

Passthrough Partner

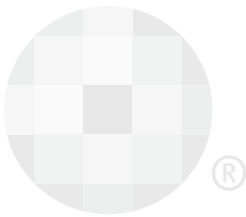
Any Partner, Member or Manager May Sign a Partnership Return. Right?

By *J. Leigh Griffith*

An Internal Legal Memorandum¹ issued in June 2014 highlights what should be (but is not) a straightforward administrative requirement as to who can sign the partnership tax return (Form 1065) that appears to be tripping up taxpayers and tax preparers. It is the IRS's position that each year's initial 1065 is not valid unless it is signed by a general partner or an LLC member-manager. A not-uncommon example illustrating the problem is an investment fund structured as a partnership that contracts out operating and investing authority to a fund manager who does not own an interest in the fund. Even though the fund manager essentially runs the partnership and may be the only person in a position to know whether the return is substantively correct, the fund manager cannot validly sign and file the Form 1065 if such fund manager does not have a partnership interest in the fund. This circumstance occurs more frequently than many realize, particularly in the larger investment LLCs/partnerships. It is also common in closely held family LLCs/partnerships where the older generation is in fact running the entity but younger generations—directly, or indirectly through trusts—own all of the partnership/membership interests.

If a partnership fails to properly file the Form 1065, the statute of limitations does not start for the partnership items in that partnership's tax year, any elections that the partnership is entitled to make that year are not made, and there are significant potential penalties for failure to file and/or late filing. The partnership return must be properly executed in order to be a valid tax return, and the filing of an invalid partnership return is disregarded.² The issue of who can validly sign a partnership return is so significant that the AICPA Tax Division in its May 2014 comments for the IRS 2014-2015 Guidance Priority List, requested that the Treasury provide guidance for the partnership tax return under Code Sec. 6063. Specifically, the request was for the IRS to provide greater specificity as to who can validly sign an originally filed partnership tax return, including when a limited partner or nonmember-manager LLC member can sign such a return.³

On January 30, 2015, at the ABA Section of Taxation Mid-Winter 2015 meeting (the "Mid-Winter Meeting"), Elizabeth G. Chirich, Branch 1 Chief, IRS Office of Associate Chief Counsel (Procedure and Administration) participated in a panel discussion entitled "Who Can Sign a Partnership Return?" She set forth the IRS position that the proper execution requires a general partner or a member-manager



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and, in the absence of direct authority on the issues, urged the audience to look to the authorities concerning Tax Matters Partners for guidance. She also stated, however, that the grantor/owner of a trust that is a partner in a partnership cannot sign the partnership return, only the trustee can sign for the trust as a partner in the partnership.⁴ As a technical matter, the trust is not a disregarded entity for federal tax purposes such as a single member LLC (SMLLC). However, all of the income, gain, loss, deductions and credits of the partnership attributable to the trust wind up on the grantor's tax return,⁵ and the trust often does not even have a federal identification number. This raises the question as to who is the appropriate party

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to execute a partnership return in which the SMLLC is the general partner. Whose is the appropriate signature for a limited partnership Form 1065 when a SMLLC (a disregarded entity for federal income tax purposes⁶ but a regarded entity under state law) is the general partner of the limited partnership? Is the limited partnership return executed by the member of the SMLLC as a member-manager on behalf of the SMLLC or, since the SMLLC is disregarded, as the deemed partner for federal income tax purposes? Should the return be signed by the owner of the SMLLC in a dual capacity just to be "sure"?⁷ Clearly, it is the position of the IRS that the limited partners are not valid signatories.⁸ As discussed later herein, it is the IRS's position that the single member should sign in the capacity of the member-manager of the SMLLC, which is in turn the general partner or member-manager of the partnership filing the Form 1065.

Analysis of the Outstanding Guidance

Code Sec. 6011(a) generally requires, "Every person required to make a return or statement shall include therein the information required by such forms or regulations." Code Sec. 6031(a), subject to special rules applicable to foreign partnerships⁹ and a few other exceptions,¹⁰ requires every partnership (as defined by Code Sec. 761(a))¹¹ to make a return for each tax year

stating specifically the information the Secretary may by forms¹² and regulations prescribe.¹³

Code Sec. 6063 provides, "The return of a partnership made under section 6031 shall be signed *by any one of the partners*. (Emphasis added.) The fact that a partner's name is signed on the return shall be prima facie evidence that such partner is authorized to sign the return on behalf of the partnership." The language of the Code is largely parroted by the applicable Regulations: "Returns, statements, and other documents required to be made by partnerships under the provisions of Subtitle A or F of the Code, or the regulations thereunder, with respect to any tax imposed by subtitle A of the Code shall be signed *by any one of the partners*."¹⁴ (Emphasis added.) The Regulations also provide: "A partner's signature on a return, statement, or other document made by or for a partnership of which he is a member shall be prima facie evidence that such partner is authorized to sign such return, statement, or other document."¹⁵ It also is important to note that an indirect partner/member is not a partner/member of the partnership or LLC.¹⁶ For example, a member of an LLC (that is a partner in partnership 2) is not a partner in partnership 2. The LLC is the partner of partnership 2.

Code Sec. 6061 provides that except as provided in Code Sec. 6062 (signing corporate returns) and Code Sec. 6063 (signing partnership returns), any return or other document required under the internal revenue laws or Regulations shall be signed in accordance with forms or Regulations prescribed by the Treasury. By its terms, this grant of authority does not apply to the signing of partnership returns. The Treasury is also given authority to develop procedures for the acceptance of signatures in digital or other electronic form.¹⁷ This grant of authority does not seem to be limited by Code Sec. 6063 in the same manner as the signing of the return. For the electronic filing of partnership returns, the IRS has issued form 8453-PE (2014). This form to enable the electronic Form 1065 to be authorized to be filed requires a general partner or LLC member-manager to sign the form. Although strange that the authorization to file a form electronically (and serving as the signing of such return) may have a better foundation for the IRS to require a general partner or member-manager than the execution of the paper form, it appears that is the case.

Neither the Code nor the Regulations specifically deal with signatures by LLC members with respect to Form 1065. One would think, however, that since the multi-member domestic LLC, in the absence of an election to be treated as an association taxable as a corporation,¹⁸ is taxable as a partnership, all members of such LLCs that do not elect to be treated as associations taxable as a

corporation are partner equivalents and therefore would be eligible to sign the Form 1065.

However, this is not the IRS's view of the world. Page 4 of the instructions for Form 1065¹⁹ states: "Form 1065 is not considered to be a return unless it is signed by a *general partner or LLC member manager*."²⁰ (Emphasis added.)²¹ IRS publication 3401, *Taxation of Limited Liability Companies*, states: "Only a member manager of an LLC can sign the partnership tax return, and only a member manager can represent the LLC as the tax matters partner ... If there are no elected or designated member managers, each owner is treated as a member manager."²² Publication 3401 defines "member manager" as "... any owner of an interest in the LLC who, alone or together with others, has the continuing authority to make the management decisions necessary to conduct the business for which the LLC was formed."²³ The term "owner" is not defined. Query, under LLC laws such as Delaware where a person can be a member without an economic interest,²⁴ is such a member an "owner" or a "partner" for tax purposes?²⁵ The instructions and Publication 3401 do not suggest that a general partner or a member-manager must specifically be designated or granted specific authority to sign the Form 1065.

More than 30 years ago, before the LLC came to prominence, the AICPA apparently requested the IRS to revise the instructions and signature block for partnership returns. In GCM 38781,²⁶ counsel recommended against eliminating the requirement that the form be signed by a general partner. There were three basic reasons given for this position: (1) a limited partner is not an agent of the limited partnership and does not have a right to participate in the management of the limited partnership; (2) the execution of the partnership return by a limited partner may be an element of causing the limited partner to lose its limited liability; and most importantly (3) the potential for returns signed by limited partners being treated as invalid because of the inability of a limited partner to execute documents on behalf of a partnership and therefore concerns about whether it could properly be treated as a return made on behalf of the limited partnership. Counsel did acknowledge, "We recognize that section 6063 and section 1.6063-1 may be read to allow limited partners to sign partnership returns. We believe, however, that section 6061 gives the Service a great deal of authority with respect to the requirements for signing returns and that it is reasonable and proper for the Service to continue to require that a general partner sign the partnership return."

If one simply reads the Code and the regulations, it seems very clear that a partner of the partnership must sign the partnership return (Form 1065). Nothing more,

nothing less. Only under very limited circumstances²⁷ may an agent sign a tax return for a partner. A partnership return executed by the treasurer of a corporation (formed by the general partners) that was the managing agent for the partnership but was not itself a partner when the return was signed was not valid return.²⁸ The IRS has held that a person who was a general partner for the tax year for which the tax return is filed may sign such partnership's tax return even though such person was not a partner when signing the return.²⁹ Likewise, the IRS has also held that a person who is the general partner of the partnership at the time the partnership return was signed can validly sign the return even though such person was not a partner in the period for which the tax return applies.³⁰ Although not reported by Tax Notes, at the Mid-Winter Meeting, Elizabeth Chirich also verbally confirmed that a person who was either a general partner or member-manager (1) at the time such return was executed for filing, or (2) in the year for which the return is filed is an appropriate partner for purposes of the execution of the partnership return.³¹ This is very helpful in situations where there has been a change in the general partner (or manager-members of an LLC taxable as a partnership) on or after the end of a tax year and before the filing date.³²

The instructions and Publication 3402 seem to be more restrictive toward LLCs than the statute or the regulations require or warrant.³³ Neither the statute nor the regulations require a general partner nor do they require a partner that has the continuing authority to make management decisions. The statutory language requires a partner—end of story. Granted, Code Sec. 6063 dates back to the original 1954 Code, a period when the partnership world (at least the domestic partnership world) was much simpler and there were (1) general partnerships with only general partners, and (2) limited partnerships with limited partners and at least one general partner. At that time, limited partners could lose their limited liability protection if they participated in the management of the limited partnership and were therefore likely neither knowledgeable nor desirous of signing the Form 1065.³⁴ Perhaps more importantly, a limited partner was not an agent of the partnership and, at least under the default rules of the uniform limited partnership act, could not bind the partnership.³⁵ Neither the Code nor the applicable regulations, however, provided that a limited partner could not validly execute the partnership's Form 1065. While there is a logic in the concept that the person who signs the tax return should be knowledgeable of the activities of the partnership, the partnership tax law is so complex it is doubtful if any but a very small percentage of partners—however defined and however sophisticated—are likely to know if the tax

return of any but the simplest partnerships is substantively correct. It is understandable that the IRS would want the signature to be someone who could bind the partnership/LLC. Nonpartners, even if knowledgeable and specifically authorized to sign the Form 1065, are not permitted signatories because the statute requires a partner's signature. Code Sec. 6011 gave legislative license to the Treasury to impose requirements for information pursuant to the forms and regulations, but does "information" encompass additional requirements as to what partners are permitted to sign the partnership tax return—particularly in light of specific statutory language?

Under the Tennessee Revised Limited Liability Company Act, Section 48-249-402, with respect to a director-managed LLC, no member or director is an agent of the LLC for the purposes of its business solely by reason of being a member or a director. In a director-managed LLC or any other LLC with a president, the president is an agent of the LLC for the purposes of its business but may or may not be a member. Under the Code and the regulations, unless the president is a member, the president cannot properly execute the federal income tax return of the partnership, and the filing of such a tax return would not constitute a validly filed tax return even though the operating agreement expressly provided that the president could or should sign tax returns. Such an officer could not be the tax matters partner. A director who is a member may not be a proper signatory, as a director generally does not have authority to bind the LLC. In that case, a specific action or a provision in the operating agreement authorizing any of the director members or another officer who is a member to execute the tax return would be appropriate. Board-managed LLCs are not uncommon, and attention should be paid to whether the directors by whatever name have the authority to bind the LLC.

Surprisingly to the author, there appears to be a question if the single member of a member-manager LLC which is a general partner or member-manager of a partnership/LLC can sign the Form 1065 for such partnership or LLC taxable as a partnership in such person's individual capacity claiming such person is a "partner" or "member-manager." Under the small partnership exception to the TEFRA partnership rules³⁶ as interpreted by Rev. Rul. 2004-88, although the SMLLC's owner is a partner of the partnership for income tax purposes, the IRS treats it as a passthrough partner,³⁷ since under state law, the SMLLC is the member or partner so, under the IRS analysis, the owner is an indirect partner/member. The SMLLC is recognized as a partner for purposes of the small partnership exception.³⁸ Technically, in case of a TEFRA audit, it appears the SMLLC is supposed to give notice to the single

member since the SMLLC is the "partner" and its single member an indirect partner.³⁹ If the tax matters partner rules are what the IRS intends to apply to determine who is a partner eligible to sign the 1065, Rev. Rul. 2004-88 expressly provides:

Although the regulations under sections 301.7701-3 provide that a disregarded entity is disregarded for all federal tax purposes, these regulations do not alter state law, which determines a partner's status as a general partner.

Under the facts of this ruling, A, LLC's owner [sole owner], does not become a general partner under state law by operation of sections 301.7701-1 through 301.7701-3. Although LLC is a disregarded entity for federal tax purposes, LLC remains a partner in P and is the sole general partner authorized to bind the partnership under state law. A has no power to bind other partners as a general partner under state law. Accordingly A cannot step into the shoes of LLC, the disregarded entity, as the TMP.

The analysis provided for the SMLLC in this revenue ruling may indicate that in order to execute the Form 1065, the signatory must both be (1) a state law partner or member, and (2) a partner for tax purposes. Delaware, as well as many other states, permits a person to be classified as a member even though such person has invested zero capital, receives a zero allocation of income and loss, and is not entitled to distributions as opposed to compensation.⁴⁰ It is believed that such a member often signs Form 1065, as he or she is generally the person who runs the LLC, is an agent of the LLC, executes all other contracts and is the most knowledgeable concerning the affairs of the LLC. However, it is not at all clear that such state law member will be a qualified signatory as it would not be a partner for tax purposes, although clearly a partner for state law purposes. The IRS will accept and process such a return under the *prima facie* rule but has the right to challenge the validity later on the basis of an improper party signed the Form 1065.

This indicates that the Form 1065 of a partnership in which the SMLLC is the general partner or an LLC in which the SMLLC is the member-manager should be executed in the name of the SMLLC by the single member or perhaps signed by the single member in a dual capacity—both on behalf of the SMLLC and on behalf of the single member. Presumably, an officer of the SMLLC could also sign, but if it is later determined that "disregarded" means "disregarded," the owner will not have signed the

partnership return. If the single member is an entity, an analysis needs to occur to determine who is authorized to sign documents in that entity. If the single member is in turn a partnership, a general partner or member-manager of that entity needs to sign the Form 1065 and identify himself or herself as a member-manager signatory of SMLLC, the general partner or member-manager of the entity filing the Form 1065.

The author is unaware of any authority directly addressing who signs for a limited liability partnership. Under the state laws of which the author is aware,⁴¹ the limited liability partnership is a general partnership that has made an election and appropriate state filings to provide limited liability to all partners. Arguably, all the partners should be general partners for purposes of signing the Form 1065. If one or more partners post-filing control the management of the limited liability partnership, then perhaps those partners by analogy to the member-manager should be able to sign the Form 1065. If there are no member-manager equivalents, then perhaps all partners have the ability to execute the federal tax return by analogy to the discussion of who can sign an LLC tax return when there are no manager-members.⁴² At the Mid-Winter Meeting, there appeared to be confusion on the part of the panelists who seemed to believe that all the partners of a limited liability partnership were limited partners and therefore in that capacity unable to sign a return. It appeared the suggestion was to look for the equivalent of a member-manager of such entity and authorize such person to sign the return. A specific authorization in the LLP agreement as to who is authorized to sign the Form 1065 and a statement that such signature binds the LLP may be advisable.

With respect to limited liability limited partnerships, the issue may even be a bit trickier. Often the same state law mechanics and filings are made for a limited partnership for it to become a limited liability partnership. Under Tennessee law, for example, a limited partnership files the application with the secretary of state and applies for the status of a registered limited liability limited partnership.⁴³ Delaware provides a similar process for the formation of a limited liability limited partnership.⁴⁴ Although the statute and applicable regulations only require the signing of a return by any partner, there would have been one or more general partners prior to the election. Presumably, one of such general partners, if still equivalently involved in the management of the limited liability limited partnership, should be the party able to execute the tax return. If, after the limited partnership becomes a limited liability limited partnership, there are additional or different partners with the authority to manage or participate in the management of the partnership's affairs presumably they would

be permitted signatories. Given the view of the IRS that a limited partner cannot sign the Form 1065 and the confusion at the Mid-Winter Meeting as to the "classification equivalent" of the partners in a limited liability partnership, this seems to leave the issue a bit unsettled. Obviously, in this context, someone has to sign the Form 1065. In the case of an LLLP, it is certainly recommended that the governing documents or other action designate one or more partners or classes of partners as authorized to sign the Form 1065.

If the general partner or member-manager is an entity, then the partnership and the tax return preparer must determine which individual is qualified to sign returns for the entity.

Finally, with respect to foreign entities that have no concept of a partner but which are treated as partnerships for U.S. federal income tax purposes, who signs the tax return? It would appear that it must be an "owner" and preferably an "owner" who is in a position to make management decisions, and there should be an action authorizing or directing such person to sign the U.S. tax returns.

Toward the end of the panel of the Mid-Winter Meeting and following discussions on limited liability partnerships, foreign entities that are treated as partnerships but do not have the concept of a partner and a question concerning state law members who do not have economic interests, Elizabeth Chirich said what the IRS was looking for was a knowledgeable partner that is authorized and knows what is going on.⁴⁵

While Ms. Chirich encouraged practitioners to look at the authorities for who can be a tax matters partner for guidance, the statute concerning tax matters partners is greatly different from the statute specifying who can sign a partnership return. Code Sec. 6231(a)(7) specifies that the tax matters partner of a partnership is "(A) the *general* partner designated as the tax matters partner as provided in regulations, or (B) if there is no general partner who has been so designated, the general partner having the largest profits interest ..." (Emphasis added.) The tax matters partner statutory provision defining tax matters partner requires a "general partner." The regulations provide that solely for purposes of applying Code Sec. 6231(a)(7) to an LLC, *only* a member-manager of an LLC is treated as a

general partner, and a member who is not a member-manager is treated as a partner other than a general partner.⁴⁶ The regulations go on to define a “member-manager” for purposes of Code Sec. 6231(a)(7) as “... a member of an LLC who, alone or together with others, is vested with the continuing exclusive authority to make the management decisions necessary to conduct the business for which the organization was formed. If there are no elected or designated member managers, each owner is treated as a member manager.”⁴⁷ IRS Publication 3402 almost quotes the regulation, except it uses the term “owner” when it discusses who can sign a Form 1065 other than a member-manager. This wording may be designed to draw attention to the idea that a state law member without an economic interest is not an owner and therefore not eligible to sign the return. Where a partnership’s managing partner did not own a capital or profits interest in the partnership, but kept all of the partnership’s books and records, filed and signed tax returns, sent out K-1s, could sign checks and make investment decisions, he could not serve as the tax matters partner.⁴⁸ Presumably, such managing partner could not sign the Form 1065 either.

In the context of the tax matters partner/member, a general partner or equivalent is required by virtue of the “general partner” requirement of the statute and the interpretation of the regulations as a member-manager as an equivalent. That should be contrasted with the Code Sec. 6063 and associated regulations which merely require a partner.

Although the author has always thought the statutes controlled, particularly when unambiguous, and tax return instructions and IRS publications are not controlling, great care should be taken to be sure each partnership tax return is validly signed by a partner who is either the general partner or a member with management decision-making authority. The requirement may be given a degree of deference since it has been outstanding for decades. The failure to file a partnership tax return can have very significant negative consequences and avoiding the fight on the front end is very worthwhile.

The impact of Reg. §1.6063-1(b) statement should be understood: “A partner’s signature on a return, ... made by or for a partnership of which he is a member shall be prima facie evidence that such partner is authorized to sign such return, statement, or other document.” This does not mean that whichever partner signs the return is necessarily acceptable to the IRS. Basically, the return will be accepted, and the signer holding himself or itself out as a partner is presumed to have the appropriate capacity unless it is shown otherwise by either the taxpayer, but more often, the IRS. The burden is on the party challenging the validity

of the return to prove that the signing partner did not have the authority to do so.⁴⁹ Either the taxpayer or the IRS can demonstrate that the person signing the return was not a partner or member (or perhaps a general partner or a manager-member) and overcome the presumption that the person signing was appropriate.

Ramifications of an Improperly Signed Form 1065

Although at the Mid-Winter Meeting Ms. Chirich assured the audience that the IRS was not looking for trouble, but merely wanting somebody for whom the IRS can make a case they are authorized and know what is going on, the ramifications of filing a Form 1065 executed by an inappropriate person can be severe.

- Since the return is deemed not to have been filed, if the partnership is a TEFRA partnership, there is technically no statute of limitations concerning partnership items.⁵⁰
- If the return is for the first year of the partnership, the ability to make elections that are required to be made the first year are lost. Any current or future changes to accounting methods will be a change of accounting method and entail the applicable procedures and IRS approvals.
- The late filing penalty or failure to file correct information returns can be significant. It is \$195 per month or fraction thereof for up to twelve months that such return is not filed. This amount is adjusted for the cost-of-living adjustment determined under Code Sec. 1(f)(3) per partner for returns due after January 1, 2015.⁵¹ For a partnership of 11 partners, the penalty before the adjustment for inflation would be \$2,145 per month or a maximum of \$25,740.⁵² Since the late filing penalty and the failure to file correct information returns are in the same Code section only the greater one will apply.
- There is a penalty for failing to file correct information returns on or before the due date.⁵³ This penalty is \$100 for each informational return failure.
- In addition, there is a separate potential penalty for failure to file if such failure is willful.⁵⁴

An example of a potentially catastrophic missed election would be the loss of a Code Sec. 754 election for the year of a significant transaction whereby a transferee partner is permitted to adjust the basis of partnership property and obtain additional depreciation and amortization for the transferee partner. The author is aware of a dispute with the IRS over a possibly improperly executed partnership

return that involves a Code Sec. 754 election and a potential \$60 million basis step-up.

Be Safe, Not Sorry

While there may be ambiguity as to which partners or members may sign a Form 1065, there are some clear rules which the tax return preparer, tax advisors to a partnership and the partners should keep in mind.

- The signature must be of a partner.⁵⁵ The IRS's position is that the signatory must be a general partner or a member-manager.⁵⁶
- The signature must be that of an individual (a live person), not an entity.⁵⁷ The live person may be signing on behalf of an entity partner or manager.
- A partner may not delegate signature authority to a nonpartner regardless of what state law permits or the partnership agreement or operating agreement, as applicable, requires.⁵⁸
- An indirect partner is not considered a partner for signature purposes.
- If an entity is a general partner or a member-manager, one must look at state law to determine who can sign on behalf of the entity partner.
- The grantor of a trust general partner or member-manager taxable as a grantor trust cannot sign the Form 1065 in the capacity as the grantor.

Examples of nonpartners who perhaps all too frequently execute partnership returns are (1) nonpartner management companies, (2) nonmember-managers, (3) a nonmember officer or employee of a partnership or LLC with general authority to enter into contracts, (4) the holder of a power of attorney, (5) the grantor of a grantor trust member or partner, and (6) the member of a SMLLC. Today it is not uncommon for nonmembers to be the managers who are paid compensation to run and manage the LLC or limited partnership. These individuals may be the most familiar with the operations, income, gain and loss of the LLC or partnership and are the parties that sign all other documents and make the management decisions. They cannot, however, sign the Form 1065.

Although given the statute, it should be more than an argument that any partner of a partnership or member of an LLC can sign the Form 1065, prudence dictates the following:

- A general partner should sign if there is a general partner.
- A member-manager should sign if there is a member-manager.
- If there is an entity partner that should be the partner or member who will sign, look at state law to

determine what individual has the power to sign for the entity. The individual should sign his or her name and identify the capacity. For example, "Leigh Griffith, CEO of ABC, Inc., the General Partner of XYZ limited partnership."

- If there is no general partner or member-manager, consider an action authorizing one or more individual members of the partnership (preferably an individual member involved in the business of the partnership and authorized under either the state law to sign binding contracts or via a delegation of authority from the entity) to sign the Form 1065. In such action (as opposed to the Form 1065) state XYZ member or partner is knowledgeable in the business and affairs of the partnership and is hereby authorized to execute the Form 1065 of the partnership.
- The single member of a SMLLC which is the general partner of a partnership or the member-manager of an LLC taxable as a partnership cannot simply sign his or her name to the Form 1065. Even though the regulations state such SMLLC is disregarded as an entity separate from its owner for federal income tax purposes,⁵⁹ the IRS appears to consider such person as an indirect partner and should sign the Form 1065 in his or her own name as the sole member or manager of the SMLLC, the general partner or member-manager of the partnership filing the Form 1065.

Conclusion

Who can sign a partnership return appears to be unnecessarily complex and uncertain except for general partners and, largely, member-managers.⁶⁰ In today's world where limited partners often undertake roles in the management of the limited partnership and in many LLCs where members with economic interests have no or little management or contracting authority and managers are not individually members, there is a wide latitude for error.⁶¹ With provision that a partner's name is signed on the return as *prima facie* evidence the partner is authorized to sign, tax returns may be processed without question for years with the same person signing the return. Then in a year of an important election (such as a Code Sec. 754 election that is very material), the IRS may look at who signed the return and decide that such person is not a general partner or member-manager and disallow the election and even attempt to impose or threaten to impose the late filing or failure to file penalties.

Each entity taxable as a partnership and the tax return preparer for such entities should carefully examine who is signing the Form 1065 or Form 8453-PE and

be sure there is a general partner or member-manager (using both the state and federal tax law definition of “member”) signing. With respect to an LLC, if there is no member-manager, the return must be signed by a member (using both the state and federal tax law definition of “member”) who is involved in the operation and business of the LLC with authority to bind the LLC. If the general partner or member-manager is an entity, then the partnership and the tax return preparer must

determine which individual is qualified to sign returns for the entity.

In the context of transactions in which there is a transfer of a membership or partnership interest and the Code Sec. 754 election is important for a large step-up, if there is any question about the validity of the signature on a prior year’s tax return in which the Code Sec. 754 election was previously made, make a new election in the year of the transaction.

ENDNOTES

¹ ILM 201425011 (Feb. 21, 2014).

² *Agri-Cal Venture Associates*, 80 TCM 295, Dec. 54,022(M), TC Memo. 2000-271; *Burford Oil Co.*, CA-5, 46-1 ustc ¶9185, 153 F2d 745; *H.C. Elliott*, 113 TC 125, Dec. 53,498 (1999).

³ 2014 TNT 97-20, Doc. 2014-12530 (May 1, 2014).

⁴ 2015 TNT 22-3, Doc 2015-2518 (Feb. 3, 2015).

⁵ For purposes of determining whether the small partnership exception to the TEFRA provisions apply, a partnership cannot have more than 10 partners at any time during the year, and all partners must be individuals, estates of a deceased partner or C corporations. Passthrough partners are not eligible. A grantor trust is considered as a passthrough partner. IRM 4.31.2.1.6 (Oct. 1, 2010). A SMLLC is considered to be a passthrough partner disqualifying the partnership from small partnership classification. Rev. Rul. 2004-88, 2004-2 CB 165.

⁶ Reg. §301.7701-3.

⁷ Logic would indicate that a disregarded entity for federal income tax purposes is disregarded for purposes of determining who signs the limited partnership return. However, while there are technical distinctions between a grantor trust and a SMLLC with respect to the theory of why the income and loss is that of the single member or grantor, the IRS has held in Rev. Rul. 2004-88, 2004-2 CB 165, that the SMLLC is the partner for designation as the tax matters partner. Therefore, the IRS’s position is the single owner should sign the return in the capacity as the manager-member of the SMLLC. It may be a good idea for the sole owner to sign both individually and as the member-manager for the SMLLC which is the general partner of the limited partnership, particularly if there is an important election being made.

⁸ GCM 38781 (July 31, 1981); FSA 1992 WL 1354775 (Nov. 4, 1992).

⁹ See Code Sec. 6031(e) for special rules applicable to foreign partnerships.

¹⁰ Generally, the exceptions are (1) when a partnership has no income, deductions or credits for the tax year; (2) partnerships in which income is derived from holding or disposition of specified tax-exempt obligations or share of a RIC that pays exempt-interest dividends; (3) an eligible partnership that has previously elected out of Subchapter K; and (4) a qualified joint venture described in Code Sec. 761(f).

¹¹ The Code’s definition of partnership controls, not a state law definition. The Code’s definition is generally broader than that of state law.

¹² The Code’s reference to forms would appear to give the forms and their instructions a great deal of authority even though the issuance of forms and instructions does not go through a required process analogous to the issuance of Regulations or even other formal guidance. However, the authority is limited to information, and who signs the return does not appear to the author to constitute “information.” See also Sheldon I. Banoff and Allan G. Donn, *Who Can Sign a Partnership’s or LLC’s Tax Returns? Simple Questions; Complex Answers*, J. TAX’N (2010).

¹³ Although small partnerships of 10 or fewer individuals meeting certain specified requirements are presumed to meet the reasonable cause standard for failing to file pursuant to Rev. Proc. 84-35, 1984-1 CB 509 and not subject to penalty, the failure to file a return may preclude treatment the partnership desires to use which requires elections. For example, the election under Code Sec. 195 must be made in the year the business begins, and Code Sec. 754 elections must be made in years prior to or for the year of sale or exchange, or transfer by death.

¹⁴ Reg. §1.6063-1(a).

¹⁵ Reg. §1.6063-1(b). Interestingly, any authorized partner can sign a foreign partnership return to make a U.S. election if the partnership is not otherwise required to file a U.S. partnership return. This return only contains a written statement citing Reg. §1.6031-1(b)(5)(ii), lists the name and address of the partnership making the election and identifies the specific election being made. Such a return is not a return filed under Code Sec. 6031 for purposes of Code Sec. 6501 (except regarding the specific election) and may be signed by any partner in the partnership at the time the election is made or any partner of the partnership who is authorized (under local law or the partnership’s organizational documents) to make the election and who represents having such authorization under penalties of perjury. Reg. §1.6031(a)-1(b)(5).

¹⁶ In the context of the tax matters partner, Code Sec. 6231(a)(2) includes not only partners in the partnership, but “... any other person whose income tax liability under subtitle A is determined in whole or in part by taking into

account directly or indirectly partnership items of the partnership.” Code Sec. 6231(a)(2)(B).

¹⁷ Code Sec. 6061(b).

¹⁸ See Reg. §301.7701-3.

¹⁹ Page 4 of the 2014 Instructions for Form 1065, *U.S. Return of Partnership Income* (Jan. 15, 2015).

²⁰ The instructions provide special rules for returns filed by a receiver, trustee or assignee.

²¹ The instructions have long maintained that the general partner of a partnership must sign the Form 1065. More than 30 years ago, the AICPA requested that the form and instructions be changed from requiring a general partner to that of any partner. In GCM 38781 (July 31, 1981), the IRS concluded that the instructions should not be changed.

²² IRS Pub. 3401, *Taxation of Limited Liability Companies*, at 2 (2014). Presumably, the requirement that the member be a member-manager is an analogue to the requirement that a partner signing the Form 1065 must be a general partner except no unlimited liability is required.

²³ IRS Pub. 3402, at 2 (2014).

²⁴ “Unless otherwise provided in a limited liability company agreement, a person may be admitted to a limited liability company without acquiring a limited liability company interest in the limited liability company.” 6 Del 18-301(d).

²⁵ A corporate general partner of a partnership existing for the purpose of satisfying state law requirements for state financing of a construction project but which had no interest in the partnership’s income, gains, losses, deductions, credits or capital and no beneficial interest in its receipts, investments or other property on liquidation did not have a real interest in the partnership and was not a partner for tax purposes. Rev. Rul. 75-31, 1975-1 CB 10.

²⁶ GCM 38781 (July 31, 1981).

²⁷ Reg. §1.6012-1(a)(5) permits a recognized representative to sign a tax return on behalf of a taxpayer only in the following circumstances: (1) disease or injury; (2) continuous absence from the United States (including Puerto Rico), for a period of at least 50 days prior to the date required by law for filing of the tax return; or (3) specific permission is requested of and granted by the IRS for other good cause.

²⁸ *Agri-Cal Venture Associates*, *supra* note 2.

²⁹ FSA 1993-747.

³⁰ FSA 1993-747.

³¹ ABA Section of Taxation Mid-Winter 2015 meeting, Partnerships & LLCs Committee, Jan. 30, 2015.

³² If an extension of the statute of limitations is required, only a general partner or member-manager in the year for which the extension applies can execute a valid extension. Such person is not required to be a member or partner of the partnership or LLC at the time such person signs the extension.

³³ The instructions are also similarly restrictive with respect to limited partnerships as requiring a general partner to sign rather than any partner (limited or general).

³⁴ See Uniform Limited Partnership Act (1916).

³⁵ In *Agri-Cal*, the Tax Court *in dictum* stated that a limited partner having no authority to execute partnership returns on behalf of the partnership would not be a valid signatory under Code Sec. 6063. The court did not determine, even *in dictum*, if a limited partner were authorized to sign the tax return that such a signing would not be binding.

³⁶ Code Sec. 6231(a)(2)(B).

³⁷ The term "pass-thru partner" is defined in Code Sec. 6231(a)(9) in the context of a tax matters partner.

³⁸ This is perhaps analogous to *Primco Management Co.*, 74 TCM 177, Dec. 52,160(M), TC Memo. 1997-332 (grantor trust holding legal title to an interest in an S corporation was a "pass-thru shareholder"; small S corporation exception under the parallel provisions of Reg. §301.6241-1T(c)(2)(ii) is inapplicable). However, to the author, this analogy appears to be

inconsistent with the concept a business entity that has a single owner and is not taxable as a corporation is disregarded as an entity separate from its owner as found in Reg. §§301.7701-2, -3 and -4.

³⁹ See Reg. §301.6223(h)-1 in combination with Rev. Rul. 2004-88.

⁴⁰ 6 Del. § 18-301(d).

⁴¹ 6 Del. 15-1001 and TENN. CODE ANN. §61-1-1001. The common terminology would be if a general partnership filed the papers to be a limited liability partnership, such entity would be called a limited liability partnership whereas if a limited partner filed such papers, it would be called a limited liability limited partnership.

⁴² IRS Pub. 3402, at 2 (2014).

⁴³ TENN. CODE ANN. §61-1-1001.

⁴⁴ 6 Del. §17-214.

⁴⁵ See 2015 TNT 22-3 (Feb. 3, 2015).

⁴⁶ Reg. §301.6231(a)(7)-2(a).

⁴⁷ Reg. §301.6231(a)(7)-2(b)(3).

⁴⁸ *Sente Investment Club Partnership of Utah*, 55TCM 1565, Dec. 44,980(M), TC Memo. 1988-376.

⁴⁹ FSA 1993-747.

⁵⁰ *Lucas v. Pilliod Lumber Co.*, S Ct, 2 USTC ¶1521, 281 US 245, 50 S Ct 297.

⁵¹ Code Sec. 6698. This penalty is assessed against the partnership and must be paid before litigation of the penalty can start. Partners are liable for the penalty personally to the extent of their liability for partnership debts generally.

⁵² The penalty does not apply if the failure is due to reasonable cause.

⁵³ Code Sec. 6721.

⁵⁴ Code Sec. 7203. It is unlikely that the filing of a

return with an improper signature will constitute a willful failure to file.

⁵⁵ Code Sec. 6063.

⁵⁶ Page 4 of the 2014 instructions for Form 1065, *U.S. Return of Partnership Income* (Jan. 15, 2015).

⁵⁷ ILM 201425011 (Feb. 21, 2014). "The primary object of written signature is identification, and this goal is subverted when a company name is used rather than the person who signed the document." *Citing Sinnot v. Louisville & N.R. Co.*, 104 Tenn. 233 (1900). For the Form 1065 of CDE LP the signature should be of Ms. YXX, a member-manager of ABC LLC, a general partner of CDE LP.

⁵⁸ Reg. §1.6012-1(a)(5) permits a recognized representative to sign a tax return on behalf of a taxpayer only in the following circumstances: (1) disease or injury; (2) continuous absence from the United States (including Puerto Rico), for a period of at least 50 days prior to the date required by law for filing of the tax return; or (3) specific permission is requested of and granted by the IRS for other good cause.

⁵⁹ Reg. §§301.7701-2 and -3.

⁶⁰ For a 47-page analysis of who can sign a partnership return, see Banoff and Donn, *supra* note 12.

⁶¹ At the Mid-Winter Meeting, the author was told by one tax attorney that he was presently involved in a case in which the IRS was asserting that the return was not signed by a partner or member-manager and asserting the Code Sec. 754 election which involved a \$60 million step-up was invalid. Apparently, the manager who signed the return had been signing the Form 1065 for many years.

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