of the Tax Court petition, leaving the FPAA (and the partners' resultant

tax liabilities) undisturbed. Further review is not warranted.

A. Curr-Spec contends that 26 U.S.C. 6229(a) is a statute of limitations, and that the FPAA at issue in this case was untimely because it was issued more than three years after the filing of the partnership return for the taxable year 1999. See, *e.g.*, Pet. 8 (stating that "the Commissioner issued its FPAA purporting to change Curr-Spec's 1999 partnership tax return beyond the three-year period of 26 U.S.C. § 6229"). That reading of Section 6229(a) is incorrect and contrary to uniform appellate authority. Properly understood, Section 6229(a) can extend, but can never shorten, the limitations period (see 26 U.S.C. 6501(a)) for assessing an individual partner's tax.

1. As every court of appeals to consider the question (including the court below) has held, Section 6229(a) is not a statute of limitations. By its terms, Section 6229(a) provides only that the period for assessing tax attributable to partnership items "shall not expire before" three years from the date the partnership return is due or filed. Section 6229(a) identifies no point *after* which assessment becomes impermissible, and it therefore cannot have the effect of barring an assessment that would otherwise be timely. Rather, it operates under certain circumstances to extend the limitations period in Section 6501(a), which provides (with exceptions not applicable here) that "any tax" imposed by the Internal Revenue Code "shall be assessed within" three years after the filing of the individual's return. The cross-reference in Section 6501(n)(2)—which describes Section 6229 as an "extension of period"—confirms that understanding.

Thus, all taxes, including those arising from adjustments to partnership items, generally must be assessed against an individual partner within three years after the date he filed his individual return. Section 6229(a) provides, however, that the assessment period for taxes attributable to partnership items *cannot be less than* three years after the filing date of the partnership return. If a partnership return is filed later than an individual partner's return, Section 6229(a) extends the period for assessing tax against the individual partner until three years after the partnership return is filed. Taken together, Sections 6229(a) and 6501(a) ensure that the Service has at least three years to examine a partner's return *and* the underlying partnership return together before it must act to assess any additional tax against a partner.

2. Every court of appeals to consider the matter has agreed that Section 6229(a) does not create an independent limitations period, but rather can only extend the limitations period in Section 6501(a). See Pet. App. 2a, 14a nn.3 & 4; *AD Global Fund, LLC ex rel. North Hills Holding, Inc.* v. *United States*, 481 F.3d 1351, 1354-1355 (Fed. Cir. 2007); *Andantech L.L.C.* v. *Commissioner*, 331 F.3d 972, 976-977 (D.C. Cir. 2003); see also *Rhone-Poulenc Surfactants & Specialties, L.P.* v. *Commissioner*, 114 T.C. 533, 540-551 (2000) (en banc), appeal dismissed, 249 F.3d 175 (3d Cir. 2001).

None of the decisions cited by Curr-Spec or amicus SRK Wilshire Partners (SRK) holds otherwise. The court in one of those cases held that the challenged assessment was untimely under all of the relevant provisions. *Callaway* v. *Commissioner*, 231 F.3d 106 (2d Cir. 2000) (holding assessment untimely because all applicable limitations periods, including 26 U.S.C. 6501(a), had

expired). In other cases the courts held that the challenged assessments were timely under other provisions, and therefore had no occasion to consider whether Section 6229(a) could operate as an independent limitations bar under different circumstances. See *CC&F W. Operations Ltd. P'ship* v. *Commissioner*, 273 F.3d 402 (1st Cir. 2001) (holding assessment timely under extended limitations period of 26 U.S.C. 6229(c)(2)); *Madison Recycling Assocs.* v. *Commissioner*, 295 F.3d 280 (2d Cir. 2002) (holding assessment timely under agreed extension provision of 26 U.S.C. 6229(b)(1)); *Monetary II Ltd. P'ship* v. *Commissioner*, 47 F.3d 342, 343 (9th Cir. 1995) (same); *Anderson* v. *United States* (*In re Anderson*), No. 94-5165, 1995 WL 481196 (10th Cir. Aug. 8, 1995) (unpublished decision) (holding assessment timely under special limitations period of 26 U.S.C. 6229(f)), cert. denied, 516 U.S. 1119 (1996). Still other decisions mention Section 6229(a) only incidentally in the course of resolving unrelated issues. See, *e.g.*, *Monahan* v. *Commissioner*, 321 F.3d 1063 (11th Cir. 2003) (addressing effect of settlement agreement).

Thus, any fleeting suggestion in those cases that Section 6229(a) is a statute of limitations is dicta. Indeed, some of the circuits offering such dicta have, in later cases, recognized (again in dicta) that Section 6229(a) operates only to extend an otherwise applicable limitations period. See *Bakersfield Energy Partners, LP* v. *Commissioner*, 568 F.3d 767, 770 n.5 (9th Cir. 2009) (Section 6229(a) "provides a minimum time period in which the IRS can assess a tax deficiency," and thus is not an independent statute of limitations.); *Field* v. *United States*, 381 F.3d 109, 112 n.1 (2d Cir. 2004) ("[S]ection 6229(a), by its terms, does not purport to *limit* the time available to assess tax, but only to *extend*

limitations otherwise applicable."). Likewise, the court of appeals recognized in the decision below that its own comments about Section 6229(a) in prior cases had been dicta. See Pet. App. 11a-13a, 19a n.43 (dismissing as dicta characterizations of Section 6229(a) made in *Weiner* v. *United States*, 389 F.3d 152, 154-155 (5th Cir. 2004), cert. denied, 544 U.S. 1050 (2005), and *United States* v. *Martinez* (*In re Martinez*), 564 F.3d 719, 724, 726 (5th Cir. 2009)). Because every appellate court to interpret Section 6229(a) in its holding has correctly concluded that the provision is not a statute of limitations, further review is unwarranted.[4]

B. Curr-Spec contends that the Tax Court lacked jurisdiction in this partnership-level proceeding to consider the limitations issues in this case. That contention is not properly presented here because neither Curr-Spec nor the individual partners would obtain any tangible benefit if this Court agreed with Curr-Spec's jurisdictional argument. In any event, Curr-Spec's conten-

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[4] Amicus SRK also points (Br. 6) to informal advice from the Service's Chief Counsel, IRS CCA 200951035, 2009 WL 4884136 (June 24, 2009). Amicus misapprehends that advice. The actual advice, issued in response to an inquiry regarding partnership items in a tiered bankruptcy, consisted of only a simple statement ("There is no conversion."). The remainder of the text on Westlaw, beginning with "CHAPTER 21," was merely an attachment copied from a bankruptcy manual that predated the D.C. Circuit decision in *Andantech* in 2003. The out-of-date attachment is not the Service's official position on the statute of limitations in TEFRA proceedings (26 U.S.C. 6110(k)(3)), much less a "tentative rejection by the IRS of a position it has litigated and won in a series of cases," as amicus claims (Br. 6). See *Rhone-Poulenc*, 114 T.C. at 543; Chief Counsel Notice, IRS CCN N(35)000-154, 1998 WL 34358890 (Oct. 19, 1998) (revoking Litigation Guideline Memorandum, IRS LGM TL-43, 1988 WL 898060 (Jan. 22, 1988)); Litigation Guideline Memorandum, IRS LGM 199905040, 1999 WL 50721 (Feb. 5, 1999).

tion that the Tax Court lacked jurisdiction is contradicted by 26 U.S.C. 6226(d)(1), which expressly confers jurisdiction over the precise limitations issue presented here. Finally, even setting Section 6226(d)(1) aside, courts have long recognized that a limitations issue affecting all individual partners—like the argument Curr-Spec makes—is a partnership item over which the Tax Court has jurisdiction in a partnership-level proceeding.

1. Curr-Spec's central contention is that "TEFRA jurisdiction flowing from [Section] 6226(f) bars" "individual partner statutes of limitations under [Section] 6501(a) * * * from being litigated in Curr-Spec's partnership-level case below." Pet. 8. Even if that argument were legally sound, it would be entirely self-defeating, since it would mean that the Tax Court lacked jurisdiction to consider whether an assessment against any of the partners was time-barred. Because Krause conceded the FPAA's correctness in all other respects, the Tax Court would have been obliged to dismiss the petition Krause filed. And while Curr-Spec appears to assume that such a dismissal would have redounded to the partners' benefit, exactly the opposite is true: a dismissal would have left the FPAA undisturbed. See 26 U.S.C. 6226(h) ("If an action brought under this section is dismissed * * *, the decision of the court dismissing the action shall be considered as its decision that the [FPAA] is correct."). Thus, even if this Court accepted Curr-Spec's jurisdictional argument, it would not affect the outcome of the partnership-level proceeding.

2. In any event, the Tax Court did have jurisdiction to consider whether Curr-Spec's partners' individual assessment periods under Section 6501(a) remained open. If a given partner's assessment period had ex-

pired for all tax years, that partner would not have been a party to the Tax Court proceeding, and the FPAA would have been moot as to that partner. Section 6226 expressly contemplates, and authorizes the Tax Court to resolve, the question whether the period for assessing tax against a particular individual partner remains open.

As a baseline, Section 6226(c) provides that each person who was a partner during the partnership taxable year shall be treated as a party to the proceeding challenging the FPAA. That provision is then qualified by Section 6226(d)(1)(B), which states that a partner shall *not* be treated as a party after "the period within which any tax attributable to [the adjusted] partnership items may be assessed against that partner expire[s]." Thus, if the FPAA will not affect a particular partner because that partner has a limitations defense to any assessment arising from adjustments in the FPAA, that partner cannot challenge the FPAA. In order to invoke Section 6226(d)(1)(B), however, the individual partner must appear in the partnership-level proceeding, and the court in that proceeding has jurisdiction to decide whether the limitations period for assessing tax against him remains open. See 26 U.S.C. 6226(d)(1) (providing that such a person "shall be permitted to participate * * * solely for the purpose of asserting that the period of limitations for assessing any tax attributable to partnership items has expired with respect to such person, and the court having jurisdiction of such action shall have jurisdiction to consider such assertion"); Pet. App. 6a; *BLAK Invs.* v. *Commissioner*, 133 T.C. No. 19, 2009 WL 4981301, at *4-5 (Dec. 23, 2009); *G-5 Inv. P'ship* v. *Commissioner*, 128 T.C. 186, 190-192 (2007); *Kligfeld Holdings* v. *Commissioner*, 128 T.C. 192, 207 (2007). That grant of jurisdiction helps to prevent the waste of

limited judicial resources that could otherwise occur if the Tax Court decided the merits of an FPAA, only to find in subsequent partner-level proceedings (of which there could be many depending on the number of partners) that no tax could be assessed based on the adjustments in the FPAA.

Curr-Spec's assertion that the limitations period had expired as to all partners is clearly covered by Section 6226(d)(1). Curr-Spec's only response (Pet. 10) is that the Tax Court may exercise its jurisdiction under Section 6226(d)(1) only when a partner so requests. But Curr-Spec cites no authority for that one-sided reading, and the statutory text does not support it. Section 6226(d)(1) states that the court "shall have jurisdiction" to consider whether "the period within which any tax attributable to [the adjusted] partnership items may be assessed against that partner [has] expired." Moreover, Curr-Spec's interpretation of Section 6226(d)(1) would apparently permit a partner with no stake in the outcome of the partnership-level proceeding to elect to participate in it nevertheless. That would pose troubling standing questions for partnership-level proceedings in and appeals to Article III courts (where many such matters are heard, see 26 U.S.C. 6226(a)(2)-(3), (c) and (g), 7482). See *Warth* v. *Seldin*, 422 U.S. 490, 498-499 (1975) ("[T]he standing question is whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant *his* invocation of federal-court jurisdiction.") (quoting *Baker* v. *Carr*, 369 U.S. 186, 204 (1962)).

3. Even setting Section 6226(d)(1) aside, a long line of cases establishes that the Tax Court had jurisdiction under 26 U.S.C. 6226(f) to decide Curr-Spec's statute-of-limitations argument. Section 6226(f) confers juris-

diction to determine all partnership items for the partnership taxable year to which the FPAA relates. Curr-Spec argues (Pet. 6-8) that the limitations issue here is not a "partnership item." But as Curr-Spec concedes, "eight and perhaps nine or ten Circuits * * * 'have reasoned that because the FPAA limitation issue affects the partnership as a whole,'" it "thus *is* a partnership item." Pet. 14 (emphasis added) (quoting *Weiner*, 389 F.3d at 156-157).

If it had been legally sound, the limitations defense that Curr-Spec asserted below—*i.e.*, that any assessments based on the FPAA in this case are barred by 26 U.S.C. 6229(a) because the FPAA was issued more than three years after the partnership return was filed—would have been a complete defense to the FPAA, applicable to all partners. That general applicability is the hallmark of a partnership item, and numerous courts have therefore treated similar limitations questions as partnership items. See *Keener* v. *United States*, 551 F.3d 1358, 1362-1364 (Fed. Cir.) (Section 6229(a)), cert. denied, 130 S. Ct. 153 (2009); *AD Global*, 481 F.3d 1351 (same); *Andantech*, 331 F.3d 972 (same); *Weiner*, 389 F.3d at 159 (same); see also *Davenport Recycling Assocs.* v. *Commissioner*, 220 F.3d 1255, 1259 & n.9 (11th Cir. 2000) (extension of limitations period as to all partners by agreement of tax management partner under 26 U.S.C. 6229(b)(1)(B)); *Kaplan* v. *United States*, 133 F.3d 469, 473 (7th Cir. 1998) (same); *Chimblo* v. *Commissioner*, 177 F.3d 119, 125 (2d Cir. 1999) (rejecting taxpayers' untimely attempt to "raise *the partnership's* statute of limitations defense") (emphasis added), cert. denied, 528 U.S. 1154 (2000).

Thus, contrary to amicus SRK's claim (Br. 8-10), the relevant appellate decisions uniformly treat limitations

questions like the one at issue here as partnership items. Conversely, amicus's discussion of "cases that considered whether nonpartnership items may be determined in a partnership proceeding," Br. 8, is simply irrelevant, since none of the published decisions amicus cites (see Br. 14-15) casts doubt on Section 6229(a)'s status as a partnership item.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 2010

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