

**Internal Revenue Service**

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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:B01  
PLR-171510-03

Date:  
September 24, 2004

Legend

X =

Y =

Trust 1 =

Income Beneficiary =

Trust 2 =

Trustee =

D1 =

D2 =

State =

Dear :

This letter responds to your letter dated December 5, 2003, requesting relief (1) for X to make a late S corporation election under § 1362(b)(5) of the Internal

Revenue Code; (2) for X to be treated as continuing to be an S corporation under § 1362(f); and (3) for X to make a late Qualified Subchapter S Subsidiary Corporation (QSub) election under § 301.9100 of the Procedure and Administration Regulations for Y.

## FACTS

X was incorporated on D1 under the laws of State. The shareholders of X intended X to be treated as an S corporation effective on D1, but X inadvertently failed to timely file an S corporation election.

On D2, X transferred shares to Trust 1 and Trust 2. Because Income Beneficiary inadvertently failed to make a timely election for Trust 1 to be a Qualified Subchapter S Trust (QSST) and because Trustee inadvertently failed to make a timely election for Trust 2 to be an Electing Small Business Trust (ESBT), neither Trust 1 nor Trust 2 was an eligible S corporation shareholder when it received the X shares. Therefore, when Trust 1 and Trust 2 received the X shares on D2 an S corporation election by X would have terminated.

Also on D2, X acquired all of the outstanding shares of Y. X intended to make a QSub election for Y, effective on D2, but X inadvertently failed to timely file the QSub election.

## LAW AND ANALYSIS

### Section 1362(b)(5)

Section 1362(a) allows a small business corporation to elect to be treated as an S corporation.

Section 1362(b) provides the rules as to when such an election will become effective. Section 1362(b)(2) states in relevant part that if an S election is made within the first two and one-half months of a corporation's taxable year, then the corporation will be treated as an S corporation for the year in which the election is made. Under § 1362(b)(3) if an S election is made after the first two and one-half months of a corporation's taxable year, then that corporation will not be treated as an S corporation until the taxable year after the year in which the S election is filed.

Section 1362(b)(5) provides that (1) if no election is made pursuant to section 1362(a), or if the election is made after the date prescribed for making such an election, and (2) the Secretary determines that there was reasonable cause for the failure to timely make the election, then the Secretary may treat such an election as timely made for such taxable year and effective as of the first day of that year.

X did not timely file an election to be treated as an S corporation under § 1362(a), but X has established reasonable cause for not making a timely S election and is entitled to relief under § 1362(b)(5).

#### Section 1362(f)

Section 1361(a)(1) defines an S corporation as a small business corporation for which an election under § 1362(a) is in effect. Section 1361(b)(1) defines “small business corporation” as a domestic corporation that 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 (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 1361(c)(2)(A)(i) provides that a trust, all of which is treated (under subpart E of part I of subchapter J of chapter 1) as owned by an individual who is a citizen or resident of the United States, may be a subchapter S corporation shareholder.

Under § 1362(d)(2), an election to be an S corporation will be terminated whenever the corporation ceases to be a small business corporation.

Section 1362(f) provides that a corporation will be treated as continuing to be an S corporation during the period specified by the Secretary if (1) an election under § 1362(a) by the corporation was terminated under paragraph (2) or (3) of § 1362(d), (2) the Secretary determines that the termination was inadvertent, (3) no later than a reasonable period of time after discovery of the terminating event, steps were taken so that the corporation is once more 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 any adjustments (consistent with the treatment of the corporation as an S corporation) as may be required by the Secretary with respect to that period.

#### Section 301.9100

Section 1361(b)(3)(B) of the Internal Revenue Code defines a QSub as a domestic corporation that is not an ineligible corporation, if 100 percent of the stock of the corporation is owned by an S corporation, and the S corporation elects to treat the corporation as a QSub.

A taxpayer makes a QSub election with respect to a subsidiary by filing a Form 8869, Qualified Subchapter S Subsidiary Election, with the appropriate service center.

Section 1.1361-3(a)(4) of the Income Tax Regulations provides that the election will be effective on the date specified on the election form or on the date the election is

filed if no date is specified. The effective date specified on the election form cannot be more than two months and 15 days prior to the date of filing and cannot be more than 12 months after the date of filing.

Section 301.9100-1(c) provides that the Commissioner has discretion to grant a reasonable extension of time under the rules set forth in § 301.9100-3 to make a regulatory election. Section 301.9100-1(b) defines a regulatory election as an election with a due date prescribed by a regulation published in the Federal Register, or a revenue ruling, revenue procedure, notice, or announcement published in the Internal Revenue Bulletin.

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 301.9100-3(a).

## CONCLUSION

### Section 1362(b)(5)

Based solely on the facts submitted and the representations made, and provided that X otherwise qualifies as an S corporation, we conclude that X will be treated as an S corporation effective D1. Within sixty (60) days from the date of the letter, X should submit a properly completed Form 2553, with a copy of this letter attached, to the relevant service center.

Except as expressly provided herein, no opinion is expressed or implied concerning whether X is eligible to make an S corporation election.

### Section 1362(f)

Based solely on the facts submitted and the representations set forth above, we conclude that (1) X's S corporation election would have terminated on D2; and (2) the termination would have been inadvertent within the meaning of § 1362(f). Pursuant to § 1362(f), X will be treated as continuing to be an S corporation from D2 forward unless X's S corporation election otherwise terminates under § 1362(d). X must file a new Form 2553 effective D2 with the appropriate service center within sixty (60) days of this letter. A copy of this letter should be attached to the Form 2553.

In addition, we conclude that Income Beneficiary has until sixty (60) days from the date of this letter to elect to treat Trust 1 as a QSST, effective D2, and Trustee has until sixty (60) days from the date of this letter to elect to treat Trust 2 as an ESBT, also effective D2. The elections should be made with the appropriate service center. Copies of this letter should be attached to the elections.

Section 301.9100

Based solely on the facts submitted and the representations made we conclude that X has satisfied the requirements of §§ 301.9100-1 and 301.9100-3. Accordingly, X is granted an extension of time of sixty (60) days from the date of this letter to elect to treat Y as a QSub effective D2. The election should be made by filing Form 8869 with the appropriate service center. A copy of this letter should be attached to the election.

Except as expressly provided herein, no opinion is expressed or implied concerning the tax consequences of any aspect of any transaction or item discussed or referenced in this letter. Specifically, no opinion is expressed concerning whether X is a valid S corporation or whether Y is a valid QSub.

This ruling is directed only to the taxpayer who requested them. Section 6110(k)(3) provides that this letter may not be used or cited as precedent. Pursuant to a power of attorney on file with this office, a copy of this letter is being sent to the taxpayer.

Sincerely,

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

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

CC: