

Part III

Administrative, Procedural, and Miscellaneous

26 CFR 601.201: Rulings and determinations letters.
(Also Part 1, §§ 7701; 301.7701-1, 301.7701-2, 301.7701-3, 301.9100-1, 301.9100-3.)

Rev. Proc. 2009-41

SECTION 1. PURPOSE

This revenue procedure provides guidance under § 7701 of the Internal Revenue Code for an eligible entity that requests relief for a late classification election filed with the applicable IRS service center within 3 years and 75 days of the requested effective date of the eligible entity's classification election. The revenue procedure also provides guidance for those eligible entities that do not qualify for relief under this revenue procedure and that are required to request a letter ruling in order to request relief for a late entity classification election.

SECTION 2. BACKGROUND

.01 Section 301.7701-3(a) of the Procedure and Administration Regulations provides in part 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 at least two members can elect to be classified as either an association (and thus as a corporation under § 301.7701-2(b)(2)) or a partnership, and 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) provides a default classification for an eligible entity that does not file an entity classification election. Thus, an entity classification election is necessary only when an eligible entity chooses to be classified initially as other than its default classification or when an eligible entity chooses to change its classification.

.02 Section 301.7701-3(c)(1)(i) provides the general rules for the time and place for filing an entity classification election. Section 301.7701-3(c)(1)(i) provides that, except as provided in paragraphs (c)(1)(iv) (limitation) or (c)(1)(v) (deemed elections) of § 301.7701-3, an eligible entity may elect to be classified other than as provided under § 301.7701-3(b), or to change its classification, by filing Form 8832, "Entity Classification Election," with the IRS service center designated on Form 8832. An election will not be accepted unless all of the information required by the form and instructions, including the taxpayer identifying number of the entity, is provided on Form 8832. See § 301.6109-1 for rules on applying for and displaying Employer Identification Numbers.

.03 Section 301.7701-3(c)(1)(ii) provides that an eligible entity required to file a federal tax or information return for the taxable year for which an election is made must attach a copy of its Form 8832 to its federal tax or information return for that year. If the entity is not required to file a return for that year, a copy of its Form 8832 must be attached to the federal income tax or information return of any direct or indirect owner of

the entity for the taxable year of the owner that includes the date on which the election was effective.

.04 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 such 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. If an election specifies an effective date more than 75 days prior to the date on which the election is filed, it will be effective 75 days prior to the date it was filed. If an election specifies an effective date more than 12 months from the date on which the election is filed, it will be effective 12 months after the date it was filed.

.05 Section 301.7701-3(d)(1) provides in general that a foreign eligible entity's classification is relevant when its classification affects the liability of any person for federal tax or information purposes.

.06 Under § 301.9100-1(c) the Commissioner may grant a reasonable extension of time to make a regulatory election or certain statutory elections under all subtitles of the Code, except subtitles E, G, H, and I.

.07 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. An entity classification election made pursuant to § 301.7701-3(c) is a regulatory election.

.08 The Commissioner has authority under § 301.9100-1 and § 301.9100-3 to grant an extension of time if a taxpayer fails to file a timely election under § 301.7701-3(c). Section 301.9100-3 provides that the Commissioner will grant an extension of time when the taxpayer provides the evidence to establish to the satisfaction of the Commissioner that the taxpayer has acted reasonably and in good faith and the grant of relief will not prejudice the interests of the government.

.09 Rev. Proc. 2002-59, 2002-2 C.B. 615, provides guidance under § 301.7701-3 for entities newly formed under local law to request relief for a late initial classification election filed by the due date for the first federal tax return (excluding extensions) of the entity's desired classification for the year of the entity's formation.

SECTION 3. SCOPE

.01 This revenue procedure supersedes Rev. Proc. 2002-59 by extending late entity classification relief to both initial classification elections and changes in classification elections along with extending the time for filing late entity classification elections to within 3 years and 75 days of the requested effective date of the eligible entity's classification. Thus, the extended filing period no longer is limited, as it was under Rev. Proc. 2002-59, to entities newly formed under local law requesting relief to file an initial classification election and to the due date for the first federal tax return (excluding extensions) of the entity's desired classification for the year of the entity's formation. For those entities that satisfy the requirements set forth in Section 4.01, this revenue procedure is the exclusive means for obtaining relief for a late entity classification election and is in lieu of the letter ruling procedure that is used to obtain

relief for a late entity classification election under § 301.9100-1 and § 301.9100-3. Accordingly, user fees do not apply to action under this revenue procedure.

.02 An eligible entity may qualify for alternative relief under § 301.7701-3(c)(1)(v)(C), which treats an entity as having made a classification election to be treated as an association when it timely elects to be an S corporation under § 1362(a)(1). Also, see Rev. Proc. 2004-48, 2004-2 C.B. 172, and Rev. Proc. 2007-62, 2007-41 I.R.B. 786, or their successors for special rules applicable to late S corporation elections and late entity classification elections.

.03 An entity that does not satisfy the requirements for relief under this revenue procedure may request relief by applying for a letter ruling. Additionally, eligible entities that do not qualify for relief under this revenue procedure, because they do not satisfy all of the requirements set forth in Section 4.01, and that request a letter ruling for late entity classification relief either must include as part of their letter ruling request the affirmative representation in Section 4.04 or an explanation why the entity cannot make the affirmative representation in Section 4.04. The procedural requirements for requesting a letter ruling are described in Rev. Proc. 2009-1, 2009-1 I.R.B. 1 (or its successor).

SECTION 4. RELIEF FOR LATE CLASSIFICATION ELECTIONS

.01 Eligibility for relief. An entity is eligible for relief under Section 4.03 of this revenue procedure for a late classification election if the following requirements are met:

(1)(a) the entity failed to obtain its requested classification as of the date of its formation or upon the entity's classification becoming relevant within the meaning of § 301.7701-3(d) solely because Form 8832 was not filed timely under § 301.7701-

3(c)(1)(iii); or

(b) the entity failed to obtain its requested change in classification (subject to the limitations of § 301.7701-3(c)(1)(iv)) solely because Form 8832 was not filed timely under § 301.7701-3(c)(1)(iii); and

(2)(a) the eligible entity seeking an extension of time to make an entity classification election has not filed a federal tax or information return for the first year in which the election was intended because the due date has not passed for that year's federal tax or information return; or

(b) the eligible entity seeking an extension of time to make an entity classification election timely filed all required federal tax returns and information returns consistent with its requested classification for all of the years the entity intended the requested election to be effective and no inconsistent tax or information returns have been filed by or with respect to the entity during any of the taxable years. For changes in an eligible entity's classification election, consistent filing of returns includes filing returns consistent with the deemed treatment of elective changes under § 301.7701-3(g).

Under this revenue procedure, if the eligible entity is not required to file a federal tax return or information return, each affected person, who is required to file a federal tax return or information return, must have timely filed all such returns consistent with the entity's requested classification for all of the years the entity intended the requested election to be effective and no inconsistent tax or information returns have been filed during any of the taxable years. Solely for purposes of this section 4.01(2)(b), an entity and an affected person will be treated as having timely filed a required tax or information return if the return is filed within 6 months after its due date, excluding

extensions. An indirect owner of an eligible entity (such as a partner in a partnership that holds an interest in the eligible entity) is not an affected person if an entity in which the indirect owner holds a direct or indirect interest would be required to attach a copy of the eligible entity's Form 8832 to its federal tax or information return in the circumstances described in section 4.01(2)(b)(i) or (ii) . An affected person is either:

(i) with respect to the effective date of the eligible entity's classification election, a person who would have been required under § 301.7701-3(c)(1)(ii) to attach a copy of the Form 8832 for the eligible entity to its federal tax or information return for the taxable year of the person which includes that date; or

(ii) with respect to any subsequent date after the entity's requested effective date of the classification election, a person who would have been required under § 301.7701-3(c)(1)(ii) to attach a copy of the Form 8832 for the eligible entity to its federal tax or information return for the person's taxable year that includes that subsequent date had the election first become effective on that subsequent date; and

(3) the eligible entity has reasonable cause for its failure to timely make the entity classification election; and

(4) 3 years and 75 days from the requested effective date of the eligible entity's classification election have not passed.

.02 Procedural requirements for requesting relief. Within 3 years and 75 days from the requested effective date of the eligible entity's classification election, the eligible entity must file with the applicable IRS service center (determined in accordance with the instructions to Form 8832) a completed Form 8832, signed in accordance with § 301.7701-3(c)(2). The Form 8832 must indicate that it is being filed pursuant to this

revenue procedure in accordance with the Form 8832 and accompanying instructions. The Form 8832 must include both a declaration that the elements required for relief in Section 4.01 of this revenue procedure have been satisfied and a statement explaining the reason for the failure to file a timely entity classification election (referred to as “the reasonable cause statement”). (Until Form 8832 is modified to include the declaration contained in this revenue procedure and space for a reasonable cause statement, the eligible entity should write “Filed Pursuant to Rev. Proc. 2009-41” at the top of Form 8832 and attach both the declaration and the reasonable cause statement to its Form 8832 that is filed with the applicable IRS service center. The declaration and reasonable cause statement must be accompanied by a dated declaration, signed by an authorized representative of the eligible entity and the affected person(s), if any, which states: “Under penalties of perjury, I (we) declare that I (we) have examined this election, including accompanying documents, and, to the best of my (our) knowledge and belief, the election contains all the relevant facts relating to the election, and such facts are true, correct, and complete.” The individual or individuals who sign must have personal knowledge of the facts and circumstances related to the election. The copy of the Form 8832 that is required under §301.7701-3(c)(1)(ii) to be attached to either the eligible entity’s or the affected person’s return does not need the writing at the top of the Form 8832 or the attachments described in this section 4.02.)

.03 Relief for late entity classification elections. Upon receipt of a completed Form 8832 requesting relief under Section 4.01 of this revenue procedure, the IRS service center will determine whether the requirements for granting the late entity classification election have been satisfied and will notify the entity of the result of its

determination. An entity receiving relief under this revenue procedure is treated as having made a timely entity classification election as of the requested effective date of the election.

.04 Eligible entities that do not meet all of the eligibility requirements under Section 4.01 of this revenue procedure. Eligible entities requesting a letter ruling because they do not meet all of the eligibility requirements of Section 4.01 of this revenue procedure must include either the following representation as part of the entity's request for a letter ruling or an explanation regarding why they do not qualify to do so: "All required U.S. tax and information returns of the entity (or, if the entity was not required to file any such returns under the desired classification, then all required U.S. tax and information returns of each affected person as defined in Section 4.02 of Rev. Proc. 2009-41) were filed timely or within 6 months of the due date of the respective return (excluding extensions) as if the entity classification election had been in effect on the requested date. No U.S. tax or information returns were filed inconsistently with those described in the prior sentence."

SECTION 5. EFFECTIVE DATE

.01 In general. Except as provided in section 5.02, this revenue procedure is effective September 28, 2009, the date of publication of this revenue procedure in the Internal Revenue Bulletin. This revenue procedure applies to requests pending with the IRS service center pursuant to Rev. Proc. 2002-59 on September 28, 2009, and to requests received thereafter. It also applies to all ruling requests pending in the national office on September 28, 2009, and to requests for relief received thereafter.

.02 Transition rule for pending letter ruling requests. If an entity has filed a request for a letter ruling seeking relief for a late entity classification election and that letter ruling request is pending in the national office on September 28, 2009, the entity may rely on this revenue procedure, withdraw that letter ruling request and receive a refund of its user fee. However, the national office will process letter ruling requests pending on September 28, 2009, unless, prior to the earlier of November 12, 2009, or the issuance of the letter ruling, the entity notifies the national office that it will rely on this revenue procedure and withdraw its letter ruling request.

SECTION 6. EFFECT ON OTHER DOCUMENTS

Rev. Proc. 2002-59 is superseded.

SECTION 7. PAPERWORK REDUCTION ACT

The collections of information contained in this revenue procedure have been reviewed and approved by the Office of Management and Budget (OMB) in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) under control number 1545-1771.

The collection of information in these regulations is in Sections 4.02 and 4.04 of this revenue procedure. The information will help the IRS to determine if an eligible entity meets the requirements of Section 4.01 of this revenue procedure. The collection of information is required to obtain permission to file a late entity classification election. The information will be reported on Form 8832 or submitted as part of a letter ruling request. The time needed to complete and file a letter ruling request or a Form 8832 will vary depending on individual circumstances. The estimated burden for eligible entities filing a letter ruling request or Form 8832 are included in the estimates shown in

the Paperwork Reduction Act of the annually published letter ruling revenue procedure and the instructions for Form 8832 respectively.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

SECTION 8. DRAFTING INFORMATION

The principal author of this revenue procedure is Richard T. Probst of the Office of Associate Chief Counsel (Passthroughs & Special Industries). For further information regarding this revenue procedure contact Richard T. Probst at (202) 622-3060 (not a toll free call).