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:03
PLR-109292-20

Date:
October 06, 2020

Legend

Company =

State =

Date 1 =

Date 2 =

Date 3 =

Date 4 =

Date 5 =

Agreement 1 =

Agreement 2 =

A =

B =

C =

D =

E =

a =

b =

c =

d =

e =

f =

Dear :

This letter responds to a letter dated April 3, 2020, and subsequent correspondence, submitted on behalf of Company by its authorized representative, requesting a ruling under §1362(f) of the Internal Revenue Code (Code).

Facts

The information submitted states Company was organized on Date 1 as a limited liability company under the laws of State. On Date 2 an operating agreement, Agreement 1, was executed and included provisions in contemplation of Company being treated as a partnership for Federal income tax purposes; however, the applicability of those provisions was not limited to such a situation. On Date 4 Company made an election to be an S corporation effective Date 3. On and after Date 3, the owners of Company were and are A, B, C, D, and E each an eligible S corporation shareholder.

Agreement 1 included the following provisions:

Article I provided,

> 'LLC Units' or 'Units' means measures of ownership in the LLC. The capital structure of the LLC shall consist of Units all of the same class with equal rights for all purposes under this Operating Agreement.

'LLC Unit Percentage' means with respect to an LLC member, the percentage derived from the following fraction: number of LLC Units held by such Member divided by the total number of LLC Units held by all Members (and, thereafter, multiplying said fraction by 100 to arrive at a percentage).

Article III, Section 3.1 provided,

Members. The name, initial capital contribution, LLC Units and LLC Unit Percentage of the Members are set forth in the below table, which shall be amended from time to time to reflect the admission of new Members.

Member Name	Initial Capital Contribution	Units	LLC%
A	a	b	d%
B	a	c	e%

Article V, Section 5.1 provided,

The capital structure of the Company shall consist of one class of LLC Units having equal rights under all provisions of this operating agreement.

Article VI, Section 6.1 provided,

Allocations to Capital Accounts. Except as may be required by the Internal Revenue Code (Title 26 of the United States Code) or the Treasury Regulations (Title 26 of the Code of Federal Regulations) or this Operating Agreement, net profits, net losses, and other items of income, gain, loss, deduction and credit of the Company shall be allocated among the Members ratably in proportion to each Member's LLC Unit Percentage. For example, if a Member has an LLC Unit Percentage of f%, he or she shall be allocated f% of all profits and losses (and other allocation items) for any given tax year.

a. Notwithstanding the foregoing, no item of loss or deduction of the Company shall be allocated to a Member to the extent such allocation would result in a negative balance in such Member's capital account if other Members then have positive balances in their capital accounts. Such loss or deduction shall be allocated first among the Members with positive balances in their capital accounts in proportion to (and to the extent of) such positive balances and thereafter to Members in accordance with their Unit Percentages.

Article VI, Section 6.2 provided,

Tax Allocations. In the case of any special tax allocations allowed under the Internal Revenue Code or Treasury Regulations, the method of allocation and formula determined by the Tax Matters Partner shall be followed so long

> as it complies with state law, the Internal Revenue Code, the Treasury Regulations, and fairly treats each Member. The method of tax allocation selected by the Tax Matters Partner shall be presumed to be “fair to all the members” and any Member or party challenging said al location on these grounds shall bear the burden of proof.

Article VI, Section 6.3 provided,

> Distributions. The Company Members by resolution issued pursuant to this agreement, may make distributions to the Members from time to time in amounts it deems appropriate; however, no distribution shall be declared or made if, after giving it effect, the Company would not be able to pay its debts as they become due in the usual course of business or the Company's total assets would be less than the sum of its total liabilities.

Article VIII, Section 8.1 provided,

> Dissolution. The Company shall be dissolved upon the occurrence of the following event (hereinafter, a “Liquidation Event”): a supermajority vote in interest of Members to dissolve the Company. Despite any provision of state law to the contrary, no other event--including (but not limited to) the withdrawal, removal, death, insolvency, liquidation, dissolution, expulsion, bankruptcy, or physical or mental incapacity of a Member--shall cause the existence of the Company to terminate or dissolve.

Article VIII, Section 8.2 provided,

> Liquidation.
>
> * * *
>
> b. Should a Liquidation Event occur, the Company shall then be liquidated and its affairs shall be wound up-- including preparation of final financial statements and an accounting--by (or at the direction of) the Company Members. All proceeds from the liquidation shall be distributed in accordance with state law, and all LLC Units shall, thereafter, be cancelled. Distributions to the Members shall be made in accordance, and proportion, with the Members' relative Capital Account balances.
>
> c. Final distributions to Members shall not be made until all liabilities have been satisfied and any contingent claims against the Company have been resolved.
>
> d. Upon the completion of the liquidation and distribution of the Company’s assets, the Company shall be terminated and the Managers shall cause the

Company to execute and file a certificate of cancellation in accordance with state law.

Upon learning that Agreement 1's made Company's S election ineffective, Company and A, B, C, D and E executed Agreement 2 that replaced Agreement 1.

Company makes the following eight representations. First, Company intended to file a valid election to be treated as an S corporation, as defined in §1361(a)(1), effective Date 3. Second, Company's election was ineffective solely because of Company being treated as having more than one class of stock for purposes of §1361(b)(1)(D) due to certain provisions in Agreement 1. Because Company had more than one class of stock outstanding at the time that it filed its S election, Company failed to qualify as a small business corporation at the time of filing, causing the S election to be invalid. Third, the Federal income tax returns of Company have been filed for all relevant periods consistent with Company having a valid S election in effect on Date 3 and thereafter, unless its S election otherwise terminates under §1362(d). Fourth, the Federal income tax returns of Company's members have been or will be filed, for all relevant periods, consistent with Company having a valid S election in effect on Date 3 and thereafter, unless its S election otherwise terminates under §1362(d). Fifth, since Date 3, items of income, gain, loss and deduction were made in proportion to each owner's interest in Company. Sixth, as of Date 4, Company, A, B, C, D and E made corrective steps so that Company qualified as a small business corporation within the meaning of §1361(b)(1). Seventh, Company represents that the termination of Company's S corporation election was inadvertent and not motivated by tax avoidance. Eighth, Company and its members have agreed to make such adjustments consistent with the treatment of Company as an S corporation as may be required by the Secretary.

Company requests relief pursuant to §1362(f) due to Agreement 1 having governing provisions that created more than one class of stock.

Law and Analysis

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 1361(b)(1) provides that for purposes of subchapter S, the term "small business corporation" means a domestic corporation, which is not an ineligible corporation and does not have (A) 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 subsection §1361(c)(6)) who is not an individual, (C) have a nonresident alien as a shareholder, and (D) have more than 1 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(a)(1) 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(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 (i) 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 (ii) was terminated under §1362(d)(2) or (3); (2) the Secretary determines that the circumstances resulting in such ineffectiveness or termination were inadvertent; (3) no later than a reasonable period of time after discovery of the circumstances resulting in such ineffectiveness or termination, steps were taken so that the corporation for which the election was made or the 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 of the corporation at any time during the period specified pursuant to §1362(f), agree to make the adjustments (consistent with the treatment of the corporation as an S corporation as may be required by the Secretary with respect to this period, then, notwithstanding the circumstances resulting in such ineffectiveness or termination, the corporation shall be treated as an S corporation during the period specified by the Secretary.

Conclusion

Based on the facts submitted and representations made, we conclude that Company's S election with an effective date of Date 3 was an inadvertent ineffective election within the meaning of §1362(f). Accordingly, under §1362(f), Company will be treated as an S corporation from Date 3, and thereafter, provided the S election for Company is otherwise valid on Date 3 and has not otherwise terminated.

This ruling is contingent on Company and its shareholders must file, if not done so already, within 120 days of the date of this letter, all required federal income tax returns and information returns (including amended returns) consistent with the requested relief.

A copy of this letter should be attached to each such filing.

Except as specifically ruled above, we express or imply no opinion as to the federal income tax consequences of the facts described above under any other provision of the Code, including Company's eligibility to be a valid S corporation.

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

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.

Sincerely,

_____

Richard T. Probst
Senior Technician Reviewer, Branch 3
Office of the Associate Chief Counsel
(Passthroughs & Special Industries)

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

cc: