

**Internal Revenue Service**

Department of the Treasury

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Washington, DC 20224

Person to Contact:

Telephone Number:

Refer Reply To:  
CC:PSI:1- PLR-101817-00  
Date:  
July 18, 2000

Legend:

X =

LLC =

D1 =

D2 =

D3 =

D4 =

State =

:

This responds to your letter dated December 30, 1999, submitted on behalf of X, requesting a ruling that LLC be given an extension of time under section 301.9100-3 of the Procedure and Administration Regulations to elect to be treated as a corporation for federal tax purposes and be granted relief under section 1362(f) of the Internal Revenue Code.

**FACTS**

X elected to be treated as an S corporation effective D1. On D2, LLC was formed under State law and X merged into LLC, with LLC surviving the merger under state law. X represents that the merger qualified as a reorganization under section 368(a)(1)(F) of the Code. Although LLC intended that it be taxed as a corporation for federal tax purposes as of D2, LLC did not timely file an election (Form 8832) to be treated as an association, and therefore taxable as a corporation for federal income tax purposes.

On D3, when LLC realized that it did not timely file and election (Form 8832) to be treated as an association taxable as a corporation, it requested relief under section 301.9100-3. LLC was advised by the Internal Revenue Service that its Operating Agreement provided for more than one class of stock, which made LLC no longer eligible

to be taxed under subchapter S of the Code.

On D4, LLC adopted a new Operating Agreement which provided that LLC have no more than one class of stock. LLC represents that it did not intend to terminate its S corporation election and that during the termination period it has timely and consistently filed its tax returns consistent with its treatment as an S corporation.

### **LAW AND ANALYSIS**

Section 301.7701-3(a) provides that a business entity that is not classified as a corporation under section 301.7701-2(b)(1), (3), (4), (5), (6), (7), or (8) (an “eligible entity”) can elect its classification for federal tax purposes. A “business entity” is an entity recognized for federal tax purposes that is not properly classified as a trust under section 301.7701-4 or otherwise subject to special treatment under the Code. Section 301.7701-2(a). An eligible entity with at least two members can elect to be classified as either an association (and thus a corporation under section 301.7701-2(b)(2)) or a partnership.

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

To elect to be classified other than as provided in section 301.7701-3(b), an eligible entity must file Form 8832, Entity Classification Election, with the designated service center. Section 301.7701-3(c)(1)(i). An election can be effective on the date specified on the Form 8832 or on the date filed if no such date specified. The effective date specified on the Form 8832 cannot be more than 75 days prior to the date the election is filed. Section 301.7701-3(c)(2)(iii).

Section 301.9100-1(c) provides that the Commissioner has discretion to grant a reasonable extension of time under the rules set forth in section 301.9100-3 to make a regulatory election. Section 301.9100-1(b) defines a regulatory election as an election whose due date is prescribed by a regulation published in the Federal Register, or in 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 an election. Section 301.9100-1(a).

Section 301.9100-2 provides automatic extensions of time for making certain elections. Section 301.9100-3 provides extensions for time for making elections that do not meet the requirements of section 301.9100-2.

Requests for relief under section 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).

Section 1361(a)(1) defines an “S corporation”, with respect to any taxable year, as a small business corporation for which an S election under section 1362(a) is in effect for such year.

Section 1361(b)(1)(D) provides that a small business corporation cannot have more than one class of stock.

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

Section 1362(f), in relevant part, provides that, if: (1) an election under section 1362(a) by any corporation was terminated under section 1362(d); (2) the Secretary determines that the termination was inadvertent; (3) no later than a reasonable period of time after discovery of the event resulting in the termination, 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 in the corporation at any time during the period specified pursuant to section 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 such period, then, notwithstanding the terminating event, the corporation shall be treated as continuing to be an S corporation during the period specified by the Secretary.

The Committee reports accompanying the Subchapter S Revision Act of 1982 explain section 1362(f) as follows:

If the Internal Revenue Service determines that a corporation’s subchapter S election is inadvertently terminated, the Service can waive the effect of the terminating event for any period if the corporation timely corrects the event and if the corporation and the shareholders agree to be treated as if the election had been in effect for such period.

The committee intends that the Internal Revenue Service be reasonable in granting waivers, so that corporations whose subchapter S eligibility requirements have been inadvertently violated do not suffer the tax consequence of a termination if no tax avoidance would result from the continued subchapter S treatment. In granting a waiver, it is hoped that the taxpayers and the government will work out agreements that protect the revenues without undue hardship to taxpayers . . . . It is expected that the waiver may be made retroactive for all years, or retroactive for the period in which the corporation again became eligible for subchapter S treatment, depending on the facts.

S. Rep. No. 640, 97<sup>th</sup> Cong., 2d Sess. 12-13 (1982), 1982-2 C.B. 718, 723-24; H.R. Rep. No. 826, 97<sup>th</sup> Cong., 2d Sess. 12 (1982), 1982-2 C.B. 730, 735.

### **CONCLUSIONS**

Based solely on the facts submitted and the representations made, we conclude that the requirements of section 301.9100-3 have been satisfied. As a result, LLC is granted an extension of time to elect to be taxed as an association as of D2. LLC has 60 days from the date of this letter to file Form 8832 with the applicable service center to elect to be treated as an association for federal tax purposes as of D2.

Further, we conclude that LLC's subchapter S election terminated on D2 when X merged into LLC, and LLC's Operating Agreement provided that LLC have more than one class of stock. We also conclude that the termination constituted an "inadvertent termination" within the meaning of section 1362(f). Pursuant to section 1362(f), X will be treated as continuing to be an S corporation from D2.

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 the original election made by X to be treated as an S corporation was a valid election under section 1362.

This ruling is directed only to the taxpayer who requested 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 the taxpayer.

Sincerely,  
Paul F. Kugler  
Associate Chief Counsel  
(Passthroughs and Special Industries)

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