

**Office of Chief Counsel
Internal Revenue Service
Memorandum**

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subject: Powers of Attorney in Partnership Level Proceedings

This Chief Counsel Advice responds to your request for assistance. This advice may not be used or cited as precedent.

From whom is a power of attorney ("POA") sufficient in order for an employee of the Service to solicit documents and discuss details of a partnership-level proceeding with the individual granted power of attorney?

- a. Who is authorized to sign a POA appointing a representative for a partnership or limited liability company (LLC) being examined in a TEFRA partnership-level examination?
- b. Who is authorized to sign a POA appointing a representative for a partnership or limited liability company for other purposes?

CONCLUSIONS

A general partner or, in the case of an LLC, a member-manager, may sign a POA for purposes of a TEFRA partnership-level examination¹ or for other tax purposes of the partnership. A POA can also be secured from a limited partner or LLC member for the purposes of securing partnership item information and disclosing partnership information to the POA. In the case of an LLC that has no member who is also a manager, the non-member manager² may sign the POA for purposes of establishing that it would be appropriate and helpful to secure partnership item information including securing documents and discussing the information with the designated individual.

BACKGROUND

The Tax Equity and Fiscal Responsibility Act of 1982 (“TEFRA”) added sections 6221 through 6232 to the Internal Revenue Code, which provide unified partnership audit and litigation procedures for partnerships (except certain small partnerships) filing Form 1065, U.S. Return of Partnership Income (TEFRA partnerships).³ Under the unified partnership audit and litigation procedures, the TEFRA partnership return is subject to a single audit and court proceeding binding on all the direct and indirect partners. Only the partners whose tax liabilities will be affected, and generally not the TEFRA partnership itself, are the parties-in-interest in the partnership-level audit or litigation. *Chef’s Choice v. Commissioner*, 95 T.C. 388 (1990).

LAW AND ANALYSIS

State Law Background

Under the provisions of the Uniform Partnership Act (1997) and the Uniform Limited Partnership Act (2001)⁴, a general partner is an agent of the partnership for purposes of its business except in limited circumstances.⁵ Section 301 of Uniform Partnership Act (1997), section 402 of the Uniform Limited Partnership Act (2001). An act of the general partner for apparently carrying on in the ordinary course of partnership business binds

¹ Typically the Service will interact with the tax matters partner, as defined by section 6231(a)(7) of the Internal Revenue Code, or his representative during a partnership-level examination. As section 6231(a)(7) and Treas. Reg. Sec. 301.6231(a)(7)-2 provide, the tax matters partner is a general partner or member-manager except in limited circumstances.

² A non-member manager is able to act for an entity under state or foreign law where the entity is formed, but has no direct ownership interest in the entity.

³ Sections 6233 and 6234 were later added to these provisions.

⁴ While states have generally adopted most provisions of these acts, each state’s laws may vary in certain regards. These acts are being cited as general background and should not be relied upon in all circumstances.

⁵ The general partner does not serve as agent where the partner had no authority to act for the partnership in the particular manner and the person dealing with the partner knew or received a notification that the person lacked authority. See Section 301 of Uniform Partnership Act (1997).

the partnership. *Id.* An act of limited partner in a limited partnership does not bind such partnership. Section 302 of the Uniform Limited Partnership Act (2001).

Section 403 of the Uniform Partnership Act (1997) provides that a partnership shall provide partners and their agents and attorneys access to its books and records. The partnership is also required to provide former partners and their agents and attorneys access to books and records pertaining to the period during which they were partners. The right of access provides the opportunity to inspect and copy books and records during ordinary business hours. A general partner in a limited partnership also may copy and inspect any records maintained by the limited partnership regarding the limited partnership's activities and financial condition. Section 402 of the Uniform Limited Partnership Act (2001).

Limited liability companies have largely supplanted state law partnerships in modern times. LLC's typically are taxed as partnerships. The LLC may be managed by either its members or a manager with no ownership interest in the LLC. See section 407 of the Revised Uniform Limited Liability Company Act (2006). The specific laws of the state in which the LLC was established govern the terms regarding who can act for, and inspect and copy the records of, the LLC. For example, under the provisions of the Revised Uniform Limited Liability Company Act (2006)⁶, a member in a member-managed limited liability company generally may, upon reasonable notice inspect and copy during regular business hours, at a reasonable location specified by the company, any record maintained by the company regarding the company's activities, financial condition, and other circumstances, to the extent the information is material to the member's rights and duties under the LLC's operating agreement. Section 410(a) of the Revised Uniform Limited Liability Company Act (2006).

Depending on the laws of the state where the LLC was formed, members of a manager-managed limited liability company may, during regular business hours and at a reasonable location specified by the company, have the right to obtain from the company and inspect and copy full information regarding the activities, financial condition, and other circumstances of the company as is just and reasonable if: the member seeks the information for a purpose material to the member's interest as a member; the member makes a demand in a record received by the company, describing with reasonable particularity the information sought and the purpose for seeking the information; and the information sought is directly connected to the member's purpose. *Id.*

TEFRA Partnership Provisions

⁶ Note that the Revised Uniform Limited Liability Company Act (2006) is a proposal for states to adopt as law for the governance of LLC's and, while the act tries to summarize many state provisions, is not actual law. Again, LLCs are governed by the laws of the state where the LLC was formed.

Section 6221 of the Internal Revenue Code provides that the tax treatment of any partnership item shall be determined at the partnership level, except as otherwise provided in subchapter C of Chapter 63 on the Internal Revenue Code.

Section 6224(a) provides that “any partner has the right to participate in any administrative proceeding relating to the determination of partnership items at the partnership level.”

Section 6226(c) provides that in any action initiated by the filing of a petition under that section, each person who was a partner in such partnership at any time during the year at issue shall be treated as a party to such action.

Section 6231(a)(2) provides that the term “partner” means a partner in the partnership and 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.

Section 6229(b) states that the period for assessing tax with respect to any person which is attributable to any partnership item (or affected item) for a partnership taxable year may be extended with respect to all partners, by an agreement entered into by the Service and the tax matters partner, or any other person authorized by the partnership in writing to enter such an agreement.

Disclosure Authorization

Section 6103(e)(1)(c) provides that the return of a partnership shall upon written request be open to inspection by or disclosure to any person who was a member of such partnership during any part of the period covered by the return. Section 6103(e)(6) authorizes, upon written request, the return to also be open to inspection by or disclosure to the member’s attorney in fact duly authorized in writing. Section 6103(e)(7) provides that return information of the partnership is open to inspection by or disclosure to the member or the member’s attorney in fact if the Secretary determines that such disclosure would not seriously impair Federal tax administration.

Section 6103(h)(4) states that a return or return information may be disclosed in a federal judicial or administrative proceeding if the taxpayer is a party to the proceeding, or the proceeding arose out of, or in connection with, determining the taxpayer’s civil liability, in respect of any tax imposed under the Internal Revenue Code. Section 6223(a)(1) provides for the issuance of a notice of the beginning of an “administrative proceeding” at the partnership level which is issued at the beginning of a TEFRA audit. In *Abelein v. United States*, 323 F.3d 1210 (9th Cir. 2003) the court held that a TEFRA partnership audit constituted an “administrative proceeding” for the purposes of section 6103(h)(4) and that the partners were parties to that proceeding.

Section 6103(k)(6) provides that an internal revenue officer or employee may in connection with his official duties relating to any audit or civil tax investigation or any other offense under the internal revenue laws, disclose return information to the extent that such disclosure is necessary in obtaining information, which is not otherwise reasonably available, with respect to the correct determination of tax, liability for tax, or with respect to the enforcement of any other provision of the Internal Revenue Code. Treas. Reg. Sec. 301.6103(k)(6)-1(c)(1) defines “necessary” in this context to mean “appropriate and helpful.” Specific duties for which such disclosures may be made include, but are not limited to: establishing or verifying the correctness or completeness of any return or return information; determining the responsibility for filing a return, for making a return if none has been made, or for performing such acts as may be required by law concerning such matters; establishing or verifying misconduct (or possible misconduct) or other activity proscribed by the internal revenue laws or related statutes; and obtaining, verifying, or establishing information concerned with making determinations regarding a taxpayer’s liability under the Internal Revenue Code, including, but not limited to, the administrative appeals process and any ruling, negotiated agreement, or pre-filing process. Treas. Reg. Sec. 301.6103(k)(6)-1(a).

DISCUSSION

The Service may make inquiries and disclose details of a TEFRA partnership-level examination to any person who is a party to, or has authority to represent a party in, the partnership examination. See Sections 6103(h)(4) and 6224(a). Such parties generally include any direct or indirect partner of the partnership, or member of the LLC treated as a partnership, for the taxable year at issue. The Service is also authorized under section 6103(e)(1)(C) to allow a partner or member, upon written request, to inspect the items of the partnership. To the extent any partner may inspect or receive return information, that partner’s attorney in fact also has such authority. See sections 6103(e)(6) and section 6103(h)(4). As a result, a POA from a partner of the partnership, including a member of an LLC taxed as a partnership, during the taxable year at issue allows the Service to solicit and discuss partnership-level issues with the person appointed. Because the partnership or LLC itself is generally not a party to the partnership proceeding or a member in itself, the POA from the partner should be done in the partner’s individual capacity as a partner. A general partner or managing member, if authorized by state law, can also execute and sign a POA on behalf of the partnership or LLC. A limited partner or member who is not a manager cannot act for the entity, and may only execute a POA in the partner’s or member’s individual capacity.⁷ Only someone duly authorized by state law (or foreign law in the case of a foreign entity) to act for and bind the entity can execute a POA in the name of the entity. Treas. Reg. Sec. 601.503(c).⁸

⁷ Thus, neither a limited partner nor his POA can sign contracts or any kind of agreement for the partnership itself.

⁸ The operating agreement of the partners or members of the entity, as approved under state or foreign law where the entity was formed, will generally dictate who is authorized to act for (i.e. manage) the entity

To the extent that a partner does not have authority to act for the partnership or LLC, however, he may have limited access to the partnership or LLC books and records. In such circumstances, the Service may want a POA executed in the name of the entity itself. Typically a general partner or state law manager can act for a partnership or LLC taxed as a partnership, as provided by the governing state law.

To the extent a manager of a LLC has no ownership interest, however, he is not treated as a “partner” to whom partnership return information can be disclosed under section 6103(e). I.R.C. Sec. 761(b) (members treated as “partners”). The non-member manager as well as the LLC itself are also not generally considered parties in the TEFRA examination. Nevertheless, section 6103(k)(6) authorizes the Service to solicit documents and discuss details of the partnership-level examination with any individual where the Service employee reasonably believes such discussion is helpful and appropriate to obtaining information to determine partnership items. A POA by a LLC through its manager helps to establish the reasonableness and appropriateness of discussing issues in the partnership-level examination with the individual designated by the entity. Similarly, where reasonable, such designation would also be sufficient in the context of a private letter ruling request from the entity or in the context of proceedings or investigations pertaining to the entity’s filing obligations.

The authorization from a partner or a person with authority to act for the partnership, however, may not be sufficient to provide authority to extend the period of limitations for all of its partners. If the partnership wishes to authorize someone other than the tax matters partner to extend the period with respect to all partners, the partnership should provide a statement in accordance with Treas. Reg. Sec. 301.6229(b)-1. The statement should: provide that it is an authorization for such person to extend the assessment period with respect to all partners; identify the partnership, the person being authorized, and the taxable years for which the authorization is effective; and, be signed by all persons who were general partners at any time during the years for which the authorization is effective. *Id.*

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itself and the extent of any authorization. A manager may operate under many potential titles such as president, general partner, tax director, chief executive office, board of directors, etc. However, it is the operating agreement that ultimately dictates whether the pertinent titled position has authorization to act for the entity.