

**Internal Revenue Service**

Department of the Treasury  
Washington, DC 20224

Number: **202322004**

Release Date: 6/2/2023

Index Number: 1362.00-00, 1362.01-01,  
1362.04-00

Third Party Communication: None  
Date of Communication: Not Applicable

Person To Contact:  
, ID No.

Telephone Number:

Refer Reply To:  
CC:PSI:01  
PLR-116711-22

Date:  
March 01, 2023

LEGEND

X =

Agreement  
1 =

Agreement  
2 =

A =

B =

C =

D =

E =

Date 1 =

Date 2 =

Date 3 =

State

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

This letter responds to a letter dated August 30, 2022, submitted on behalf of X by its authorized representatives, requesting a ruling under § 1362(f) of the Internal Revenue Code.

FACTS

The information submitted states that X was organized on Date 1 as a limited liability company under the laws of State. Effective Date 1, X filed Form 2553, Election by a Small Business Corporation, for X to be treated as an S corporation. However, X represents that it did not obtain all of the shareholder consents required by § 1.1362-6, resulting in an ineffective election.

Prior to Date 2, X was wholly owned by spouses C and D through disregarded entities A and B and had an operating agreement, Agreement 1. Agreement 1 provided for different rights concerning distributions and liquidation proceeds. Specifically, Sections 4.2 through 4.5 of Agreement 1 provided that X would have three classes of equity. Sections 9.1, 9.4, and 12.3 of Agreement 1 provided various details for the preferences, distributions, and allocations that the holders of various units of stock would be entitled to. On Date 2, E acquired shares of X. If X's S election had not been ineffective, it would have terminated on Date 2 due to a second class of stock created by the provisions of Agreement 1.

The provisions of Agreement 1 applied until Date 3, when Agreement 2 replaced Agreement 1. The provisions of Agreement 2 reclassified all units issued between Date 1 and Date 3 into a single class of units. Additionally, Agreement 2 did not include capital account maintenance provisions and required that all distribution and liquidation proceeds be shared in accordance with the shareholders' ownership interests.

X represents that it intended to make a valid S corporation election effective Date 1 and that the ineffectiveness of the election was inadvertent and not motivated by tax avoidance or retroactive tax planning. X further represents that neither X nor its shareholders intended to terminate X's Subchapter S election on Date 2 and that X and its shareholders have filed consistently with being an S corporation. X represents that, other than the ineffectiveness caused by the failure to submit consents from all required shareholders on the original Form 2553 and the termination caused by the provisions contained within Agreement 1, X has qualified as a small business corporation at all times since its election effective Date 1. X also represents that X and its shareholders agree to make any adjustments required as a condition of obtaining relief under the inadvertent invalid election rule as provided under § 1362(f) that may be required by the Secretary.

### LAW AND ANALYSIS

Section 1362(a) 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 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 1362(a)(2) provides that an election to be treated as 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 1361(b)(1) provides that the term “small business corporation” means 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 1.1361-1(l)(1) provides, in part, that a corporation is generally 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 laws, and binding agreements relating to distribution and liquidation proceeds (collectively, governing provisions).

Section 1362(d)(2)(A) provides that an election under § 1362(a) shall be terminated whenever (at any time on or after the 1st day of the 1st taxable year for which the corporation is an S corporation) such corporation ceases to be a small business corporation.

Section 1362(f) provides, in part, that if (1) an election under § 1362(a) by any corporation was not effective for the taxable year made (determined without regard to § 1362(b)(2)) by reason of failure to obtain shareholder consents, or was terminated under § 1362(d)(2) or (3), (2) the Secretary determines that the circumstances resulting in the ineffectiveness or termination were inadvertent, (3) no later than a reasonable period of time after the discovery of the circumstances resulting in the ineffectiveness or termination, steps were taken so that the corporation for which the election was made or termination occurred is a small business corporation, and (4) the corporation for which the election was made or the termination occurred, and each person who was a shareholder in such corporation at any time during the period of inadvertent ineffectiveness or termination of the S election, agrees to make such adjustments (consistent with the treatment of the corporation as an S corporation) as may be required by the Secretary with respect to such period, then, notwithstanding the circumstances resulting in the ineffectiveness or termination, the corporation is treated as an S corporation during the period specified by the Secretary.

CONCLUSION

Based on the facts submitted and the representations made, we first conclude that X's S corporation election was ineffective because the required shareholder consents to the election were not obtained, and because of the provisions contained in Agreement 1. However, we also conclude that the ineffectiveness of X's S corporation election was inadvertent within the meaning of § 1362(f). We further conclude that, if X's election had not been ineffective, it would have terminated on Date 2 because of the provisions found in Agreement 1. We further conclude that the termination was inadvertent within the meaning of § 1362(f). Accordingly, under § 1362(f), X will be treated as an S corporation from Date 2, and thereafter, provided the S election for X otherwise is valid and has not terminated under § 1362(d).

As a condition of this ruling, any current or former shareholder of X required by § 1.1362-6 to sign X's Form 2553 that has not done so must sign a written statement as described in § 1.1362-6(b)(1) consenting to X's S election effective Date 1. The written statement(s) must be filed with the appropriate service center within 120 days from the date of this letter, indicating that the statement(s) are to be associated with X's originally filed Form 2553.

Except as specifically ruled above, we express or imply no opinion concerning the federal tax consequences of the facts described above under any other provisions of the Code. Specifically, we express or imply no opinion as to whether X was otherwise eligible to be treated as an S corporation.

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.

This ruling is directed only to the taxpayer that requested it. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.

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

Sincerely,

/s/ Joy C. Spies  
Joy C. Spies  
Senior Technician Reviewer, Branch 1  
(Passthroughs & Special Industries)

Enclosure (1)  
Copy of this letter for § 6110 purposes

cc: