

*Needed Changes to Operating Agreements
Required by BBA Audit Rules*

*Akron Bar Association
January 11, 2019*

David J. Lewis, Esq.
Nate Tucker, Esq.
Krugliak, Wilkins, Griffiths
& Dougherty Co., L.P.A.
Akron, OH
330-436-5300
330-436-5311
dlewis@kwgd.com
ntucker@kwgd.com

Today's Topics

- The Bipartisan Budget Act Partnership Audit Rules (“BBA Rules”) were enacted in November 2015 but generally are effective for tax years beginning after December 31, 2017; and
- The BBA Rules cause the following considerations:
 - Existing Multi-Partner Partnerships and Limited Liability Companies taxed as Partnerships (together, “Partnerships”);
 - Newly Created Multi-Partner Partnerships; and
 - Sales of Partnership Interests in Multi-Partner Partnerships.

New BBA Rules

- Generally Effective for Partnership Years beginning after December 31, 2017.
- **But Partnership Representative can elect for BBA Rules to apply to an earlier tax year beginning after November 2, 2015. See BBA § 1101(g)(4).**
- What's the difference?
 - BBA Rules Create the Concept of “Imputed Underpayments” and tax the Partnership rather than partners on adjustments; and
 - Essentially, Partnerships are treated like C corporations regarding tax examinations and tax assessments, except as described below.
- TEFRA Rules taxed the partnership's partners on any flow-through adjustments.

History of Pass thru Entity Audits

- Prior to 1982, audits and resulting adjustments to partnership items and S corporation items could only be made at the partner or shareholder levels;
- This made auditing a large partnership very difficult for the IRS, because each partner's returns had to be separately examined;
- In 1982, Congress enacted the Tax Equity and Fiscal Responsibility Act ("TEFRA") allowing the IRS to audit partnerships and make determinations of partnership items at the partner level, which resulted in notifications of adjustments to partners but "audits" were not done at the partner level;
- In 1982, Congress extended TEFRA to apply to S corporations also;
- By 1997, Congress enacted the Taxpayer Relief Act of 1997, which in part repealed application of TEFRA to S corporations; and
- In 2015, Congress enacted the Bipartisan Budget Act ("BBA"), which repealed TEFRA and enacted BBA Rules generally for tax years beginning after December 31, 2017.

Old Partnership Rules

IRS Examination of Partnership under TEFRA

- Under former TEFRA examination rules, the IRS would conduct examinations at the entity level of TEFRA partnerships;
- Each partner had the ability to participate in it;
- A “tax matters partner” represented the partnership in the examination;
- Taxes were assessed against each partner for the period of his/her/its ownership; but
- The partnership itself did not pay the tax. Why? Because of pass-through taxation, meaning the partners paid the additional tax of audit adjustments and not the partnership.
- **These old rules still apply to qualifying partnerships for tax years beginning prior to January 1, 2018.**

Operating Agreement Example: Tax Matters Partner Language

Tax Matters Partner. If required, the Partners shall select the Company's tax matters partner ("Tax Matters Partner"). The Tax Matters Partner shall have all powers and responsibilities provided in Code Section 6221, et seq. The Tax Matters Partner shall keep all Partners informed of all notices from governmental taxing authorities that may come to the attention of the Tax Matters Partner. The Company shall pay and be responsible for all reasonable third-party costs and expenses incurred by the Tax Matters Partner in performing those duties. A Partner shall be responsible for any costs incurred by the Partner with respect to any tax audit or tax-related administrative or judicial proceeding against any Partner, even though it relates to the Company. The Tax Matters Partner may not compromise any dispute with the Internal Revenue Service without the approval of the Partners.

TEFRA did not Apply to Small Partnerships

- “Small Partnerships” were not subject to TEFRA;
- A Small Partnership must have:
 - 10 or few partners; and
 - Only have individuals, a deceased partner’s estate, or C corporations as partners; and
- Partnerships meeting the Small Partnership definition automatically qualified and, so, did not need to elect to be a Small Partnership under TEFRA; and
- Small Partnerships under TEFRA meant that the IRS had to make adjustments on each partner’s returns.

TEFRA Audit Rules

- Applied to partnerships other than Small Partnerships;
- Examination at the partnership level;
- Notices sent to the partners to adjust their tax liabilities;
- No payment of tax at the partnership level; and
- Partnership represented by the “tax matters partner”, who had to be a partner.

BBA Rules

IRS Examination of Partnership Years Beginning after December 31, 2017

- Generally effective for tax years beginning after December 31, 2017, but a partnership's partnership representative can elect for BBA Rules to apply to IRS's examinations of earlier years unless the partnership's governing documents provide otherwise;
- IRS can conduct the examination at the partnership level, see IRC §6221(a), and even conclude the examination with an assessment against the partnership—an “Imputed Underpayment”—rather than an assessment against the partners;
- Unless otherwise provided through elections-out, the IRS need not contact the partnership's partners but instead can deal solely with the partnership's partnership representative to conduct and resolve the IRS examination;
- Unlike TEFRA, partners cannot participate in IRS partnership examinations;
- If the partnership does not designate a partnership representative, then the IRS may do so; and
- The partnership could pay the imputed underpayment for any period examined, unless otherwise elected by the partnership representative or paid by the partners, see IRC §6226(a) or 6225(c)(2), respectively. See discussion below.

BBA Rules – Four Paths for Dealing with IRS Audit

- 1) Small Partnership election;
- 2) Partners File amended returns under IRC § 6225(c)(2);
- 3) Make a push-out election; or
- 4) Pay the Imputed Underpayment at the partnership level.

BBA Rules

What is a Small Partnership?

- Generally, under the BBA Rules a “Small Partnership” must have 100 or less partners, which must be:
 - Individuals,
 - Estates of deceased partners,
 - C corporations,
 - S corporations, and
 - Foreign entities that would otherwise be considered C corporations for U.S. tax purposes.
- Please note that any of the following as partners will disqualify a partnership from Small Partnership eligibility:
 - Partnerships;
 - Single member LLCs or disregarded entities; and
 - Trusts. See Treas. Reg. § 301.6221(b)-1(b)(3)(ii).
- When a Small Partnership election is made, then all adjustments must be made at the partner level, which can lead to different results for each partner even with respect to the same partnership item.

BBA Rules

Imputed Underpayment

- When no Small Partnership election is made, then the BBA Rules apply, so any adjustments are made at the partnership level. See IRC § 6221;
- The partnership itself is liable for any tax underpayment, rather than the individual partners;
- An adjustment that results in a tax underpayment owed by the partnership is called an “Imputed Underpayment.” See IRC § 6225(a) and (b); and
- An Imputed Underpayment is computed by netting all partnership adjustments to the examined tax year and applying the highest rate of tax in effect for that tax year under IRC § 1 or § 11. See IRC § 6225(b)(1).
- For 2018, the highest tax rate is 37 percent.

BBA Rules

Imputed Underpayment

- The Imputed Underpayment can be modified and reduced under ***IRC § 6225(c)(2)*** when partners file amended returns and report and pay their share of tax (which is paid at the partner(s') tax rates for that year). See IRC § 6225(c)(2).
- Alternatively, a partnership can avoid a partnership level Imputed Underpayment by making a ***push-out election***, discussed below.

Example 1 – No Partnership Representative Language

LLC has three members, A, B, and C, and it is taxed as a partnership. The IRS examines LLC's 2018 Form 1065. LLC's operating agreement does not appoint a partnership representative. The IRS designates A as the partnership representative. The IRS assesses a \$50,000 tax, along with interest and penalties against LLC. Unknown to B or C, A settles LLC's Imputed Underpayment with the IRS for \$50,000 plus interest and penalties.

Example 1 – Issues

- The BBA Rules allow the IRS to appoint a partnership representative if the partnership itself failed to do so. See IRC § 6223(a). So in Example 1, the IRS is able to designate A as LLC's partnership representative;
- A partnership and its partners are bound by the actions of the partnership representative, and the partnership representative does not have to seek the approval from, or even inform, the other partners of the ongoing audit. So in Example 1, B, C, and LLC are bound to the consequences of A's decisions; and
- And since LLC's operating agreement was silent on the issue of a partnership representative, B and C have no recourse against the IRS to undo A's actions, although maybe they have claims against A, if A violated standards of good faith, fair dealing or other standards of care.

Example 1 – Solutions

- Identify in the operating or partnership agreement a specific member, manager or other person as the partnership representative, or include language in the partnership agreement that provides a method for selecting a partnership representative if an audit occurs;
- The partnership representative does not have to be a partner in the partnership, see IRC § 6223(a);
- The partnership representative can be an entity, see Treas. Req. § 301.6223-1(b)(3); and
- The partnership agreement could limit the authority of the partnership representative and make him or her more accountable to the partnership.

Example 1— Partnership Representative Language

Partnership Representative. For the purposes of this Agreement, the partnership representative shall mean a partnership representative within the meaning of IRC §6223.

Appointment of Partnership Representative. The partnership hereby appoints the Manager or [insert name: _____] as its partnership representative. The members by majority vote may replace the partnership representative with or without cause or may otherwise fill a vacancy resulting by any reason.

Duties Partnership Representative. In connection with any IRS audit of the partnership, the partnership representative must do the following:

- Notify all partners of commencement of the audit;
- Inform all partners of significant developments in the audit; and
- Resolve each issue in the audit only in accordance with the affirmative vote of a majority in interest of the partners.

Example 1--Limiting Authority of Partnership Representative Language

IRS Commitments. *During any IRS examination of the partnership, the partnership representative shall make no significant commitment to the IRS affecting the partnership or any partner without the consent of a majority in interest of the partners.*

Partner Involvement. *The partnership representative shall take reasonable efforts to communicate with the partners as matters arise and before positions are taken on material issues so that partners can contribute to the extent helpful in an IRS examination of any partnership income tax return.*

Appeals. *The partnership representative shall make no decision contesting the result of any IRS audit on appeal or in any court without the consent of a majority in interest of the partners.*

Example 1 – The Partnership Representative may want the following protections:

- Indemnification for acting in the interests of the partnership as its partnership representative;
- Authority to retain experts to defend against an IRS examination;
- Authority to pay expenses and costs of serving the partnership; and
- Waiver of claims by partners against the partnership representative.
- **Please note that the partnership representative should likewise execute the partnership agreement.**

Example 1—Duty of Partners

The partners agree to cooperate in good faith with the partnership representative and provide information as reasonably requested by the partnership representative in connection with any income tax examinations of the partnership. A partner, before taking a position on the partner's income tax return that is contrary to the Schedule K-1 issued by the partnership to the partner, must first notify the partnership representative of reasons supporting the partner's position and must in good faith attempt to resolve concerns with the partnership representative before filing the return at issue.

Example 2 – No Small Partnership Election

LLC has three members, A, B, and C, all of whom are individuals. LLC is taxed as a partnership. LLC timely files its 2018 Form 1065, but does not make a Small Partnership election on this return. Later, the IRS selects LLC's 2018 Form 1065 for examination, and the IRS applies the BBA Rules.

Example 2 – Issue

- LLC qualifies as a Small Partnership that could have elected out of the BBA Rules. But the BBA Rules apply to the audit of LLC's 2018 return because LLC did not make a Small Partnership election on its tax return. See IRC § 6221(b)(1)(D)(i);
- Small Partnership elections can be made if the partnership has 100 or fewer partners, which must be individuals, C corporations, eligible foreign entities, S corporations, and estates of deceased partners. See IRC § 6221(b)(1)(B) and (C); and
- For determining if partnership has 100 or fewer partners when S corporation is a partner, each S corporation shareholder is counted as a partner.

Example 2 – Solution

Include language in the operating agreement requiring the partnership representative to make a Small Partnership election for years in which the partnership qualifies.

Example 2--
Small Partnership Election Language

Small Partnership Election. During any taxable year of the partnership for which the partnership qualifies for Small Partnership election, the partnership representative shall determine on a timely basis whether the partnership is qualified. If the partnership is so qualified, the partnership representative shall make a timely Small Partnership election for the partnership for that taxable year.

Small Partnership Election, Partnership Representative Appointment, & Electing BBA Treatment for Prior years

Form 1065: <https://www.irs.gov/pub/irs-pdf/f1065.pdf>

Schedule K-1: <https://www.irs.gov/pub/irs-pdf/f1065sk1.pdf>

Amended Form 1065: <https://www.irs.gov/pub/irs-pdf/f1065x.pdf>

Schedule B Other Information (continued)

	Yes	No
c Is the partnership required to adjust the basis of partnership assets under section 743(b) or 734(b) because of a substantial built-in loss (as defined under section 743(d)) or substantial basis reduction (as defined under section 734(d)))? If "Yes," attach a statement showing the computation and allocation of the basis adjustment. See instructions		
11 Check this box if, during the current or prior tax year, the partnership distributed any property received in a like-kind exchange or contributed such property to another entity (other than disregarded entities wholly owned by the partnership throughout the tax year) <input type="checkbox"/>		
12 At any time during the tax year, did the partnership distribute to any partner a tenancy-in-common or other undivided interest in partnership property?		
13 If the partnership is required to file Form 8858, Information Return of U.S. Persons With Respect To Foreign Disregarded Entities (FDEs) and Foreign Branches (FBs), enter the number of Forms 8858 attached. See instructions		
14 Does the partnership have any foreign partners? If "Yes," enter the number of Forms 8805, Foreign Partner's Information Statement of Section 1446 Withholding Tax, filed for this partnership.		
15 Enter the number of Forms 8865, Return of U.S. Persons With Respect to Certain Foreign Partnerships, attached to this return.		
16a Did you make any payments in 2018 that would require you to file Form(s) 1099? See instructions		
b If "Yes," did you or will you file required Form(s) 1099?		
17 Enter the number of Form(s) 5471, Information Return of U.S. Persons With Respect To Certain Foreign Corporations, attached to this return.		
18 Enter the number of partners that are foreign governments under section 892.		
19 During the partnership's tax year, did the partnership make any payments that would require it to file Form 1042 and 1042-S under chapter 3 (sections 1441 through 1464) or chapter 4 (sections 1471 through 1474)?		
20 Was the partnership a specified domestic entity required to file Form 8938 for the tax year? See the Instructions for Form 8938		
21 Is the partnership a section 721(c) partnership, as defined in Treasury Regulations section 1.721(c)-1T(b)(14)?		
22 During the tax year, did the partnership pay or accrue any interest or royalty for which the deduction is not allowed under section 267A? See instructions. If "Yes," enter the total amount of the disallowed deductions. ▶ \$		
23 Did the partnership have an election under section 163(j) for any real property trade or business or any farming business in effect during the tax year? See instructions		
24 Does the partnership satisfy one of the following conditions and the partnership does not own a pass-through entity with current year, or prior year, carryover excess business interest expense? See instructions a The partnership's aggregate average annual gross receipts (determined under section 448(c)) for the 3 tax years preceding the current tax year do not exceed \$25 million, and the partnership is not a tax shelter, or b The partnership only has business interest expense from (1) an electing real property trade or business, (2) an electing farming business, or (3) certain utility businesses under section 163(j)(7). If "No," complete and attach Form 8990.		
25 Is the partnership electing out of the centralized partnership audit regime under section 6221(b)? See instructions. If "Yes," the partnership must complete Schedule B-2 (Form 1065). Enter the total from Schedule B-2, Part III, line 3. ▶ If "No," complete Designation of Partnership Representative below.		

Designation of Partnership Representative



Small Partnership Election



Designation of Partnership Representative (see instructions)

Enter below the information for the partnership representative (PR) for the tax year covered by this return.

Name of PR ▶	U.S. taxpayer identification number of PR ▶
U.S. address of PR ▶	U.S. phone number of PR ▶
If the PR is an entity, name of the designated individual for the PR ▶	U.S. taxpayer identification number of the designated individual ▶
U.S. address of designated individual ▶	U.S. phone number of designated individual ▶

26 Is the partnership attaching Form 8996 to certify as a Qualified Opportunity Fund? Yes No
If "Yes," enter the amount from Form 8996, line 13. ▶ \$

Example 2--
Loss of Small Partnership Status

What if the partnership inadvertently loses its status as a Small Partnership? To accommodate such a possibility, it would be good to have BBA Rules addressed in the partnership agreement.

Example 3

LLC is a partnership with three Partners A, B, and C. A and B are individuals, and C is a partnership, so LLC cannot be a Small Partnership. The IRS examines LLC's 2019 Form 1065 and proposes an adjustment of \$100 against LLC. Assume the highest tax rate for 2019 is 40 percent, which results in an Imputed Underpayment of \$40 ($\$100 * 40$ percent). If A has \$20 of the \$100 adjustment allocated to him and under IRC § 6225(c)(2) he files an amended return reporting the \$20, then he pays the tax based on his individual tax rate of 20 percent, which results in \$4 of tax liability ($\$20 * 20$ percent) to him. The adjustment to LLC's Imputed Underpayment from A's amended return filing is computed by reducing the proposed \$100 adjustment to \$80 (\$100 less the \$20 allocated to A), which at the 40 percent rate results in an Imputed Underpayment of \$32 ($\$80 * 40$ percent). So by A filing an amended return, the Imputed Underpayment was reduced from \$40 to \$32.

Example 4

LLC is a partnership with three equal members, A, B, and C. A and B are individuals, and C is a partnership, so LLC cannot be a Small Partnership. LLC's operating agreement appoints A as its partnership representative. But LLC's operating agreement is silent on how to respond to an Imputed Underpayment. The IRS examines LLC's 2018 Form 1065 and assesses an Imputed underpayment of \$60,000 of tax, along with interest and penalties against LLC. Thereafter, consistent with IRC § 6225(c)(2), A files an amended 2018 Form 1040 reporting and paying the additional tax, interest, and penalties on his share of the Imputed Underpayment, which reduces it to \$40,000. B and C do not file amended returns. Instead, LLC pays the remaining Imputed Underpayment of \$40,000.

Example 4 - Issue

- Even though A has already paid his share of the Imputed Underpayment, this only reduces the Imputed Underpayment to that extent so LLC remains liable for the remaining amount. Because the remaining Imputed Underpayment is paid by LLC, A is paying albeit indirectly part of B and C's liability;
- Consider language in the operating agreement requiring all partners to file amended returns and pay their share of the Imputed Underpayment under IRC § 6225(c)(2); or
- Alternatively, require a push-out election. See examples 6 and 7.
- Note that the IRC § 6225(c)(2) only reduces the Imputed Underpayment that would otherwise be owned by the partnership only to the extent that a partner(s) indeed files amended returns reporting his share of the imputed underpayment.

Example 4 - Sample Language requiring Amended Returns

Each Member agrees to amend its federal income tax return(s) to include (or reduce) its allocable share of the Company's income (or losses) resulting from an IRS Adjustment and pay any tax due with such return as required under Code §6225(c)(2), even if the Imputed Underpayment liability of the Company or IRS Adjustment occurs after the Member's withdrawal from the Company.

Example 5 – Small Partnership Election & Changes of Ownership

LLC has three members, A, B, and C, all of whom are individuals. LLC is taxed as a partnership. LLC's operating agreement appoints A as its partnership representative, and requires A to make a Small Partnership election. In 2018 B sells his membership in LLC to XYZ Co., which is taxed as a partnership.

What if the LLC is No Longer a Small Partnership?

Example 5 – Issue

- When filing LLC's 2018 Form 1065, A cannot elect for LLC to be a Small Partnership because one of its partners—XYZ Co.—is a partnership.
- Why? Because a partnership that has a partnership as a partner is not an eligible Small Partnership. See Treas. Reg. § 301.6221(b)-1(b)(3)(ii)(A).

Example 5 – Solution

Consider restricting transferability of partnership or membership interests to prevent transfers to entities that would disqualify the partnership from making a Small Partnership election.

Example 5: Language Limiting Transferability

Transferability. No partner may transfer all or any part of such partner's interest if such transfer would render the partnership ineligible to make a Small Partnership election, unless the partner obtains the written consent of all partners. Any purported transfer of an interest in violation of the terms of this Agreement shall be null and void and of no effect.

Who Pays the Tax: the Partnership or Its Partners? - Examples 6 and 7

Push-Out Election

- Rather than pay the Imputed Underpayment, the partnership can make a push-out election. See IRC § 6226(a);
- The push-out election requires the partnership to issue amended Schedules K-1 to the partners, and the partners must then file amended returns and pay the tax, interest, and penalties. See IRC § 6226(a) and (b). **The partners pay the tax at their applicable tax rates rather than the highest tax rate used to compute an Imputed Underpayment;**
- It must be made within 45 days after the partnership receives a notice of final partnership adjustment. See IRC § 6226(a);
- Unlike filing amended returns under IRC § 6225(c)(2), which only **reduces** the partnership's Imputed Underpayment for amounts actually paid by its partners, the push-out election takes liability away from the partnership and puts it on the partners.
- Because the push-out election puts liability on the partners for the examination year, then a former partner could be liable under this method; and
- When a push-out election is made and a partner that is itself a partnership or an S corporation receives the amended Schedule K-1, then such partner can itself make a similar push-out election to its partners or shareholders or pay the Imputed Underpayment at the entity level. See IRC § 6226(b)(4).

BBA Rules No Small Partnership Election Applies
Example 6 – No Push-Out Election

LLC is a partnership with three equal members, A, B, and C. A and B are individuals, and C is a partnership, so LLC cannot be a Small Partnership. LLC's operating agreement appoints A as its partnership representative, but it has no language requiring A to make a push-out election. The IRS examines LLC's 2018 Form 1065 and assesses \$100,000 of tax, along with interest and penalties against LLC. Under A's directions, LLC pays the \$100,000 plus interest and penalties. But see push-out discussion under Example 7.

BBA Rules No Small Partnership Election Applies

Example 6 – Issue

- Because LLC must pay the imputed underpayment, LLC loses enterprise value, so A, B, and C as equal partners are each bearing indirectly $1/3$ of the burden of the assessment paid by LLC.
- And that could be okay, if all were partners during the year that generated the assessment. But, what if one of the partners is a new partner?

Ownership Transfer: Who Pays the Tax?

Example 7 – New Partner

LLC is a partnership with three equal members, A, B, and C. In 2020, C sells his membership interest in LLC to D. Later in 2020, the IRS examines LLC's 2018 Form 1065 and assesses \$100,000 of tax, along with interest and penalties against LLC. No Small Partnership election was made on LLC's 2018 Form 1065. And LLC makes no push-out election. Instead, LLC pays the \$100,000 plus interest and penalties.

Example 7 – Issues

Because LLC pays the tax directly, D is in essence paying a share of tax through reduced enterprise value for a year in which D was not even a member of LLC. Essentially, D is paying C's share of the tax.

BBA Rules No Small Partnership Election Applies

Example 7 – Solution

- If the partnership is not eligible to make a Small Partnership election, then instead the partnership agreement could include language requiring the partnership representative to make a push-out election;
- The push-out election requires the partnership to issue amended Schedules K-1, and requires the partners to then file amended returns. See IRC § 6226(a) and (b); and
- The partnership agreement could require partners to pay their share of tax for a prior year assessment, even if they are no longer a partner.

Example 7 — Push-Out Election Language

Push-Out Election. If for any partnership taxable year, the partnership representative determines that the partnership cannot qualify for a Small Partnership election, the partnership representative shall make a push-out election under IRC § 6226(a). The partners for any year in which the partner was a partner will be obligated to file an amended return caused by the partnership's push-out election or otherwise resulting from the partnership's election to be treated as a Small Partnership as permitted by the Code.

Example 7—

What if the partnership is not a Small Partnership or no push-out election has been made?

The partnership or operating agreement could still cause the partners to file amended returns to report the partners' respective shares of tax liability resulting from partnership adjustments. To the extent that a partner does so, then the partnership's Imputed Underpayment will be reduced. See IRC § 6225(c)(2).

Example 8

Recharacterization of Income

LLC is a partnership with three Partners A, B, and C. A and B are individuals, and C is a partnership, so LLC cannot be a Small Partnership. In 2021, the IRS examines LLC's 2019 Form 1065, and proposes to recharacterize \$100 of long-term capital gain income as \$100 of ordinary income, which assuming a 40 percent tax rate results in an Imputed Underpayment of \$40 ($\$100 * 40$ percent). And as a result of the recharacterization, LLC is allowed to reduce its 2021 long-term capital gains on its 2021 Form 1065 by \$100. See Prop. Treas. Reg. § 301.6225-3(b)(1). The above assumes no push-out election.

Example 8

Recharacterization of Income

- Because of the recharacterization, the \$100 of income has been taxed twice—once when the partners originally reported it on their 2019 Forms 1040 and when the LLC paid the \$40 Imputed Underpayment;
- Although the LLC can reduce its 2021 long-term capital gains by \$100, it may not have 2021 long-term capital gain; and
- And because the recharacterization reduces the LLC's 2021 long-term capital gains rather than 2019, changes in ownership needs to be considered too.

What to Do?

- Inform clients about these rules and ask them about their partnership and operating agreements;
- Ask clients about opting out (Small Partnership election) or other choice (Amended partner returns or push-out election), if an IRS examination results.;
- Update the language of operating agreement or other governing documents to include partnership representative language;
- Obligate partnership representatives to keep partners informed of income tax examinations;
- BBA Rules do not require a partner to be the partnership representative but should the CPA serve? Tax Counsel? Business Counsel?
- Consider the return preparer's duties with respect to Small Partnership election and appointing the partnership representative;
- Require partnership representative to make Small Partnership election and/or push-out election if possible;
- Consider impact of BBA Rules when buying/selling partner or membership interests; and
- **Please note that IRS has no stake in enforcing a partner's partnership rights, but instead, the partner must enforce them through the partnership's or LLC's governing documents.**