



November 14, 2022

Ms. Holly Porter
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Mr. Cliff Scherwinski
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Re: Partnership Continuations – Reporting Considerations

Dear Ms. Porter and Mr. Scherwinski:

The American Institute of CPAs (AICPA) is pleased to submit comments proposing practical solutions pertaining to certain partnership continuation issues occurring under section 708.¹ The general uncertainty regarding partnership continuations is well documented and comprehensive comments have previously raised these issues.² Differing (but appropriate) interpretations of what constitutes a *continuing partnership* presents a threshold issue that clouds ancillary issues predicated upon the initial determination of a partnership treated as continuing.

These comments target specific partnership return reporting issues resulting from the continuation determination that continues to vex taxpayers, practitioners, and the IRS. These proposed solutions to certain narrow-scope issues would alleviate the administrative burden experienced by practitioners and provide more consistent reporting for a partnership that is treated as continuing under section 708(a).³ The AICPA is cognizant that developing a guidance regime addressing partnership continuations generally is a significant undertaking. Nevertheless, our proposed solutions are not dependent upon that guidance foundation for implementation.

Specifically, these comments propose solutions to those issues that stem from the threshold determination of a continuing partnership:

- I. Form 1065 Checkbox Indicating Partnership Continuation(s)
- II. Treatment of Employer Identification Numbers for Continuing Partnerships

¹ Unless otherwise indicated, all section references are to the Internal Revenue Code of 1986, as amended, or to the Treasury Regulations promulgated thereunder.

² See, e.g., N.Y. State Bar Association, [Report No. 1432 – Report on Partnership Terminations Following the Tax Cuts and Jobs Act](#) (providing comprehensive comments on section 708 continuation issues) (Jan. 17, 2020).

³ See Treas. Reg. § 1.708-1(a) (partnership will be treated as continuing if it is not terminated).

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The AICPA is the world's largest member association representing the accounting profession, with more than 421,000 members in the United States and worldwide, and a history of serving the public interest since 1887. Our members advise clients on federal, state, and international tax matters and prepare income and other tax returns for millions of Americans. Our members provide services to individuals, not-for-profit organizations, small and medium-sized businesses, as well as America's largest businesses.

We appreciate your consideration of these comments and welcome the opportunity to discuss these issues further. If you have any questions, please contact Jose Ramon Carrasco, Chair, AICPA Partnership Taxation Technical Resource Panel, at (202) 521-1552 or Jose.Carrasco@us.gt.com; Jon Williamson, AICPA Senior Manager – Tax Policy & Advocacy, at (216) 509-2972 or Jon.Williamson@aicpa-cima.com; or me at (601) 326-7119 or JanLewis@HaddoxReid.com.

Sincerely,

A handwritten signature in cursive script, appearing to read "Jan Lewis", written in black ink.

Jan F. Lewis, CPA
Chair, AICPA Tax Executive Committee

cc: Mr. Douglas O'Donnell, Acting Commissioner, Internal Revenue Service
Mr. William M. Paul, Principal Deputy Chief Counsel, Internal Revenue Service

American Institute of CPAs

Partnership Continuations – Reporting Considerations

November 14, 2022

BACKGROUND

The Tax Jobs and Cuts Act (TCJA)⁴ repealed the partnership technical termination provision under former section 708(b)(1)(B). Reducing electivity was the intended policy goal in repealing the technical termination rules. However, this repeal introduced further complications regarding partnership continuations – *when a partnership is treated as continuing upon certain transactions*.

There are multiple, appropriate approaches, in determining when a partnership is considered a continuing partnership and uncertainty regarding when a partnership terminates under section 708(b)(1).⁵ This uncertainty regarding partnership *terminations* inherently affects partnership *continuations* due to the definition of a continuing partnership (e.g., a partnership that has not terminated). Framing the definition of a partnership continuation in the negative coupled with inconsistent guidance and the former section 708(b)(1)(B) technical termination repeal may inhibit proper compliance. For example, there are a several tax issues where the “answer” depends on properly identifying a continuing partnership such as: (1) section 163(j) limitations; (2) depreciation and amortization of long-lived assets; (3) accounting methods and required tax years; and (4) certain partnership-level elections.

The significant complexity due to the statutory definitions and repeal of the technical termination rules created situations that may result in multiple continuing partnerships. However, there is no consistent method to notify either taxpayers or the IRS that a particular partnership is a continuation of another partnership.

I. Form 1065 Checkbox Indicating Partnership Continuation(s)

Overview

There is no consistent method to indicate on a partnership return when a partnership is treated as continuing. Current practice includes footnote disclosures and whitepaper statements – if disclosed at all. The IRS does not have a process for this identification resulting in inconsistent practice(s). This results in a “wild west” scenario where not only are there multiple interpretations of what constitutes a continuation, but then differing approaches in notifying the taxpayer, practitioner, or IRS of this result. Both tax and non-tax issues are dependent upon proper identification of a continuation.

⁴ P.L. 115-97.

⁵ See N.Y. State Bar Association, [Report No. 1432 – Report on Partnership Terminations Following the Tax Cuts and Jobs Act](#) (scope of section 708(b)(1) and approaches to determine partnership terminations include “overlap rule,” “modified overlap rule,” and “entity activity rule”).

Recommendation

The AICPA recommends adding a checkbox on the Form 1065, *U.S. Return of Partnership Income*, to indicate whether the partnership is treated (and identified) as a continuation of another partnership.

Analysis

Many of the compliance issues noted above depend upon properly identifying when a continuation occurs. The AICPA understands that issuing guidance to address all partnership continuation issues – and classifying the various fact patterns that emerge – is impractical. Taxpayers and practitioners (as well as the IRS) may take different approaches in identifying when a partnership is properly treated as continuing. Once this identification does occur, however, many of these cascading tax issues are relatively straightforward to address in the normal course of compliance.

Allowing taxpayers to affirmatively identify a continuation on the Form 1065 provides more consistent reporting (including a clearer indication as to the eligibility of a partnership to make an election or retain a method of accounting, for example), reduces administrative burden, and mitigates the complexity of whether a partnership *is continuing* while simultaneously “alerting” the IRS of a partnership continuation. This checkbox also facilitates the general compliance process as taxpayers and practitioners will have clearer information in (1) reviewing historical records; (2) compiling partnership transactions; and (3) determining the proper tax treatment of partnership-level determinations *after* a continuation is identified.

II. Treatment of Employer Identification Numbers for Continuing Partnerships

Overview

One important consideration upon a section 708 partnership continuation is whether the continuing partnership should use an existing employer identification number (EIN), if available, or obtain a new EIN. The plain language of Treas. Reg. § 1.708-1(a) that “an existing partnership shall be considered as continuing if it is not terminated” could suggest that a continuing partnership retains an EIN because the tax entity (the partnership) continues to exist.

Notwithstanding the plain language of the regulations, contradictory guidance exists concerning what EIN a continuing partnership should use for its various tax filing obligations. Rev. Rul. 95-37⁶ concludes that the conversion of an interest in a domestic partnership into an interest in a domestic LLC that is classified as a partnership does not cause a termination under section 708 and the resulting LLC does not need to obtain a new taxpayer identification number. However, CCA 201315026⁷ suggests using a new EIN is not precluded for a “New Partnership” that is treated

⁶ The holding in Rev. Rul. 95-37 is based in part on Rev. Rul. 84-52 that similarly holds that the conversion of a general partnership to a limited partner is a continuation transaction. *See also* PLR 200022016 (conversion of domestic general partnership to domestic LLC is not a termination event and a new EIN is not required).

⁷ (“The New Partnership is considered a continuation of the Original Partnership, even though the New Partnership bears a different EIN.”)

as a continuation of an “Original Partnership” – and that EIN has no bearing in determining whether a continuation has occurred.

The AICPA suspects that some of this uncertainty also stems from the interplay between Subchapter K principles that view a continuing partnership as retaining all tax attributes and characteristics (including the EIN), and procedural regulations requiring a state law entity to retain an EIN despite that entity’s tax classification changing.⁸

Example

A and B are equal partners in LLC1, and then contribute their LLC1 interests to a new LLC (LLC2), resulting in LLC2 becoming a partnership and LLC1 a disregarded entity. LLC2 can be viewed as a continuation of LLC1 under section 708. Under Rev. Rul. 95-37 (and relying on such authority), LLC2 would continue to use the EIN of LLC1 even if LLC1 still exists as a separate legal entity under local law. However, the procedural regulations appear to require LLC2 to obtain a new EIN because LLC1 (as a state law legal entity whose tax classification changes) retains the historic EIN. This ambiguity results in inconsistent treatment and difficulty in identifying which entity is using a particular EIN (as LLC1 no longer files Form 1065).

The merger regulations suggest Subchapter K principles could override certain of the procedural regulations, resulting in a state law entity not retaining its EIN. Treas. Reg. § 1.708-1(c)(5), Ex. 2, comments on a merger accomplished under state law by one partnership (Partnership Y) contributing its assets and liabilities into a second partnership (Partnership X) in exchange for interests in Partnership X followed by Partnership Y distributing interests in Partnership X to its partners (liquidating Partnership Y). The example recharacterizes the merger for federal income tax purposes, treating Partnership X as contributing its assets to Partnership Y in exchange for interests in Partnership Y followed by Partnership X distributing interests in Partnership Y to its partners (liquidating partnership X), because the fair market value of Partnership Y’s assets (net of liabilities) was greater than that of Partnership X. The resulting merged Partnership X (state law entity) is treated as a continuation of Partnership Y and would use the EIN of Partnership Y under Treas. Reg. § 1.708-1(c)(2), despite Partnership Y ceasing to exist for state law purposes (and as a legal entity).

Guidance for continuing partnerships under section 708 (outside of partnership mergers and divisions) is currently unclear regarding which principles control for EIN purposes – leading to inconsistent practice and compliance difficulties.

Recommendations

The AICPA recommends allowing a partnership treated as continuing under section 708 to elect to either:

⁸ Treas. Reg. § 301.6109-1(h)(1) generally provides that “[a]ny entity that has an employer identification number (EIN) will retain that EIN if its federal tax classification changes under § 301.7701-3.”

1. Use a new EIN for its various tax filing obligations; or
2. Use an existing EIN so long as that EIN relates to a partnership that became the continuing partnership under section 708.

As an extension of the recommendation under Part I, one possible implementation mechanism is a second checkbox on the relevant Form 1065 indicating that the partnership is (1) continuing under section 708; and (2) is either using an existing EIN or a new EIN. This second checkbox provides further (and clearer) notification to the IRS of what EIN will be used once the partnership has determined a section 708 continuation has occurred.

Analysis

EINs are often critical to everyday business functions. For example, businesses contracting with state and federal governmental agencies (including Medicare) rely upon their EIN to track contracts and receive payment. Loss of an EIN, or the requirement to use a new EIN, can result in a business having to enter new contracts with governmental agencies and await approval for payment in processes that can take months or in some cases, years. EINs are also critical for payroll tax and certain state law tax reporting purposes.

Currently, practitioners are unable to provide certainty to a business client undertaking a section 708 partnership continuation regarding which EIN should be used by the continuing partnership.⁹ For instance, in the above Example, if a practitioner determines LLC2 is a continuation of LLC1 under section 708, it is unclear whether LLC2 should use LLC1's EIN or obtain a new EIN.

In the absence of a concrete answer, practitioners often rely upon white paper statements (or similar attachments) included with tax returns to explain why a continuing partnership is using a new or existing EIN. Under this informal process, taxpayers and practitioners effectively may "elect" whether an entity such as LLC2 uses the historic LLC1 EIN or obtains a new EIN. It is unclear whether the IRS can, or will, process these elections on such statements.

Generally, the choice of using a new or existing EIN is not based on income tax planning. Therefore, the IRS is not prejudiced by affirmatively allowing taxpayers to choose whether to use an existing or new EIN by creating a checkbox. Allowing taxpayers to choose an EIN is consistent with existing governmental guidance recognizing that a continuing partnership may obtain a new EIN) while in other situations, it can continue to use the historic EIN. In certain circumstances, (e.g., the conversion of a state law LLC taxed as a partnership into a state law limited partnership) the only "choice" may be to continue using the existing EIN. The IRS is similarly benefited by the proper notification of a new or existing EIN to track the entity's Form 1065 returns to assist in compliance efforts. Currently, a defunct or prior partnership converted into a state law entity may have EINs on file without any corresponding filed returns, due to the lack of a filing requirement.

⁹ This confusion exists for both practitioners and the IRS – taxpayers without sufficient counsel are disproportionately burdened due to the myriad tax regulations, guidance, and state law issues that do not provide a single method to determine the appropriate EIN choice.