

Internal Revenue Service

Department of the Treasury

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Person to Contact:

Telephone Number:

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Date:

November 1, 1999

LEGEND:

X =

Y =

D1 =

D2 =

This letter responds to a letter dated July 19, 1999, written on behalf of X, requesting a ruling under § 1362(g) of the Internal Revenue Code Regulations that X be granted consent to make a subchapter S election prior to the termination of the five-year waiting period imposed by § 1362(g).

FACTS

According to the information submitted, X and Y were two of eleven corporations owned by six related shareholders. On D1, ten of the corporations were merged into X in a § 368(a)(1)(A) reorganization. All of the corporations were C corporations, except Y which was an S corporation. The value of Y's assets is approximately 3 percent of total value of X after the merger.

LAW AND ANALYSIS

Section 1362(g) of the Code provides that if a small business corporation has made an election under § 1362(a) and if the election has been terminated under § 1362(d), the corporation (and any successor corporation) shall not be eligible to make

an election under § 1362(a) for any taxable year before its 5th taxable year which begins after the 1st taxable year for which the termination is effective, unless the Secretary consents to the election.

Section 1.1362-5(b) of the regulations defines a successor corporation as a corporation where (1) 50 percent or more of the stock of the corporation (the new corporation) is owned, directly or indirectly, by the same persons who, on the date of the termination, owned 50 percent or more of the stock of the corporation whose election terminated (the old corporation); and (2) either the new corporation acquires a substantial portion of the assets of the old corporation, or a substantial portion of the assets of the new corporation were assets of the old corporation.

Section 1.1362-5(a) of the regulations provides that the Commissioner may permit the corporation to make a new election before the 5-year period expires. The corporation has the burden of establishing that under the relevant facts and circumstances, the Commissioner should consent to a new election. The fact that more than 50 percent of the stock in the corporation is owned by persons who did not own any stock in the corporation on the date of the termination tends to establish that consent should be granted. In the absence of this fact, consent ordinarily is denied unless the corporation shows that the event causing termination was not reasonably within the control of the corporation or shareholders having a substantial interest in the corporation and was not part of a plan on the part of the corporation or of such shareholders to terminate the election.

In discussing the predecessor of the § 1362(g) of the Code, the legislative history of the Technical Amendments Act of 1958 indicates that the purpose of the provision is to prevent a corporation from electing in and out of subchapter S. S. Rep. No. 1983, 85th Cong., 2d Sess. 89 (1958), 1958-3 C.B. 922, 1010.

CONCLUSIONS

Therefore, based on the facts as presented in this ruling request, and viewed in light of the applicable law and regulations, consent is granted for X to elect to be an S corporation effective D2. A copy of this letter should be attached to X's next federal income tax return. A copy of this letter is enclosed for that purpose.

Except for the specific rulings above, no opinion is expressed or implied concerning the federal income tax consequences of the facts of this case under any other provision of the Code. Specifically, no opinion is expressed regarding X's eligibility as a small business corporation under § 1361(b) to make the election under § 1362(a).

This ruling is directed only to the taxpayer on whose behalf it was requested. Section 6110(j)(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 will be sent to X.

Sincerely yours,

William P. O'Shea
Chief, Branch 3
Office of the Assistant Chief
Counsel
(Passthroughs and Special
Industries)

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