

## Internal Revenue Service

Number: **202231009**

Release Date: 8/5/2022

Index Number: 1362.04-00

Department of the Treasury  
Washington, DC 20224

Third Party Communication: None  
Date of Communication: Not Applicable

Person To Contact:  
, ID No.

Telephone Number:

Refer Reply To:  
CC:PSI:B03  
PLR-123530-21  
Date:  
May 4, 2022

## LEGEND

X =

State =

Date 1 =

Date 2 =

Date 3 =

Date 4 =

Date 5 =

Trust =

Partnership =

A =

B =

C =

D =

E =

n =

Dear :

This letter responds to a letter dated October 18, 2021, and subsequent correspondence, submitted on behalf of X by its authorized representative, requesting relief under § 1362(f) of the Internal Revenue Code (the Code).

### FACTS

The information submitted discloses that X was incorporated under the laws of State on Date 1 and elected to be an S corporation effective Date 2. On Date 2, Trust and Partnership, ineligible S corporation shareholders, owned all of the shares of X stock. X represents that Trust qualifies as an electing small business trust (ESBT) within the meaning of § 1361(e). However, Trust's trustee failed to make an ESBT election under § 1361(e)(3) to treat Trust as an ESBT effective Date 2. Moreover, neither of X's shareholders consented to X's S corporation election. Instead, A, a partner in Partnership and a Trust beneficiary, signed a statement consenting to X's S corporation election as specified on Form 2553, Election by a Small Business Corporation. Consequently, X's S corporation election was ineffective.

Around Date 3, X learned that its S corporation election was ineffective and subsequently took corrective action by filing this request for relief. In addition, on Date 4, Partnership dissolved and distributed all of its shares of X stock to individuals, A, B, C, D, and E.

X represents that the circumstances resulting in its ineffective S corporation election were inadvertent and were not motivated by tax avoidance or retroactive tax planning. X further represents that it has filed its income tax returns consistent with having a valid S corporation election in effect for all taxable years since Date 2. Lastly, X and its shareholders agree to make any adjustments required as a condition of obtaining relief under § 1362(f) that may be required by the Secretary.

### LAW AND ANALYSIS

Section 1361(a)(1) of the Code 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 100 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 1361(c)(2)(A)(v) provides that, for purposes of § 1361(b)(1)(B), an ESBT may be an S corporation shareholder.

Section 1361(e)(1)(A) provides that an ESBT means any trust if (i) such trust does not have as a beneficiary any person other than (I) an individual, (II) an estate, (III) an organization described in § 170(c)(2), (3), (4), or (5), or (IV) an organization described in § 170(c)(1) which holds a contingent interest in such trust and is not a potential current beneficiary; (ii) no interest in such trust was acquired by purchase; and (iii) an election under § 1361(e) applies to such trust.

Section 1361(e)(3) provides that an election under § 1361(e) shall be made by the trustee. Any such election shall apply to the taxable year of the trust for which made and all subsequent taxable years of such trust unless revoked with the consent of the Secretary.

Section 1.1361-1(m)(2)(i) of the Income Tax Regulations provides, in relevant part, that the trustee of an ESBT must make the ESBT election by signing and filing, with the service center where the S corporation files its income tax return, a statement that meets the requirements of § 1.1361-1(m)(2)(ii).

Section 1362(a)(1) provides that except as provided in § 1362(g), a small business corporation may elect, in accordance with the provisions of § 1362, to be an S corporation.

Section 1362(a)(2) provides that an election to be an S corporation shall be valid only if all persons who are shareholders in such corporation on the day on which such election is made consent to such election.

Section 1.1362-6(a)(2)(i) of the Income Tax Regulations provides that the election to be an S corporation is not valid unless all shareholders of the corporation at the time of the election consent to the election in the manner provided in § 1.1362-6(b). Section 1.1362-6(b)(2)(iv) provides that in the case of an ESBT, the trustee and the owner of any portion of the trust that consists of the stock in one or more S corporations under subpart E, part I, subchapter J, chapter 1 of the Code must consent to the S corporation election.

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 ineffectiveness were inadvertent; (3) no later than a reasonable period of time after discovery of the circumstances resulting in such ineffectiveness, steps were taken (A) so that the corporation for which the election was made is a small business corporation, or (B) to acquire the required shareholder consents; and (4) the corporation for which the election was made, and each person who was a shareholder in such corporation at any time during the period specified pursuant to § 1362(f), agrees to make the adjustments (consistent with the treatment of such corporation as an S corporation) as may be required by the Secretary with respect to such period, then, notwithstanding the circumstances resulting in such ineffectiveness, such corporation shall be treated as an S corporation during the period specified by the Secretary.

Section 1.1362-4(d) provides that the Commissioner may require any adjustments that are appropriate. In general, the adjustments required should be consistent with the treatment of the corporation as an S corporation during the period specified by the Commissioner.

### CONCLUSIONS

Based solely on the facts submitted and the representations made, we conclude that X's S corporation election was not effective on Date 2 because the trustee of Trust failed to file an ESBT election under § 1361(e)(3), Partnership held shares of X stock on Date 2, and none of X's shareholders on Date 2 consented to X's S corporation election. We further conclude that the ineffectiveness of X's S corporation election was inadvertent within the meaning of § 1362(f). Therefore, under § 1362(f), X will be treated as an S corporation on and after Date 2, provided X's S corporation election was otherwise valid and not otherwise terminated under § 1362(d).

This ruling is contingent on the following: (1) the trustee of Trust must file within 120 days from the date of this letter an ESBT election effective Date 2 with the appropriate service center and attach a copy of this letter to the ESBT election; (2) Trust must file within 120 days from the date of this letter amended returns for taxable years Date 5 to properly reflect the treatment of Trust as an ESBT and attach a copy of this letter to the amended returns; and (3) the trustee of Trust must sign a written statement as described in § 1.1362-6(b)(1) consenting to X's S corporation election effective Date 2. The written statement must be filed with the appropriate service center within 120 days from the date of this letter, indicating that the statement is to be associated with X's originally filed Form 2553.

Furthermore, as an adjustment under § 1362(f)(4), a payment of \$n and a copy of this letter must be sent within 45 days from the date of this letter to the following address: Internal Revenue Service, Kansas City Submission Processing Campus, Attn: Manual Deposit, 333 W. Pershing Road, Stop 7777, Kansas City, MO 64108.

If the above conditions are not met, then this ruling is null and void. Furthermore, if these conditions are not met, X must notify the service center with which it filed its S corporation election that its election on Date 2 was ineffective.

Except for the specific ruling 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 regarding X's eligibility to be an S corporation or Trust's eligibility to be an ESBT.

This ruling is directed only to the taxpayer requesting it. According to § 6110(k)(3) of the Code, this ruling may not be used or cited as precedent.

The ruling contained in this letter is based upon information and representations submitted by the taxpayer and accompanied by a penalty of perjury statement executed by an appropriate party. While this office has not verified any of the material submitted in support of the ruling request, it is subject to verification on examination.

Under a power of attorney on file with this office, we are sending a copy of this letter to X's authorized representative.

Sincerely,

Mary Beth Carchia  
Senior Technician Reviewer, Branch 3  
Office of the Associate Chief Counsel  
(Passthroughs & Special Industries)

Enclosure:

Copy of this letter for § 6110 purposes

cc: