

# Internal Revenue Service

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Department of the Treasury

Washington, DC 20224

Third Party Communication: None

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Person To Contact:

, ID No.

Telephone Number:

Refer Reply To:

CC:PSI:B01

PLR-163028-04

Date:

August 23, 2005

## Legend:

X =

State =

D1 =

Dear :

This letter responds to the letter dated January 18, 2005, and related correspondence, written on behalf of X, requesting a ruling that a draft limited liability company (LLC) agreement of X, once executed in a substantially identical form, will be a “governing provision” within the meaning of § 1.1361-1(l)(2)(i) of the Income Tax Regulations, and the agreement will not cause X to have more than one class of stock within the meaning of § 1361(b)(1)(D) of the Internal Revenue Code (“Code”). This ruling supplements the private letter ruling issued to X on April 8, 2005 (“April 8, 2005 letter ruling”).

## **FACTS**

The information submitted discloses that X was incorporated under the laws of State. X elected to be treated as an S corporation for federal tax purposes, effective D1. For business reasons, X intended to convert under the laws of State to an LLC. The newly formed LLC would elect under Treas. Reg. § 301.7701-3 to be treated as an association taxable as a corporation for federal tax purposes. In the April 8, 2005 letter ruling, it is ruled that the proposed conversion constitutes a reorganization under § 368(a)(1)(F). Further, X’s S election will not terminate as a result of the reorganization, provided that the new LLC meets the requirements of an S corporation under § 1361.

## **LAW AND ANALYSIS**

Section 1361(a)(1) defines an "S corporation" as a small business corporation for which an election under § 1362(a) is in effect for such year.

Section 1361(b)(1) provides that the term "small business corporation" means a domestic corporation that is not an ineligible corporation and that does not (A) have more than 100 shareholders, (B) have as a shareholder a person (other than an estate, a trust described in subsection (c)(2), or an organization described in subsection (c)(6)) who is not an individual, (C) have a nonresident alien as a shareholder, and (D) have more than 1 class of stock.

Section 1.1361-1(l)(1) provides that, except as provided in § 1.1361-1(l)(4) (relating to instruments, obligations, or arrangements treated as a second class of stock), a corporation is treated as having only one class of stock if all outstanding shares of stock of the corporation confer identical rights to distribution and liquidation proceeds.

Section 1.1361-1(l)(2)(i) provides that the determination of whether all outstanding shares of stock confer identical rights to distribution and liquidation proceeds is made based on the corporate charter, articles of incorporation, bylaws, applicable state law, and binding agreements relating to distribution and liquidation proceeds (collectively, the governing provisions). A commercial contractual agreement, such as a lease, employment agreement, or loan agreement, is not a binding agreement relating to distribution and liquidation proceeds and thus is not a governing provision unless a principal purpose of the arrangement is to circumvent the one class of stock requirement of § 1361(b)(1)(D) and § 1.1361-1(l).

## **CONCLUSION**

Based solely on the facts and documents submitted and representations made, we conclude that the LLC agreement, once executed in a substantially identical form, will be considered a governing provision for purposes of § 1.1361-1(l)(2)(i), since it will be a binding agreement that defines the members' rights to distribution and liquidation proceeds. Further, the LLC agreement, once executed, will not, by its terms, cause X to have a second class of stock within the meaning of § 1361(b)(1)(D).

Except as specifically set forth above and provided in the April 8, 2005 letter ruling, we express no opinion concerning the federal tax consequences of the facts described above under any other provision of the Code.

This ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) of the Code 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 mailed to your authorized representative.

Sincerely,

/s/ Dianna K. Miosi

Dianna K. Miosi  
Chief, Branch 1  
Office of the Associate Chief Counsel  
(Passthroughs and Special Industries)

Enclosures (2)

Copy of this letter  
Copy for § 6110 purposes

cc: