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Taxpayer Services Division
Technical Services Bureau

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Tax Law Provisions Allow Late New York S Corporation Elections

On August 7, 1997 Governor George E. Pataki signed into law Chapter 389, which amends the Tax Law to conform to the federal tax treatment of S corporations in respect to late filed or invalid S elections. As with the federal treatment, the amendments are effective for taxable periods beginning after 1982. This memorandum will recap the general procedures for making a New York S election and explain the new Tax Law provisions covering late New York S elections and the procedures necessary to remedy late elections.

Election to be a New York S Corporation

A federal S corporation must make a separate election to be taxed as a New York S corporation by filing Form CT-6, *Election by a Federal S Corporation to be Treated as a New York S Corporation*.

A CT-6 election will be valid if the corporation is a federal S corporation, it is taxable under Article 9-A or Article 32 of the Tax Law, and all of the shareholders consent to the New York S election.

Generally, for an election to be valid for a taxable year, the election must be made at any time during the preceding taxable year or on or before the fifteenth day of the third month of the tax year to which the election will apply. For taxable years of two and one-half months or less, an election made not later than two months and fifteen days after the first day of the taxable year will be treated as timely filed for that year.

The election will be effective for the entire year for which it is made and for all succeeding years until the election is terminated.

Summary of Late and Invalid S Elections Provisions

Authority to treat late elections, etc., as timely. (Tax Law section 660(b)(5)) If an election is made by an eligible S corporation for any taxable year after the election filing deadline for that taxable year, or if no election is made at all, and it is determined by the Commissioner that there was a reasonable cause for the failure to make a timely election, the Commissioner may treat that election as timely filed for that taxable year.

Inadvertent invalid elections. (Tax Law section 660(e)) If an election by an eligible S corporation was not valid because the corporation failed to obtain the consent of all the shareholders, and within a reasonable amount of time after discovering the failure, the corporation took steps to acquire the necessary consents, the Commissioner may determine that the omission was inadvertent, and may retroactively validate the election. A retroactive validation requires both the shareholders and the corporation to recognize the tax consequences of the election for the retroactive period.

Validated federal elections (Tax Law section 660(f)) When an S election is retroactively validated for federal purposes, pursuant to Internal Revenue Code section 1362(f), then the Commissioner may retroactively validate the New York State election. The validation will apply for any taxable years occurring within the period validated by the Internal Revenue Service. As above, any retroactive validations require both the shareholders and the corporation to recognize the tax consequences of the election for the retroactive period.

Procedure for Late Elections

Corporations seeking relief for late, invalid, or validated federal elections under the above provisions should file Form CT-6 with an attachment explaining the circumstances and indicating under which section of the above Tax Law they are seeking relief. On the Form CT-6, the effective date of the election must be specified and the signatures of all the shareholders on the specified date must be included. In addition, a copy of Federal Form, 2553 *Election by a Small Business Corporation*, and the federal approval letter must be attached.

Form CT-6 may be requested by calling 1 800 972-1233. The Tax Department also provides a Fax-on-Demand service to order copies of this form. This service may be utilized by calling 1 800 748-3676. Note: to use Fax-on-Demand you must have access to a fax machine, call from a Touch Tone phone, and provide the correct code for the CT-6. The correct code for the CT-6 is 12 002; the code for the instructions is 12 003.

Forms are also available through our website. Our Internet address is: <http://www.tax.state.ny.us>

Mail completed CT-6 forms to: NYS Tax Department, Corporation Tax Registration, Building 8, Room 425, W A Harriman Campus, Albany NY 12227. You will receive written confirmation of your election.