

1 **WO**

2

3

4

5

6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA

8

9 Robert A. Gosnell,

No. CV-09-01399-PHX-NVW

10 Plaintiff,

ORDER

11 vs.

12 United States of America,

13 Defendant.

14

15

16 This case is before the Court on the parties’ cross-motions for summary judgment
17 on stipulated facts. (Docs. 17, 18, 21.) Oral argument was heard on April 8, 2011.

18 **I. Procedural and Factual Background**

19 Plaintiff Robert A. Gosnell is a developer of luxury resort properties. In the early
20 1980’s Gosnell formed a limited partnership to develop the Tapatio Cliffs luxury resort
21 (“the Resort”) near Phoenix, Arizona. The limited partnership was called Pointe Tapatio
22 Resort Properties No. 1, LP (“the Limited Partnership”). In the aggregate, Gosnell and
23 his business entities owned about 69 percent of the Limited Partnership. One of
24 Gosnell’s business entities was the general partner of the Limited Partnership, and
25 Gosnell and his executive team were the Limited Partnership’s principal decision makers.

26 In 1986, the Limited Partnership accepted Mutual Life Insurance Company of New
27 York (“MONY”) as a joint venture partner, and the Resort asset was placed in a newly
28 formed partnership, MONY/PTC Properties Joint Venture. In 1997, MONY exercised a

1 buy-sell provision contained in the joint venture agreement. To raise the funds necessary
2 to buy out MONY and place \$16.8 million in escrow pending the outcome of litigation
3 with MONY, the Limited Partnership obtained loans from Hilton Hills Corporation and
4 its wholly owned subsidiary Destination Resorts International, Inc. As a result,
5 ownership of the Resort was transferred to a new joint venture owned jointly by the
6 Limited Partnership and Destination Resorts International, Inc. As security for its loans,
7 the Limited Partnership put up its interest in the new joint venture and the disputed funds
8 held in escrow subject to a claim by MONY.

9 In March 2000, the Limited Partnership was in default under one of the loans
10 because it failed to make a quarterly interest payment. If it failed to satisfy the defaulted
11 loan, the Limited Partnership would not only lose its interest in the Resort, it would incur
12 taxable income of more than \$30 million in connection with a foreclosure or transfer in
13 lieu of foreclosure. This taxable income would pass through the Limited Partnership, an
14 entity not subject to income tax, to Gosnell and his partners, who ultimately would be
15 liable for the income tax resulting from the income.

16 Gosnell arranged with KPMG to purchase a “Son of BOSS”¹ transaction that,
17 according to KPMG, would either (1) make a large profit sufficient to pay off the loan
18 and save the resort or (2) generate non-economic tax losses sufficient to offset the income
19 anticipated from losing the Resort. Gosnell and 22 of the other individual Limited
20 Partnership partners participated in the Son of BOSS transaction. The participants in the
21 transaction faced no risk of incurring an economic loss in excess of their out-of-pocket
22 costs. The transaction involved, among other things, the sale and purchase of foreign
23 currency option contracts by each participant, contributions of those contracts by the
24

25 ¹“BOSS” is an acronym for “Bond and Options Sales Strategy” and refers to an
26 abusive tax shelter. “Son of BOSS” refers to variants of the slightly older BOSS tax shelter.
27 In IRS Notice 2000-44 (“Tax Avoidance Using Artificially High Basis”), published
28 September 5, 2000, the IRS alerted taxpayers that the Son of BOSS scheme had been listed
as an abusive tax shelter.

1 participants to the Limited Partnership, contributions of those contracts by the Limited
2 Partnership to a newly formed second-tier partnership (“Holdings LLC”) controlled by
3 the Limited Partnership, and contributions of those contracts by Holdings LLC to a newly
4 formed third-tier partnership (“Acquisitions LLC”), which also was controlled by the
5 Limited Partnership. Gosnell was an officer of Holdings LLC.

6 The Son of BOSS transaction included Gosnell and each of the other participants
7 selling a short foreign currency option contract to, and purchasing a long foreign currency
8 option contract from, Deutsche Bank. The option contracts, purchased on August 24,
9 2000, were on Japanese yen and would be exercisable only at 10:00 a.m., January 15,
10 2001. The strike price for the long contracts was 124.56. The strike price for the short
11 contracts was 124.58. A profit could be made only if the market price for yen was 124.57
12 at 10:00 a.m., January 15, 2001. If not, the contracts would expire worthless. The
13 contracts were dated to close before Destination Resorts International’s anticipated
14 foreclosure.

15 After selling and purchasing the short and long contracts, Gosnell and the other
16 participants contributed their contracts to the Limited Partnership and received an
17 aggregate capital contribution credit of \$36,891,562. These contributions served to
18 increase pro rata the “outside basis”² the participating partners claimed in their respective
19 partnership interests. This aggregate capital contribution credit figure represented
20 \$35,411,000 in basis for their contribution of the long contracts (which KPMG considered
21 to be an asset because of its potential value), with no reduction for the potential offsetting
22 liability of the short contracts (which KPMG did not consider a liability for purposes of
23

24 ²“The tax concept of ‘basis’ in the partnership-tax context refers to the value of a
25 partner’s investment in the partnership.” *Desmet v. Comm’r of Internal Revenue*, 581 F.3d
26 297, 300 n.2 (6th Cir. 2009). “Outside basis refers to the partner’s basis in his or her
27 partnership interest, while inside basis refers to the partnership’s basis in its own assets.”
28 *Murfam Farms, LLC v. United States*, 94 Fed. Cl. 235, 244 (2010). “Outside basis is an
affected item, not a partnership item.” *Id.* (quoting *Jade Trading, LLC v. United States*, 598
F.3d 1372, 1380 (Fed. Cir. 2010).

1 determining the basis each relevant partner claimed), plus \$1,480,562 in basis for cash
2 contributions (which were used to pay the costs of the transaction).

3 Then the Limited Partnership contributed both the short and long contracts to
4 Holdings LLC. The Limited Partnership claimed an outside basis of \$35,411,000.
5 Holdings LLC then contributed the same contracts to Acquisitions LLC. Holdings LLC
6 claimed an outside basis of \$35,411,000. Then the Limited Partnership contributed its
7 ownership interest in the Resort (held by the Limited Partnership and Destination Resorts
8 International, Inc. joint venture) plus 94 percent of its interest in Holdings LLC to a
9 newly formed partnership with Hilton (“Hilton-Holdings partnership”). The Limited
10 Partnership claimed an outside basis of \$33,315,000 in the Hilton-Holdings partnership.

11 In December 2000, Acquisitions LLC “closed” the contracts before their exercise
12 date by exchanging them for \$1,000 in Canadian currency, their approximate market
13 value at the time, generating a short-term capital loss. In March 2001, the Limited
14 Partnership liquidated the 6 percent interest it had retained in Holdings LLC, obtaining its
15 share of the Canadian dollars held by Acquisitions LLC. In July 2001, unable to satisfy
16 the defaulted loan, the Limited Partnership transferred its remaining 94 percent interest in
17 the Hilton-Holdings partnership to Destination Resorts International in lieu of
18 foreclosure.

19 In December 2001, the Limited Partnership exchanged its Canadian dollars for
20 U.S. dollars. On its 2001 tax return, the Limited Partnership claimed a foreign currency
21 loss of approximately \$2,096,000 resulting from exchanging its Canadian dollars for U.S.
22 dollars. This foreign currency loss was due to claiming a basis in the Canadian dollars
23 equal to approximately 6 percent of its original \$35,411,000 capital contribution to
24 Holdings LLC (when the Limited Partnership cashed out its 6 percent interest in Holdings
25 LLC for Canadian dollars, its basis in its partnership interest carried over to the property
26 received from the partnership).

27 Gosnell received a 2000 Form K-1 reporting his share of the short-term capital
28 loss, which he reported on his Form 1040 for 2000. This derivative share of loss resulted

1 in a claimed benefit to Gosnell of \$239,047 on his 2000 tax return. On his 2000 tax
2 return, Gosnell's share of non-passive ordinary foreign currency loss from the transaction
3 was a claimed \$15,838.

4 On its 2001 return, the Limited Partnership took the position that the income it
5 otherwise would have realized from the disposition of its interest in the Hilton-Holdings
6 partnership from the deed in lieu of foreclosure was largely offset by the \$33,315,000
7 increase in basis it received when it contributed its 94 percent interest in the Limited
8 Partnership and Destination Resorts International, Inc. joint venture to the Hilton-
9 Holdings partnership. With respect to Gosnell, \$7,723,078 of his proportionate share of
10 income was offset.

11 On its 2001 return, the Limited Partnership reported the costs of the transaction as
12 a business expense. Gosnell received a 2001 Form K-1 from the Limited Partnership
13 reporting his share of this business expense, which he reported as a loss on his Form 1040
14 return for 2000. This 2001 share of the Limited Partnership's business expense was a
15 claimed benefit to Gosnell of \$347,564. On his 2001 return, Gosnell's share of long-term
16 capital loss from the transaction was a claimed \$977,561. Gosnell carried forward
17 \$949,692 of that claimed loss to 2002. Gosnell did not use the carried-forward loss in
18 2002 and so carried it forward to 2003.

19 In 2004, the Internal Revenue Service ("IRS") opened an examination of the
20 Limited Partnership and related partnerships involved in the Son of BOSS transaction.
21 On May 24, 2004, the IRS announced a Settlement Initiative involving Son of BOSS
22 transactions. Under the terms of the Settlement Initiative, if taxpayers agreed to the
23 deficiency in income tax and statutory interest resulting from disallowance of the tax
24 benefits they claimed from the transaction, they could reduce their I.R.C.³ § 6662 civil
25 penalty exposure from forty percent of the deficiency to ten or twenty percent, depending
26

27
28 ³I.R.C. refers to the Internal Revenue Code, Title 26 of the United States Code.

1 on the circumstances, and deduct the out-of-pocket costs of the transaction. Payment of
2 the tax, penalty, and interest was required in full within thirty days.

3 On June 21, 2004, Gosnell and all but one of the other individual participants in
4 the Son of BOSS transaction notified the IRS of an intention to seek relief under the
5 Settlement Initiative. In a letter to IRS revenue agent Onalee Whitmore dated August 25,
6 2004, Kristina C. Gibson, on Gosnell's behalf, enclosed a Notice of Election to
7 Participate in Announcement 2004-46 Settlement Initiative and supporting enclosures. In
8 his Notice of Election to Participate in Announcement 2004-46 Settlement Initiative,
9 Gosnell disclosed that he had claimed total tax benefits of \$9,127,421 and net out-of-
10 pocket costs of \$347,564. When applying for Settlement Initiative relief, Gosnell
11 disclosed the Son of BOSS tax benefits he claimed on his 2000, 2001, and 2003 returns.

12 On December 22, 2004, Whitmore sent Gosnell a Form 4549A, *Income Tax*
13 *Examination Changes*, notifying him of the changes to his individual income tax
14 liabilities. (Doc. 17-7.) Along with the Form 4549A, Whitmore sent Gosnell a proposed
15 Form 906 settlement agreement, which set forth relevant facts and described all of the
16 benefits and attributes he had claimed from the shelter, including the changes to his tax
17 liabilities for tax years 2000, 2001, and 2003 set forth in the Form 4549A, a deduction for
18 out-of-pocket costs, and assessment of a ten percent penalty pursuant to the terms of the
19 Settlement Initiative. (*Id.*) Whitmore's cover letter states, in part:

20 Enclosed is Form 906, *Closing Agreement*, under Internal Revenue Code
21 Sections 7121 and 6224(c), reflecting the terms of the settlement, as well as
22 certain attachments. Under Section 4 of Announcement 2004-46, the
Closing Agreement must be signed and returned within 30 days of the date
of this letter to the address above.

23 The tax deficiency, any applicable penalties, and interest are shown on the
24 enclosed Form 4549-A, *Income Tax Examination Changes* (audit report);
25 explanations for the adjustments are provided on Form 886-A. Full
26 payment of this amount should accompany the signed Form 906. If you are
unable to fully pay the liabilities, please advise me as soon as possible and
complete the enclosed Forms 433-A and 433-B, *Collection Information*
Statements, (also available on our website at www.irs.gov).

27 (*Id.* at 3; emphasis in original.) The enclosed Form 906, which Gosnell subsequently
28 signed and returned, states, in part:

1 (14) Taxpayer will pay a penalty under I.R.C. section 6662 of 10 percent of
2 the underpayment of tax attributable to the Son of BOSS transaction (taking
3 into account the amounts shown in paragraphs (9) and (10) of this Closing
4 Agreement.

5 (15) The Taxpayer, by signing this agreement, waives all defenses against
6 and restrictions on the assessment of the tax liabilities determined under this
7 Closing Agreement, including the applicable penalty and interest.

8 (16) The Taxpayer shall execute all forms necessary to waive the
9 restrictions on assessment and collection provided by sections 6225(a) and
10 6213(a), and consent to the assessment and collection of any deficiency
11 resulting from the application of the foregoing paragraphs in accordance
12 with sections 6224(b) and 6213(d) of the Code.

13 (17) The Taxpayer shall make full payment of his liability for tax, penalties
14 and interest resulting from the application of the foregoing paragraphs,
15 upon returning this executed closing agreement to the IRS.

16 (*Id.* at 36; Doc. 17-8.)

17 On January 20, 2005, Internal Revenue Officer Eric Petersen sent Gosnell an
18 unsigned letter regarding payment arrangements. Gosnell sent the IRS a check for \$5,000
19 with a copy of Revenue Officer Petersen's letter and later sent a check for \$389,018.

20 On January 21, 2005, Gosnell signed and returned the Form 906 settlement
21 agreement and a Form 872-I extending the statute of limitations on assessment. In part,
22 the Form 906 stated:

23 Taxpayer concedes all claimed tax benefits and attributes from the Son of
24 BOSS transaction, including, but not limited to, ordinary or capital losses,
25 inflated basis loss, inflated basis in retained assets, loss carryforwards or
26 carrybacks, deductions for fees, losses passed through from partnerships or
27 other flow-through entities, and net interest expenses on loans from third
28 parties.

On January 27, 2005, revenue agent Onalee Whitmore endorsed the Form 906 as follows:

"I have examined the specific matters involved and recommend the acceptance of the
proposed agreement." The IRS did not execute the Form 906 settlement.

On March 9, 2005, Revenue Officer Greg Gillen returned Gosnell's check for
\$389,018, informing Gosnell that the January 20, 2005 Eric Petersen letter did not
constitute an installment agreement. The parties attempted to negotiate an installment
agreement acceptable to the IRS, but the IRS rejected Gosnell's proposal in a letter dated
June 16, 2005.

1 The IRS resumed examination of Gosnell’s returns. In a letter dated August 2,
2 2005, Gosnell’s representative wrote to the examining agent: “It is not Mr. Gosnell’s
3 desire to contest the substantive imposition of tax.” Gosnell did not dispute that he owed
4 additional taxes in the amounts as previously disclosed pursuant to the Settlement
5 Initiative, but he did seek to persuade the IRS to reduce the forty percent penalty. On
6 August 16, 2005, Gosnell’s representative wrote that Gosnell “remains committed to full
7 payment of all of his tax obligations” and the only unresolved question was the amount of
8 the penalty to be applied to the tax deficiency. Because Gosnell and two other partners of
9 the Limited Partnership were unable or unwilling to enter into Form 906 settlement
10 agreements pursuant to the Settlement Initiative, the IRS continued its partnership-level
11 examination of the Son of BOSS transaction to its conclusion.

12 On December 30, 2005, the IRS issued a Notice of Final Partnership
13 Administrative Adjustment (“FPAA”) to Acquisitions LLC for 2000 and 2001 in the form
14 of twenty duplicate originals sent by certified mail, addressed to Acquisitions LLC and its
15 tax matters partner at multiple addresses, and to the partners of Acquisitions LLC and
16 their tax matters partners at multiple addresses. No response to the FPAAs was made by
17 or on behalf of Acquisitions LLC. Because of the defaulted FPAAs, the determinations in
18 the FPAAs became final.

19 On November 6, 2006, the IRS prepared a revised Form 4549A, *Income Tax*
20 *Examination Changes*, pertaining to Gosnell’s 2000, 2001, and 2002 income taxes. The
21 Form 4549A used the same tax adjustments as those in the Form 906 Gosnell signed and
22 the revenue agent recommended, except for the substitution of a forty percent penalty and
23 disallowance of out-of-pocket costs. The IRS did not send Gosnell this revised Form
24 4549A until August 2007 upon Gosnell’s representative’s request. The disallowance of
25 the out-of-pocket costs caused consequences to the calculations of Gosnell’s itemized
26 deductions and Alternative Minimum Tax liabilities on his individual federal income tax
27 returns. The IRS did not send Gosnell a statutory notice of deficiency for 2000, 2001, or
28

1 2003 because it determined that assessments could be made through computational
2 adjustments without a notice of deficiency.

3 On May 25, 2007, the IRS made assessments against Gosnell for 2000, 2001, and
4 2003 based on the revised examination changes. The assessments for tax, penalties, and
5 accrued interest were \$95,659.02 for tax year 2000; \$3,104,035.49 for tax year 2001; and
6 \$326,744.83 for tax year 2003. In August 2007, under cover of a Notice 1354-A
7 transmittal slip, the IRS mailed Gosnell's representative a copy of a Form 4549A
8 denominated "Revised Report" reflecting the tax calculations underlying the assessments.
9 On July 19, 2007, and August 14, 2007, Gosnell paid the assessments for 2000, 2001, and
10 2003 in full, including accrued statutory interest, after his representative verified the
11 mathematical accuracy of the tax calculations in light of the changes the IRS made to add
12 the penalties and disallow the net out-of-pocket expenses.

13 On November 3, 2008, Gosnell filed Form 1040X administrative refund claims for
14 2000, 2001, and 2003 with the IRS under I.R.C. § 7422. Gosnell alleged in each of his
15 administrative refund claims that the IRS made the assessments illegally, without first
16 issuing him a statutory notice of deficiency under I.R.C. § 6212, and that the liabilities
17 could not be reassessed because the applicable limitations periods had expired. The IRS
18 did not act on the administrative refund claims within six months.

19 On July 1, 2009, Gosnell commenced this action for refund under 28 U.S.C.
20 § 1346, based on the same grounds stated in his administrative claims, attaching copies of
21 his Form 1040X refund claims to the complaint. His Complaint for Refund of Internal
22 Revenue Taxes and Penalties seeks recovery of IRS federal income tax, penalties, and
23 interest for the taxable years ended December 31, 2000, December 31, 2001, and
24 December 31, 2003. (Doc. 1.) As grounds for recovery, Gosnell alleged and argued in
25 the alternative that (1) he never received a statutory notice of deficiency with respect to
26 his 2000, 2001, and 2003 tax years; (2) the IRS illegally and without authority assessed
27 additional federal income tax, penalties, and interest based erroneously on Form 4549A,
28 *Income Tax Examination Changes*; and (3) he is entitled to a refund of all amounts paid

1 on the assessments because such amounts are statutory overpayments under I.R.C.
2 § 6402(a). (*Id.*)

3 **II. Statutory Background**

4 **A. The Tax Equity and Fiscal Responsibility Act (“TEFRA”)**

5 Under the Internal Revenue Code, a partnership is required to file an annual
6 information return, but a partnership is not a taxable entity for federal income tax
7 purposes. *Olson v. United States*, 172 F.3d 1311, 1316 (Fed. Cir. 1999) (citing I.R.C.
8 §§ 701, 6031). Individual partners are responsible for reporting their distributive share of
9 the partnership’s income, loss, deductions, and credits on their individual tax returns and
10 for paying whatever amount of tax is due on their share. *Id.* (citing I.R.C. § 702).

11 Before the 1982 enactment of TEFRA, adjustments to the tax treatment of
12 partnership items had to be determined in separate proceedings involving each individual
13 partner because there was no administrative or judicial mechanism for making
14 adjustments to the tax treatment of partnership items at the partnership level. *Id.* TEFRA
15 was enacted to permit one proceeding to determine how partnership items would be
16 reported on all partners’ individual returns, and it requires partners to treat partnership
17 items on their individual returns consistently with the item’s treatment on the partnership
18 information return. *Id.* (citing I.R.C. § 6222(a)).

19 TEFRA requires that the tax treatment of any “partnership item” be determined at
20 the partnership level. *Id.* (citing I.R.C. § 6221). As defined by regulation, “partnership
21 items” include items of gain, loss, deduction, or credit claimed by the partnership. *Id.* at
22 1316-1317. “The term ‘affected item’ means any item to the extent such item is affected
23 by a partnership item.” I.R.C. § 6231(a)(5).

24 The IRS must give partners notice of the beginning of an administrative
25 proceeding at the partnership level with respect to a partnership item and the FPAA, *i.e.*,
26 notice of final partnership administrative adjustment, resulting from any such proceeding.
27 I.R.C. § 6223(a). Upon completion of partnership-level proceedings, the IRS must mail
28 to the tax matters partner and each notice partner a copy of the resulting FPAA before

1 making any assessments attributable to that item against the partners. *Olson*, 172 F.3d at
2 1317 (citing I.R.C. § 6223(a)(2)). Once an FPAA is mailed, the partnership’s tax matters
3 partner has ninety days to file a petition for readjustment of partnership items. *Petaluma*
4 *FX Partners, LLC v. Comm’r*, 591 F.3d 649, 651 (D.C. Cir. 2010) (citing I.R.C.
5 § 6226(a)). If the tax matters partner does not file within that period, any other partner
6 who received the FPAA has an additional sixty days to file a petition. *Id.* (citing I.R.C.
7 § 6226(b)(1)). Once a petition has been filed, the reviewing court has jurisdiction to
8 determine all partnership items for the partnership taxable year addressed by the FPAA.
9 *Id.* (citing I.R.C. § 6226(f)).

10 **B. Notices of Deficiency**

11 Once a final partnership-level adjustment has been made to a partnership item in a
12 TEFRA proceeding, if there is no challenge to the FPAA or any such challenge has been
13 concluded, the IRS may proceed to make corresponding computational adjustments to
14 each partner’s return. *Desmet v. Comm’r*, 581 F.3d 297, 302 (6th Cir. 2009). A
15 “computational adjustment” is “the change in the tax liability of a partner which properly
16 reflects the treatment under [TEFRA] of a partnership item.” I.R.C. § 6231(a)(6). “All
17 adjustments required to apply the results of a proceeding with respect to a partnership
18 under [TEFRA] to an indirect partner shall be treated as computational adjustments.” *Id.*

19 For purposes of § 6230(c)(2), the IRS is deemed to have sent to the partner a
20 notice of computational adjustment when it sends to the partners Form 4549, *Income Tax*
21 *Examination Changes*, showing the adjustments that make the partner’s tax return
22 consistent with partnership-level determinations and the subsequent change to tax
23 liability. IRS Chief Counsel Notice CC-2009-027, 2009 WL 2853841. Form 4549A,
24 *Income Tax Discrepancy Adjustments*, is “virtually identical” to Form 4549:

25 These forms are virtually identical except the Form 4549 includes a
26 signature line for the taxpayer, which, if signed, waives the taxpayer’s
27 appeal rights with the Service and ability to contest the form with the Tax
28 Court. The Form 4549-A does not include a signature line for the taxpayer
but conveys the same information as the Form 4549; consequently, it meets
the requirements of the notice of computational adjustment referred to in

1 I.R.C. § 6230(c)(2)(A) starting the 6-month period [for filing a claim for
2 refund].

3 IRS Chief Counsel Advice CC-2010030109160941, 2010 WL 1257375.

4 Deficiency procedures provided in I.R.C. §§ 6211-6216 (“Subchapter B”), which
5 include a notice requirement, generally do not apply to the assessment or collection of
6 any computational adjustment. I.R.C. § 6230(a)(1). However, Subchapter B applies to
7 “any deficiency attributable to . . . affected items which require partner level
8 determinations,” “other than penalties, additions to tax, and additional amounts that relate
9 to adjustments to partnership items.” I.R.C. § 6230(a)(2)(A). If the partner’s liability
10 relates to “affected items which require partner level determinations,” then the IRS must
11 send a notice of deficiency to that partner, which initiates proceedings against him
12 individually pursuant to Subchapter B deficiency procedures. *Desmet*, 581 F.3d at 302.
13 Deficiency proceedings permit the partner to dispute liability by filing a petition for
14 redetermination before paying the tax. *Id.*; I.R.C. § 6213(a). For deficiencies other than
15 those resulting from mathematical or clerical errors, the IRS may not assess or collect the
16 deficiency before sending the notice of deficiency and the expiration of the taxpayer’s
17 time to file a petition for redetermination by the Tax Court. I.R.C. § 6213(a), (b). If the
18 taxpayer files a petition with the Tax Court for a redetermination of the deficiency, the
19 IRS may not assess or collect the deficiency until the decision of the Tax Court has
20 become final. I.R.C. § 6213(a). But if the partner’s liability does not relate to affected
21 items requiring partner-level determinations, “the IRS may directly assess the tax against
22 the individual partner by making a computational adjustment—applying the new tax
23 treatment of all partnership items to that partner’s return.” *Desmet*, 581 F.3d at 302.

24 **C. Claims for Refunds**

25 A partner may file a claim for refund on grounds that the IRS “erroneously
26 computed any computational adjustment necessary . . . to apply to the partner a
27 settlement, a final partnership administrative adjustment, or the decision of a court in an
28 action brought under section 6226 or section 6228(a).” I.R.C. § 6230(c)(1)(A). A partner

1 also may file a claim for refund on the grounds that the IRS “erroneously imposed any
2 penalty, addition to tax, or additional amount which relates to an adjustment to a
3 partnership item.” I.R.C. § 6230(1)(C). Any claim under § 6230(1)(A) or (C) must be
4 filed within six months after the day on which the IRS mails the notice of computational
5 adjustment to the partners. I.R.C. § 6230(c)(2)(A).

6 Additionally, a partner may file a claim for refund on the grounds that the IRS
7 “failed to allow a credit or to make a refund to the partner in the amount of the
8 overpayment attributable to the application to the partner of a settlement, a final
9 partnership administrative adjustment, or the decision of a court in an action brought
10 under section 6226 or section 6228(a).” I.R.C. § 6230(c)(1)(B). Any such claim must be
11 filed within two years after the settlement is entered into, the court decision becomes
12 final, or “the day on which the period during which an action may be brought under
13 section 6226 with respect to the final partnership administrative adjustment expires.”
14 I.R.C. § 6230(c)(2)(B).

15 **D. Limitations Periods for Making Assessments**

16 The period for assessing any income tax that is attributable to any partnership item
17 (or affected item) for a partnership taxable year generally does not expire before the date
18 that is three years after the later of the (1) the date on which the partnership return for the
19 taxable year was filed or (2) the last day for filing the return for that year (determined
20 without regard to extensions). I.R.C. § 6229(a). The period may be extended by
21 agreement before the expiration of the period. I.R.C. § 6229(b). If notice of an FPAA
22 with respect to any taxable year is mailed to the tax matters partner, the running of the
23 period shall be suspended for the period during which an action may be brought under
24 § 6226 and for one year thereafter. I.R.C. § 6229 (d). Limitations periods apply to
25 penalties the same as if they were imposed as income tax. I.R.C. § 6229(g).

26 **III. Jurisdiction**

27 Gosnell’s complaint alleges subject matter jurisdiction under 28 U.S.C.
28 § 1346(a)(1) and I.R.C. § 7422. Under 28 U.S.C. § 1346(a)(1), district courts have

1 original jurisdiction of “[a]ny civil action for the recovery of any internal-revenue tax
2 alleged to have been erroneously or illegally assessed or collected, or any penalty claimed
3 to have been collected without authority or any sum alleged to have been excessive or in
4 any manner wrongfully collected under the internal-revenue laws.”

5 I.R.C. § 7422 permits civil actions against the United States for the refund of taxes,
6 but § 7422(a) prohibits suit before filing a claim for refund:

7 No suit or proceeding shall be maintained in any court for the recovery of
8 any internal revenue tax alleged to have been erroneously or illegally
9 assessed or collected, or of any penalty claimed to have been collected
10 without authority, or of any sum alleged to have been excessive or in any
11 manner wrongfully collected, until a claim for refund or credit has been
12 duly filed with the Secretary, according to the provisions of law in that
13 regard, and the regulations of the Secretary established in pursuance
14 thereof.

15 Section 7422’s requirement that a person first file an administrative claim before
16 commencing a district court action is “a statutory limitation on Congress’s express waiver
17 of sovereign immunity pursuant to § 1346(a)(1).” *Dunn & Black, P.S. v. United States*,
18 492 F.3d 1084, 1090-91 (9th Cir. 2007). “Unless a taxpayer has duly filed a claim for
19 refund of federal taxes with the IRS, a district court is without jurisdiction to entertain a
20 suit for refund, and a claim is not duly filed unless it is timely.” *Yuen v. United States*,
21 825 F.2d 244, 245 (9th Cir. 1987) (per curiam).

22 Section 7422(h) provides, “No action may be brought for a refund attributable to
23 partnership items (as defined in section 6231(a)(3)) except as provided in . . . section
24 6230(c).” Section 6230(c) establishes two different limitations periods: (1) two years for
25 a claim for refund of overpayment and (2) six months for a claim for refund due to
26 erroneous computation of a computational adjustment or erroneous imposition of a
27 penalty or additional amount related to adjustment of a partnership item.

28 Gosnell states that he seeks a refund of overpayment under § 6401(a) based on the
IRS’s failure to send him a statutory notice of computational adjustment, in which case
the two-year limitations period would apply. Section 6401(a) defines “overpayment” as
“that part of the amount of the payment of any internal revenue tax which is assessed or

1 collected after the expiration of the period of limitation properly applicable thereto.”

2 Gosnell’s complaint alleges the following:

3 A. Plaintiff never received a statutory notice of deficiency with
4 respect to his 2000, 2001 and 2003 tax years.

5 B. After failing to issue statutory notices of deficiency, the IRS
6 illegally and without authority assessed additional federal income tax,
penalties, and interest. The assessments were erroneously based on Form
4549A Income Tax Examination Changes.

7 C. The Plaintiff is entitled to a refund of all amounts paid on the
8 assessments pursuant to the Form 4549A Income Tax Examination
Changes, because such amounts are statutory overpayments under 26
9 U.S.C. § 6402(a).⁴

10 (Doc. 1 at 3.) Gosnell also contends that he is “seeking a statutory overpayment under
11 IRC § 6401(a) based on the government collecting an illegally assessed tax liability.”

12 (Doc. 22 at 3.)

13 A partner’s claim that the IRS “failed to allow a credit or to make a refund to the
14 partner in the amount of overpayment attributable to the partner of . . . a final partnership
15 administrative adjustment” may be filed within two years after “the day on which the
16 period during which an action may be brought under section 6226 with respect to the final
17 partnership administrative adjustment expires.” I.R.C. § 6230(c)(2)(B)(ii). The IRS
18 issued an FPAA to Acquisitions LLC for tax years 2000 and 2001 on December 30, 2005.
19 The tax matters partner could have filed a petition for readjustment of partnership items
20 for those tax years within ninety days, and any notice partner could have filed a petition
21 for readjustment within sixty days after the close of the ninety-day period. I.R.C.
22 § 6226(a), (b). Thus, Gosnell’s time to bring an action for overpayment for tax years
23 2000 and 2001 expired two years and 150 days after December 30, 2005, which was May
24 30, 2008. On November 3, 2008, Gosnell filed Form 1040X administrative refund claims
25 for 2000, 2001, and 2003. Thus, if Gosnell’s claims were, as he contends, for refund of
26

27 _____
28 ⁴The reference should be to § 6401(a).

1 overpayment under § 6230(c)(1)(B), they were untimely under § 6230(c)(2)(B)(ii), and the
2 Court would lack jurisdiction to entertain this suit for refund. *See Yuen*, 825 F.2d at 245.

3 But the IRS argues, and the Court agrees, Gosnell’s claim is not one for
4 overpayment. He does not really seek reimbursement of taxes “assessed or collected after
5 the expiration of the period of limitation properly applicable thereto” because, as shown
6 below, he concedes that the assessments and collections were timely. Rather, Gosnell
7 argues that the assessment periods never properly opened because the IRS did not issue a
8 notice of deficiency. But, as shown below, the IRS was not required to issue a notice of
9 deficiency. Therefore, Gosnell’s claim more closely resembles a claim that the IRS
10 “erroneously computed any computational adjustment necessary . . . to apply to the
11 partner . . . a final partnership administrative adjustment” or “erroneously imposed any
12 penalty . . . which relates to an adjustment to a partnership item.” I.R.C. § 6230(c)(A)(ii),
13 (C).

14 Because Gosnell’s claim arises under § 6230(c)(A) or (C), the six-month
15 limitations period applies. The IRS contends, therefore, that Gosnell’s administrative
16 claims were untimely under § 6230(c) because they were filed in November 2008, which
17 is more than six months after the IRS sent Gosnell’s representative a copy of a Form
18 4549A in August 2007.

19 Section 6230(c)(2)(A) requires that a partner’s claim arising out of erroneous
20 computation of a computational adjustment to a partnership item or erroneous imposition
21 of penalty or additional amount related to an adjustment to a partnership item be filed
22 within six months after the day on which the IRS mails the notice of computational
23 adjustment to the partner. For purposes of § 6230(c)(2), the IRS is deemed to have sent
24 to the partner a notice of computational adjustment when it sends to the partners a Form
25 4549 showing the adjustments that make the partner’s tax return consistent with
26 partnership-level determinations and the subsequent change to tax liability, and Form
27 4549A is “virtually identical” to Form 4549. The IRS mailed to Gosnell a Form 4549A
28 on December 22, 2004, as part of the settlement documents, before the partnership-level

1 examination concluded. Although the IRS subsequently prepared a revised Form 4549A
2 after the partnership-level examination was completed and the FPAA was issued, the
3 record does not show that the revised Form 4549A was mailed to Gosnell. Nor does the
4 record show any basis for finding that mailing the revised Form 4549A to Gibson in
5 August 2007 was equivalent to mailing it to Gosnell, as required by § 6230(c)(2)(A). On
6 this record, the IRS has failed to show when the six-month limitations period for Gosnell
7 to file an administrative claim began. Thus, agreeing with the IRS that Gosnell’s claims
8 were for refund under § 6230(c)(1)(A) or (C), the Court must conclude his administrative
9 claim was timely under § 6230(c)(2)(A), and therefore it has subject matter jurisdiction to
10 decide this case under 28 U.S.C. § 1346(a)(1) and I.R.C. § 7422.

11 **IV. Analysis**

12 **A. Did the IRS Assess Additional Tax, Penalties, and Interest Outside of** 13 **the Limitations Periods?**

14 In his motion for summary judgment, Gosnell asserts that “the IRS not only
15 assessed the tax against plaintiff, Mr. Gosnell, after the statute of limitations on
16 assessment expired, the IRS also collected the tax after the statute of limitations expired.”
17 (Doc. 18 at 3.) But Gosnell also states that the limitation period during which the IRS
18 was permitted to assess his 2000 and 2001 taxes expired on May 30, 2007, and the
19 limitation period during which the IRS was permitted to assess his 2003 taxes expired
20 October 15, 2007. (*Id.* at 12.) And the parties stipulated that the IRS made assessments
21 against Gosnell for 2000, 2001, and 2003 on May 25, 2007. (Doc. 17 at 14, ¶ 78.)
22 Similarly, Gosnell states, “Plaintiff’s 2003 statute of limitations expired on October 15,
23 2007,” and “the assessments for 2000, 2001, and 2003 [were] made on May 24, 2007.”⁵
24 (Doc. 18 at 12.)

25 In response, the IRS noted that Gosnell acknowledged that the assessments were
26 made before the earliest limitations period expired and that Gosnell’s “real argument is

27 ⁵The IRS’s response does not dispute Gosnell’s reference to May 24, 2007, even
28 though the parties’ Stipulation of Facts states the assessment was made on May 25, 2007.

1 that the assessments were ‘illegal’ when they were made because no notice of deficiency
2 was issued.” (Doc. 21 at 2 n.1.) Gosnell replied, “Here, this is a distinction without a
3 difference, but plaintiff maintains that there was nothing to keep the statute of limitations
4 on assessment open at any time, because the IRS was prohibited from making any
5 assessments at all times.” (Doc. 22 at 4.)

6 Thus, it appears that Gosnell concedes that the IRS assessed the 2000, 2001, and
7 2003 taxes against Gosnell within the applicable statutory limitations periods if the IRS
8 were permitted to assess the taxes without issuing notices of deficiency.

9 **B. Did the Final Partnership Administrative Adjustment Require a**
10 **Partner-Level Determination? Was the IRS Required to Send Gosnell a**
11 **Notice of Deficiency?**

12 Subchapter B, which includes a notice of deficiency requirement, applies to “any
13 deficiency attributable to . . . affected items which require partner level determinations,”
14 “other than penalties, additions to tax, and additional amounts that relate to adjustments to
15 partnership items.” I.R.C. § 6230(a)(2)(A).

16 Gosnell contends that adjustment of partnership items at the partnership level
17 related to the Son of BOSS transaction required a partner-level determination to apply the
18 adjustments to him individually. If a partner-level determination was required, the IRS
19 was required to have sent him a notice of deficiency, and it did not. A notice of
20 deficiency would have triggered a ninety-day period during which he could have sought
21 redetermination by the Tax Court, which would have postponed the time during which the
22 IRS would have been permitted to assess and collect the deficiency from him. He states
23 that although he does not dispute the calculation and amount of tax assessed, he was
24 deprived of opportunity to raise procedural issues before the Tax Court.

25 When Gosnell applied for Settlement Initiative relief, he disclosed the Son of
26 BOSS tax benefits he claimed on his 2000, 2001, and 2003 returns. On December 22,
27 2004, the IRS sent Gosnell a Form 4549A, notifying him of the changes to his individual
28 income tax liabilities. The IRS also sent Gosnell a proposed Form 906 settlement
agreement, which set forth relevant facts and described all of the benefits and attributes

1 he had claimed from the shelter, including the changes to his tax liabilities set forth in the
2 Form 4549A, a deduction for out-of-pocket costs, and assessment of a ten percent penalty
3 pursuant to the terms of the Settlement Initiative. In August 2005 Gosnell's
4 representative communicated to the IRS: "The **only** unresolved question in the
5 Examination of tax years 2000, 2001, 2002 and 2003 **is the amount of the penalty to be**
6 **applied to the deficiency in tax.**" (Doc. 17 at 12; emphasis in original.) After the IRS
7 completed the partnership-level examination of the Son of BOSS transaction, it issued an
8 FPAA, and no response to the FPAA was made by or on behalf of Acquisitions LLC.
9 Then the IRS prepared a revised Form 4549A which used the same tax adjustments as
10 those in the Form 906 Gosnell signed and the revenue agent recommended, except for the
11 substitution of a forty percent penalty and disallowance of out-of-pocket costs. The
12 disallowance of the out-of-pocket-costs caused consequences to the calculations of
13 Gosnell's itemized deductions and Alternative Minimum Tax liabilities on his individual
14 federal income tax returns. The assessments made against Gosnell for 2000, 2001, and
15 2003 on May 25, 2007, were based on the revised examination changes. The revised
16 Form 4549A was sent to Gosnell's representative in August 2007, and Gosnell paid the
17 assessments in full after his representative verified the mathematical accuracy of the tax
18 calculations in light of the changes the IRS made to add the penalties and disallow the net
19 out-of-pocket expenses.

20 In *Olson*, the Federal Circuit held that the disputed assessments "were mere
21 'computational adjustments' requiring no noncomputational, factual determinations at the
22 partner level and thus were not subject to the Code's standard deficiency procedures."
23 172 F.3d at 1317. The court explained that the assessment appeared to be "a prime
24 example of a mere computational adjustment because it apparently entailed nothing more
25 than reviewing the taxpayers' returns for the years in question, striking out the tax credits
26 that had been improperly claimed, and re-summing the remaining figures." *Id.* at 1318. It
27 did not matter that the IRS may need to ask the taxpayer for certain additional information
28 regarding certain figures on the tax returns, as long as "no individualized factual

1 determination takes place as to the correctness of the originally declared figures or any
2 other factual matter such as the state of mind of the taxpayer upon filing.” *Id.* Although
3 in *Olson* the taxpayers had signed a settlement agreement regarding partnership items and
4 the IRS had accepted it, and here the IRS did not accept Gosnell’s settlement offer, both
5 in *Olson* and here the partnership items were resolved, and only issues regarding applying
6 the adjustment of partnership items to affected items on the individuals’ tax returns was
7 disputed. Here, as in *Olson*, the application of undisputed facts to the individual tax
8 returns requires only computational action.

9 The Second Circuit has provided this example:

10 An example of an affected item that requires no further factual
11 determination at the partner level would be a partner’s medical expense
12 deduction, pursuant to I.R.C. §213(a). The allowable deduction is a
13 function of the partner’s adjusted gross income, which in turn depends on
the partner’s distributive share of the partnership income or loss.
Determining the allowed deduction is a mathematical calculation and
requires no further factual finding.

14 *Callaway v. Comm’r*, 231 F.3d 106, 110 n.4 (2d Cir. 2000) (citation omitted).

15 Here, no partner-level determination of any affected item was required. The
16 substitution of a forty percent penalty and disallowance of out-of-pocket costs required
17 only mathematical calculations. Gosnell’s representative verified the mathematical
18 accuracy of the tax calculations before Gosnell paid the taxes in full. No resolution of
19 factual issues was required to apply the partnership-level adjustment to Gosnell’s
20 individual return.


21 Therefore, the IRS was not required to send Gosnell a notice of deficiency because
22 adjustment at the partnership level did not require any partner-level determination before
23 assessing and collecting additional income tax, interest, and penalties from Gosnell.

24 IT IS THEREFORE ORDERED that Plaintiff’s Motion for Summary Judgment
25 (Doc. 18) is denied and Defendant’s Cross-Motion for Summary Judgment (Doc. 21) is
26 granted.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IT IS FURTHER ORDERED that the Clerk shall enter judgment in favor of Defendant and against Plaintiff. The Clerk shall terminate this case.

DATED this 28th day of June, 2011.



Neil V. Wake
United States District Judge