

## Internal Revenue Service

Department of the Treasury

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Person to Contact:

Telephone Number:

Refer Reply To:

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Date:

May 14, 2002

### Legend

X:

A:

B:

C:

D:

State:

D1:

D2:

Dear \_\_\_\_\_ :

This responds to the letter dated February 7, 2002, and additional correspondence, submitted on behalf of X, requesting a ruling under § 1362(f) of the Internal Revenue Code.

### Facts

The represented facts are as follows: X was incorporated under State law and filed an election to be treated as an S corporation under § 1362 for its first taxable year beginning D1. On D1, A, B, C and D were the shareholders of X. None of X's shareholders on D1 were aware that A, a limited liability company classified as a

PLR-111200-02

partnership, was an impermissible S corporation shareholder.

On D2, X discovered that A was an impermissible shareholder. X immediately contacted A, and A agreed to a rescission of the subscribed, but unpaid shares, effective as of the date of subscription. X and its shareholders then requested inadvertent invalid election relief under § 1362(f) of the Code.

X represents that there was no intent to knowingly make an invalid S election and that the events that resulted in the invalid election were not motivated by tax avoidance or retroactive tax planning. X and its shareholders agree to make any adjustments required by the Secretary consistent with the treatment of X as an S corporation.

### Law and Analysis

Section 1361(a)(1) 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 such year.

Section 1361(b)(1) defines a "small business corporation" as a domestic corporation which is not an ineligible corporation and which 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 § 1361(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 1362(f) provides, in relevant part, that if (1) an election under § 1362(a) by any corporation 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, (2) the Secretary determines that the circumstances resulting in such termination were inadvertent, (3) no later than a reasonable period of time after discovery of the circumstances resulting in ineffectiveness, 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 the period, then, notwithstanding the circumstances resulting in the ineffectiveness, the corporation shall be treated as continuing to be an S corporation during the period specified by the Secretary.

### Conclusion

Based solely on the information submitted and the representations made, we conclude that X's invalid subchapter S election, as described above, was inadvertent within the meaning of § 1362(f). Therefore, X will be treated as an S corporation from D1 and thereafter provided that X's S election is not otherwise terminated under

PLR-111200-02

§ 1362(d). A will not be treated as a shareholder of X for the period from D1 and thereafter. Accordingly, X's other shareholders, in determining their federal tax liability for that period, must include their pro rata share of the separately and nonseparately computed items of X as provided in § 1366, make any adjustments to stock basis as provided in § 1367, and take into account any distributions made by X to shareholders as provided § 1368. This ruling shall be null and void if the requirements of this paragraph are not met.

Except as specifically set forth above, we express no opinion concerning the federal tax consequences of the above-described facts under any other provision of the Code. Specifically, no opinion is expressed on whether X is otherwise eligible to be treated as an S corporation.

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.

Pursuant to a power of attorney on file with this office, a copy of this letter is being forwarded to X's authorized representative.

Sincerely yours,  
Matthew Lay  
Senior Technician Reviewer, Branch 2  
Associate Chief Counsel  
(Passthroughs and Special Industries)

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