

## Rev. Rul. 2008-18

### ISSUE

In the transactions described in Situations 1 and 2 below, does an S corporation election under § 1362(a) of the Internal Revenue Code (the Code) terminate and what are the proper employer identification numbers (EINs) for the entities participating in the transactions?

### FACTS

Situation 1. B, an individual, owns all of the stock in Y, an S corporation. Y's EIN is 22-2222222. In Year 1, B forms Newco and contributes all of the Y stock to Newco. Newco meets the requirements for qualification as a small business corporation and timely elects to treat Y as a qualified subchapter S subsidiary (QSub), effective immediately following the transaction. The transaction meets the requirements of a reorganization under § 368(a)(1)(F). In Year 2, Newco sells a 1% interest in Y to D.

Situation 2. C, an individual owns all of the stock of Z, an S corporation. Z's EIN is 33-3333333. In Year 1, Z forms Newco, which in turn forms Mergeco. Pursuant to a plan of reorganization, Mergeco merges with and into Z, with Z surviving and C receiving solely Newco stock in exchange for Z stock. Newco meets the requirements for qualification as a small business corporation and timely elects to treat Z as a QSUB, effective immediately following the transaction. The transaction meets the requirements of a reorganization under § 368(a)(1)(F).

### LAW AND ANALYSIS

#### S Corporation Election

Section 368(a)(1)(F) provides that a reorganization includes a mere change in identity, form, or place of organization of one corporation, however effected.

Section 1.381(b)-1(a)(2) provides that, in the case of a reorganization qualifying under § 368(a)(1)(F) (whether or not such reorganization also qualifies under any other provision of § 368(a)(1)), the acquiring corporation shall be treated (for purposes of § 381) just as the transferor corporation would have been treated if there had been no reorganization.

Section 1361(a)(1) provides that the term "S corporation" means, with respect to any taxable year, a small business corporation for which an election under § 1362(a) (S election) is in effect for such year.

Section 1361(b)(1) defines a "small business corporation" as a domestic corporation which is not an ineligible corporation and which does not – (A) have more than 100 shareholders, (B) have as a shareholder a person (other than an estate, a trust described in § 1361(c)(2), or an organization described in § 1361(c)(6)) who is not an individual, (C) have a nonresident alien as a shareholder, and (D) have more than 1 class of stock.

Section 1361(b)(3)(A) provides that, except as provided in regulations, a QSub

shall not be treated as a separate corporation and all assets, liabilities, and items of income, deduction, and credit of the QSub shall be treated as assets, liabilities and such items of the S corporation. Section 1361(b)(3)(B) provides that a QSub means any domestic corporation which is not an ineligible corporation, if 100 percent of the stock of the QSub is held by the S corporation and the S corporation elects to treat the corporation as a QSub.

Section 1.1361-4(a)(2) provides that, if an S corporation makes a valid QSub election with respect to a subsidiary, the subsidiary is deemed to have liquidated into the S corporation and that, except as provided in § 1.1361-4(a)(5), the tax treatment of the liquidation of a larger transaction that includes the liquidation is determined under the Code and general principles of tax law, including the step transaction doctrine.

The rules applicable to corporate reorganizations, as well as other provisions, recognize the unique characteristics of reorganizations qualifying under § 368(a)(1)(F). In contrast to other types of reorganizations, which can involve two or more operating corporations, a reorganization of a corporation under § 368(a)(1)(F) involves a single operating entity.

Rev. Rul. 64-250, 1964-2 C.B. 333, provides that when an S corporation merges into a newly formed corporation in a transaction qualifying as a reorganization under § 368(a)(1)(F), and the newly formed surviving corporation also meets the requirements of an S corporation, the reorganization does not terminate the S election. Thus, the S election remains in effect for the new corporation. See also Rev. Rul. 2004-85, 2004-2 C.B. 189.

### Identifying Numbers

Section 6011(b) authorizes the Secretary to require such information with respect to persons subject to taxes as is necessary or helpful in securing proper identification of such persons.

Section 6109(a)(1) provides generally that when required by regulations, any person required to make a return, statement, or other document shall include such identifying number as may be prescribed for securing proper identification of such person.

Section 6109(c) provides that the Secretary is authorized to require such information as may be necessary to assign an identifying number to any person.

Section 301.6109-1(a)(1)(ii)(C) provides that any person other than an individual (such as corporations, partnerships, nonprofit associations, trusts, estates, and similar nonindividual persons) that is required to furnish a taxpayer identifying number must use an EIN. Situation 3 of Rev. Rul. 73-526, 1973-2 C.B. 404, issued prior to the amendment to the Code providing for QSubs, describes a transaction that qualifies as a reorganization under § 368(a)(1)(F). The ruling states that the broad language contained in §§ 6011(b) and 6109(a) indicates that Congress has vested in the Secretary or his delegate discretionary authority to require the use of whatever identifying number is deemed necessary or helpful for the proper identification of a taxpayer, employer, employee, or other person. Based on this authority, Rev. Rul. 73-526 in Situation 3 concludes that, in a transaction qualifying as a reorganization under

§ 368(a)(1)(F), the acquiring corporation should use the EIN of the transferor corporation.

However, since the publication of Rev. Rul. 73-526, the Code was amended to provide the classification of certain wholly-owned subsidiaries of S corporations as QSubs and the regulations under § 6109 have been amended to address the effect of QSub elections under § 1361.

Section 301.6109-1(i)(1) provides that any entity that has an EIN will retain that EIN if a QSub election is made for the entity under § 1.1361-3 or if a QSub election that was in effect for the entity terminates under § 1.1361-5. Section 301.6109-1(i)(2) provides that, except as otherwise provided in regulations or other published guidance, a QSub must use the parent S corporation's EIN. Section 301.6109-1(i)(3) provides that if an entity's QSub election terminates, it may not use the EIN of the parent S corporation after the termination. If the entity had an EIN prior to becoming a QSub or obtained an EIN while it was a QSub in accordance with regulations or other published guidance, the entity must use that EIN. If the entity had no EIN, it must obtain an EIN upon termination of the QSub election.

For tax years beginning after December 31, 2004, Congress amended § 1361(b)(3)(E) to provide that, except to the extent provided by the Secretary, QSubs are not disregarded for purposes of information returns under part III of subchapter A of chapter 61. Further, QSubs are not disregarded for certain other purposes as provided in regulations. For example, § 1.1361-4(a)(7) provides that a QSub is treated as a separate corporation for purposes of employment tax and related reporting requirements (effective for wages paid on or after January 1, 2009), and § 1.1361-4(a)(8) provides that a QSub is treated as a separate corporation for purposes of certain excise taxes (effective for liabilities imposed and actions first required or permitted in periods beginning on or after January 1, 2008).

Because the QSub is treated as a separate corporation for certain federal tax purposes, the QSub must retain and use its EIN when it is treated as a separate corporation for federal tax purposes. Thus, it would not be appropriate for the acquiring corporation in a reorganization under § 368(a)(1)(F) to retain the EIN of the transferor corporation that becomes a QSub.

#### HOLDING

Situation 1. In Situation 1, consistent with Rev. Rul. 64-250, Y's original S election does not terminate but continues for Newco. Newco must obtain a new EIN. Y must retain its EIN (EIN 22-2222222) even though a QSub election is made for it and must use its original EIN any time the QSub is otherwise treated as a separate entity for federal tax purposes (including for employment and certain excise taxes) or if the QSub election terminates. In Year 2, when Newco sells a 1% interest of Y to D, Y's QSub election terminates pursuant to § 1361(b)(3)(C). Y must use its original EIN of 22-2222222 following the termination of Y's QSub election.

Situation 2. In Situation 2, consistent with Rev. Rul. 64-250, Z's original S election does not terminate but continues for Newco. Newco must obtain a new EIN. Z must retain its EIN (EIN 33-3333333) even though a QSub election is made for Z and must use its original EIN any time the QSub is otherwise treated as a separate entity for

federal tax purposes (including for employment and certain excise taxes) or if the QSub election terminates.

#### EFFECT ON OTHER RULINGS

Rev. Rul. 64-250 is amplified for transactions qualifying as a reorganization under § 368(a)(1)(F) where the transferor S corporation becomes a QSub of the acquiring corporation. The holding of Situation 3 in Rev. Rul. 73-526 continues to apply to its facts.

#### EFFECTIVE DATE

This revenue ruling applies to § 368(a)(1)(F) reorganizations occurring on or after January 1, 2009. For § 368(a)(1)(F) reorganizations occurring on or after March 7, 2008 and before the effective date of this ruling, taxpayers may rely on this revenue ruling. The Service is aware that, prior to the effective date of this revenue ruling, some S corporations have undergone reorganizations under § 368(a)(1)(F) in a manner similar to those described in Situations 1 and 2 above in which the acquiring corporation continued to use the transferor corporation's EIN in an effort to comply with Rev. Rul. 73-526. In the cases described in the immediately preceding sentence, the acquiring corporation should continue to follow Rev. Rul. 73-526 and use the transferor corporation's EIN, and furthermore, after the § 368(a)(1)(F) reorganization, the transferor (QSub) should use the parent's EIN until such time the transferor (QSub) is otherwise treated as a separate corporation for federal tax purposes (including for employment and certain excise taxes) or until such time that the QSub terminates. At such time, the QSub must obtain a new EIN.

The IRS will need to make administrative adjustments to ensure that its Campuses recognize the continuation of the S election in the fact situations presented in this revenue ruling. Consequently, for a § 368(a)(1)(F) reorganization occurring prior to January 1, 2009, it may be prudent for the acquiring corporation to make a protective S election.

#### DRAFTING INFORMATION

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