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In this article, the authors explain the evolution and relief provisions of Rev. Proc. 2013-30, the uniform late S corporation election relief revenue procedure, and they examine situations in which it could and could not be used over the past decade, highlighting some unintended consequences.

Rev. Proc. 2013-30, 2013-36 IRB 173, was published just over a decade ago, on September 3, 2013. The revenue procedure creates a system under which entities filing a late election can correct their tardiness directly with the IRS service center/campus instead of filing private letter ruling requests with the Passthroughs and Special Industries division of IRS Chief Counsel in Washington.

Rev. Proc. 2013-30 consolidates, modifies, supersedes, and obsoletes a series of revenue procedures that evolved between 1997 and 2007 into a single, one-stop shop for relief for late elections related to S corporations. It provides late election relief for:

- S corporation elections;
- electing small business trust (ESBT) elections;
- qualified subchapter S trust elections;
- qualified subchapter S subsidiary elections; and
- check-the-box elections for an eligible entity intended to take effect on the same date that the S corporation election would take effect.

This is why Rev. Proc. 2013-30 is often referred to as the uniform late S corporation election relief revenue procedure.

Generally, the relief afforded to taxpayers can be granted by the IRS when the entity fails to qualify for its intended status (an S corporation, QSub, QSST, or ESBT) solely because it failed to file the appropriate election with the IRS *and* all returns reported their respective income consistently as if the late election(s) were in effect.

This article summarizes the legal requirements of each of the elections covered by Rev. Proc. 2013-30 and briefly examines the revenue procedures issued between 1997 and 2007 that it replaced. We examine the relief provisions in Rev. Proc. 2013-30, along with some background on how the revenue procedure was developed. Finally, the article provides practitioner commentary on situations that have occurred over the last 10 years when Rev. Proc. 2013-30 could and could not be used, and it highlights some unintended consequences.

I. Elections Covered by Rev. Proc. 2013-30

A variety of elections may be required for a business entity to be taxed under the provisions of subchapter S. The headliner, of course, is that an affirmative election must be made to treat the business entity as an S corporation. In some situations, before electing S status, that business entity must elect — or be deemed to elect — to be taxed as a corporation for federal income tax

purposes. Moreover, only certain types of trusts are permitted shareholders of an S corporation. To meet the definition of two of those qualifying trusts — an ESBT and a QSST — an affirmative election is required as well. Lastly, an S corporation may treat a wholly owned corporate subsidiary as an entity disregarded as separate from the S corporation, but only if a QSub election is timely filed. What follows is a detailed discussion of the requirements for each of these five elections.

A. S Corporation Elections

A small business corporation that wishes to be an S corporation makes an S corporation election by timely filing Form 2553, "Election by a Small Business Corporation."[1] Form 2553 can be filed by either mail or fax. The IRS will notify the corporation whether its S corporation election is accepted and, if accepted, when it will take effect.[2]

A small business corporation may make an S corporation election for any tax year (1) at any time during the preceding tax year or (2) at any time during the tax year and on or before the 15th day of the third month of the tax year.[3] If an S corporation election is made after the 15th day of the third month of the tax year and on or before the 15th day of the third month of the following tax year, the S corporation election is treated as made for that following tax year.[4]

B. QSST Elections

As mentioned, a QSST is a permitted S corporation shareholder.[5] A trust is considered a QSST only if several requirements are met.[6] First, the trust terms must require that (1) during the life of the current income beneficiary, there is only one income beneficiary of the trust; (2) any corpus distributed during the income beneficiary's life can be distributed only to the income beneficiary; (3) the current beneficiary's income interest must terminate on the earlier of that beneficiary's death or the termination of the trust; and (4) upon termination of the trust during the life of the current income beneficiary, the trust must distribute all its assets to its income beneficiary. Second, all the trust's income must be distributed (or required to be distributed) to one individual, who is a citizen or resident of the United States.[7]

The beneficiary of the trust must make the QSST election by signing and filing an election statement with the applicable IRS service center.[8] The beneficiary must make the QSST election within the two-month-and-16-day period beginning on the day that the S corporation stock is transferred to the trust.[9] Once the beneficiary of the trust makes the QSST election, that person is treated as the owner[10] of the portion of the trust that consists of stock in an S corporation.[11]

C. ESBT Elections

As also mentioned, an ESBT is a permitted S corporation shareholder if several requirements are met.[12] First, the trust must not have any beneficiaries other than an individual, an estate, or certain charitable organizations.[13] Second, any beneficiary of the trust must not have purchased their interest in the ESBT.[14] Third, an election under section 1361(e) must apply to the trust.[15] However, the following trusts are ineligible to be ESBTs: (1) any QSST (as defined in section 1361(d)(3)) if an election under section 1361(d)(2) applies to any corporation whose stock is held by that trust; (2) any tax-exempt trust under subtitle A; and (3) any charitable remainder annuity trust or charitable remainder unitrust (as defined in section 664(d)).[16]

[1] Reg. section 1.1362-6(a)(2).

[2] Instructions to Form 2553 (Dec. 2017 version).

[3] Section 1362(b)(1).

[4] Section 1362(b)(3).

[5] Section 1361(d).

[6] Section 1361(d)(3).

[7] *Id.*

[8] Section 1361(d)(1) and (2).

[9] Reg. section 1.1361-1(j)(6)(iii)(A).

[10] The beneficiary of the trust will be treated as the owner of the trust for purposes of section 678(a).

[11] Section 1361(d)(1).

[12] Section 1361(c)(2)(A)(v) and (e).

[13] *See* section 1361(e)(1)(A)(i) (eligible charitable organizations include an organization described in section 170(c)(2), (3), (4), or (5), or an organization described in section 170(c)(1) that holds a contingent interest in the trust and is not a potential current beneficiary).

[14] Section 1361(e)(1)(A)(ii); *see* section 1361(e)(1)(C) (for purposes of subparagraph (A), the term "purchase" means any acquisition if the basis of the property acquired is determined under section 1012).

[15] Section 1361(e)(1)(A)(iii).

[16] Section 1361(e)(1)(B).

The trustee of the trust must make the ESBT election by filing and signing a statement that meets the requirements of reg. section 1.1361-1(m)(2)(ii) with the IRS service center where the S corporation files its income tax return.[17] The trustee must file the ESBT election within the time requirements prescribed in reg. section 1.1361-1(j)(6)(iii) for filing a QSST election — that is, the two-month-and-16-day period beginning on the day that the S corporation stock is transferred to the trust, as described above.[18] The election applies to the tax year of the trust for which the election was made and all subsequent tax years of that trust unless revoked with the consent of the Treasury secretary.

D. QSub Elections

An S corporation may elect to treat one or more certain wholly owned subsidiaries as QSubs.[19] A QSub must be a corporation that is otherwise eligible to be an S corporation, and an S corporation must hold 100 percent of the stock of the corporation.[20] A QSub is not treated as a separate corporation.[21] Instead, all assets, liabilities, and items of income, deduction, and credit of the QSub are treated as assets, liabilities, and items of income, deduction, and credit of the parent S corporation.[22]

An S corporation makes a QSub election by filing Form 8869, "Qualified Subchapter S Subsidiary Election," with the applicable IRS service center.[23] A QSub election may be filed at any time during the tax year.[24] The election is effective on the date specified on Form 8869 or, if no date is specified, on the date that Form 8869 is filed.[25] However, the date specified on Form 8869 cannot be earlier than two months and 15 days before the filing date.[26] Further, the date specified on Form 8869 cannot be more than 12 months after the date that the form was filed.[27] If Form 8869 specifies an effective date more than two months and 15 days before the date on which Form 8869 is filed, the QSub election will be effective two months and 15 days before the date that Form 8869 is filed. If Form 8869 specifies an effective date more than 12 months after the date on which Form 8869 is filed, the QSub election will be effective 12 months after the date Form 8869 is filed.[28]

E. Check-the-Box Elections

A business entity is any entity recognized for federal tax purposes that is not properly classified as a trust under reg. section 301.7701-4 or otherwise subject to special treatment under the code.[29] A business entity that is not classified as a corporation under reg. section 301.7701-2(b) can elect its classification for federal tax purposes.[30] Under the check-the-box regulations, default rules exist when business entities do not make an election to be treated as a specific business entity. Domestic business entities with one or more members will be treated as a partnership for tax purposes unless the entity elects otherwise.[31] Domestic business entities with one member will be treated as an entity disregarded as separate from its owner, or a sole proprietorship, unless the entity elects otherwise.[32]

If an eligible entity does not want to be classified under the default rules, it must make an election to be classified differently. The entity must make a check-the-box election by filing Form 8832, "Entity Classification Election," with the IRS campus designated on Form 8832. If an entity makes a check-the-box election, the election is effective on the date specified on Form 8832. If no date is specified, the check-the-box election is

[17] Section 1361(e)(3); reg. section 1.1361-1(m)(2)(i).

[18] Reg. section 1.1361-1(m)(2)(iii).

[19] Section 1361.

[20] Section 1361(b)(3)(B).

[21] Section 1361(b)(3)(A).

[22] *Id.*

[23] Reg. section 1.1361-3(a)(2).

[24] Reg. section 1.1361-3(a)(3).

[25] Reg. section 1.1361-3(a)(4).

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] Reg. section 301.7701-2(a).

[30] Reg. section 301.7701-3(a).

[31] *Id.*

[32] *Id.*

effective on the date that Form 8832 was filed. However, the date specified on Form 8832 cannot be (1) more than 75 days before the date on which the election was filed or (2) more than 12 months after the date on which the election was filed. If an eligible entity makes a check-the-box election, it cannot change its tax classification again during the next 60 months.[33]

An eligible entity that timely elects to be an S corporation under section 1362(a)(1) is treated as also having made an election to be classified as an association if the entity meets all other requirements to qualify as a small business corporation (as of the effective date of the S corporation election).[34] Further, the entity must make the elections by filing Form 2553.

II. Legal Authority to Grant Late Elections

Before the IRS could publish Rev. Proc. 2013-30 and its predecessors, the legal authority had to exist to allow the IRS to grant relief from the failure to timely file any of the five elections discussed above.

A. Late S Corporation Elections

Section 1362(b)(5) provides that if (1) an election under section 1362(a) is made for any tax year (determined without regard to section 1362(b)(3)) after the date prescribed by section 1362(b) for making the election for the tax year, or no election is made for any tax year, and (2) 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 tax year (and section 1362(b)(3) will not apply).

This is the legal authority used to create the provisions in Rev. Proc. 2013-30 granting late election relief for S corporation elections.

B. Late ESBT and QSST Elections

If the beneficiary or trustee of a trust fails to properly make a QSST or ESBT election, the results can be fatal to the corporation's S status. This is because the failure to properly file the QSST or ESBT election may result in a shareholder who is not an eligible S corporation shareholder under section 1361(b)(1)(B) holding stock of the corporation. If there is an ineligible shareholder, the S corporation election is inadvertently invalid or terminated. Specifically, an election under section 1362(a) is terminated whenever (at any time on or after the first day of the first tax year for which the corporation is an S corporation) that corporation ceases to be a small business corporation.[35] If the S corporation's election is terminated, the termination is effective on and after the date of termination.[36]

However, section 1362(f) can provide relief in cases in which the secretary determines that an S corporation's election was inadvertently invalid or inadvertently terminated. To obtain relief under section 1362(f), several requirements must be met. First, the corporation must take steps to ensure that the corporation is a small business corporation or acquire the required shareholder consents within a reasonable time after the corporation finds out about the inadvertent termination.[37] Second, the corporation and each of its shareholders must agree to make the adjustments (consistent with the treatment of the corporation as an S corporation) required by the secretary.[38] If the corporation meets these requirements, it will be treated as an S corporation during the period in which its S corporation election was inadvertently terminated.[39]

In cases in which an S corporation's election was inadvertently invalid or terminated, the corporation can request a private letter ruling from the IRS.[40] The letter ruling request should include all relevant facts and circumstances regarding the S corporation election. Specifically, it should include: (1) the date (or intended date) of the corporation's election; (2) details about the cause of the election's invalidity or termination; (3) when and how the event was discovered by the

[33] However, under reg. section 301.7701-3(c)(1)(iv), a check-the-box election upon formation does not count as a change for purposes of the 60-month rule.

[34] Reg. section 301.7701-3(c)(1)(v)(C).

[35] Section 1362(d)(2)(A).

[36] Section 1362(d)(2)(B).

[37] Section 1362(f)(3).

[38] Section 1362(f)(4).

[39] *Id.*

[40] Reg. section 1.1362-4(c).

corporation; and (4) the steps taken by the corporation to eliminate the cause of the invalidity or termination.[41]

This is the legal authority used to create the provisions in Rev. Proc. 2013-30 granting late election relief for ESBT and QSST elections.

C. Late QSub Elections

A QSub election is considered a regulatory election because it is an election with a due date prescribed by a regulation published in the *Federal Register*; or a revenue ruling, revenue procedure, notice, or announcement published in the Internal Revenue Bulletin.[42] Since a QSub election is a regulatory election, the commissioner may permit a late QSub election under the rules set forth in reg. section 301.9100-3.

If a taxpayer seeking relief takes "corrective action," automatic six-month or 12-month extensions to make certain elections can be granted.[43] Corrective action means that the taxpayer must file an original or amended return for the year in which the election should have been made and attach the required form for making the election.[44] Further, taxpayers electing automatic extensions must file their return consistently with the election and comply with all other requirements for making the election for the year in which the election should have been made and for all affected years.[45] If the taxpayer fails to take corrective action, the IRS may invalidate the election.[46]

A six-month extension can be granted for any statutory or regulatory election with the same due date as the return (including extensions).[47] A 12-month extension can be granted for certain regulatory elections, regardless of whether the taxpayer timely filed its return.[48]

Additional relief is available under reg. section 301.9100-3 for making elections when automatic relief under reg. section 301.9100-2 is unavailable. Specifically, nonautomatic extensions of time can be granted in circumstances in which the taxpayer acted reasonably and in good faith, and when the grant of relief will not prejudice the interests of the government.[49] For purposes of reg. section 301.9100-3, a taxpayer is deemed to have acted reasonably and in good faith if it (1) applies for a nonautomatic extension before the IRS discovers the failure to make the election; (2) failed to make the election because of intervening events beyond the taxpayer's control; (3) failed to make the election because, after exercising reasonable diligence (taking into account the taxpayer's experience and the complexity of the return or issue), was unaware of the necessity for the election; (4) reasonably relied on the written advice of the IRS; or (5) reasonably relied on a qualified tax professional, including a tax professional employed by the taxpayer, and the tax professional failed to make or advise the taxpayer to make the election.[50]

To request relief under reg. section 301.9100-3, the taxpayer must follow the procedures for private letter ruling requests and must pay a substantial user fee.[51] Further, the request must include the following: (1) an affidavit from the taxpayer describing the events that led to the failure to make a valid regulatory election and to the discovery of the failure, signed under penalties of perjury; (2) affidavits from the individuals having knowledge or information about the events that led to the failure to make a valid regulatory election and to the discovery of the failure that are signed under penalties of perjury; and (3) information regarding the return with which the election should have been made, including whether the return is under exam, and copies of documents referring to the election.[52]

Because a QSub election is a regulatory election, reg. section 301.9100-3 is the legal authority used to create the provisions in Rev.

[41] *Id.*

[42] Reg. section 301.9100-1(b).

[43] Reg. section 301.9100-2.

[44] Reg. section 301.9100-2(c).

[45] *Id.*

[46] *Id.*

[47] Reg. section 301.9100-2(b).

[48] Reg. section 301.9100-2(a)(1).

[49] Reg. section 301.9100-3.

[50] Reg. section 301.9100-2(b)(1).

[51] Reg. section 301.9100-3(e)(5).

[52] Reg. section 301.9100-3(e)(1)-(4).

Proc. 2013-30 granting late election relief for QSub elections.

D. Late Check-the-Box Elections

If an eligible entity fails to make a timely check-the-box election, the commissioner may grant a reasonable extension to make a regulatory election if (1) the taxpayer can demonstrate that it acted reasonably and in good faith; and (2) the interests of the government will not be prejudiced.[53]

Similarly, if an entity that wishes to make both an entity classification election and an S corporation election fails to timely file either Form 8832 or Form 2553, the entity may be able to obtain relief. When an entity timely files Form 2553 but does not timely file Form 8832, the entity is deemed to have timely filed Form 8832.[54] If the entity instead timely filed Form 8832 but did not timely file Form 2553, the entity may be required to obtain a private letter ruling to obtain relief.

For the same reasons discussed in the preceding section, because an entity classification election is a regulatory election, reg. section 301.9100-3 is the legal authority used to create the provisions in Rev. Proc. 2013-30 granting late election relief for QSub elections.

III. The Predecessor Revenue Procedures

Equipped with the authority under section 1362(b)(5) and (f) and reg. section 301.9100-3, the IRS has all the tools necessary to fix erroneous situations that taxpayers and tax advisers inadvertently get themselves into. But the default method of resolution is through the private letter ruling process described in the first revenue procedure issued every year (Rev. Proc. 20XX-1). However, private letter rulings are costly to taxpayers and are time-consuming for taxpayers, their advisers, and the IRS National Office. As such, the IRS has used the noted statutory and regulatory authority to issue revenue procedures to reduce the number of letter ruling requests submitted to the IRS.

In our opinion, these revenue procedures save taxpayers millions of dollars in professional fees and IRS user fees and, at the same time, save countless tax practitioners from malpractice claims. And for the IRS National Office, shifting the corrective action and "fixes" to the IRS service centers frees up scarce resources that can be redirected to focus on more important projects, such as regulations, revenue rulings, and other items (including other revenue procedures) that benefit the American tax system as a whole.

A. Rev. Proc. 97-48

Rev. Proc. 97-48, 1997-2 C.B. 521, provides special procedures to obtain automatic relief for certain late S corporation elections. However, it does not provide relief for late ESBT, QSST, or QSub elections.[55] The procedures set forth in Rev. Proc. 97-48 are in lieu of the private letter ruling process under section 1362(b)(5). Thus, corporations seeking relief under Rev. Proc. 97-48 do not need to pay the user fee associated with the letter ruling process.[56]

Generally, relief is available in situations in which (1) a corporation intends to be an S corporation; (2) the corporation and its shareholders reported their income consistently with S corporation status for the tax year the S corporation election should have been made and for every subsequent year; and (3) the corporation did not receive notification from the IRS regarding any problem with the S corporation status within six months of the date on which the Form 1120S, "U.S. Income Tax Return for an S Corporation," for the first year was timely filed.[57]

Corporations seeking relief under Rev. Proc. 97-48 must file a completed Form 2553 with the applicable service center. Further, Form 2553 must include several different things. First, it must include the signatures of an officer of the corporation and all the shareholders during the time when the corporation intended to be an S corporation.[58] Second, the following statement must be included at the top of Form 2553: "FILED

[53] Reg. sections 301.9100-1(c) and 301.9100-3.

[54] Reg. section 301.7701-3(c)(1)(v)(C) (effective for elections filed after July 20, 2004). This is the case only if all requirements for eligibility are met at the time of the election.

[55] Rev. Proc. 97-48, section 3.2.

[56] *Id.* at section 3.1.

[57] *Id.* at sections 3.1 and 4.01(1).

[58] *Id.* at section 4.01(2).

PURSUANT TO REV. PROC. 97-48."[59] Third, a declaration signed under penalties of perjury by an officer of the corporation and all shareholders of the corporation during the time when the corporation intended to be an S corporation must be included and state that the corporation and the shareholders reported their income consistently with S corporation status for the year in which the election was made and all subsequent tax years.

Rev. Proc. 2013-30 incorporates certain relief provisions included in Rev. Proc. 97-48 and supersedes the relief provided in section 3.1 of Rev. Proc. 97-48 when a corporation intended to be an S corporation. Rev. Proc. 2013-30 also obsoletes the transitional relief provided in section 3.2 of Rev. Proc. 97-48 when a corporation intended to be an S corporation but late election relief was not available for periods before January 1, 1997, since that relief was no longer applicable in 2013.

B. Rev. Proc. 2003-43

Rev. Proc. 2003-43, 2003-1 C.B. 998, provides simplified methods for taxpayers to request relief for late S corporation elections. Unlike Rev. Proc. 97-48, it also provides relief for late ESBT, QSST, and QSub elections.

To use Rev. Proc. 2003-43, first, the entity must fail to qualify as an S corporation, ESBT, QSST, or QSub solely because of the failure to timely file the corresponding election.[60] Second, less than 18 (or, in some cases, 24) months must have passed since the original due date of the S corporation election.[61] Third, the entity must show reasonable cause why the S corporation election was not timely filed.[62] Fourth, all taxpayers whose tax liability or tax returns would be affected by the election (including all shareholders of the S corporation) must have reported consistently with the corresponding election on all affected returns for the year the election was intended and for any subsequent years.[63]

The deadline for filing for relief under Rev. Proc. 2003-43 turns on whether the entity has filed Form 1120S. If the entity did not file Form 1120S, it must make the S corporation election by filing Form 2553 by the earlier of (1) 18 months after the original due date for the S corporation election[64] or (2) six months after the due date of Form 1120S (excluding extensions) for the first year in which the S corporation election was intended.[65]

If, instead, the entity has filed Form 1120S for the first year in which the S corporation election was intended, the entity must request relief under Rev. Proc. 2003-43 within 24 months of the original due date of the S corporation election. The entity must have also filed Form 1120S within six months of the original due date of Form 1120S (excluding extensions).[66] Further, certain additional documents must be attached to the election form.

If the entity is seeking relief for a late S corporation election, it must file a completed Form 2553. Form 2553 must be signed by an officer of the corporation and by all shareholders who were shareholders during the time when the corporation intended to be an S corporation. Form 2553 must also include (1) statements from all shareholders during the period between the date the S corporation election was to have become effective and the date the completed election was filed that they have reported their income (on all affected returns) consistently with the S corporation election for the year the election should have been made and for all subsequent years; and (2) a dated declaration signed by the officer of the corporation that is made under penalties of perjury.[67]

If the entity is seeking relief for a late ESBT or QSST election, the trustee or current income beneficiary must sign and file the ESBT or QSST election with the applicable IRS service center. The completed election form must also contain the following:

- a statement from the trustee of the ESBT or current income beneficiary of the QSST that

[59] *Id.*

[60] Rev. Proc. 2003-43, section 4.02(1).

[61] *Id.* at section 4.02(2).

[62] *Id.* at section 4.02(3).

[63] *Id.* at section 4.02(4).

[64] *Id.* at section 4.03(1).

[65] *Id.* at section 4.03(2).

[66] *Id.* at section 4.03(2).

[67] *Id.* at section 4.03(2)(a).

includes the information required by reg. section 1.1361-1(m)(2)(ii) or (j)(6)(ii) for ESBT and QSST elections, respectively;
- for a QSST, a statement from the trustee that the trust satisfies the QSST requirements of section 1361(d)(3) and that the income distribution requirements have been and will continue to be met;
- for an ESBT, a statement from the trustee that all potential current beneficiaries meet the shareholder requirements of section 1361(b)(1) and that the trust satisfies the requirements of an ESBT under section 1361(e)(1) other than the requirement to make an ESBT election;
- a statement from the trustee of the ESBT or the current income beneficiary of the QSST that the beneficiary or trustee acted diligently to correct the mistake upon discovery;
- statements from all shareholders during the period between the date the S corporation election was to have become effective and the date the completed election was filed that they have reported their income (on all affected returns) consistently with the S corporation election for the year the election should have been made and for all subsequent years; and
- a dated declaration signed by the trustee of the ESBT or the current income beneficiary of the QSST which states: "Under penalties of perjury, I declare that, to the best of my knowledge and belief, the facts presented in support of this election are true, correct, and complete."[68]

C. Rev. Proc. 2004-48

Rev. Proc. 2004-48, 2004-2 C.B. 172, provides a simplified method for taxpayers to request relief for late S corporation elections and late corporate classification elections that were intended to be effective on the same date that the S corporation election was intended to be effective. Under Rev. Proc. 2004-48, generally, certain eligible entities may be granted relief if several requirements are met.

First, the entity must file a properly completed Form 2553 no later than six months after the due date for the tax return, excluding extensions, for the first tax year the entity intended to be an S corporation.[69] The entity must also include the following language at the top of the Form 2553: "FILED PURSUANT TO REV. PROC. 2004-48."[70] The entity must attach a statement explaining the reason for the failure to timely file the S corporation election and a statement explaining the reason for the failure to timely file the entity classification election to the Form 2553.[71] Once the IRS receives the entity's application, it will determine whether the entity satisfied the requirements for granting additional time to file.[72] The IRS will then notify the entity of the result of that determination.[73]

D. Rev. Proc. 2004-49

Rev. Proc. 2004-49, 2004-2 C.B. 210, supplements Rev. Proc. 2003-43 and provides an alternate method of relief when a QSub election is terminated because of a transfer (whether by sale or as part of a reorganization under section 368(a)(1)(A), (C), or (D) but not as part of a reorganization under section 368(a)(1)(F)) by the S corporation of 100 percent of the QSub stock to another S corporation.

An acquiring S corporation can request relief under Rev. Proc. 2004-49 by attaching a completed Form 8869 to its timely filed return (including extensions) for the tax year during which the transfer occurred.[74] The entity must also include the following statement at the top of Form 8869: "FILED PURSUANT TO REV. PROC. 2004-49."[75] Further, the entity must specify the effective date of the QSub election (that is, the date on which the transaction occurred) on Form 8869.[76] The effective date of Rev. Proc. 2004-49 is August 16, 2004; however, Rev. Proc. 2004-49 offers

[68] *Id.* at section 4.03(2)(b).

[69] *Id.* at section 4.02.

[70] *Id.*

[71] *Id.*

[72] Rev. Proc. 2004-48, section 4.03.

[73] *Id.*

[74] Rev. Proc. 2004-49, section 4.01.

[75] *Id.*

[76] *Id.*

retroactive relief for entities engaged in such transactions if they occurred before August 16, 2004, if the relief requests were filed before August 16, 2005. The prospective relief granted in Rev. Proc. 2004-49 has been modified and superseded by Rev. Proc. 2013-30, which is discussed later.[77]

E. Rev. Proc. 2007-62

Rev. Proc 2007-62, 2007-2 C.B. 786, supplements Rev. Proc. 2003-43 and Rev. Proc. 2004-48 by providing simplified methods for obtaining relief for late S corporation elections if certain requirements are met.

Specifically, Rev. Proc. 2007-62 allows small businesses that missed filing Form 2553 to file the form simultaneously with their first Form 1120S. Rev. Proc. 2007-62 is effective for tax years that end on or after December 31, 2007.

To qualify for relief for a late S corporation election under Rev. Proc. 2007-62, several requirements must be met.[78] First, the entity must fail to qualify for its intended status as an S corporation on the first day that status was desired, solely because of the failure to file a timely Form 2553.[79] Second, the entity must have reasonable cause for its failure to timely file Form 2553.[80] Third, the entity seeking to make the S corporation election must not have filed a tax return for the first year in which the election was intended.[81] Fourth, the application for relief must be filed no later than six months after the due date of the tax return (excluding extensions) of the entity seeking to make the election for the first tax year in which the election was intended.[82] Fifth, no taxpayer whose tax liability or tax return would be affected by the S corporation election (including all shareholders of the S corporation) has reported inconsistently with the S corporation election on any affected return for the year the S corporation election was intended.[83]

In addition to providing relief for late S corporation elections, Rev. Proc. 2007-62 also provides relief for late check-the-box elections.[84] To qualify for a late check-the-box election, eight requirements must be met. First, the entity must be an eligible entity under reg. section 301.7701-3(a).[85] Second, the entity must have intended to be classified as a corporation as of the intended effective date of the S corporation status.[86] Third, the entity must fail to qualify as a corporation solely because Form 8832 was not timely filed (or not filed at all).[87] Fourth, the entity must fail to qualify as an S corporation because the entity did not file Form 2553.[88] Fifth, the entity must have reasonable cause for its failure to timely file Form 8832 and Form 2553.[89] Sixth, the entity seeking to make the S corporation election has not filed a tax return for the first tax year in which the election was intended to be effective.[90] Seventh, the entity must file an application for relief under Rev. Proc. 2007-62 within six months (excluding extensions) of the due date of the entity's S corporation return.[91] Eighth, no taxpayer whose tax liability or tax return would be affected by the S corporation election (including all shareholders of the S corporation) has reported inconsistently with the S corporation election on any affected return for the year the S corporation election was intended.[92]

An entity may request relief for a late S corporation election and a late check-the-box election by filing with the applicable IRS campus a properly completed Form 2553 with a Form 1120S for the first tax year the entity intended to be an S corporation.[93] A properly completed Form 2553 includes a statement establishing reasonable

[77] Technically, Rev. Proc. 2013-30 incorporates certain relief provisions included in Rev. Proc. 2004-49 and modifies and supersedes the relief provided in sections 4.01 and 4.02 of Rev. Proc. 2004-49. Rev. Proc. 2013-30 obsoletes the relief provided in section 4.03 of Rev. Proc. 2004-49 because the time period for its narrow scope of relief has expired.

[78] Rev. Proc. 2007-62, section 4.01.

[79] *Id.* at section 4.01(1).

[80] *Id.* at section 4.01(2).

[81] *Id.* at section 4.01(3).

[82] *Id.* at section 4.01(4).

[83] *Id.* at section 4.01(5).

[84] *Id.* at section 5.

[85] *Id.* at section 5.01(1).

[86] *Id.* at section 5.01(2).

[87] *Id.* at section 5.01(3).

[88] *Id.* at section 5.01(4).

[89] *Id.* at section 5.01(5).

[90] *Id.* at section 5.01(6).

[91] *Id.* at section 5.01(7).

[92] *Id.* at section 5.01(8).

[93] *Id.* at sections 4.02 and section 5.02.

cause for the failure to timely file the S corporation election.[94] Form 1120S and Form 2553 must be filed together no later than six months after the due date of the tax return (excluding extensions) of the entity for the first tax year in which the S corporation election was intended.[95] Upon receipt of a completed application requesting relief under Rev. Proc. 2007-62, the IRS will determine whether the requirements for granting relief for the late S corporation election have been satisfied.[96] Rev. Proc. 2007-62 is effective for S corporation elections and check-the-box elections intended to be effective for tax years ending on or after December 31, 2007.[97]

Before Rev. Proc. 2007-62, taxpayers had to submit Form 2553 along with a statement explaining the reasons for the late election. Thus, Rev. Proc. 2007-62 provides a simplified method to request relief by permitting taxpayers to file their first Form 1120S along with Form 2553 and include the statement on the form. The new procedures in Rev. Proc. 2007-62 were intended to reduce taxpayers' burdens by allowing the IRS to process properly completed tax returns and corresponding elections without delays or additional contact with taxpayers to resolve the issue of a missing election.

IV. Behind the Scenes of Rev. Proc. 2013-30

To fully understand Rev. Proc. 2013-30 requires a small peek behind the curtain into the drafting process. Because one of the authors of this article was also the primary drafter of Rev. Proc. 2013-30, albeit 10 years ago, we can share with our readers some of the guiding principles and logic used during the three-plus years it took to publish the revenue procedure.

A. Procedural Rationale for Consolidation

Discussion surrounding updating the various S corporation revenue procedures began, at least in earnest, following the release of Rev. Proc. 2009-41, 2009-39 IRB 439. Rev. Proc. 2009-41 provides relief for late entity classification elections for an eligible entity's initial classification election or change in classification election. Eligible entities meeting the requirements under section 4 of that revenue procedure must request relief within three years and 75 days of the requested effective date of the eligible entity's classification election.

Once Rev. Proc. 2009-41 was issued with a three-year-plus-75-days window for filing late check-the-box elections, it put the two-year window allowed for deemed check-the-box elections with S elections covered in Rev. Proc. 2007-62 at a disadvantage. If an eligible entity wanted to be a C corporation, it could use Rev. Proc. 2009-41 to get late election relief going back three years. But if the same taxpayer wanted to be an S corporation, Rev. Proc. 2009-41 couldn't help them. They could use Rev. Proc. 2009-41 to make a check-the-box election three years back, but they would only be a C corporation. To be an S corporation, they could only "throw" the late S corporation election back two years. That created a situation in which taxpayers could do one of two things: (1) have their first year as a C corporation and convert to an S corporation[98] or (2) apply for a private letter ruling. Thus, taxpayers were left to choose between the lesser of two evils.

Consequently, it seemed logical — or at least equitable — to amend Rev. Proc. 2007-62 to align with the time limit in Rev. Proc. 2009-41. But if it were only that easy.

Recall that Rev. Proc. 2007-62 had a two-year late relief period but so did Rev. Proc. 2003-43, so if a taxpayer organized as a limited liability company could use an amended Rev. Proc. 2007-62 with a three-year relief window to get S corporation status, a state law corporation would be stuck with only a two-year window under Rev. Proc. 2003-43. That did not strike many as equitable. So the thread started to get pulled such that a policy decision was made to align all the S corporation-related revenue procedures described in the proceeding section with the new "policy" of a three-year late election relief option

[94] *Id.*

[95] *Id.*

[96] *Id.* at sections 4.03 and 5.03.

[97] *Id.* at section 7.

[98] This would, of course, come with all the unfortunate consequences of converting a C corporation to an S corporation, such as (1) potentially having to pay the section 1374 built-in gains tax (which, at the time, was a 10-year issue); (2) potentially having corporate earnings and profits that could cause an S corporation termination if the company has too much passive income in the future; and (3) having last-in, first-out recapture if it used that inventory method before becoming an S corporation.

that could be done at the IRS service center without a private letter ruling.

Once the decision was made to align the time limits in S corporation-related revenue procedures with Rev. Proc. 2009-41, the next step was to determine *how* that should be done. One option was to simply issue another revenue procedure that cross-referenced the old revenue procedures and would say something to the effect of "replace 24 months with three years and 75 days of the requested effective date." Although this may have been the path of least resistance, it had great potential to confuse taxpayers and tax advisers because, contrary to popular belief, not every taxpayer or tax adviser knows revenue procedures by heart. So there was the very real possibility that people would, for example, find Rev. Proc. 2003-43 on the internet and believe that the time limit for relief is still two years because they wouldn't connect the dots to the new procedure updating only that specific aspect while leaving the rest of Rev. Proc. 2003-43 intact. Given that potential downside, the IRS was faced with the unenviable task of trying to consolidate all the revenue procedures into what would become the uniform late S corporation election relief revenue procedure, or Rev. Proc. 2013-30, about three years later.

Of course, a new variant of the same question resurfaced — *how* exactly should an omnibus-style revenue procedure operate? There was one dominant guiding principle: Relief should only be expanded. Taxpayers should not be denied relief under the new revenue procedure if they were eligible under one of the predecessor revenue procedures; the time limit relief should simply be extended to align with Rev. Proc. 2009-41.

Did it work? If you want to know, keep reading.

B. Burden on Taxpayers and the IRS

Another stated reason for the issuance of Rev. Proc. 2013-30 was to reduce the burden on taxpayers and the IRS National Office.

As part of the writing of this article, we conducted a simple search of published private letter rulings between 2009 and 2018 to see if there was any statically significant reduction in the number of issued rulings after the release of Rev. Proc. 2013-30.[99] For the period from 2009 to 2013, our query found 726 private letter rulings. For the period from 2014 to 2018, our query found 303 private letter rulings.

It would be a little too presumptuous for us to conclude that the revenue procedure was the sole reason that number of private letter rulings decreased by more than 50 percent, but it would also be naive to conclude that it had nothing to do with the decrease. The real statistic that would show the impact to the IRS National Office and taxpayers would be to consider the number of relief requests the IRS service center campuses handled between 2009 and 2018 to see if there was any statically significant increase in the number of relief requests after 2013, but those data do not appear to be publicly available.[100]

V. Relief Provided by Rev. Proc. 2013-30

With its publication 10 years ago, Rev. Proc. 2013-30 became the one-stop shop for all things late S elections, superseding the previously discussed revenue procedures by consolidating and expanding the opportunities for late relief. Rev. Proc. 2013-30 allows eligible taxpayers to avoid the time-consuming and costly letter ruling process by providing late relief for (1) S corporation elections, including S corporation elections made in conjunction with a late entity classification election; (2) ESBT and QSST elections; and (3) QSub elections.

[99] The sample was conducted by searching for specific unified issue list (UIL) numbers that the Office of the Associate Chief Counsel (Passthroughs and Special Industries) assigns to private letter rulings involving S corporation election issues. We searched for the following UILs:

- 1362.02-00 — Termination of election;
- 1362.01-03 — Late elections;
- 1361.05-00 — Qualified subchapter S subsidiary; and
- 1362.04-00 — Inadvertent terminations.

Admittedly, we did not read every single private letter in the two samples, so there might be ones included in each of these searches. But even if there were a few in each sample that should not be in there, the overall percentage decrease is difficult to refute.

[100] It is David Kirk's recollection that at some point during the development of the revenue procedure, the estimated number of S corporation relief requests processed by the IRS service centers was somewhere in the neighborhood of 30,000 per year.

A. Procedures Applicable to All Elections

Late relief under Rev. Proc. 2013-30 is obtained by filing the appropriate form within three years and 75 days of the desired effective date.[101] As discussed below, the appropriate form depends on which form of relief is being requested:

- late S corporation election: Form 2553;
- late S corporation election concurrent with late entity classification election: Form 2553;
- late ESBT election: taxpayer-prepared separate statements;
- late QSST election: either Form 2553 or taxpayer-prepared separate statements, depending on whether the trust owned the shares on the desired effective date or acquired them after the desired effective date;
- late QSub election: Form 8869.

In certain situations, however, a taxpayer may request relief for a late S corporation election even when more than three years and 75 days have passed since the desired effective date. This can be accomplished only when each of the following requirements is met[102]:

1. the corporation is not seeking late corporate classification election relief concurrently with a late S corporation election;
2. the corporation fails to qualify as an S corporation solely because the Form 2553 was not timely filed;
3. the corporation and all its shareholders reported their income consistently with S corporation status for the year the S election should have been made and for every subsequent tax year (if any);
4. at least six months have elapsed since the date on which the corporation filed its tax return for the first year it intended to be an S corporation; and
5. neither the corporation nor any of its shareholders was notified by the IRS of any problem regarding the S corporation status within six months of the date on which the Form 1120S for the first year was timely filed.

The party requesting relief has three options for filing the applicable election form.

First, the appropriate form can be filed separately with the applicable IRS service center.[103] Alternatively, if the S corporation has filed all Forms 1120S for tax years between the effective date and the current year, the election form can be attached to the current-year Form 1120S as long as the current-year Form 1120S is filed within three years and 75 days after the effective date. It's critical to note that an extension of time to file the current-year Form 1120S will not extend the due date for relief.[104] To illustrate, if the extended due date of the 2022 Form 1120S is September 15, 2023, a Form 2553 for a late S corporation election with an effective date of January 1, 2020, must be filed before March 15, 2023. As a result, if the S corporation wants to extend its 2022 return, the election will need to be separately filed by March 15, 2023.

Third, for an S corporation that has not filed Form 1120S for the tax year including the effective date or any year following the effective date, the election form may be attached to the Form 1120S for the year including the effective date as long as (1) the Form 1120S for the year including the effective date is filed within three years and 75 days after the effective date, and (2) all other delinquent Forms 1120S are filed simultaneously and consistently with the requested relief.[105]

If either the second or third filing options are selected, the Form 1120 must state at the top "INCLUDES LATE ELECTION(S) FILED PURSUANT TO REV. PROC. 2013-30" or comply with specific instructions included with Form 1120S instructions.

If a taxpayer is seeking multiple requests for late relief under Rev. Proc. 2013-30, all election forms can be submitted at the same time using one of the three aforementioned methods.[106] When multiple relief requests are filed together, each application for relief must independently comply

[101] Rev. Proc. 2013-30, section 4.02(3).

[102] *Id.* at section 5.04.

[103] *Id.* at section 4.03(2)(c).

[104] *Id.* at section 4.03(2).

[105] *Id.* at section 4.03(2).

[106] *Id.* at section 4.04.

with the applicable procedural requirements discussed above.

Upon receipt of a completed request for relief under Rev. Proc. 2013-30, the IRS will determine whether the requirements for granting additional time to file the election have been satisfied and will notify the requesting party of the result of that determination.[107]

B. S Corporation Elections

Rev. Proc. 2013-30 allows for a late S corporation election when a corporation — or an eligible entity as defined by reg. section 301.7701-3(a) — intended to be classified as an S corporation as of the desired effective date,[108] the election was invalid solely because it was not timely filed,[109] and the taxpayer has reasonable cause for its failure to timely file the election and has acted diligently to correct the mistake upon its discovery.[110] To satisfy this final requirement, the corporation must include in its late election a statement, signed under penalties of perjury, that describes its reasonable cause for failure to timely file the election and its diligent actions to correct the mistake upon its discovery.[111]

Relief is requested by filing a completed Form 2553 signed by an officer of the corporation authorized to sign and all persons who were shareholders at any time during the period that began on the first day of the tax year for which the election is to be effective and ends on the day the completed Form 2553 is filed.[112]

Rev. Proc. 2013-30 does not allow a taxpayer to retroactively change its tax status to an S corporation; it merely allows a corporation that has always believed itself to be an S corporation — despite having not made a timely filed election — to obtain late relief and make a valid election. As a result, the completed Form 2553 must include statements from all shareholders during the period between the date the S corporation election was to have become effective and the date the completed Form 2553 is filed that they have reported their income on all affected returns consistently with the S corporation election for the year the election should have been filed and for all subsequent years.[113]

C. QSST and ESBT Elections

To obtain relief for a late ESBT or QSST election, (1) the trustee seeking a late ESBT election or the trust beneficiary seeking a late QSST election must have intended the trust to be an ESBT or QSST, respectively, as of the desired effective date,[114] (2) the failure to qualify as a ESBT or QSST was solely because the election was not timely filed,[115] and (3) the failure to file the timely election was inadvertent, and the person seeking relief acted diligently to correct the mistake upon discovery.[116] As a result, both a late ESBT and a late QSST election must include a statement explaining that the failure to file the election was inadvertent and describing the diligent actions undertaken to correct the mistake upon its discovery.[117] Moreover, both elections must include statements from all shareholders during the period between the date the S corporation election was to have become effective or was terminated and the date the completed election is filed that they have reported their income on all affected returns consistently with the S corporation election for the year the election should have been made and for all subsequent years.[118]

The trustee of an ESBT or the current income beneficiary of a QSST must sign and file the appropriate election form. In the case of a late

[107] *Id.* at section 4.05.

[108] *Id.* at section 4.02(1).

[109] *Id.* at section 4.02(3). Interestingly, Rev. Proc. 2022-19, 2022-41 IRB 282, which was issued by the IRS to notify taxpayers of six areas in subchapter S on which it will no longer issue letter rulings, encourages taxpayers to remedy an election that was invalid because of a missed shareholder consent or officer signature by using Rev. Proc. 2013-30. This would seem to contradict the requirement that the election was invalid solely because it was not timely filed. After all, if an election was timely filed but missing a consent, it was invalid because of the missing consent, not because the deadline for making the election had passed.

[110] Rev. Proc. 2013-30, section 4.03(1).

[111] This is satisfied by completing Line I of Form 2553.

[112] Rev. Proc. 2013-30, section 5.01.

[113] *Id.* at section 5.02. This requirement is satisfied by the language in Box K of Part I.

[114] *Id.* at section 4.02(1).

[115] *Id.* at section 4.02(3).

[116] *Id.* at section 4.02(4).

[117] *Id.* at section 4.03(1). When a late QSST election is filed using Form 2553, this is satisfied by completing Line 1.

[118] *Id.* at section 6.01(4). When a late QSST election is filed using Form 2553, this requirement is satisfied by the language in Box K of Part I.

ESBT election, no standard form exists; as a result, the relief is requested on a taxpayer-prepared statement, signed under penalties of perjury, which includes[119]:

- a statement from the trustee of the ESBT that includes the information required by reg. section 1.1361-1(m)(2)(ii); and
- a statement from the trustee that all potential current beneficiaries meet the shareholder requirements of section 1361(b)(1) and that the trust satisfies the requirements of an ESBT under section 1361(e)(1) other than the requirement to make an ESBT election.

If a late QSST election is made for a QSST that owned shares at the time of the intended S corporation election, the beneficiary of the QSST can file for late relief using Form 2553. If the trust acquired shares after a valid election had been made — resulting in an inadvertent termination — the trustee must file the following separate statements, both of them filed under penalties of perjury[120]:

- a statement from the current beneficiary of the QSST that includes the information required by reg. section 1.1361-1(j)(6)(ii); and
- a statement from the trustee that the trust satisfies the QSST requirements of section 1361(d)(3) and that the income distribution requirements have been and will continue to be met.

D. QSub Elections

A parent S corporation that intended to treat a wholly owned subsidiary as a QSub as of the desired effective date[121] but that failed to do so solely because the election was not timely filed,[122] and that has reasonable cause for its failure to timely file the election and has acted diligently to correct the mistake upon its discovery,[123] may use Rev. Proc. 2013-30 to obtain late relief. The late election is filed using Form 8869,[124] which, unlike Form 2553, does not include a "reasonable cause" statement. As a result, when filing the Form 8869, the parent S corporation must include a separate statement, signed under penalties of perjury, that describes its reasonable cause for failure to timely file the election and its diligent actions to correct the mistake upon its discovery.[125]

The completed Form 8869 must also include a statement signed by an officer of the S corporation under penalties of perjury that the subsidiary corporation satisfies the QSub requirements of section 1361(b)(3)(B) and that all assets, liabilities, and items of income, deduction, and credit of the QSub have been treated as assets, liabilities, and items of income, deduction, and credit of the S corporation on all affected returns consistently with the QSub election for the year the election was intended to be effective and for all subsequent years.[126]

E. Deemed Check-the-Box Elections

In addition to the requirements described above, for a late corporate classification election intended to be effective on the same date as the S corporation election, the completed Form 2553 must also include the following representations:

- the taxpayer is an eligible entity as defined in reg. section 301.7701-3(a);
- the taxpayer intended to be classified as a corporation as of the effective date of the S corporation status;
- the taxpayer fails to qualify as a corporation solely because Form 8832 was not timely filed under reg. section 301.7701-3(c)(1)(i), or Form 8832 was not deemed to have been filed under reg. section 301.7701-3(c)(1)(v)(C);
- the taxpayer fails to qualify as an S corporation on the effective date of the S corporation status solely because the S corporation election was not timely filed; and

[119] *Id.* at section 6.01

[120] *Id.* at section 6.01. When the late QSST election is filed using Form 2553, Part III of the form contains the required statements and information.

[121] *Id.* at section 4.02(1).

[122] *Id.* at section 4.02(3).

[123] *Id.* at section 4.02(4).

[124] *Id.* at section 4.01(4).

[125] *Id.* at section 4.03(1).

[126] *Id.* at section 7.02.

- either the taxpayer timely filed all required federal tax returns and information returns consistently with its requested classification as an S corporation for all of the years that the entity intended to be an S corporation, or the taxpayer has not filed a federal tax or information return for the first year in which the election was intended to be effective because the due date has not passed for that year's federal tax or information return.[127]

VI. Practical Implications

As has been noted on several occasions, Rev. Proc. 2013-30 establishes a one-stop shop for relief for late S corporation elections (including those being made simultaneously with an entity classification election), QSub elections, QSST elections, and ESBT elections. However, the relative ease of administration of the revenue procedure also begets natural limitations and reveals certain practical considerations, as explored in further detail below.

A. Limitations on Scope

Typically, the primary reason that relief under the revenue procedure may not be available to an otherwise eligible entity is because the late election is discovered after the deadline for relief has passed. Subject to an important exception discussed below, the relevant window for action under Rev. Proc. 2013-30 is generally three years and 75 days.[128] Although that is not an insignificant amount of time, it is still common for taxpayers to discover a failure to file an election several months or years after that window has closed, at a point when the taxpayer is generally unable to access the relief provisions.

Even when time is not a limiting factor, relief under Rev. Proc. 2013-30 may be unavailable if the election would have been invalid if it had been timely filed (or if the election would have been invalid for any period between the effective date and filing date under the revenue procedure).[129] For example, if there was an invalid shareholder or if the corporation was not qualified during any part of the period back to the effective date of the election, the late-filed election would be invalid, and therefore relief would not be afforded under Rev. Proc. 2013-30.

Further, if the entity otherwise qualified as an eligible S corporation, relief is not allowed if the entity did not previously intend to be classified as an S corporation or if the entity or shareholder did not have reasonable cause for failure to timely make a particular election. Essentially, Rev. Proc. 2013-30 does not allow a mere "change of heart" regarding entity classification and requires a reasonable cause for the failure to make a timely election. Indeed, the entire revenue procedure is predicated on beginning with an invalid S corporation that may be cured through a late election. Accordingly, the revenue procedure is similarly not available to provide late election relief to change a trust classification from one qualifying trust election to another. For example, Rev. Proc. 2013-30 does not allow taxpayers to retroactively switch from a qualifying ESBT election to a qualifying QSST election or vice versa. Similarly, the revenue procedure does not allow for relief for a late ESBT election or QSST election when the taxpayer is already a valid testamentary trust S corporation shareholder (that is, when no election is required for two years after stock is transferred), even though an ESBT or QSST election could have been made sooner, during the two-year window.[130]

It is also important to remember that Rev. Proc. 2013-30 does not cover faulty S corporation elections resulting from missed consent signatures from spouses in community property states. In Rev. Proc. 2004-35, 2004-1 C.B. 1029, the

[127] *Id.* at section 5.03. These representations are included in Part IV of Form 2553.

[128] The exception to this rule occurs when the entity is solely requesting relief for a late S election under Rev. Proc. 2013-30 (*i.e.*, there is not a corresponding request for a late corporate classification). This "unlimited lookback" exception is discussed further below.

[129] Rev. Proc. 2022-19 provides that certain inadvertent errors may be corrected under Rev. Proc. 2013-30. Rev. Proc. 2022-19, section 3.03(2) provides that a Form 2553 that contains an "inadvertent error" regarding a permitted year may be corrected under Rev. Proc. 2013-30. Moreover, Rev. Proc. 2022-19, section 3.03(3) provides that a Form 2553 or Form 8869 that is missing the signature of an authorized officer of the S corporation that affects the validity of the S election or QSub election may be corrected under Rev. Proc. 2013-30.

[130] Section 1361(c)(2)(A)(iii). A trust for stock transferred to it under the terms of a will but only for the two-year period beginning on the day on which the stock is transferred to it.

IRS provided procedures to obtain automatic late filing relief of shareholder consents for spouses of S corporation shareholders in community property states. The revenue procedure provides for automatic relief if (1) the S corporation election is invalid solely because the Form 2553 failed to include the signature of a community property spouse who was a shareholder solely by reason of state community property law; and (2) both spouses have reported all items of income, gain, loss, deduction, or credit consistently with the S corporation election on all affected federal income tax returns. That revenue procedure was not changed by Rev. Proc. 2013-30.

Finally, relief is unavailable under Rev. Proc. 2013-30 unless the entity (and all shareholders) reported all relevant returns, and for all relevant periods, consistently with having an S corporation election in effect.

If the entity does not qualify under the late election relief provisions of Rev. Proc. 2013-30 for the reasons described above, generally the only recourse for the entity is to request a private letter ruling under section 1362(f).

B. Obtaining Consents

As has been noted, Rev. Proc. 2013-30 creates a system whereby S corporations can correct various late-filed elections. Historically, practitioners have debated whether relief under Rev. Proc. 2013-30 may be limited to circumstances in which an election was simply missed or filed late, or if the revenue procedure could also be used to cure a defect or a missing consent by superseding an originally filed (timely) election with a newly filed election that comports with the requirements of Rev. Proc. 2013-30. In our view, it is reasonable to conclude that Rev. Proc. 2013-30 applies in situations in which a critical defect — such as a missed shareholder consent — may have caused the initial election to be invalid *ab initio* (that is, the election was considered missing, or late, as a result of a defect with filing).

Some of this debate was put to rest through the release of Rev. Proc. 2022-19, 2022-41 IRB 282, which amplified the relief provisions of Rev. Proc. 2013-30. Under Rev. Proc. 2022-19, Treasury and the IRS provided that taxpayers may seek relief under Rev. Proc. 2013-30, when otherwise applicable, in circumstances whereby an election was invalid because of a missed shareholder consent or missing officer signature. While Rev. Proc. 2022-19 confirms the ability to use Rev. Proc. 2013-30 in the scenarios enumerated, an open debate may remain as to whether relief may be afforded under Rev. Proc. 2013-30 when other potential defects in the election exist.

Importantly, the revenue procedures that were superseded by Rev. Proc. 2013-30 did not universally require all shareholders to consent to access the relief provisions of those revenue procedures. Accordingly, the imposition of a broad-based consent requirement to Rev. Proc. 2013-30 creates an additional burden on taxpayers that was not present under the prior revenue procedures. This additional limitation seems to have largely gone unnoticed in the tax community, but it creates several practical challenges. For example, what happens if the purported S corporation cannot secure consents under Rev. Proc. 2013-30 (for example, a shareholder died, an estate closed, a trust terminated, or parties simply won't return phone calls)?[131] Through a private letter ruling request under section 1362(f), such missing consents may be excused under reasonable circumstances. However, there is generally no exception for missing consents under Rev. Proc. 2013-30. Accordingly, in cases in which the taxpayer is unable to secure a missing shareholder consent, the taxpayer may be constrained to use a more costly private letter ruling process to access retroactive relief, in lieu of the simplified relief provided through Rev. Proc. 2013-30.

Also note that for a missing consent in a community property state, Rev. Proc. 2004-35 (which was not consolidated into Rev. Proc. 2013-30) and reg. section 1.1362-6(b)(3)(iii) provide that an election that is timely filed for any tax year — and that would be valid except for the failure of any shareholder to file a timely consent — is not invalid if consents are later gathered and filed with the IRS and if it is further shown to the satisfaction of the service center with which the corporation files its income tax return that (1)

[131] In Rev. Rul. 92-82, 1992-2 C.B. 238, the IRS ruled that an executor of a deceased shareholder's estate could consent to the corporation's S election, so this avenue may be an option in some fact patterns.

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.[132]

If relief is not afforded the S corporation under Rev. Proc. 2013-30 (as amplified by Rev. Proc. 2022-19) or Rev. Proc. 2004-35, the taxpayer may be forced to request relief for the S corporation to acquire the required shareholder consents under section 1362(f).

C. The Unlimited Lookback

One of the most significant — yet often overlooked — opportunities for relief under Rev. Proc. 2013-30 is the ability to cure a late S election beyond the standard three-year-and-75-day window requirement. Essentially, a special rule in the revenue procedure allows for an unlimited lookback period when the taxpayer is *solely* requesting relief for a late S election (that is, the request is not in conjunction with a late check-the-box election). Section 5.04 of Rev. Proc. 2013-30 provides that the standard three-year-and-75-day limitation on granting relief will not apply if certain enumerated requirements are satisfied. Key among them that the corporation may not be seeking late entity classification election relief concurrently with a late check-the-box election under Rev. Proc. 2013-30.

If the purported S corporation is organized under local law as a corporation, the potential analysis for assessing benefit under the unlimited lookback provision of the revenue procedure may be relatively straightforward. In short, if such an entity failed to timely make an S election, and it otherwise met the requirements of section 5.04 of Rev. Proc. 2013-30, relief may be available for a late S election for an unlimited period.

For an entity organized under state law as an LLC, an assessment of whether relief may be afforded under Rev. Proc. 2013-30 may become more complicated. The issue stems from the fact that an LLC that makes a timely (and valid) election to be treated as an S corporation is *deemed to have made an election to be classified as an association taxable as a corporation*.[133] However, for the reasons discussed below, the unlimited lookback rule of section 5.04 does not apply to circumstances in which a taxpayer is simultaneously seeking relief for both a late S election and a late check-the-box election. Accordingly, for an LLC, relief under the unlimited lookback provisions of Rev. Proc. 2013-30 will turn on whether the entity otherwise checked the box to be treated as a corporation with a separate Form 8832 or if it relied on the deemed check-the-box election through the filing of Form 2553.[134] If it is the former, then an unlimited lookback window may apply; whereas, if it is the latter, the taxpayer may be limited to three years and 75 days in seeking relief.

While not implying that any taxpayer might establish an entity with an expectation of a defect, the unlimited lookback relief opportunity provided under Rev. Proc. 2013-30 may cause some taxpayers that are intending to make an S election for an LLC to consider separately filing a Form 8832 to check the box to treat the LLC as a corporate entity, rather than relying on the filing of the Form 2553. Such behavior might allow for an extended window of time for relief under Rev. Proc. 2013-30 if a defect with the filing of the Form 2553 could be discovered in the future (assuming that the Form 8832 was otherwise valid). However, some other taxpayers may prefer to use Form 2553 to serve its dual purpose of checking the box on corporate status for the LLC and simultaneously making an S election with a view toward defaulting to an entity classification other than a C corporation if there might be a critical defect with the initial S corporation filing (that is, the S election would be invalid, along with the check-the-box election, resulting in the entity reverting to its default classification).

When describing the unlimited lookback rule, the IRS website editorially provides:

> Although this exception exists, it is unlikely many situations will qualify since the current system is set up to notify the

[132] Rev. Proc. 2004-35.

[133] Reg. section 301.7701-3(c)(1)(v)(C).

[134] An LLC that makes a timely and valid election to be treated as an S corporation is deemed to have made an election to be classified as an association taxable as a corporation. *See* reg. section 301.7701-3(c)(1)(v)(C).

> corporation of the problem with its filing requirement when the return rejects in processing. It could apply to a case in which it did not go through normal processing.[135]

While it may be true that the IRS systems will generally catch circumstances in which a taxpayer is trying to file an S corporation return (or extension) without a corresponding S election lodged in the system, there are additional circumstances that may arise to cause a defect with a filed S election. Accordingly, the S election has been filed but is still invalid, yet the IRS is unaware of that defect. For example, what happens if the taxpayer filed an ineffective election because of an invalid signature (for example, the S election was not signed by a proper officer)? Here, the S election wasn't effective, but the IRS never informed the taxpayer. As noted above, in our view, there is an argument that the unlimited lookback rule of Rev. Proc. 2013-30 would allow the taxpayer to correct such an S election through a new filing, assuming all other requirements are met.

In addition to the requirement that the late election relief cover solely a late S election, Rev. Proc. 2013-30 further requires that (1) the corporation failed to qualify as an S corporation solely because the Form 2553 was not timely filed; (2) the corporation and all its shareholders reported their income consistently with S corporation status for the year that the S corporation election should have been made and for every subsequent tax year (if any); (3) at least six months have elapsed since the date on which the corporation filed its tax return for the first year it intended to be an S corporation; and (4) neither the corporation nor any of its shareholders was notified by the IRS of any problem regarding the S corporation status within six months of the date on which the Form 1120S for the first year was timely filed.

D. Intended Treatment

A theme running throughout Rev. Proc. 2013-30 — which applies to every late election — is the requirement that the requesting entity (and applicable shareholders, when relevant) have filed all required federal tax returns and all information returns consistently with the notion that the entity is an S corporation for all relevant years. This provision creates an important requirement to exercise caution with all taxpayer filings, including extension filings, to ensure consistency in approach.

This requirement, coupled with the "time traveling" aspect of retroactive relief, can create interesting conundrums in filing returns. For example, if a taxpayer discovers a potential missed election in the process of filing a return, it should exercise caution in determining which filing is appropriate. On the one hand, the discovery of a missing election may place the taxpayer on notice that there is a defect to cause the S corporation to lose its S corporation status, and that knowledge may then preclude the taxpayer from the ability to sign the return as an S corporation (because the proper filing of the return may now be as a C corporation, partnership, or sole proprietorship, etc.). However, if the loss of S status was not intended, the filing of an inconsistent return (as to a valid S election) would then preclude the retroactive relief afforded under Rev. Proc. 2013-30, creating a potential problem of circularity. In general, when relief may be available under the revenue procedure (or even through a private letter ruling if Rev. Proc. 2013-30 is unavailable), the taxpayer may be advised to first cure the election defect through the revenue procedure (or begin the private letter ruling process) as quickly as possible to then allow the taxpayer to continue to file consistently with its expected treatment as an S corporation.

An open question under Rev. Proc. 2013-30 is whether a taxpayer may be allowed under certain situations to file an amended return to correct a prior inconsistency before seeking relief under the revenue procedure (at which point all filed returns would be "consistent" with the requested treatment). For example, what happens if a trustee forgets to file an ESBT election for a testamentary trust within tow and a half months after the end of the two-year testamentary trust grace period? After the two-year window, the trustee continued to file Form 1041s for the next couple of years without considering section 641(c)

[135] IRS, "Late Election Relief" (last updated June 27, 2023).

and the requirement to bifurcate the trust into an "S portion" and a "non-S portion." In that case, did all taxpayers file consistently with the intended treatment of the entity as an S corporation, including the trustee (without taxing the S activity as an ESBT)? Can the trustee amend the Form 1041 to report as an ESBT and then seek relief under Rev. Proc. 2013-30? Does a tax return preparer have any section 6694 concerns about knowingly filing an ESBT return when the trustee did not have an ESBT election in place (and, technically, the entity was not an S corporation either if all trusts were not treated as eligible shareholders)?

E. Disaster Relief Extension

Sections 7508A and 7508(a)(1) provide that in the event of a federally declared disaster (as declared by the president of the United States), the IRS may likewise declare an extension period of up to one year that may be disregarded in determining whether certain time-sensitive acts were performed within their prescribed period. Rev. Proc. 2018-58, 2018-50 IRB 990, provides a summary of the latest updated list of time-sensitive acts, the performance of which may be postponed in the case of a federally declared disaster under sections 7508 and 7508A. Unfortunately, Rev. Proc. 2018-58 does not include the relief provisions of Rev. Proc. 2013-30 in the list of time-sensitive acts that are automatically extended for a federally declared disaster area.[136] Essentially, unless and until the IRS revises Rev. Proc. 2018-58 to include Rev. Proc. 2013-30, taxpayers are ineligible for automatic disaster relief for the time-sensitive acts contained therein.

F. Looking to the Future

Nearly on the 10-year anniversary of Rev. Proc. 2013-30, Treasury and the IRS released Rev. Proc. 2022-19. Among other objectives, Rev. Proc. 2022-19 amplifies Rev. Proc. 2013-30 and establishes additional procedures that allow S corporations and their shareholders to resolve frequently encountered issues that transcend the late-election remedies of Rev. Proc. 2013-30. The issues addressed by Rev. Proc. 2022-19 are those that the IRS historically has identified as not affecting the validity or continuation of a corporation's election under section 1362(a) to be treated as an S corporation or under section 1361(b)(3)(B)(ii) to treat its subsidiary as a QSub. Rev. Proc. 2022-19 also identifies areas in which the IRS will not rule, or will not ordinarily rule, regarding the validity or continuation of an S election or a QSub election.

Regarding the amplification of Rev. Proc. 2013-30, Rev. Proc. 2022-19 provides that certain "inadvertent errors" may be corrected under Rev. Proc. 2013-30. Section 3.03(2) of Rev. Proc. 2022-19 provides that a Form 2553 that contains an incorrect year may be corrected under Rev. Proc. 2013-30. Also, section 3.03(3) provides that a Form 2553 or Form 8869 that is missing the signature of an authorized officer of the S corporation that affects the validity of the S election or QSub election may be corrected under Rev. Proc. 2013-30. As stated previously, Rev. Proc. 2022-19 essentially solidifies the view that Rev. Proc. 2013-30 may be used in a broad range of circumstances, including when an election is not otherwise valid because of a missing element or critical defect. In other words, Rev. Proc. 2022-19 confirms that Rev. Proc. 2013-30 is not solely for situations in which the deadline for making an election has passed.

Another significant element of Rev. Proc. 2022-19 is the provision of relief for certain situations in which taxpayers may retroactively validate or preserve an S election that was invalidated or terminated solely as the result of one or more "non-identical governing provisions" that, for federal income tax purposes, cause the S corporation to have more than one class of stock under reg. section 1.1361-1(l)(1). Rev. Proc. 2022-19 also identifies certain issues for which a private letter ruling will not be available or will not ordinarily be issued, either because the IRS does not believe there is an existing concern with the validity of the entity's S election (or QSub election) (and perhaps the issuance of the private letter ruling would simply constitute a "comfort ruling") or because there are other avenues to address the matter outside the private letter ruling process.

[136] Rev. Proc. 2018-58 still includes a reference to the time-sensitive acts covered under the revenue procedures that were superseded by Rev. Proc. 2013-30, but it doesn't include a reference to the time-sensitive acts covered under Rev. Proc. 2013-30 itself.

VII. Conclusion

As discussed, Rev. Proc. 2013-30 favorably provides simplified taxpayer assistance procedures to allow S corporations and their shareholders to resolve frequently encountered late election issues. For the past 10 years, the revenue procedure has provided welcome relief for S corporation taxpayers and their shareholders in addressing potential errors in election filing, in lieu of a more costly private letter ruling from the IRS. The revenue procedure provides a pragmatic approach to solving common problems (with helpful color-coded decision trees, no less) to assist well-intentioned taxpayers that are dealing with an often complicated area of the law, in furtherance of the stated goal of efficient administration of the tax law.[137] ■

[137] The information in this article is not intended to be "written advice concerning one or more Federal tax matters" subject to the requirements of section 10.37(a)(2) of Treasury Department Circular 230. The information contained herein is of a general nature and based on authorities that are subject to change. Applicability of the information to specific situations should be determined through consultation with your tax adviser. The views reflected in this article are the views of the authors and do not necessarily reflect the views of Ernst & Young LLP, KPMG LLP, or other members of their respective global organizations.