

INTERNAL REVENUE SERVICE EXTENDS RELIEF FOR LATE ENTITY CLASSIFICATION ELECTIONS

On September 28, 2009, the Internal Revenue Service (“IRS”) issued Revenue Procedure 2009-41 (“Rev. Proc. 2009-41”), which provides relief for taxpayers making a late entity classification election. Rev. Proc. 2009-41 permits relief for certain late entity classification elections and extends the period for making a late entity classification election to three years and 75 days after the requested effective date of such election. Entities that had “reasonable cause” for their failure to timely file an election can qualify for relief under Rev. Proc. 2009-41 if they satisfy the requirements described below.

BACKGROUND

Treasury Regulations provide that a business entity that is not classified as a *per se* corporation (an “eligible entity”) can elect its classification for federal tax purposes. An eligible entity with at least two members can elect to be classified either as an association taxable as a corporation or as a partnership, and an eligible entity with a single owner can elect to be classified as an association taxable as a corporation or to be disregarded as an entity separate from its owner (a “disregarded entity”).

Treasury Regulations also set forth default classifications for eligible entities that do not file an entity classification election. In the absence of such an election, a domestic eligible entity will be classified as (i) a partnership if it has two or more members or (ii) a disregarded entity if it has a single owner. A foreign eligible entity that does not make a classification election will be classified as (i) a partnership if it has two or more members and at least one member does not have limited liability, (ii) an association taxable as a corporation if all members have limited liability, or (iii) a disregarded entity if it has a single owner that does not have limited liability. Thus, an entity classification election generally is necessary only when an eligible entity chooses to be classified initially as other than its default classification or chooses to change its classification.

ENTITY CLASSIFICATION ELECTION

An eligible entity may elect to be classified other than as its default classification or may elect to change its classification by filing Form 8832, “Entity Classification Election,” with the IRS. Such an election generally will be effective on the date specified by the entity on Form 8832, provided that the effective date specified cannot be more than 75 days prior to the date on which the election is filed and cannot be more than 12 months after the date on which the election is filed.

In Revenue Procedure 2002-59 (“Rev. Proc. 2002-59”), the IRS issued guidance permitting a late initial classification election to be filed by the due date for the taxable year beginning with the date of the entity’s formation if the entity had reasonable cause for its failure to file a timely initial election.



REVENUE PROCEDURE 2009-41

Rev. Proc. 2009-41 supersedes Rev. Proc. 2002-59 by (i) extending late entity classification relief to both initial classification elections and changes in classification elections, and (ii) extending the time for filing late entity classification elections to within three years and 75 days of the requested effective date of the eligible entity's classification. Thus, the extended filing period no longer is limited, as it was under Rev. Proc. 2002-59, to newly formed entities requesting relief to file an initial classification election, nor is the extended filing period limited to the due date for the federal tax return for the year of the entity's formation.

ELIGIBILITY FOR RELIEF

An entity is eligible for relief for a late classification election under Rev. Proc. 2009-41 if the following requirements are met:

- (1) The entity failed to obtain its requested initial classification as of the date of its formation solely because Form 8832 was not filed timely, or the entity failed to obtain its requested change in classification solely because Form 8832 was not timely filed;
- (2) Either
 - (i) the entity has not filed a federal tax or information return for the first year in which the election was intended because the due date has not passed for that year's federal tax or information return, or
 - (ii) the entity timely filed all required federal tax returns and information returns consistent with its requested classification for all of the years the entity intended the requested election to be effective and no inconsistent tax or information returns have been filed by the entity during any of the taxable years. If the entity is not required to file a federal tax return or information return, each affected person (*i.e.*, each person required to attach a copy of Form 8832 for the entity to its own federal tax or information return) required to file a tax or information return must have timely filed all such returns consistent with the entity's requested classification for all of the years the entity intended the election to be effective and no inconsistent returns may have been filed;
- (3) The eligible entity has reasonable cause for its failure to timely make the entity classification election; and
- (4) The election is made within three years and 75 days from the requested effective date.

An entity that is not eligible for relief under the foregoing requirements may request relief by applying for a letter ruling.

PROCEDURAL REQUIREMENTS FOR REQUESTING RELIEF

To obtain relief under Rev. Proc. 2009-41, the eligible entity must file with the IRS a completed Form 8832 within three years and 75 days from the requested effective date of the eligible entity's classification election. The Form 8832 must indicate that it is being filed pursuant to Rev. Proc. 2009-41 and must include a declaration that the entity is eligible for relief and a statement explaining the reason for the failure to file a timely election. In addition, the foregoing declaration and statement must be signed under penalties of perjury by an authorized representative of the entity.

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