

Internal Revenue Service

Department of the Treasury
Washington, DC 20224

Number: **200518018**

Release Date: 5/6/2005

Index Number: 1362.01-03, 9100.00-00,
444.00-00

Person To Contact:

, ID No.

Telephone Number:

Refer Reply To:

CC:PSI:3 – PLR-136065-04

Date:

January 03, 2005

Company:

Subsidiary:

Shareholders:

State:

a:

b:

c:

d:

Dear _____ :

This letter responds to a letter from your authorized representative dated June 24, 2004, as well as additional correspondence, requesting rulings for Company under § 1362(b)(5) of the Internal Revenue Code (regarding a late S corporation election and a concomitant fiscal year election under § 444), and § 301.9100-1(c) of the Procedure

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and Administration Regulations (regarding a late qualified subchapter S subsidiary (QSub) election).

Company was incorporated under the laws of State on a and first had shareholders on b. Company, formed to serve solely as a stock holding company of Subsidiary, acquired all of Subsidiary's outstanding stock and certain of its assets on c. Company had no assets or revenues before this date. Shareholders intended Company to be treated as an S corporation beginning b (the first day of its first tax year), with a tax year ending d, and they intended Subsidiary to be treated as a QSub; however, Form 2553 (Election by a Small Business Corporation), Form 8716 (Election To Have a Tax Year Other Than a Required Tax Year), and Form 8869 (Qualified Subchapter S Subsidiary Election) inadvertently were not filed timely with the Internal Revenue Service. Company has filed Form 1120S (U.S. Income Tax Return for an S Corporation) for each of its tax years since c, and Shareholders have filed their individual income tax returns for the same period consistent with Company's intended status as an S corporation and Subsidiary's intended status as a QSub.

Section 1362(b)(1) provides, in general, that an election by a small business corporation under § 1362(a) to be an S corporation may be made for any tax year (A) at any time during the preceding tax year, or (B) at any time during the tax year and on or before the 15th day of the 3d month of the tax year.

Section 1362(b)(3) provides that if (A) a small business corporation makes an election under § 1362(a) for any tax year, and (B) that election is made after the 15th day of the 3d month of the tax year and on or before the 15th day of the 3d month of the following tax year, then that election shall be treated as made for the following tax year.

Section 1362(b)(5) provides that if (A) an election under § 1362(a) is made for any tax year (determined without regard to § 1362(b)(3)) after the date prescribed by § 1362(b) for making the election for that tax year or no such election is made for any tax year, and (B) the Secretary determines that there was reasonable cause for the failure to timely make the election, the Secretary may treat such election as timely made for that tax year (and § 1362(b)(3) shall not apply).

Section 1361(b)(3)(B) defines a QSub as a domestic corporation that is not an ineligible corporation (as defined in § 1361(b)(2)), if 100 percent of the stock of such corporation is held by an S corporation, and the S corporation elects to treat the corporation as a QSub.

Section 444(a) provides that, except as otherwise provided in § 444, a partnership, S corporation, or personal service corporation may elect to have a tax year other than the required tax year.

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Section 1.444-3T(b)(1) of the Income Tax Regulations provides that a § 444 election shall be made by filing a properly prepared Form 8716 with the service center indicated by the instructions to the form. Except as provided in § 1.444-3T(b)(2) and (4), Form 8716 must be filed by the earlier of (i) the 15th day of the fifth month following the month that includes the first day of the tax year for which the election will first be effective, or (ii) the due date (without regard to extensions) of the income tax return resulting from the § 444 election.

A taxpayer makes a QSub election with respect to a subsidiary by filing Form 8869 with the appropriate service center.

Section 1.1361-3(a)(4) of the Income Tax Regulations provides that the QSub 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.

Under § 301.9100-1(c), the Commissioner may grant a reasonable extension of time to make a regulatory election, or a statutory election (but no more than six 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 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.

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. Section 301.9100-1(a).

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

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).

Based on the facts and representations submitted, we conclude that there was reasonable cause for Company's failure to make a timely S corporation election under § 1362(a), and that Company has satisfied the requirements of § 301.9100-1 and 301.9100-3 regarding a late QSub election. Consequently--

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- Company's late election under § 1362(a) is to be treated under § 1362(b)(5) as filed timely for its tax year beginning b. This ruling is contingent on Company filing Form 2553, to be effective on b, with the appropriate service center no later than 60 days from the date of this letter. A copy of this letter should be attached to the Form 2553.
- Company is granted an extension of 60 days from the date of this letter for electing under § 1361(b)(3)(B) to treat Subsidiary as a QSub, effective c. Company must file Form 8869 within the extension period with the appropriate service center. A copy of this letter should be attached to the Form 8869.

Company, if qualified, may elect under § 444 to have a fiscal year ending d by indicating that intention on Form 2553 and attaching a completed Form 8716. For each year that a § 444 election is in effect, Company must file a return on Form 8752 (Required Payment or Refund Under § 7519), as provided by § 1.7519-2T(a)(2) of the Temporary Income Tax Regulations, and make any payments required by § 1.7519-2T.

Except for the specific rulings above, we express or imply no opinion concerning the federal tax consequences of the facts of this case under any other provision of the Code. Specifically, we express or imply no opinion on whether Company otherwise qualifies to be an S corporation, is eligible to make a § 444 election, or is liable for any penalties or interest accruing because of its failure to make timely required payments under § 7519. In addition, § 301.9100-1(a) provides that the granting of an extension of time for making an election is not a determination that the taxpayer is otherwise eligible to make the election.

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 on whose behalf it was requested. According to § 6110(k)(3), this ruling may not be used or cited as precedent.

Sincerely,

HEATHER C. MALOY
Associate Chief Counsel
(Passthroughs and Special Industries)

enclosures: copies of this letter (2)
copy for § 6110 purposes