No. 11-895

In the Supreme Court of the United States

LYMAN F. BUSH, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF BEVERLY J. BUSH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES 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. Under the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), the proper tax treatment of partnership items is determined at the partnership level in a unified audit, and the results of that proceeding are applied to each partner's return through a "computational adjustment," which is a "change in the tax liability of a partner which properly reflects the treatment under [TEFRA] of a partnership item," 26 U.S.C. 6231(a)(6). "In general," the Internal Revenue Service (IRS) undertakes the "assessment or collection of any computational adjustment" without first issuing a notice of deficiency (which would allow a taxpayer to seek relief in the Tax Court), but the IRS must issue such a notice if the partner's tax liability is "attributable to * * * affected items which require partner level determinations." 26 U.S.C. 6230(a)(1), (a)(2)(A) and (A)(i).

Petitioners resolved partnership-level proceedings through settlements with the IRS. The IRS then computed and assessed petitioners' tax liabilities based on the settlement agreements, without issuing notices of deficiency. The questions presented are as follows:

1. Whether the assessments were "assessment[s] * * * of * * * computational adjustment[s]."

2. Whether the assessments "require[d] partner level determinations."

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OPINIONS BELOW

The en banc opinion of the court of appeals (Pet. App. 1-41) is reported at 655 F.3d 1323. The panel opinion of the court of appeals (Pet. App. 42-100) is reported at 599 F.3d 1352. The opinion of the United States Court of Federal Claims in *Bush* v. *United States* (Pet. App. 101-129) is reported at 78 Fed. Cl. 76. The opinion of the United States Court of Federal Claims in *Shelton* v. *United States* (Pet. App. 130-142) is not published in the *Federal Claims Reporter*, but is available at 2007 U.S. Claims LEXIS 311.

JURISDICTION

The judgments of the court of appeals were entered on August 24, 2011. The petition for writs of certiorari was filed on November 22, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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(a)-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. To achieve consistent treatment of all partners in the same partnership, and to remove the substantial burden occasioned by duplicative audits and litigation, Congress established a unified procedure for determining the proper tax treatment of partnership items. See Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), Pub. L. No. 97-248, § 402(a), 96 Stat. 648; see also H.R. Conf. Rep. No. 760, 97th Cong., 2d Sess. 599-600 (1982) (conference report).[1] Partnership items include those items that are "required to be taken into

[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.

account for the partnership's taxable year" under certain provisions of the Internal Revenue Code, and that the Secretary of the Treasury has deemed to be "more appropriately determined at the partnership level than at the partner level." 26 U.S.C. 6231(a)(3).

When the Internal Revenue Service (IRS or Service) disagrees with a partnership's reporting of any partnership item, it 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). Certain partners may seek review of the IRS's determinations in the Tax Court, 26 U.S.C. 6226, before any tax is assessed against the partners, 26 U.S.C. 6225(a). If a petition contesting adjustments in an FPAA is filed, all partners with interests in the outcome are treated as parties and have a right to participate in the determination of all partnership items to which the FPAA relates. 26 U.S.C. 6224(a), 6226(c), (d) and (f).

A partner may opt out of the partnership-level proceeding by entering into a settlement agreement with the IRS with respect to the determination of partnership items. 26 U.S.C. 6224(c). The settling partner's partnership items convert to "nonpartnership items" (defined as an item "which is (or is treated as) not a partnership item," 26 U.S.C. 6231(a)(4)), and the partner is no longer treated as a party to the partnership-level proceeding because the partner no longer has an interest in the outcome. 26 U.S.C. 6226(d)(1)(A), 6231(b)(1)(C).

b. The partnership-level proceeding does not itself result in the assessment of income tax. Rather, upon final determination of the treatment of any partnership item in a partnership proceeding or in a settlement, the

Service makes a corresponding computational adjustment with respect to the tax liability of each individual partner. 26 U.S.C. 6201, 6230(a)(1). A "computational adjustment" is "the change in the tax liability of a partner which properly reflects the treatment under [TEFRA] of a partnership item." 26 U.S.C. 6231(a)(6).

As relevant here, assessments of computational adjustments are exempt from certain deficiency procedures (referred to as "subchapter B of this chapter") except when the deficiency is attributable to an affected item that requires a partner-level determination (*i.e.*, an item on a partner's return that is not a partnership item, but that is "affected by a partnership item," 26 U.S.C. 6231(a)(5), and that requires a partner-level determination):

> (a) Coordination with deficiency proceedings.
>
> (1) In general.
>
> Except as provided in paragraph (2) or (3), subchapter B of this chapter shall not apply to the assessment or collection of any computational adjustment.
>
> (2) Deficiency proceedings to apply in certain cases.
>
> (A) Subchapter B shall apply to any deficiency attributable to—
>
> (i) affected items which require partner level determinations.

26 U.S.C. 6230(a).

Accordingly, if a computational adjustment is attributable to an affected item that requires a partner-level determination, then the Service must issue a notice of deficiency to the partner, allowing the partner to chal-

lenge the adjustment in the Tax Court. 26 U.S.C. 6213(a), 6230(a)(2)(A)(i). That procedure gives the partner access to a pre-payment forum for judicial review of any partner-level determinations that could not have been resolved in the partnership-level proceeding. See *N.C.F. Energy Partners* v. *Commissioner*, 89 T.C. 741, 746 (1987), superseded on other grounds by statute, Taxpayer Relief Act of 1997, Pub. L. No. 105-34, § 1238(a), 111 Stat. 1026.

"In general," however, computational adjustments are exempt from deficiency procedures, and are directly assessed. 26 U.S.C. 6230(a)(1). A partner who wishes to challenge the assessment of a computational adjustment generally must first pay it in full and then file a timely claim for a refund. 26 U.S.C. 6230(c)(1) and (2)(A). Congress limited the fora for challenging assessments that require no partner-level determination "because the partner will already have benefitted from notice of and the right to participate in any proceeding under the TEFRA provisions to determine the partnership items at the partnership level." *Callaway* v. *Commissioner*, 231 F.3d 106, 109 (2d Cir. 2000); see *Olson* v. *United States*, 172 F.3d 1311, 1317 (Fed. Cir. 1999).

2. Petitioners invested in limited partnerships marketed by the Greenberg Brothers Partnership. Pet. App. 6 & n.1. Petitioner Bush was a limited partner in Lone Wolf McQuade and Cinema '84. *Id.* at 6. Petitioner Shelton was a limited partner in Cinema '84. *Id.* at 9. Each petitioner reported his distributive share of partnership losses on his individual income tax returns and used those losses to offset his taxable income. *Id.* at 8-9. The IRS examined the partnerships' tax returns and disallowed certain deductions on Lone Wolf McQuade's partnership returns for the 1983 through

1986 tax years, and on Cinema '84's partnership returns for the 1985 through 1989 tax years. *Id.* at 6. The IRS issued FPAAs reflecting these disallowances to each of the partnerships. *Ibid.*

Pursuant to 26 U.S.C. 6226, each partnership's tax-matters partner filed a petition in the Tax Court challenging the FPAAs. Pet. App. 6. Petitioners elected to participate in the partnership proceedings. *Id.* at 103, 132; see 26 U.S.C. 6226(c)(2). While those proceedings were pending, petitioners separately settled with the IRS on Forms 906, Closing Agreements on Final Determinations Covering Specific Matters, and were dismissed from the partnership proceedings. Pet. App. 7-8, 9.

The closing agreements provided that petitioners were "at risk" under 26 U.S.C. 465 only in the amount of their cash investments and net income earned by the partnerships, and that they could claim partnership losses only up to that amount (rather than the much larger losses petitioners had claimed). Pet. App. 7. Achieving that result did not involve any change to the items on the partnership returns, and the closing agreements so provided. *Ibid*; see note 3, *infra*. Paragraphs 1 and 2 of the closing agreements set forth the basic contours of the settlement between the parties:

> 1. No adjustment to the partnership items shall be made * * * for purposes of this settlement.
>
> 2. The taxpayers are entitled to claim their distributive share of the partnership losses * * * only to the extent they are at risk under I.R.C. § 465.

Id. at 188. Paragraphs 3 through 9 detailed both the amounts that petitioners were initially at risk and the

manner in which such amounts would be calculated in succeeding years. *Ibid.*

After the closing agreements were executed, the Service issued notices of adjustment to petitioners and made assessments without issuing notices of deficiency. Pet. App. 7-8, 9-10. Petitioners paid the assessments and then filed administrative refund claims to recoup their payments, arguing that they were entitled to notices of deficiency. *Id.* at 8-9, 10. The Service declined to issue refunds. *Ibid.*

3. Petitioners brought separate refund actions in the United States Court of Federal Claims (CFC), as did approximately 30 other partners presenting nearly identical claims.[2] Pet. App. 102. The CFC selected petitioners' actions for "representative resolution." *Ibid.* On cross-motions for summary judgment, the CFC rejected petitioners' claims. *Id.* at 101-129, 130-142.

Petitioners argued that 26 U.S.C. 6212(a) required the Service to issue a notice of deficiency before making assessments based on the closing agreements, and that the Service's failure to do so made the assessments invalid. Pet. App. 109. In response, the government contended that the assessments were of "computational adjustments" and therefore satisfied 26 U.S.C. 6230(a)(1)'s general exception to the notice-of-deficiency requirement. Pet. App. 110-111. The government further argued that the assessments did not require a notice of deficiency under 26 U.S.C. 6230(a)(2)(A)(i) because the assessments were not "attributable to * * * affected

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[2] Petitioners also sought refunds for later tax years, which they claimed should have offset their liability under the closing agreements, but the CFC rejected those claims, and petitioners abandoned them on appeal. Pet. App. 55 n.6.

items which require partner level determinations." See 02-1041 T Docket entry 47-1 at 3 (Fed. Cl. May 3, 2007).

In resolving petitioner Bush's case, the CFC explained that the relevant assessments were attributable to adjustments of petitioners' at-risk amounts (which had the effect of capping the losses they could claim), and that their at-risk amounts were affected items (*i.e.*, items affected by partnership items). Pet. App. 115. The CFC held that the Service had made computational adjustments that were exempt from deficiency procedures because "[n]o non-computational determination" was required to determine petitioners' at-risk amounts for the years at issue. *Id.* at 118-122. It rejected petitioners' contention that an assessment based on at-risk amounts categorically required the Service to make partner-level determinations. *Id.* at 123-126. Recognizing that "[t]he legal issues in [petitioner Shelton's] case are virtually identical to [those in petitioner Bush's] case," the CFC likewise rejected petitioner Shelton's refund claim. *Id.* at 139-141.

4. The court of appeals consolidated the cases, and a divided panel affirmed, but on reasoning different from the CFC's. Pet. App. 42-100. The panel majority held that, absent any change to a partnership item, the adjustments of petitioners' at-risk amounts under the closing agreements were not a basis for a computational adjustment as defined in 26 U.S.C. 6231(a)(6). Pet. App. 58. The majority therefore concluded that the IRS should have issued notices of deficiency. *Id.* at 63. The panel majority nevertheless affirmed the denial of petitioners' refund claims on the theory that the IRS's failure to issue notices of deficiency was harmless error. See *id.* at 63-73. Judge Prost concurred in the result only, on the ground that the IRS had properly made

assessments of computational adjustments. *Id.* at 81. She would have rejected the majority's recognition of a harmless-error exception to the notice-of-deficiency requirement. *Id.* at 92.

5. All parties sought panel rehearing, and petitioners sought rehearing en banc. The court of appeals reheard the cases en banc and again affirmed the CFC's denial of refunds. Pet. App. 1-41. In rehearing the case, the court ordered the parties to submit supplemental briefs addressing whether petitioners were entitled to notices of deficiency, and, if so, whether the failure to issue such notices entitled them to refunds. *Id.* at 13.

a. The en banc majority held that the Service was not required to issue notices of deficiency because its assessments were of computational adjustments and involved no partner-level determinations. Pet. App. 28, 31. The en banc court accordingly did not decide (as the panel majority had) what remedy, if any, would be appropriate if notices of deficiency had been required. *Id.* at 31.

The en banc court explained that "a 'computational adjustment,' as defined in [26 U.S.C.] 6231(a)(6), does not require that the treatment of a partnership item change during the TEFRA proceeding." Pet. App. 18. Rather, the court noted, the statute requires only some "treatment" of a partnership item, and "treatment" "is not a synonym for 'change.'" *Id.* at 19. The court therefore concluded that computational adjustments are "any changes in tax liability that arise from the partnership proceeding," including, as here, from settlements that effect no change to the partnership items. *Ibid.* The en banc court found support for its conclusion in TEFRA's purpose of "provid[ing] a single, unified forum for determination of partnership items." *Id.* at 18. The court

noted that, under petitioners' view, a partner would be entitled to "a second pre-assessment bite at the apple" after receiving the opportunity to participate in a pre-assessment partnership proceeding. *Ibid*.

The en banc court also concluded that the computational adjustments at issue here were not attributable to affected items that required partner-level determinations. It agreed with the CFC that a partner-level determination is required "only when uncertainty as to factual matters must be resolved before arriving at a figure for those affected items." Pet. App. 29 (internal quotation marks and citation omitted). The court explained that the IRS faced no such uncertainty in calculating petitioners' at-risk amounts under the closing agreements because "[t]he IRS simply had to plug the numbers from the taxpayers' tax returns into the computations set out in the Closing Agreements and directly assess any change in tax liability." *Id*. at 28-30.

b. Four judges dissented, concluding that the IRS had not made assessments of computational adjustments. Pet. App. 32-41. They would have held that a computational adjustment is appropriate only if "the [partner's] return does not accurately reflect partnership items in the partnership return, or [if] a TEFRA proceeding results in a different treatment of a partnership item than in the original return." *Id.* at 35. The dissenting judges concluded that the IRS's assessments here did not satisfy either of those criteria. *Id.* at 36. In particular, those judges believed that in the context of a settlement, "the stipulated facts" will support a computational adjustment only if they "relate to a partnership item, not to an individual partner item." *Id*. at 37. In this case, the dissenters observed, "the settlement agreement by its own explicit terms changed only the

partner level at-risk amount." *Ibid.* Accordingly, the dissenting judges would have held that the IRS was required to issue a notice of deficiency, and they would have remanded the case to the CFC to determine in the first instance whether the Service's failure to do so entitled petitioners to refunds.

ARGUMENT

Petitioners contend that the Service was required to issue them notices of deficiency, either because it could not properly make a computational adjustment based on their closing agreements (Pet. 22-42), or because the Service's assessments required partner-level determinations (Pet. 42-43). The court of appeals' decision rejecting those arguments is correct and does not conflict with any decision of this Court or of another court of appeals. Further review is not warranted.

1. The court of appeals correctly concluded both that the Service had made assessments of "computational adjustment[s]" in this case (26 U.S.C. 6231(a)(6)), and that those assessments did not require the Service to make partner-level determinations (see 26 U.S.C. 6230(a)(2)(A)(i)).

a. The Service's assessments here were of computational adjustments. Those assessments followed from the Service's adjustments of petitioners' at-risk amounts based on the closing agreements. Those at-risk amounts were affected items. See 26 C.F.R. 301.6231(a)(5)-1(c).

By definition, an "affected item" is "affected by a partnership item." 26 U.S.C. 6231(a)(5). The process for determining an affected item "is well established": "the partnership prong of an affected item * * * must be determined first in a unified partnership proceeding," and "[t]he result from that proceeding is then applied at

the individual partner level." *Keener* v. *United States*, 76 Fed. Cl. 455, 460 (2007), aff'd, 551 F.3d 1358 (Fed. Cir. 2009), cert. denied, 130 S. Ct. 153 (2009). Here, the TEFRA partnership-level proceedings began when each partnership's tax-matters partner challenged the Service's determinations of partnership items in the FPAAs issued to the partnerships. The closing agreements, which (for petitioners) concluded those partnership-level proceedings, determined petitioners' at-risk amounts, necessarily including the partnership components of the at-risk amounts.[3] Accordingly, the changes in petitioners' tax liabilities identified by the Service were changes that properly reflected the treatment under TEFRA of partnership items.

Petitioners argued below that a computational adjustment can occur only as a result of a change to a partnership item in the partnership-level proceeding. See Pet. App. 17, 57. Petitioners now disavow that argument (Pet. 41 n.79), and rightly so. A change to a partnership item in the partnership-level proceeding is not a prerequisite to a computational adjustment. As the court of appeals explained, the definition of a computational adjustment requires only the "treatment" of a partnership item in a proceeding under TEFRA, and "treatment" is broader than "change." Pet. App. 19-20; see 26 U.S.C. 6222(c) (contemplating a computational adjustment to

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[3] As the government explained to the court of appeals, although the closing agreements did not adopt the changes as proposed in the FPAA, those proposed changes "indisputably would have resulted in computational adjustments reducing [petitioners'] at-risk amounts," and by simply adjusting those at-risk amounts directly, "[t]he closing agreements reached the same result." Pet. App. 28 (quoting Gov't C.A. En Banc Br. 33).

conform a partner's treatment of a partnership item to the partnership's treatment of that item).

Petitioners now adopt the en banc dissenters' view that a computational adjustment "requires a causal connection between the change in tax liability and the treatment of a partnership item." Pet. 41 (emphasis omitted); see Pet. App. 37. But that is not what 26 U.S.C. 6231(a)(6) says. Rather, the statute defines a computational adjustment as a change in tax liability that "properly reflects" the treatment of a partnership item. As with the word "treatment," the phrase "properly reflects" has a broader meaning than the one petitioners propose.

The dissent's approach would also clash with TEFRA's treatment of settlements of partnership-level proceedings. A partner may individually settle a partnership-level proceeding with the Service, as petitioners did here. 26 U.S.C. 6224(c). Under such settlements, the settling partner's partnership items convert to "nonpartnership items," 26 U.S.C. 6231(b)(1)(C), "which [are] not * * * partnership item[s]," 26 U.S.C. 6231(a)(4). It is natural to say that the computational adjustment of the partner's individual tax liability following such a settlement "properly reflects the treatment [by settlement] under [TEFRA] of * * * partnership item[s]," 26 U.S.C. 6231(a)(6), by conforming the partner's individual return to the settlement, even if those partnership items have converted to nonpartnership items. By contrast, insisting on a "causal connection" (as petitioners suggest) would cast serious doubt on whether *any* partner settlement under TEFRA could support a computational adjustment. After settlement, the relevant partnership items no longer *exist* for the

settling partner, let alone bear a causal connection to the change in the partner's tax liability.

An examination of TEFRA's broader structure and purposes reinforces the court of appeals' conclusion. TEFRA's overall plan is to determine the treatment of partnership items in a unified partnership-level proceeding before any consideration of the individual tax consequence of those items at the partner level. 26 U.S.C. 6221, 6225(a). When this process establishes tax liability without requiring any partner-level factual determinations, there is no reason to delay assessment and collection of tax. Congress therefore directed the Service to take those steps immediately, see 26 U.S.C. 6230(a)(1) and (2)(A)(i), thereby promoting one of TEFRA's core purposes—administrative and judicial economy. See *Roberts* v. *Commissioner*, 94 T.C. 853, 859-860 (1990) ("The purpose behind the enactment of section 6221 et seq. was to have one proceeding to determine all of the partnership[] items with respect to a partnership * * * and the results of that proceeding would then be automatically applied to each of the partner's returns without the necessity of further deficiency procedures."). By contrast, "[i]f a notice of deficiency were to be required in the circumstances" presented here, "individual partners would be able to have a second pre-assessment bite at the apple." Pet. App. 18.

Finally, contrary to the en banc dissent's suggestion (Pet. App. 38), the court of appeals' decision preserves an effective role for the computational-adjustment element of Section 6230(a)'s exception to deficiency procedures. The requirement of a computational adjustment limits that exception to cases involving a "treatment under [TEFRA] of a partnership item," 26 U.S.C. 6231(a)(6)—as distinguished, most obviously, from tax

assessments that have nothing to do with partnerships. And it is entirely natural that increased tax liability found after a TEFRA partnership-level proceeding will often be directly assessed, because that reflects precisely the efficiency and fairness that Congress intended to foster through TEFRA. Partners and the Service can resolve partnership items in a unified, efficient, pre-payment proceeding, and the Service can often go on to assess and collect any resulting increased tax liability without further proceedings in another pre-payment forum.

b. The court of appeals also correctly held that the Service's computational adjustments required no partner-level determinations—that is, that the deficiencies resulting from the Service's computational adjustments were not "attributable to * * * affected items which require partner level determinations," 26 U.S.C. 6230(a)(2)(A) and (A)(i). As the courts below explained, an affected item requires a partner-level determination when it raises "non-computational factual questions." *Olson* v. *United States*, 37 Fed. Cl. 727, 734 (1997), aff'd, 172 F.3d 1311 (Fed. Cir. 1999); see 172 F.3d at 1318 ("[N]o individualized factual determination takes place as to the correctness of the originally declared figures or * * * stipulated fact."); see also *Bob Hamric Chevrolet, Inc.* v. *United States*, 849 F. Supp. 500, 512 (W.D. Tex. 1994); *Cummings* v. *Commissioner*, 71 T.C.M. (CCH) 3193, 3194 (1996). Those cases illustrate and explain that a key limitation in Section 6230(a)(2)(A)(i) is its reference to "partner level *determinations*." Although the typical assessment of a computational adjustment will arithmetically entail some reference to non-partnership items, often there will be no "determination" by the Service of any such items because they are already estab-

lished beyond dispute—for example, because they already appear on the taxpayer's individual return or because they have been agreed to by settlement. This case is an apt example: no "determination" was required because the Service "simply had to plug the numbers from the taxpayers' tax returns into the computations set out in the Closing Agreements." Pet. App. 30.[4]

Petitioners assert (Pet. 42) that the closing agreements in fact required the IRS to make partner-level determinations. Petitioners apparently refer (see Pet. 43) to a provision in the agreements that allowed petitioners to submit refund claims to offset their tax liabilities. That factbound contention about the operation of the closing agreements here does not warrant this Court's review. In any event, petitioners are incorrect because their opportunity to seek refunds is irrelevant to the Service's computational adjustment, which was based on petitioners' tax liability attributable to their at-risk amounts. Because those calculations required no partner-level determinations, Section 6230(a)(2)(A)(i) did not apply.

Petitioners also contend (Pet. 31-33, 43, 47-48) that an assessment attributable to a partner's at-risk amount always requires prior issuance of a notice of deficiency. But such a categorical approach is irreconcilable with Section 6230(a)(2)(A)(i)'s text, under which the disposi-

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[4] For the same reason, petitioners are mistaken to suggest (Pet. 11, 13) that the government's position here is inconsistent with its position in *Olson*. There, "the government conceded that, if an 'at risk' *determination* were necessary, a notice of deficiency would be required." Pet. 11 (quoting *Olson*, 172 F.3d at 1319) (emphasis added). But the Service did not need to make such a determination here because the relevant items (including petitioners' at-risk amounts) were established by petitioners' tax returns and the closing agreements.

tive inquiry is whether the particular affected item to which the computational adjustment at issue is attributable actually requires a partner-level determination. Petitioners rely in part on 26 C.F.R. 301.6231(a)(6)-1T(a), which provides that a partner's at-risk amount requires a partner-level determination when that amount "depends upon the source from which the partner obtained the funds that the partner contributed to the partnership." See Pet. 43.[5] That regulation is irrelevant here. By stating petitioners' at-risk amounts expressly and supplying a formula for calculating those amounts going forward based on information in petitioners' tax returns, the closing agreements excluded the possibility that petitioners' at-risk amounts would be affected by the source of petitioners' funds. The Service had no further determinations to make.

2. The decision below does not conflict with any decision of this Court or of another court of appeals. In particular, the decision below is consistent with the general view of lower courts that, with respect to an assessment attributable to an affected item, a computational adjustment is one that "requires only computational action" following the treatment of a partnership item. *Olson*, 172 F.3d at 1318; see *Desmet* v. *Commissioner*, 581 F.3d 297, 304 (6th Cir. 2009) (stating that a post-

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[5] The version of 26 C.F.R. 301.6231(a)(6)-1T in effect during the years at issue was published at 52 Fed. Reg. 6790-6791 (1987). See 52 Fed. Reg. at 6779 (noting the regulations "apply with respect to partnership taxable years beginning after September 3, 1982"). It was superseded by a version published at 64 Fed. Reg. 3840 (1999). The final regulation, 26 C.F.R. 301.6231(a)(6)-1, was published at 66 Fed. Reg. 50,558 (2001). As they pertain to petitioners' argument, the later versions of the regulation merely clarify the original one. See Gov't C.A. En Banc Br. 16 n.4; Gov't C.A. Panel Br. 37 n.6.

settlement computational adjustment occurs when "the settlement itself resolves factual questions as to each partner"); *Callaway* v. *Commissioner*, 231 F.3d 106, 109-110 & n.4 (2d Cir. 2000) ("[W]here no further factual determinations are necessary at the partner level, an assessment attributable to an 'affected item' may also be made by computational adjustment.").

a. Petitioners principally contend (Pet. 1, 44-45) that the decision below conflicts with *Randell* v. *United States*, 64 F.3d 101 (2d Cir. 1995), cert. denied, 519 U.S. 815 (1996), a decision they never cited in the court of appeals. That is incorrect. In *Randell*, the taxpayer sought to enjoin the collection of assessments based on 26 U.S.C. 6213(a), which includes an exception to the Anti-Injunction Act, 26 U.S.C. 7421(a), for assessments made without prior issuance of a notice of deficiency. 64 F.3d at 107. The government explained, and the Second Circuit agreed, that the assessments were of computational adjustments exempt from the notice-of-deficiency requirement. *Id*. at 107-108.

Rather than rely on the holding in *Randell* (which is fully consistent with that of the court below), petitioners focus on the Second Circuit's passing statement, in its discussion of the statutory background, that "assessments for nonpartnership item adjustments are subject to the statutory notice of deficiency procedure." Pet. 45 (quoting *Randell*, 64 F.3d at 104). That statement was simply the *Randell* court's shorthand description of 26 U.S.C. 6230(a)(2)(A)(i), which requires the Service to issue a notice of deficiency if a partner's tax liability depends on partner-level determinations. See 64 F.3d at 104 (citing 26 U.S.C. 6230(a)(2)). That is not the situation here, nor was it the situation in *Randell*.

Petitioners also state that the decision below conflicts with *Desmet*, "[a]s the *en banc*-dissent observed." Pet. 47. That argument reflects a misreading of the dissent below, which suggested only that the court of appeals was wrong to "find[] support" in *Desmet*, not that the court's decision conflicted with *Desmet*. Pet. App. 38-39. In any event, there is no conflict. In *Desmet*, the Sixth Circuit applied 26 U.S.C. 6230(a)(2)(A)(i) and concluded that the Service had properly issued notices of deficiency because—unlike in this case—the tax liability at issue required partner-level determinations. 581 F.3d at 302-303; see *id.* at 304-305 (noting that after the partnership-level proceeding, "factual questions remain[ed] regarding the activities of the [partner]"). Indeed, the Sixth Circuit in *Desmet* characterized the CFC's decision in petitioner Bush's case as "procedurally and factually inapposite" to the issues before it. *Id.* at 304 (citing *Bush* v. *United States*, 78 Fed. Cl. 76 (2007)).

b. Petitioners describe the decision below as "unfortunate given that the [CFC] and the Federal Circuit are the only courts with nationwide general refund jurisdiction." Pet. 21. Petitioners correctly stop short of suggesting that the decision below forecloses the possibility of a circuit split on the questions presented in this case. Under 28 U.S.C. 1346(a)(1), the district courts have concurrent jurisdiction with the CFC over refund claims such as those at issue here, and appeals from decisions of district courts in tax refund suits are taken to the regional courts of appeals, see 28 U.S.C. 1291, 1295(a)(2). Because the plaintiff taxpayer in a refund suit chooses the forum, taxpayers who disagree with the decision below can present their claims in district court and then to a regional court of appeals. The potential for these

issues to be litigated in other fora further counsels against this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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