Internal Revenue Service

Department of the Treasury

Washington, DC 20224

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Person to Contact:

Telephone Number:

Refer Reply To:
CC:PSI:3 PLR-117690-01
Date:
August 13, 2001

Company:
State:
Shareholders:
a:
b:
c:
d:
e:

Dear

This letter responds to your letter dated February 26, 2001, as well as additional correspondence, submitted on behalf of Company, requesting a ruling under § 1362(f) of the Internal Revenue Code that Company's S corporation election was inadvertently invalid.

FACTS

Company was incorporated on a under the laws of State. Pursuant to a resolution of its board of directors dated b, Company elected on c under § 1362(a) to be treated as an S corporation effective d.

Company filed an S corporation income tax return (Form 1120S) for tax year e. For the same year, the Shareholders filed their individual income tax return (Form 1040) consistent with Company being an S corporation. The Internal Revenue Service notified Company that its Form 1120S could not be processed because there was no S corporation election (Form 2553) on file with the Service. In response to this notice, Company sent the Service a copy of its Form 2553 dated c. The Service notified Company that the Form 2553 was incomplete due to the lack of shareholder signatures. Company represents that the omission of shareholder signatures on the Form 2553 was unintentional.

LAW AND ANALYSIS

Section 1361(a)(1) provides that, for purposes of the Code, the term "S corporation" means, with respect to any tax year, a small business corporation for which an election under § 1362(a) is in effect for the year.

Section 1362(a)(2) provides that an election under § 1362(a) shall be valid only if all persons who are shareholders in the corporation on the day the election is made consent to the election.

Section 1.1362-6(b)(1) of the Income Tax Regulations provides that a shareholder's consent must be in the form of a written statement that sets forth the name, address, and taxpayer identification number of the shareholder, the number of shares of stock owned by the shareholder, the date (or dates) on which the stock was acquired, the date on which the shareholder's tax year ends, the name of the S corporation, the corporation's taxpayer identification number, and the election to which the shareholder consents. The statement must be signed by the shareholder under penalties of perjury. Section 1.1362-6(b)(3)(i) provides that the consent of a shareholder to an election by a small business corporation under § 1362(a) may be made on Form 2553 or on a separate statement in the manner described in § 1.1362-6(b)(1).

Section 1362(f) provides that if–

> (1)(A) an election under § 1362(a) by any corporation was not effective for the tax year for which made (determined without regard to § 1362(b)(2)) by reason of a failure to meet the requirements of § 1361(b) or to obtain shareholder consents;
>
> (2) the Secretary determines that the circumstances resulting in the ineffectiveness were inadvertent;
>
> (3) no later than a reasonable period of time after discovery of the circumstances resulting in the ineffectiveness, steps were taken–
>
> > (A) so that the corporation is a small business corporation, or
> >
> > (B) to acquire the required shareholder consents; and
>
> (4) the corporation, and each person who was a shareholder of the corporation at any time during the period specified pursuant to § 1362(f), agrees to make the adjustments (consistent with the treatment of the corporation as an S corporation) as may be required by the Secretary regarding this period,

then, notwithstanding the circumstances resulting in the ineffectiveness, the corporation

shall be treated as an S corporation during the period specified by the Secretary.

The conference report on the Small Business Job Protection Act of 1996 (P.L. 104-188) provides that the Service should be reasonable in exercising this authority and apply standards that are similar to those applied under present law to inadvertent subchapter S terminations. H. Rep. No. 737, 104th Cong., 2d Sess. 222 (1996); 1996-3 C.B. 741, 962.

Section 1.1362-4(b) of the Income Tax Regulations provides that, for purposes of § 1.1362-4(a), the determination of whether a termination was inadvertent is made by the Commissioner. The corporation has the burden of establishing that under the relevant facts and circumstances the Commissioner should determine that the termination was inadvertent. The fact that the terminating event was not reasonably within the control of the corporation and was not part of a plan to terminate the election, or the fact that the event took place without the knowledge of the corporation, notwithstanding its due diligence to safeguard itself against such an event, tends to establish that the termination was inadvertent.

Based solely on the facts and representations submitted by Company, we conclude that Company's S corporation election was inadvertently invalid within the meaning of § 1362(f). Consequently, we rule that Company will be treated as an S corporation beginning d, and thereafter, unless Company's S election otherwise terminates under § 1362(d).

Except for the specific ruling above, we express or imply no opinion concerning the federal income tax consequences of the facts of this case under any other provision of the Code. Specifically, we express or imply no opinion regarding the eligibility of Company to have elected under § 1362(a) to be an S corporation.

Under a power of attorney on file with this office, we are sending a copy of this letter to your authorized representative.

This ruling is directed only to the taxpayer who requested it. According to § 6110(k)(3), this ruling may not be used or cited as precedent.

Sincerely,
CHRISTINE ELLISON
Chief, Branch 3
Office of Associate Chief Counsel
(Passthroughs and Special Industries)

enclosure: copy for § 6110 purposes