TEFRA REPEAL: OPTING INTO THE NEW PARTNERSHIP TAX AUDIT REGIME?

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Last December, a new law known as the Bipartisan Budget Act of 2015 (the "BBA") (P.L. 114-74), repealed the existing partnership audit procedures under "TEFRA," which stands for the 1982 Tax Equity and Fiscal Responsibility Act, effective for tax years beginning in 2018. Thus, for IRS audits of partnerships for tax years in 2018 and thereafter, TEFRA will no longer apply, and, instead, a new partnership tax audit regime (the "BBA Regime") will govern the realm of the audit.

A partnership may elect to apply the BBA Regime to any partnership tax return filed for partnership taxable years beginning after November 2, 2015, and before January 1, 2018. As a result of Temporary and Proposed Treasury Regulations (Treas. Reg. § 301.9100-22T and Prop. Treas. Reg. § 301.9100-22) that were issued in early August (T.D. 9780, 81 Fed. Reg. 51,795 (August 5, 2016)), we now know the time, form, and manner by which a partnership makes the election to have the BBA Regime apply early (the "Early Opt-In Election").

Early Opt-In Election

Essentially, a partnership makes the Early Opt-In Election after it has received a notice from the IRS

that the partnership tax return has been selected for audit. The fact that partnerships do not need to decide in advance of an audit whether they will make the Early Opt-In Election is welcome news, given the number of unanswered questions that remain regarding the BBA Regime in general.

The partnership makes the Early Opt-In Election by having the Tax Matters Partner (or an individual who has the authority to sign the partnership tax return for the tax year under audit) sign a statement, under penalties of perjury, that the partnership is making the Early Opt-In Election.

Importantly, the statement must include the following representations:

- (1) that the partnership is not insolvent and does not reasonably anticipate becoming insolvent;
- (2) that the partnership is not currently and does not reasonably anticipate becoming subject to a bankruptcy petition under title 11 of the United States Code; and
- (3) the partnership has sufficient assets, and reasonably anticipates having sufficient assets, to pay the potential imputed underpayment that may be determined during the audit.

The Temporary Regulations, therefore, effectively have eliminated the opportunity for an insolvent partnership whose partners are solvent from electing into the BBA Regime in order to shift the obligation to fund a partnership audit adjustment away from the solvent partners to the insolvent partnership.

Although we now have guidance regarding the mechanics of making the Early Opt-In Election, there are many unanswered questions regarding the effect and operation of the BBA Regime in general. Therefore, until more guidance emerges regarding the BBA Regime, for most partnerships, it remains uncertain whether it will be preferable to make the Early Opt-In Election.