

Internal Revenue Service

Number: **200945012**

Release Date: 11/6/2009

Index Number: 1361.01-04, 1361.05-00,
1362.01-00, 9100.00-00

Department of the Treasury
Washington, DC 20224

Third Party Communication: None
Date of Communication: Not Applicable

Person To Contact: _____, ID No.

Telephone Number: _____

Refer Reply To:
CC:PSI:B02
PLR-114457-09
Date:
July 10, 2009

Legend

X =

Y =

State =

Date1 =

Date2 =

Date3 =

Date4 =

Date5 =

Date6 =

Month =

Year =

Dear _____ :

This responds to a letter dated March 12, 2009, and subsequent correspondence, submitted on behalf of X by its authorized representative, requesting (1) a ruling under § 1362(f) of the Internal Revenue Code, and (2) relief pursuant to § 301.9100-3(a) of the Procedure and Administration Regulations.

The information submitted states that X was incorporated under the laws of State in Year, and elected to be treated as an S corporation at that time. On Date1, X revoked its S election. On Date2, X's Articles of Incorporation were amended and restated to provide for two classes of stock, Class A shares and Class B shares. Both Class A and Class B shares had the same par value, voting rights, and were entitled to dividends if and when declared by the Board of Directors. X represents that, since Date2, X made equal distributions for each class of stock and treated the classes equally.

On Date3, X executed and filed a Form 2553, Election by a Small Business Corporation, to be effective for the tax year beginning Date4. At the time this election was made, X, X's shareholders, and X's legal advisors did not realize that X might be treated as having two classes of stock for purposes of § 1361(b)(1)(D) based on X's amended and restated Articles of Incorporation.

In Month, X consulted new legal counsel in preparation of an anticipated stock transaction and X was advised that X may be treated as having two classes of stock for purposes of § 1361(b)(1)(D). Shortly thereafter on Date5, X converted all of its Class B shares to Class A shares. X represents that X currently does not have any Class B shares outstanding and that X will not issue any Class B shares in the future.

X represents that X and X's shareholders have filed tax returns consistent with X being an S corporation from Date4. X further represents that the circumstances resulting in the ineffectiveness of X's S corporation election were inadvertent and were not motivated by tax avoidance or retroactive tax planning. X and each person who was or is a shareholder of X at any time since Date4 agree to make any adjustments (consistent with the treatment of X as an S corporation) as may be required by the Secretary with respect to such period.

In addition, X acquired all of the stock of Y on Date6. X intended to elect to treat Y as a qualified subchapter S subsidiary effective as of Date6. However, due to inadvertence, X failed to timely file Form 8869, Qualified Subchapter S Subsidiary Election, on behalf of Y. X represents that X and Y have filed tax returns for all of the relevant tax years consistent with the tax treatment of Y as a qualified subchapter S subsidiary from Date6.

RULINGS REQUESTED

1. To the extent that X's S corporation election on Date3 was ineffective, X requests a ruling under § 1362(f) that X will be treated as being an S corporation beginning on Date4 and thereafter;
2. X requests an extension of time under § 301.9100-3 to make a late qualified subchapter S subsidiary election on behalf of Y under §1361(b)(3)(B)(ii) and § 1.1361-3 of the Income Tax Regulations.

RULING 1

Section 1361(a) 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 the year.

Section 1361(b) provides that the term "small business corporation" means a domestic corporation that is not an ineligible corporation and that meets the requirements specified in § 1361(b)(1)(A) through (D).

Section 1361(b)(1)(D) provides that S corporations may not have more than one class of stock. Section 1.1361-1(l)(1) provides that, except as provided in § 1.1361-1(i)(4) (relating to instruments, obligations, or arrangements treated as a second class of stock), a corporation is treated as having only one class of stock if all outstanding shares of stock of the corporation confer identical rights to distribution and liquidation proceeds.

Section 1.1361-1(l)(2)(i) provides that the determination of whether all outstanding shares of stock confer identical rights to distribution and liquidation proceeds is made based on the corporate charter, articles of incorporation, bylaws, applicable state law, and binding agreements relating to distribution and liquidation proceeds (collectively, the governing provisions).

Section 1362(f) provides that if (1) an election under § 1362(a) by a corporation (A) was not effective for the taxable 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 or (B) was terminated under § 1362(d)(2) or (3), (2) the Secretary determines that the circumstances resulting in the ineffectiveness or termination were inadvertent, (3) no later than a reasonable period of time after discovery of the circumstances resulting in the ineffectiveness or termination, steps were taken (A) so that the corporation is a small business corporation or (B) to acquire the 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 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 ineffectiveness or termination, the corporation will be treated as an S corporation during the period specified by the Secretary.

Based solely on the facts submitted and the representations made, we conclude that X's S corporation election made on Date3 was invalid because X had two classes of stock at the time of the effective date of the election. We further conclude that the ineffectiveness of that election was inadvertent within the meaning of § 1362(f). Pursuant to the provisions of § 1362(f), X will be treated as being an S corporation beginning on Date4, and continuing thereafter, provided that X's S corporation election was otherwise valid and the election is not terminated under § 1362(d) for reasons not addressed in this letter.

RULING 2

Section 1362(a) generally provides that a small business corporation may elect to be an S corporation.

Section 1361(b)(3)(B) defines a qualified subchapter S subsidiary as a domestic corporation which is not an ineligible corporation, if 100 percent of the stock of the corporation is owned by the S corporation, and the S corporation elects to treat the corporation as a qualified subchapter S subsidiary.

Section 1.1361-3(a) prescribes the time and manner for making an election to be classified a qualified subchapter S subsidiary. Section 1.1361-3(a)(4) provides that an election to treat an eligible subsidiary as a qualified subchapter S subsidiary may be effective up to two months and 15 days prior to the date the election is filed or not more than 12 months after the election is filed. The proper form for making the election is Form 8869, Qualified Subchapter S Subsidiary.

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.

Section 301.9100-2 provides the rules governing automatic extensions of time for making certain elections.

Section 301.9100-3 provides the standards the Commissioner will use to determine whether to grant an extension of time for regulatory elections that do not

meet the requirements of § 301.9100-2. Under § 301.9100-3, a request for relief will be granted when the taxpayer provides evidence to establish to the satisfaction of the Commissioner that (1) the taxpayer acted reasonably and in good faith, and that (2) granting relief will not prejudice the interests of the Government.

Based solely upon the information submitted and the representations made, we conclude that the requirements of § 301.9100 have been satisfied. Accordingly, X is granted an extension of time of 60 days from the date of this letter to file Form 8869, Qualified Subchapter S Subsidiary Election, with the appropriate service center to elect to treat Y as a qualified subchapter S subsidiary effective Date6. A copy of this letter should be attached to the Form 8869. A copy is enclosed for that purpose.

Except for the specific rulings 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 Internal Revenue Code. Specifically, we express no opinion regarding whether X otherwise qualifies as a small business corporation under § 1361, or whether Y otherwise meets the definition of a qualified subchapter S subsidiary under § 1361(b)(3)(B).

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

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

Sincerely,

Curt G. Wilson
Associate Chief Counsel
(Passthroughs & Special Industries)

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

cc: