Internal Revenue Service

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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:B02
PLR-102280-08

Date:
April 04, 2008

Legend:

X:

Date 1:

Date 2:

Date 3:

Date 4:

Date 5:

Date 6:

State:

Year:

A:

a:

b:

c:

d:

Dear :

This responds to a letter dated January 17, 2008, submitted on behalf of X by X's authorized representative, requesting a ruling under § 1362(f) of the Internal Revenue Code.

The information submitted states that X was incorporated in State on Date 1. Pursuant to its Articles of Incorporation, on Date 1, X had a shares of common stock and a shares of preferred stock authorized. The preferred stock and common stock had disparate preemptive rights. X did not, therefore, qualify to be an S corporation because it had two classes of stock. Since its incorporation, all of X's outstanding stock has been owned by A. On Date 2, X's Board of Directors authorized the issuance of b shares of common stock and b shares of preferred stock to A, and stock certificates were issued to A on Date 3. Throughout Year, A purchased c additional shares of common stock and d additional shares of preferred stock. X filed a Form 2553, Election by a Small Business Corporation, effective Date 4. However, in Date 5, during a possible acquisition of X by a third party, an attorney for the third party reviewed X's Articles of Incorporation and questioned whether the preferred stock would be considered a second class of stock under § 1361(b)(1)(D). On Date 6, in order to correct the error, X and A entered into an "Agreement and Plan of Reorganization," under which the preferred stock was eliminated.

A, X's President and sole shareholder, represents that the circumstances resulting in the ineffectiveness of X's election to be an S corporation were inadvertent and that neither A nor X intended to engage in tax avoidance or retroactive tax planning. Further, A and X have treated X as an S corporation for all taxable years beginning on Date 4 and thereafter. A and X agree to make any adjustments (consistent with the treatment of X as an S corporation) that the Secretary may require.

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 75 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 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 1362(f) provides 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 is a small business corporation, or (B) to acquire the required shareholder consents, 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 such ineffectiveness, the corporation shall be treated as an S corporation during the period specified by the Secretary.

Based solely on the information submitted and the representations made, we conclude that X's S corporation election was ineffective for the taxable year beginning Date 4 because X had two classes of stock. We further conclude that the ineffective election was inadvertent within the meaning of § 1362(f). Accordingly, under the provisions of § 1362(f), X will be treated as an S corporation from Date 4, and thereafter, provided that X's S election was not otherwise invalid, or has not otherwise been terminated under § 1362(d). This ruling is contingent on X and its sole shareholder, A, treating X as having been an S corporation for the period beginning Date 4 and thereafter. Accordingly, A in determining A's tax liability for the period beginning Date 4 and thereafter must include the separately stated and non-separately computed items of X as provided in § 1366, make any adjustments to basis provided in § 1367, and take into account any distributions made by X as provided in § 1368. If X or A fail to treat themselves as described above, this ruling shall be null and void.

Except as specifically set forth above, no opinion is expressed or implied as to the federal tax consequences of the transactions described above under any other provisions of the Code. Specifically, no opinion is expressed on whether X was otherwise eligible to be treated as an S corporation.

This ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) of the Code 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 X's authorized representative.

Sincerely,

J. Thomas Hines
Chief, Branch 2
Associate Chief Counsel
(Passthroughs and Special Industries)

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

cc: