

Recent Guidance: IRS changes procedures for late entity classification elections

On September 11, 2009 the Internal Revenue Service (IRS) issued Rev. Proc. 2009-41, which revises previously established procedures regarding late entity classification elections (commonly known as “check-the-box” elections). Rev. Proc. 2009-41 extends late entity classification relief under Section 7701 to both initial classification elections and changes in classification elections. This new revenue procedure also extends the time for filing late elections to within three years and 75 days of the requested effective date of eligible entity’s classification. Under the new procedures, relief is requested by filing Form 8832, Entity Classification Election, a required declaration of eligibility, and a reasonable cause statement with the appropriate IRS Service Center. This revenue procedure is effective September 28, 2009.

Rev. Proc. 2009-41 supersedes Rev. Proc. 2002-59 which provided guidance for entities newly formed under local law to request relief for a late initial classification. Taxpayers who had failed to qualify under the limited rules in Rev. Proc. 2002-59 had to request 9100 relief via a letter ruling to correct their late election. An entity that does not satisfy the requirements of relief under the expanded relief under Rev. Proc. 2009-41 may request 9100 relief by applying for a letter ruling.

“Check-the-box” elections overview

A business entity that is not classified as a corporation can elect its classification for federal tax purposes (e.g., a corporation, a partnership, or an entity disregarded as separate from its owner). Under the “check-the-box” elections, an entity may elect initially to be classified other than its default classification as provided in Treas. Reg. Section 301.7701-3(b) or can change its classification by filing Form 8832. Such an election cannot take effect more than 75 days prior to the date the form is filed, nor can it take effect later than twelve months after the election is filed.

Eligibility

Entities are eligible for relief under the provisions of this revenue procedure if they meet the following four requirements:

1. The entity failed to obtain the desired classification for either of the following reasons:
 - a. An initial classification or a newly-formed entity failing to obtain desired classification because a Form 8832 was not timely filed under Treas. Reg. Section 301.7701-3(c)(1)(iii); or
 - b. A requested change in classification solely because Form 8832 was not timely filed under Treas. Reg. Section 301.7701-3(c)(1)(iii)
2. Tax return filings:
 - a. The entity has not filed a federal tax or information return filed for the first year in which the election was intended to be effective because the due date has not passed; or
 - b. Entity timely filed all required federal tax returns and information returns consistent with its requested classification for all of the years the entity intended the requested election to be effective and no inconsistent tax or information returns have been filed by or with respect to the entity during any of the taxable years.
3. The entity has reasonable cause for its failure to timely make the check-the-box election (see below for discussion on the reasonable cause statement); and
4. Three years and 75 days from the requested effective date of the eligible entity’s classification election have not passed.

Procedural requirements and filings

Rev. Proc. 2009-41 provides that Form 8832 must be filed within three years and 75 days from the requested effective date of the eligible entity’s classification election. This form must include a declaration that the elements required for relief have been satisfied and a statement explaining the reason for the failure to file a timely entity classification election (a “reasonable cause statement”).

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