

## Internal Revenue Service

Department of the Treasury  
Washington, DC 20224

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Person To Contact:

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Telephone Number:

Refer Reply To:

CC:PSI:B1 – PLR-130420-03

Date:

January 28, 2004

### Legend

X =

D1 =

D2 =

Dear :

This responds to your letter dated, April 30, 2003 requesting a ruling under § 301.7701-3(b)(3) of the Procedure and Administration Regulation that X's purported entity classification as in effect on the date prior to January 1, 1997, remained the same after January 1, 1997, and that X may elect under § 1362(b)(5) of the Internal Revenue Code to be an S corporation effective on D2.

### Facts

According to the information submitted, X was formed D1, a date prior to the effective date of current §§ 301.7701-1 through 301.7701-3 (the "check-the-box regulations"). Under the entity classification rules in existence prior to the effective date of the check-the-box regulations, X was classified as an association taxable as a corporation because it had more corporate than partnership characteristics. X attempted to make an S corporation election under § 1362(a), effective D2, however, it was not accepted because of uncertainty surrounding X's entity classification on that date.

### Law and Analysis

Section 1362(a) allows a small business corporation to elect to be treated as an S corporation.

Section 1362(b) provides the rules as to when an S corporation election will become effective. Section 1362(b)(2) states in relevant part that if an S election is made within the first two and one-half months of a corporation's taxable year, then the corporation will be treated as an S corporation for the year in which the election is made. Under § 1362(b)(3), however, if an S election is made after the first two and one-half months of a corporation's taxable year, then that corporation will not be treated as an S corporation until the taxable year after the year in which the S election is filed.

Section 1362 (b)(5) provides that (1) if no election is made pursuant to section 1362(a), or if the election is made after the date prescribed for making such an election, and (2) the Secretary determines that there was reasonable cause for the failure to timely make the election, then the Secretary may treat such an election as timely made for such taxable year and effective as of the first day of that year.

Section 301.7701-2(a) provides the classification of all entities formed after January 1, 1997, and entities formed prior to January 1, 1997 that file an entity classification election under § 301.7701-3(c). Section 301.7701-3(b)(3) provides that unless an entity elects otherwise, an eligible entity in existence prior to the effective date of this section will have the same classification that the entity *claimed* under §§ 301.7701-1 through 301.7701-3 as in effect on the date prior to the effective date of this section.

Section 301.7701-3(h)(1) provides that the effective date of the check-the-box regulations is January 1, 1997. Section 301.7701-3(h)(2) provides that a business entity that is not described in § 301.7701-2(b)(2), (3), (4), (5), (6), or (7), and that was in existence prior to January 1, 1997, will be respected for all periods prior to January 1, 1997 if (i) the entity had a reasonable basis within the meaning of § 6662) for its claimed classification, (ii) the entity and all members of the entity recognized the federal tax consequences of an change in the entity's classification within sixty months prior to January 1, 1997; and (iii) neither the entity nor any member was notified in writing on or before May 8, 1996, that the classification of the entity was under examination (in which case the entity's classification will be determined in the examination).

### Conclusion

Based solely on the facts submitted and the representations made we conclude that under § 301.7701-3(b)(3) X's classification as an association taxable as a corporation, in effect on the date prior to January 1, 1997, remained the same after

January 1, 1997. In addition, we rule that provided X otherwise qualifies as an S corporation, X is entitled to relief under § 1362(b)(5). Consequently X is classified as a corporation and may elect to be an S corporation effective D2. Within 60 days from the date of this letter, X should submit a properly completed Form 2553, with a copy of this letter attached, to the relevant service center.

Except as expressly provided herein, no opinion is expressed or implied concerning the tax consequences of any aspect of any transaction or item discussed or referenced in this letter.

This ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) 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 sent to your authorized tax 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 section 6110 purposes

Cc: