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Opinion No. 11-83

Application of Campaign Finance Laws to Limited Liability Companies

QUESTIONS

1. In light of the recent amendments to Tenn. Code Ann. § 2-10-102(12)(C) by Chapter 389 of the 2011 Tennessee Public Acts, should a limited liability company (LLC) be treated as a corporation and required to register as a political campaign committee or, if contributions are made to more than one candidate or measure, register as a multicandidate political campaign committee, in accordance with Tenn. Code Ann. § 2-10-105(e)?

2. Are LLCs subject to the political contribution limits for multicandidate political campaign committees set forth in Tenn. Code Ann. § 2-10-302(b) or the lower political contributions limits applicable to "persons" set forth in Tenn. Code Ann. § 2-10-302(a) ?

3. If an LLC is not required to register as either a political campaign committee or multicandidate political campaign committee, could an LLC voluntarily register as a multicandidate political campaign committee and thereby be subject to the higher contribution limits for multicandidate political campaign committees instead of the contribution limits for "persons"?

OPINIONS

1. No. The term "corporation" as added to the definition of "political campaign committee" in Tenn. Code Ann. § 2-10-102(12)(C) does not encompass the inclusion of LLCs, thus the enactment of Chapter 389 does not alter the findings in Tennessee Attorney General Opinion 99-086, issued on April 8, 1999.

2. If an LLC qualifies as a political campaign committee and makes expenditures or contributions to support or oppose two or more candidates for political office or two or more measures, then it would qualify as a multicandidate political campaign committee and be subject to the higher contribution limits.

3. No, the determination of whether the contribution limit for multicandidate political campaign committees applies to an LLC depends upon whether the LLC meets the definition of a multicandidate political campaign. An LLC cannot become a multicandidate political campaign committee by simply registering as such a committee; it must instead satisfy the statutory criteria.

ANALYSIS

1. Prior to the passage of Chapter 389 of the 2011 Tennessee Public Acts, a "political campaign committee" for purposes of the Campaign Financial Disclosure Act, Tenn. Code Ann. §§ 2-10-101, *et seq*., and the Campaign Contribution Limits Act, Tenn. Code Ann. §§ 2-10-301, *et seq*. (hereinafter "campaign finance laws"), was defined to include the following entities:

> (A) A combination of two (2) or more individuals, including any political party governing body, whether state or local, making expenditures, to support or oppose any candidate for public office or measure, but does not include a voter registration program;
>
> (B) Any corporation or any other organization making expenditures, except as provided in subdivision (4), to support or oppose a measure; or
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> (C) Any committee, club, association or other group of persons which receives contributions or makes expenditures to support or oppose any candidate for public office or measure during a calendar quarter in an aggregate amount exceeding two hundred fifty dollars ($250).

Tenn. Code Ann. § 2-10-102(12)(2010).

The General Assembly amended Tenn. Code Ann. § 2-10-102(12)(C) in 2011 to include the term "corporation" in the third part of the definition of a "political campaign committee." *See* 2011 Tenn. Pub. Acts 389, § 1.

In light of this amendment, you have asked whether limited liability corporations ("LLC") should be treated as corporations and required to register as a political campaign committee or, if contributions are made to more than one candidate or measure, register as a multicandidate political campaign committee. A "multicandidate political campaign committee" is defined as a "political campaign committee to support or oppose two (2) or more candidates for public office or two (2) or more measures." Tenn. Code Ann. § 2-10-109 (2011).

Tennessee Attorney General Opinion 99-086 addressed the central question of how a LLC should be treated for purposes of the campaign finance laws. Op. Tenn. Atty. Gen. 99-086 (April 8, 1999). This Office opined that if an LLC is organized primarily for the purpose of receiving contributions or making expenditures to support or oppose any candidate for public office or measure, then such LLC would qualify as a political campaign committee under the definition in Tenn. Code Ann. § 2-10-102(10)(A) (now § 2-10-102(12)(A)). If, however, an LLC is organized primarily for some other purpose, then the LLC would not qualify as a political campaign committee but instead would be treated as a "person," as defined at Tenn. Code Ann. § 2-10-102(10), for purposes of the campaign finance laws. This Office further determined that if an LLC is organized primarily for the purpose of receiving contributions and making expenditures to support or oppose any candidate for public office or measure and

receives contributions or makes expenditures in excess of $250 in a calendar quarter, then such company would qualify as a political campaign committee under Tenn. Code Ann. § 2-10-102(10)(C) (now § 2-10-102(12)(C)).

The addition of the term "corporation" to the third definition of a political campaign committee under Tenn. Code Ann. § 2-10-102(12) does not change the analysis in Opinion 99-086, given that an LLC is not a corporation (although corporations may be a member of an LLC). An examination of the Tennessee Limited Liability Company Act, Tenn. Code Ann. §§ 48-201-101, *et seq*. ("the Act"), reveals these business entities are intended to be separate and distinct from corporations. For example, a "limited liability company" is defined under the Act as a "limited liability company organized under chapters 201-248 of this title," while a "corporation" is defined as a "corporation for profit, which is not a foreign corporation, incorporated under or subject to the provisions of the Tennessee Business Corporation Act, compiled in chapters 11-27 of this title, as amended." Tenn. Code Ann. § 48-202-101(11) and (23). The Act further specifically prohibits a limited liability company, whether foreign or domestic, from operating under a name containing the word "corporation" or "incorporated," or any abbreviation of these words. Tenn. Code Ann. § 48-207-101(a)(1). Accordingly, a limited liability company is not a corporation for purposes of the campaign finance laws, including the definition of a political campaign committee contained in Tenn. Code Ann. § 2-10-102(12)(C). *See also In re Service Merchandise Co.*, 297 B.R. 675, 683 n. 2 (Bankr. M.D. Tenn. 2002), *aff'd sub nom*. *Ramco-Gershenson Properties, L.P. v. Service Merchandise Co.*, 293 B.R. 169 (M.D. Tenn. 2002) (stating an LLC is a form of legal entity that has the attributes of both a corporation and a partnership but is not formally characterized as either one).

Other jurisdictions have reached the same conclusion under similar circumstances. For example, federal law prohibits corporate donations to various federal elections. 2 U.S.C. § 441b(a). The Federal Election Commission has issued several advisory opinions concluding that an LLC, created under the laws of various jurisdictions, is not a corporation subject to this ban so long as it has no corporate members. F.E.C. Advisory Op. 1997-17 (September 19, 1997) (Missouri); F.E.C. Advisory Op. 1997-4 (April 25, 1997) (Pennsylvania); F.E.C. Advisory Op. 1996-13 (June 10, 1996) (District of Columbia); F.E.C. Advisory Op. 1995-11 (April 27, 1995) (Virginia).[1] In each of these opinions, the Federal Election Commission reviewed the statutory scheme governing limited liability companies and concluded the statutory scheme recognized a limited liability company as an entity distinct from a corporation or a partnership. *See also Thompson v. United States*, 87 Fed. Cl. 728, 729-730 (2009) (Claims court finding in a federal tax context that LLCs are hybrid entities that under state laws are neither partnerships nor corporations); *Alliance Obstetrics and Gynecology v. Department of Treasury*, 285 Mich. App. 284, 776 N.W.2d 160, 163 (2009) (noting in a state tax case that LLCs are not corporations under Michigan law).

2. You also asked what contribution limits are applicable to limited liability companies. Such limits are determined by reference to Tenn. Code Ann. §§ 2-10-102 and 2-10-302. Tenn. Code Ann. § 2-10-302(a) states no "person" shall make contributions in the aggregate of more

[1]The issue of corporate membership in an LLC is irrelevant in Tennessee as Tennessee law does not prohibit corporations from making campaign contributions.

than $3,600 to any candidate in a statewide election and more than $1,400 to any candidate in any other state or local election. The term "person" includes an LLC. Tenn. Code Ann. § 2-10-102(10). Tenn. Code Ann. § 2-10-302(b) provides that no "multicandidate political campaign committee" shall make contributions in the aggregate of more than $10,700 to any candidate for state senate or in a statewide election and more than $7,100 to any candidate for state house or any other state or local election. These contribution limits are to be adjusted every two years to reflect the percentage of change in the average consumer price index. *See* 2011 Acts, Ch. 389, § 4. A multicandidate political campaign committee is a political campaign committee that supports or opposes two or more candidates for public office or two or more measures. Tenn. Code Ann. § 2-10-102(9).

Accordingly, if an LLC qualifies as a political campaign committee under the analysis set forth in response to your first question and contributes to two or more candidates for public office or two or more measures, then it would qualify as a multicandidate political campaign committee and be subject to the contribution limits set forth in Tenn. Code Ann. § 2-10-302(b). Otherwise, the LLC would constitute a "person" and be subject to the lower contribution limits set forth in Tenn. Code Ann. § 2-10-302(a).

3. Your last question asks whether a limited liability company that fails to meet the criteria for a multicandidate political campaign committee could nonetheless voluntarily register as a multicandidate political campaign committee and thereby be subject to the higher contribution limits for multicandidate political campaign committees rather than the contribution limits for persons. The Legislature clearly intended the reporting and disclosure requirements for candidates, political campaign committees and multicandidate political campaign committees contained in Tenn. Code Ann. §§ 2-10-101, *et seq*., to be separate and distinct from the contribution limits for persons, including LLCs, contained in Tenn. Code Ann. §§ 2-10-301, *et seq*. Thus, the determination of whether the contribution limit for multicandidate political campaign committees applies to a LLC depends upon whether the LLC meets the definition of a multicandidate political campaign and not whether the LLC has voluntarily registered as a multicandidate political campaign committee. Such a finding comports with the general rule of statutory construction that the Legislature's expression to include one subject implies the exclusion of other things not expressly mentioned. *See, e.g., Bryant v. Baptist Health System Home Care of East Tennessee,* 213 S.W.3d 743, 749 (Tenn. 2006).

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