Internal Revenue Service

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Department of the Treasury
Washington, DC 20224

Person To Contact:

Telephone Number:

Refer Reply To:
CC:PSI:2 – PLR-129661-04
Date:
August 26, 2004

Legend

X =

Y =

A =

B =

C =

State =

d1 =
d2 =
d3 =
d4 =

d5 =

Dear

This letter responds to a letter dated May 25, 2004, submitted on behalf of X by

its authorized representative, requesting a ruling that X be given an extension of time under § 301.9100-3 of the Procedure and Administration Regulations to elect under § 301.7701-3(c) to be treated as an association taxable as a corporation for federal tax purposes and be granted relief under § 1362(f) of the Internal Revenue Code.

According to the information submitted, Y was incorporated in State and elected to be an S corporation effective d1. On d2, A, B and C, the shareholders of Y formed X, a State limited liability company. On d3, Y merged with and into X with X surviving. X represents X intended to be classified as an association taxable as a corporation and that the merger was intended to qualify as a reorganization under § 368(a)(1)(F). However, due to inadvertence, no Form 8832, Entity Classification Election, was filed for X. Additionally, X's operating agreement provided for distribution rights that may have created a second class of stock. In d4, it was discovered that no Form 8832 had been filed and that the agreement may have created a second class of stock. On d5, X executed a new operating agreement that provided for identical rights in distribution and liquidation. X represents that it did not intend to terminate its S election. X and its shareholder agree to make any adjustments consistent with the treatment of X as an S corporation as may be required by the Secretary.

Section 301.7701-3(a) provides that a business entity that is not classified as a corporation under § 301.7701-2(b)(1), (3), (4), (5), (6), (7), or (8) (an "eligible entity") can elect its classification for federal tax purposes as provided in § 301.7701-3. An eligible entity with a single owner can elect to be classified as an association or to be disregarded as an entity separate from its owner.

Section 301.7701-3(b)(1)(i) provides that except as provided in § 301.7701-3(b)(3), unless the entity elects otherwise, a domestic eligible entity is a partnership if it has two or more members.

Section 301.7701-3(c)(1)(i) provides in general that an eligible entity may elect to be classified other than as provided under § 301.7701-3(b) by filing Form 8832 with the applicable service center.

Section 301.7701-3(c)(1)(iii) provides that an election made under § 301.7701-3(c)(1)(i) will be effective on the date specified by the entity on Form 8832 or on the date filed if no date is specified on the election form. The effective date specified on Form 8832 cannot be more than 75 days prior to the date on which the election is filed and cannot be more than 12 months after the date on which the election is filed.

Section 301.9100-1(c) provides that the Commissioner may grant a reasonable extension of time to make a regulatory election, or a statutory election (but no more than 6 months except in the case of a taxpayer who is abroad), under all subtitles of the Internal Revenue Code except subtitles E, G, H, and I. Section 301.9100-1(b) defines

the term “regulatory election” as an election whose due date is prescribed by a regulation published in the Federal Register, or a revenue ruling, revenue procedure, notice, or announcement published in the Internal Revenue Bulletin.

Sections 301.9100-1 through 301.9100-3 provide the standards the Commissioner will use to determine whether to grant an extension of time to make a regulatory election.

Requests for relief under § 301.9100-3 will be granted when the taxpayer provides evidence to establish that the taxpayer acted reasonably and in good faith, and that granting relief will not prejudice the interests of the government.

Section 1361(a)(1) provides that the term "S corporation" means, with respect to any taxable year, a small business corporation for which an election under § 1362(a) is in effect for such year. Section 1361(b)(1) defines the term "small corporation" as a domestic corporation which is not an ineligible corporation and that does not (A) have more than 75 shareholders, (B) have as a shareholder a person (other than an estate, a trust described in § 1361(c)(2), or an organization described in § 1361(c)(6)) who is not an individual, (C) have a nonresident alien as a shareholder, and (D) have more than one class of stock.

Section 1362(d)(2)(A) provides that an election under § 1362(a) shall be terminated whenever (at any time on or after the first day of the first taxable year for which the corporation is an S corporation) the corporation ceases to be a small business corporation.

Section 1362(f) provides that if (1) an election under § 1362(a) by any corporation was terminated under § 1362(d)(2) or (3); (2) the Secretary determines that the circumstances resulting in termination were inadvertent; (3) no later than a reasonable period of time after discovery of the circumstances resulting in the termination, steps were taken so that the corporation is a small business corporation; 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 such adjustments (consistent with the treatment of the corporation as an S corporation) as may be required by the Secretary with respect to such period, then, notwithstanding the circumstances resulting in the termination, the corporation shall be treated as an S corporation during the period specified by the Secretary.

Based solely on the facts submitted and representations made, we conclude that the requirements of § 301.9100-3 have been satisfied. Consequently, X is granted an extension of time of 60 days from the date of this letter to file Form 8832 and elect to be classified as an association taxable as a corporation for federal tax purposes effective d2. A copy of this letter should be attached to the Form 8832.

Further, we conclude that if the conversion from a State corporation to a State limited liability company created a second class of stock and thereby terminated X's S corporation election, then the termination was inadvertent within the meaning of § 1362(f). Pursuant to the provisions of § 1362(f), X will be treated as continuing to be an S corporation from d3 to d5, and thereafter, provided that X's S election is not otherwise terminated under § 1362(d) and that X and its shareholders treat X as an S corporation during this period.

Except as specifically set forth above, we express or imply no opinion concerning the federal tax consequences of the facts described above under any other provision of the Code. Specifically, we express or imply no opinion concerning whether X otherwise was eligible to make the election or whether X otherwise qualifies as an S corporation.

Pursuant to a power of attorney on file with this office, a copy of this letter is being sent to X's authorized representative.

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

Sincerely,

Heather C. Maloy
Associate Chief Counsel
(Passthroughs and Special Industries)

Enclosures (2)
Copy of this letter
Copy for § 6110 purposes