

Part III

Administrative, Procedural, and Miscellaneous

26 CFR 601.105: Examination of returns and claims for refund, credit or abatement; determination of correct tax liability.
(Also Part I, §§ 1362; 1.1362-6.)

Rev. Proc. 2004-35

SECTION 1. PURPOSE

This revenue procedure provides automatic relief for certain taxpayers requesting relief for late shareholder consents for S corporation elections in community property states.

SECTION 2. BACKGROUND

Section 1361(a)(1) of the Internal Revenue Code defines an "S corporation," with respect to any taxable year, as a small business corporation for which an S corporation election under section 1362(a) is in effect for that year.

Section 1362(a)(2) provides that an election to be an S corporation shall be valid only if all persons who are shareholders in the corporation on the day on which the election is made consent to the election.

Section 1.1362-6(b)(2)(i) of the Income Tax Regulations provides that when stock of the corporation is owned by husband and wife as community property (or the income from the stock is community property), each person having a community interest in the stock or income therefrom must consent to the election.

Section 1.1362-6(b)(3)(iii) provides that an election that is timely filed for any taxable year and that would be valid except for the failure of any shareholder to file a timely consent is not invalid if consents are filed and it is shown to the satisfaction of the service center with which the corporation files its income tax return that (1) there was reasonable cause for the failure to file the consent, (2) the request for the extension of time to file a consent is made within a reasonable time under the circumstances, and (3) the interests of the Government will not be jeopardized by treating the election as valid.

SECTION 3. SCOPE

This revenue procedure provides automatic relief for late filing of shareholder consents for spouses of S corporation shareholders in community property states.

A corporation that does not meet the requirements for relief or is denied relief under this revenue procedure may request relief under § 1.1362-6(b)(3)(iii). The

corporation may also request inadvertent invalid election relief by requesting a letter ruling. The procedural requirements for requesting a letter ruling are described in Rev. Proc. 2004-1, 2004-1 I.R.B. 1 (or its successor).

SECTION 4. AUTOMATIC RELIEF FOR LATE SHAREHOLDER CONSENTS UNDER THIS REVENUE PROCEDURE

.01 Eligibility for Automatic Relief. Automatic relief is available if all of the following conditions are met:

(1) The S corporation election is invalid solely because the Form 2553, Election by a Small Business Corporation, failed to include the signature of a community property spouse who was a shareholder solely pursuant to state community property law; and

(2) Both spouses have reported all items of income, gain, loss, deduction or credit consistent with the S corporation election on all affected federal income tax returns.

.02 Procedural Requirements for Automatic Relief. The corporation must file with the service center with which the corporation files its income tax return a dated statement that includes the following information:

(1) A representation that reads, "This statement is being furnished pursuant to Rev. Proc. 2004-35 for a late filing of shareholder consents for community property spouses of S corporation shareholders in community property states."

(2) The name of the corporation, its employer identification number, its address, date of incorporation, state of incorporation, and the intended effective date of its initially filed Form 2553;

(3) Each spouse's name, social security number or employee identification number, tax year end and the total number of shares owned at the date of the intended election;

(4) A statement that the community property spouses reported all items of income, gain, loss, deduction or credit consistent with the S corporation election on all affected returns;

(5) A signed statement from each of the community property spouses that reads, "Under penalties of perjury, I, [name of community property spouse], declare that I consent to the election to treat [name of S corporation] to be an S corporation under section 1362(a) of the Internal Revenue Code as of [the date that the S corporation intended to be an S corporation] and to the best

of my knowledge and belief, the facts presented in support of this election are true, correct, and complete."

.03 Relief for Failure to File Timely Shareholder Consent to S Corporation Elections. A shareholder that satisfies the requirements of section 4.01 of this revenue procedure will be deemed (1) to have reasonable cause for the failure to consent to the S corporation elections, (2) to have made the request for the extension of time to file a consent within a reasonable time under the circumstances, and (3) to have satisfied the requirement that the interests of the Government will not be jeopardized by treating the election as valid. Accordingly, the shareholder will automatically be granted relief to file the late shareholder consent. The Service will notify the shareholder of the acceptance of the shareholder's request to file the late shareholder consent or of the denial of a request that fails to satisfy the requirements of this revenue procedure.

SECTION 5. EFFECTIVE DATE

This revenue procedure is effective for all applications for relief satisfying the requirements of section 4 of this revenue procedure, including those applications now being considered by the Service.

SECTION 6. PAPERWORK REDUCTION ACT

The collection of information contained in this revenue procedure has been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act (44 U.S.C. 3507) under control number 1545-_____.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number.

The collections of information in this revenue procedure are in section 4.02. This information is required to be submitted to the applicable service center in order to obtain relief for late elections under subchapter S. This information will be used to determine whether the eligibility requirements for obtaining relief have been met. The collection of information is required to obtain a benefit. The likely respondents are business or other for-profit institutions.

The estimated total annual reporting burden is 500 hours.

The estimated annual burden per respondent varies from .5 hours to 7 hours, depending on individual circumstances, with an estimated average burden of 1 hour to complete the statement. The estimated number of respondents is 200.

The estimated annual frequency of responses is on occasion.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law.

Generally tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

SECTION 7. DRAFTING INFORMATION

The principal author of this revenue procedure is Jason T. Smyczek of the Office of the Associate Chief Counsel (Passthroughs and Special Industries.) For further information regarding this revenue procedure contact Mr. Smyczek at (202) 622-3050 (not a toll free call).