
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. 97-40

SECTION 1. PURPOSE

This revenue procedure provides guidance under § 1362(b)(5) of the Internal Revenue Code for requesting relief for late S corporation elections that are filed within 6 months of the due date of the election.

1997-33 I.R.B.

SECTION 2. BACKGROUND

Section 1361(a)(1) defines an “S corporation,” with respect to any taxable year, as a small business corporation for which an S election is in effect for that year.

Section 1362(a)(1) provides that, except in a situation described in § 1362(g), a small business corporation may elect to be treated as an S corporation.

Section 1362(b)(1) provides that the corporation may make an election to be treated as an S corporation (A) at any time during the preceding taxable year, or (B) at any time during the taxable year and on or before the 15th day of the 3rd month of the taxable year. Under § 1362(b)(3), if an S corporation election is made for a taxable year after the 15th day of the 3rd month of that taxable year and on or before the 15th day of the 3rd month of the following taxable year, then the S corporation election is treated as made for the following taxable year.

Section 1362(b)(5) provides that if (A) an election under § 1362(a) is made for any taxable year (determined without regard to § 1362(b)(3)) after the date prescribed by § 1362(b) for making the election for the taxable year or no election is made for any taxable year, and (B) the Secretary determines that there was reasonable cause for the failure to timely make the election, the Secretary may treat the election as timely made for the taxable year (and § 1362(b)(3) shall not apply).

SECTION 3. SCOPE

This revenue procedure provides a special procedure to request relief for a late S corporation election. This revenue procedure applies only to a corporation (1) that has not filed a timely S corporation election under § 1362(a)(1), and (2) for which an S corporation election is filed within 6 months of the original due date for the election. This revenue procedure does not provide relief for late shareholder elections including a qualified subchapter S trust (QSST) election or electing small business trust (ESBT) election. This special procedure is in lieu of the letter ruling procedure that is used to obtain relief for a late S corporation election under § 1362(b)(5). Accordingly, user fees do not apply to corrective action under this revenue procedure. A corporation that is not eligible for relief under this revenue procedure, or is denied

relief, may request relief by applying for a private letter ruling. The procedural requirements for requesting a private letter ruling are described in Rev. Proc. 97-1, 1997-1 I.R.B. 11 (or its successor).

SECTION 4. RELIEF FOR LATE S CORPORATION ELECTIONS UNDER THIS REVENUE PROCEDURE

.01 Eligibility for Relief. A corporation is eligible for relief if it meets the following requirements:

(1) The corporation fails to qualify as an S corporation solely because the Form 2553 (Election by a Small Business Corporation) was not filed timely pursuant to § 1362(b)(1); and

(2) The due date for the tax return (excluding extensions) for the first year the corporation intended to be an S corporation has not passed.

.02 Procedural Requirements for Relief. Within 6 months of the original due date for the S corporation election, the corporation must file with the applicable service center a completed Form 2553, signed by an officer of the corporation authorized to sign and all persons who were shareholders (or deemed to have been shareholders) at any time during the period that began on the first day of the taxable year for which the election is to be effective and ends on the day the election is made. The Form 2553 must state at the top of the document “FILED PURSUANT TO REV. PROC. 97-40.” Attached to the Form 2553 must be a statement explaining the reason for the failure to file a timely S corporation election.

.03 Relief for Late S Corporation Elections. Upon receipt of a completed application requesting relief under this revenue procedure, the Internal Revenue Service will determine if there was reasonable cause for the failure to file a timely S corporation election and will notify the corporation of the result of the reasonable cause determination.

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 1545-1548.

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 control number.

The collection of information in this revenue procedure is in Section 4.02. This information is required to be submitted to the applicable service center in order to obtain relief for late S corporation elections. This information will be used to determine if the reasonable cause requirement in § 1362(b)(5) has 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 200 hours.

The estimated annual burden per respondent varies from .5 hours to 1.5 hours, depending on individual circumstances, with an estimated average of 1 hour. The estimated number of respondents is 200.

The estimated annual frequency of responses is one.

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.

DRAFTING INFORMATION

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