

Office of Chief Counsel
Internal Revenue Service
Memorandum

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date: January 28, 2016

to:

(Small Business/Self-Employed)

from: Christopher A. Pavilonis
Attorney (Jacksonville)
(Small Business/Self-Employed)

subject:

This memorandum responds to your request for assistance dated September 28, 2015.
This advice may not be used or cited as precedent.

ISSUES

1. Whether _____, has authority under Georgia law to be designated as TMP and to serve as _____.
2. Whether _____, has the authority to extend the statute of limitations pursuant to I.R.C. § 6229 for _____.
3. Whether _____, has authority to sign and execute a Form 2848, Power of Attorney and Declaration of Representative, ("Form 2848") to appoint a representative for _____.

4. The appropriate title for the TMP to execute documents related to

CONCLUSIONS

1. _____, has authority pursuant to the Operating Agreements and Georgia law to be designated and serve as TMP.
2. _____, has the authority to extend the statute of limitations pursuant to I.R.C. § 6229.
3. _____, has the authority to sign and execute a Form 2848 Power of Attorney to appoint a representative for
4. I.R.M. Exhibit 4.31.2-7 indicates that the following wording should be used by _____, when executing documents related to the examination of _____ :
_____, as Tax Matters Partner of _____, As Tax Matters Partner of _____
_____, By _____, As Tax Matters Partner of _____, Manager.

FACTS

LAW AND ANALYSIS

The period for assessing any tax imposed by subtitle A with respect to any person which is attributable to any partnership item (or affected item) for a partnership taxable year shall not expire before the date which is 3 years after the later of (1) the date on which the partnership return for such taxable year was filed, or (2) the last day for filing such return for such year (determined without regard to extensions). I.R.C. § 6229(a). The period described in subsection (a) (including an extension period under this subsection) may be extended (A) with respect to any partner, by an agreement entered into by the Secretary and such partner, and (B) with respect to all partners, by an agreement entered into by the Secretary and the tax matters partner (or any other person authorized by the partnership in writing to enter into such an agreement), before the expiration of such period. I.R.C. § 6229(b).

The tax matters partner of any partnership is the general partner designated as the tax matters partner as provided in regulations. I.R.C. § 6231(a)(7) , Treas. Reg. § 301.6231(a)(7)-1(a). A person may be designated as the tax matters partner of a partnership for a taxable year only if that person (i) Was a general partner in the partnership at some time during the taxable year for which the designation is made; or (ii) Is a general partner in the partnership as of the time the designation is made. Treas. Reg. § 301.6231(a)(7)-1(b)(1).

For purposes of applying I.R.C. § 6231(a)(7) and Treas. Reg. § 301.6231(a)(7)-1 to an LLC, only a member-manager of an LLC is treated as a general partner, and a member of an LLC who is not a member-manager is treated as a partner other than a general partner. Treas. Reg. § 301.6231(a)(7)-2(a).

For purposes of I.R.C. § 6231(a)(7), member-manager means 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. Generally, an LLC statute may permit the LLC to choose management by one or more managers (whether or not members) or by all of the members. If there are no elected or designated member-managers (as so defined in this paragraph (b)(3)) of the LLC, each member will be treated as a member-manager for purposes of this section. Treas. Reg. § 301.6231(a)(7)-2(b)(3).

Except as provided in section 14-11-301(b) of the Georgia Code, every member is an agent of the limited liability company for the purpose of its business and affairs, and the act of any member, including, but not limited to, the execution in the name of the limited liability company of any instrument for apparently carrying on in the usual way the business and affairs of the limited liability company of which he or she is a member, binds the limited liability company, unless the member so acting has, in fact, no authority to act for the limited liability company in the particular matter, and the person with whom he or she is dealing has knowledge of the fact that the member has no such authority. Ga. Code Ann., § 14-11-301(a).

If the articles of organization provide that management of the limited liability company is vested in a manager or managers: (1) No member, acting solely in the capacity as a member, is an agent of the limited liability company; and (2) Every manager is an agent of the limited liability company for the purpose of its business and affairs, and the act of any manager, including, but not limited to, the execution in the name of the limited liability company of any instrument for apparently carrying on in the usual way the business and affairs of the limited liability company of which he or she is a manager, binds the limited liability company, unless the manager so acting has, in fact, no authority to act for the limited liability company in the particular matter, and the person with whom he or she is dealing has knowledge of the fact that the manager has no such authority. Ga. Code Ann., § 14-11-301(b).

An act of a manager or a member that is not apparently for the carrying on in the usual way the business or affairs of the limited liability company does not bind the limited liability company unless authorized in accordance with a written operating agreement at the time of the transaction or at any other time. Ga. Code Ann. § 14-11-301(c).

Unless the articles of organization or a written operating agreement vests management of the limited liability company in a manager or managers, management of the business and affairs of the limited liability company shall be vested in the members, and, subject to any provisions in the articles of organization or a written operating agreement, the members shall have the right and authority to manage the affairs of the limited liability company and to make all decisions with respect thereto. The articles of organization or a written operating agreement may contain any provision relating to any phase of managing the business or regulating the affairs of the limited liability company. Ga. Code Ann. § 14-11-304(a).

If the articles of organization or a written operating agreement vests management of the limited liability company in one or more managers, then such persons shall have such right and authority to manage the business and affairs of the limited liability company as is provided in the articles of organization or a written operating agreement. Ga. Code Ann. § 14-11-304(b).

The TMP or any other person with written authorization from the partnership may execute a consent to extend the assessment period for the partnership, as to partnership items subject to unified partnership proceedings. See I.R.C. § 6229(b)(1)(B). The Second Circuit has affirmed the Tax Court's conclusion that an extension agreement (Form 872-P) signed by an attorney designated by the TMP was a valid extension. See Madison Recycling Associates v. C.I.R., 295 F.3d 280 (2nd Cir. 2002). The Second Circuit explained that the Form 2848 was an effective delegation of authority. Id.

The Service may not extend the period of limitations on assessment absent a valid waiver executed by the TMP or his counsel. Treas. Reg. § 301.6231(a)(7)-2(b)(3) refers to state law to determine whether a member or a manager is a TMP for purposes of I.R.C. § 6231(a)(7).

The Georgia Limited Liability Company Act (Georgia LLC Act) defers to the agreement of the members in the LLC's operating agreement to determine the powers and authority granted to each member of an LLC. The Georgia LLC Act merely fills in language in the event a company's operating agreement is silent to certain terms.

Based upon a review of each operating agreement,

may serve as TMP for _____, because the Georgia LLC Act in conjunction with the operating agreement recognize that

has the authority to act as TMP. As TMP, _____ may sign a statute extension pursuant to section 6229(b)(1)(B).

The instructions on the Form 2848 state: "For purposes of executing Form 2848, the TMP is authorized to act in the name of the partnership." The TMP may sign the Form 2848 designating a representative. See, e.g., Montelius v. Commissioner, 145 F.3d 1339 (9th Cir. 1998); Peking Inv. Fund, LLC v. Commissioner, T.C. Memo 2013-288; Summit Vineyard Holdings, LLC v. Commissioner, T.C. Memo 2015-140. As a result, _____ may sign and execute the Form 2848 designating a representative for _____.

The proper name to be written on the signature line of these documents is listed in IRM section 4.31.2-7. An individual must sign on behalf of these entities. The signature line will list all the entities involved and look through all the various entities to reach an individual, in this case, _____.

This writing may contain privileged information. Any unauthorized disclosure of this writing may undermine our ability to protect the privileged information. If disclosure is determined to be necessary, please contact this office for our views.

Please call Attorney Christopher Pavilonis (904) 665-1968 if you have any further questions.

A. GARY BEGUN
Associate Area Counsel (Jacksonville, Group 2)
(Small Business/Self-Employed)

By: _____
Christopher A. Pavilonis
Attorney (Jacksonville)
(Small Business/Self-Employed)

cc: Revenue Agent,
GL Reading File

(via electronic messaging)