

## LATE AND DEFECTIVE SUB 'S' ELECTIONS

If reasonable cause exists, the Service may grant relief for an improperly made Sub S Election or a Late Sub S Election. IRC §1362(b)(5). In August, 2013, the IRS released Rev. Proc. 2013-30 (generally effective 9-3-13 and after) which updates and consolidates all prior relief provisions for late and/or defective "S" corporate elections (Rev. Procs. 2003-43, 97-48, 2004-48, 2007-62, etc.). The new guidance obsoletes part or all of these prior revenue procedures. Rev. Proc. 2013-30 provides relief to correct a late or defective Sub 'S' Election, ESBT Election, QSST Election, QSub election or entity classification election (via Form 8832).

As long as the applicable requirements are met, relief for late or defective elections will be granted automatically **without a user fee**. When relief is not available under Rev. Proc. 2013-30, the corporation may still obtain a Private Letter Ruling. The procedural requirements for requesting a Private Letter Ruling are described in Rev. Proc. 2013-1 (or its successors). It appears that although reasonable cause is necessary for relief, as long as you have the filing fee, the IRS has been quite lenient in providing relief.

**"S" CORPORATION ELECTION:** An eligible corporation can make the election to be treated as an "S" corporation for a tax year as follows:

- (1) At any time during the preceding tax year; **or**
- (2) At any time during the tax year the election is to be effective as long as it is made by no later than the 15<sup>th</sup> day of the third month of that tax year.

The election is made by filing a completed Form 2553 (Election by a Small Business Corporation). IRC §1362(b)(1) and Reg. §1.1362-6(a)(2). If the election is made after the 15<sup>th</sup> day of the third month of the tax year and by no later than the 15<sup>th</sup> day of the third month of the following tax year, the election is treated as made for the following tax year. IRC §1362(b)(3). However, if IRS determines that there was reasonable cause for the failure to make a timely election, the Service may treat the election as timely made and §1362(b)(3) shall not apply. IRC §1362(b)(5).

**REV. PROC. 2013-30 (§4.02-General Requirements For Relief):** To receive relief where the only defect is a late election, the corporation must establish that:

- (1) It intended to be classified as an "S" corporation;
- (2) The failure to qualify is only a result of the lack of timely filing;
- (3) Less than 3 years and 75 days have passed since the intended effective date of the election; **and**
- (4) Reasonable cause exists for the failure to timely file, **and** the corporation has acted diligently to correct the mistake upon discovery.

**REV. PROC. 2013-30 (§4.03-General Procedural Requirements For Relief):** The corporation must complete and submit Form 2553 and attach applicable supporting documents as set forth below. Form 2553 must be signed by an authorized officer of the corporation and all shareholders holding an interest in the corporate stock at any time from the intended effective date of the "S" election to the new date of the election. Form 2553 must have the following notation at the top of the front page "**FILED PURSUANT TO REV. PROC. 2013-30**", and must be filed with the Service Center where the original 'S' election would have been filed.

**REASONABLE CAUSE/INADVERTENCE STATEMENT (§4.03(1)):** In addition to any supporting documents, a "Reasonable Cause/Inadvertence Statement" must be attached to Form 2553 describing

the **reasonable cause for failure to timely file the “S” corporate election and the diligent actions taken by the corporation to correct the mistake upon its discovery.** This statement must contain a **signed and dated penalty of perjury declaration** as follows:

“Under penalties of perjury, I (we) declare that I (we) have examined this election, including accompanying documents, and, to the best of my (our) knowledge and belief, the election contains all the relevant facts relating to the election, and such facts are true, correct and complete.”

**FILING METHODS:** A request for late filing relief may be submitted by one of three methods:

- (1) **Independent Filing:** Filing Form 2553 independent of Form 1120S within the three years and 75 days after the effective date (date the “S” election was intended to be effective).
- (2) **Filing with Current Year Form 1120S:** Attaching Form 2553 to the “S” corporation’s current year Form 1120S, provided that the “S” corporation has filed all Forms 1120S between the effective date and the current year, and provided that the current year Form 1120S is filed within 3 years and 75 days after the effective date. **NOTE:** An extension to file the current year Form 1120S does not extend the due date for relief beyond 3 years and 75 days.
- (3) **Filing with Late Filed Form 1120S:** Attaching Form 2553 to one of the “S” corporation’s late filed prior year Forms 1120S, if the “S” corporation has not filed Form 1120S (or any other income tax return) for the tax year that includes the effective date or any year following the effective date.
  - a) The late filed return for the year including the effective date cannot be filed more than three years and 75 days after the effective date.
  - b) All other delinquent Forms 1120S must be filed **simultaneously and consistently** with the requested relief.
  - c) Form 1120S must state at the top of the front page “INCLUDES LATE ELECTION(S) FILED PURSUANT TO REV. PROC. 2013-30” or comply with other specific instructions included with the Form 1120S instructions.

**ADDITIONAL SUPPORTING DOCUMENTATION:** If applicable due to timing of the requested late election relief, the following additional supporting documentation must accompany Form 2553:

- (1) Statements from all shareholders during the “S” status period that they have filed their income tax returns consistent with the “S” corporation election, signed and dated under penalties of perjury.
- (2) Representations that the entity is eligible for “S” status, intended to be classified as an “S” corporation as of the effective date of the election, failed to qualify solely because the “S” corporation election was not timely filed, has filed no tax returns inconsistent with its requested “S” status, and has reasonable cause for the election failure and acted diligently to correct the mistake upon discovery, all signed and dated under penalties of perjury by an authorized corporation officer.

**NOTE – EXCEPTION TO 3 YEAR 75 DAY FILING REQUIREMENT:** The requirement to file for relief within three years and 75 days of the effective date is **waived if all of the following conditions are met:**

- (1) The corporation fails to qualify as an “S” corporation solely because the Form 2553 was not timely filed;
- (2) The corporation and all of its shareholders reported their income consistent with “S” corporation status for the year the “S” corporation election should have been made, and for every subsequent taxable year (if any);

- (3) At least six months has elapsed since the date on which the corporation filed its tax return for the first year the corporation intended to be an “S” corporation;
- (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;
- (5) The completed Form 2553 includes the statement(s) described in Rev. Proc. 2013-30, §5.02 (i.e., statements from all shareholders who held stock between the effective date and the election date that they have reported their income on all returns consistent with “S” corporation status); **and**
- (6) The corporation is not seeking late corporate classification election relief concurrently with a late “S” corporation election under this revenue procedure.

**IRS ACCEPTANCE/REJECTION NOTIFICATION:** Upon receipt of Form 2553, IRS will determine whether the requirements for relief for late filing have been met, and the taxpayer will be notified of the outcome (Rev. Proc. 2013-30, §4.05).

**QSST OR ESBT FAILURE TO FILE:** In the case of an inadvertently invalid “S” election or an inadvertent termination of the “S” election due to the failure to make the timely QSST or ESBT election, the late QSST or ESBT election must include a statement, signed under penalties of perjury that the failure to timely elect was inadvertent, and diligent action was taken by the person or entity seeking relief to correct the mistake upon discovery. No reasonable cause statement is required to support a late QSST or ESBT.

**NOTE:** Following is a procedural diagram for use in requesting relief from late “S” corporate elections. Rev. Proc. 2013-30 contains similar procedural diagrams for use in requesting relief from late QSST & ESBT elections, late Qsub elections and late entity classification elections.

# Relief for Late S Corporation Elections

