Internal Revenue Service

Department of the Treasury

Washington, DC 20224

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Person to Contact:

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LEGEND

Company =

State =

Shareholders =

Individual =

Estate =

a =

b =

Dear :

This letter responds to a letter dated October 17, 2001, submitted on behalf of Company requesting a ruling under § 1362(f) of the Internal Revenue Code.

According to the information submitted, Company was organized under the laws of State on a. Company filed an election under § 1362(a) to be treated as an S corporation effective as of b, by filing the required Form 2553, Election by a Small Business Corporation. Company's Form 2553 was correctly and accurately completed with two exceptions. On the form, Company provided an inaccurate date of incorporation. In addition, one of Company's Shareholders did not consent to Company's S election. At the time of the election, Individual was an officer and shareholder in Company and a coexecutor for Estate. Individual consented to the election individually and on behalf of Company, but failed to consent on behalf of Estate. Moreover, neither of the other two coexecutors of Estate consented to Company's S election on behalf of Estate. Therefore, Estate never consented to Company's election to be an S corporation. Despite not providing all of the shareholder consents required for its S election, Company and its Shareholders filed their income tax returns consistent with the treatment of Company as an S corporation.

Company represents that neither Company nor its Shareholders engaged in tax avoidance or retroactive tax planning, and that Company intended to be an S corporation at all times after its election. In addition, Company and its Shareholders agree to make any adjustments (consistent with the treatment of the corporation as an S corporation) as may be required by the Service.

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 under § 1362(a) shall be valid only if all persons who are shareholders in the corporation on the day on which the election is made consent to the election.

Section 1.1362-6(b)(1) of the Income Tax Regulations provides that except as provided in § 1.1362-6(b)(3)(iii), the election of the corporation is not valid if any required consent is not filed in accordance with the rules contained in § 1.1362-6(b).

Section 1362(f) provides, in 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 the failure to meet the requirements of § 1361(b) or to obtain shareholder consents; (2) the Secretary determines that the circumstances resulting in the ineffectiveness were inadvertent; (3) no later than a reasonable period of time after discovery of the circumstances resulting in the ineffectiveness, steps were taken so that the corporation is 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 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, the corporation shall be treated as an S corporation during the period specified by the Secretary.

In Rev. Rul. 74-150, 1974-1 C.B. 241, a newly formed corporation timely filed a Form 2553 that erroneously reported the number of shares issued and outstanding. The ruling holds that because the purpose of Form 2553 is to provide a means by which a timely subchapter S election may be made by a corporation and to record the required consent of the shareholders to that election, a timely filed subchapter S election is not invalidated by the corporation's issuing a lesser number of shares of stock than was set forth in the election on Form 2553.

Based solely on the facts submitted and the representations made, we conclude that Company's subchapter S election will not be invalidated solely because of the error in Company's date of incorporation discussed above that was made on Company's Form 2553.

In addition, based solely on the facts submitted and the representations made, we conclude that Company's subchapter S election was invalid under § 1362(a)(2) because Estate, a shareholder of Company, failed to consent to Company's S corporation election.

We further conclude that the invalidity of Company's S corporation election was inadvertent within the meaning of § 1362(f). Accordingly, pursuant to provisions of § 1362(f), Company will be treated as an S corporation from b, and thereafter, provided that Company's S corporation election is otherwise valid and is not otherwise terminated under § 1362(d). However, this ruling is contingent on Company and its Shareholders treating Company as having been an S corporation from b, and thereafter. Accordingly, Company's Shareholders, in determining their income tax liabilities for the period beginning b and thereafter, must include their pro rata shares of the separately and nonseparately computed items of Company under § 1366, make any adjustments to stock basis under § 1367, and take into account any distributions made by Company to shareholders under § 1368. If Company or any of Company's Shareholders fail to treat Company as described above, this ruling will be null and void.

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 whether Company is otherwise qualified to be an S corporation.

This ruling is directed only to the taxpayer requesting it. Under § 6110(k)(3), 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 sent to Company's authorized representative.

Sincerely yours,
MARY BETH COLLINS
Senior Technician Reviewer, Branch 3
Office of the Associate Chief Counsel
(Passthroughs and Special Industries)

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