
IRS RELAXES PROCEDURE FOR CURING LATE S CORPORATION ELECTIONS

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In Revenue Procedure 2013-30,¹ the IRS has relaxed significantly the requirements for obtaining relief from failures to timely elect S corporation status, as well as other tax elections often made in connection with an S corporation election.²

Over the years, the IRS has issued numerous procedures for requesting relief from failures to make timely S corporation elections (as well as other related elections).³ Revenue Procedure 2013-30 consolidates these various procedures and also expands the instances in which an entity may obtain relief without resorting to the timely and costly process of seeking a private letter ruling.

Consistent with prior guidance, entities seeking relief must:

1. have intended since the requested effective date to be characterized as an S corporation (or ESBT, QSST, or QSub);
2. have failed to qualify for treatment as an S corporation (or ESBT, QSST, or QSub) solely for failure to timely make the required election; and
3. establish reasonable cause for such failure to timely elect (or, for ESBT and QSST elections, establish that the failure was inadvertent), as

well as that diligent action has been taken to correct the failure.

Additionally, the entity must file for relief under this new guidance within 3 years and 75 days after the intended effective date of the S corporation election (or ESBT, QSST, or QSub election).

While Congress set forth the “reasonable cause” requirement in the Code,⁴ recent IRS rulings indicate that this requirement may not be a difficult obstacle to obtaining relief from failures to timely election S corporation status.⁵ Nevertheless, entities seeking relief for failure to timely elect S corporation status under Revenue Procedure 2013-30 must provide to the IRS a shareholder statement attesting that they have reported for tax purposes consistent with S corporation treatment. (Entities seeking relief for late ESBT, QSST, and QSub elections must make appropriate representations as well.)

This IRS guidance provides multiple procedures for requesting relief. Entities that have failed to timely elect S corporation status may either attach the required materials with a current year tax return (Form 1120S) or a late-filed prior year tax return or submit the required materials separate from any tax return. While this relief procedure is considerably less onerous than the private letter ruling process, relief is not automatically provided and the IRS maintains discretion to deny relief where it determines appropriate.

This guidance is effective as of September 3, 2013, the date of publishing in the Internal Revenue Bulletin, and the IRS has provided transitional rules for entities

1 2013-36 I.R.B. 173 (Sept. 3, 2013).

2 In addition to S corporation elections, Revenue Procedure 2013-30 governs relief procedures for failures to make the following elections: Electing Small Business Trust (ESBT) elections, qualified subchapter S trust (QSST) elections, qualified subchapter S subsidiary (QSub) elections, and late corporate classification elections intended to be made in connection with S corporation elections.

3 Notably, Revenue Procedure 2013-30 modifies, supersedes and/or obsoletes all or a portion of Revenue Procedures 97-48, 2003-43, 2004-48, 2004-49, and 2007-62.

4 Code § 1362(b)(5). References to the “Code” refer to the Internal Revenue Code of 1986, as amended.

5 See, e.g., PLR 201324001 (stating only that the taxpayer “did not timely file an election under § 1362(a) to be treated as an S corporation . . .”).

that initiated the private letter ruling process prior to the issuance of Revenue Procedure 2013-30, but that qualify for relief under this new guidance without the ruling requirement.

Brian Mikulencak has extensive experience representing S corporations and other business entities in all stages of their business lifecycle.

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