

Part III – Administrative, Procedural, and Miscellaneous

Elections under § 362(e)(2)(C)

Notice 2005-70

This notice provides guidance about how a valid election under § 362(e)(2)(C) of the Internal Revenue Code can be made pending the issuance of additional guidance.

BACKGROUND

Section 362(e) was enacted on October 22, 2004, as part of the American Jobs Creation Act of 2004, Pub. L. No. 108-357, 118 Stat. 1418. Section 362(e)(2)(A) of the Code generally provides that if property is transferred to a corporation as a capital contribution or in an exchange to which § 351 applies and the aggregate basis of the transferred property exceeds its aggregate value immediately after the transaction, then the transferee corporation's basis in such property shall not exceed the fair market value of such property. Under § 362(e)(2)(C), however, the transferor and transferee can make a joint election to reduce the transferor's basis in the stock received to its fair market value, and no reduction of the transferee's basis in the property received will be required. Section 362(e)(2)(C) provides that the election to reduce stock basis shall be filed with the return of tax for the taxable year in which the transaction occurred, shall be in such form and manner as the Secretary may prescribe, and, once

made, shall be irrevocable. Section 362(e)(2)(A) does not apply, and the election under § 362(e)(2)(C) is not available, to exchanges subject to § 362(e)(1).

The Internal Revenue Service and Treasury Department are studying the issues raised by § 362(e), including the manner in which the election provided under § 362(e)(2)(C) might be made. In particular, the Service and Treasury Department are considering issuing guidance prescribing a particular form and manner for making the election. In the interim, the Service will treat elections as effective under § 362(e)(2)(C) if they are made in the form and manner of the certification set forth in this Notice. The Service will also treat other statements on or with returns as effective elections under § 362(e)(2)(C) if they disclose sufficient information to apprise the Service that an election has been made with respect to a particular transaction and by particular parties.

PROCEDURES

If the transferor is not a controlled foreign corporation (CFC) as defined in § 957, the transferor may make a valid election by including a certification as described below on or with its tax return filed by the due date (including extensions) for filing its original return for the taxable year in which the transaction occurred. If the transferor is a CFC, its controlling U.S. shareholder(s), as defined in §1.964-1(c)(5) of the Income Tax Regulations, may make a valid election for the CFC by including a certification as described below on or with each of their tax returns filed by the due date(s) (including extensions) for filing their original returns for the taxable year in which the transaction occurred.

If the election is made as described below, no election need be filed by the transferee (or any controlling U.S. shareholder thereof).

If the transferor is not a CFC, the transferor can make the election by providing the following certification: "[insert name and tax identification number of the taxpayer filing the return] certifies that [insert name and tax identification number of transferor] and [insert name and tax identification number of transferee] make an election under § 362(e)(2)(C) with respect to a transfer of property described in § 362(e)(2)(A) on [insert date(s) of transfer(s)]."

If the transferor is a CFC, its controlling U.S. shareholder(s) can make the election by providing the following certification: "[insert name and tax identification number of the taxpayer filing the return] certifies that [insert name and tax identification number, if any, of transferor (the CFC)], the controlling U.S. shareholder(s) of which is (are) [insert name(s) and tax identification number(s) of the controlling U.S. shareholder(s)], and [insert name and tax identification number, if any, of transferee] make an election under § 362(e)(2)(C) with respect to a transfer of property described in § 362(e)(2)(A) on [insert date(s) of transfer(s)]."

The common parent of a consolidated group of corporations can make the election on behalf of its members.

Taxpayers uncertain of the applicability of § 362(e)(2) to their transaction may make a protective election, which will have no effect in the event § 362(e)(2) does not apply to the transaction, but which will otherwise be binding and irrevocable.

EFFECTIVE DATE

This notice is effective for all elections under § 362(e)(2)(C) until further notice.

DRAFTING INFORMATION

The principal author of this notice is Jay Singer of the Office of Associate Chief Counsel (Corporate). Taxpayers with comments or questions about making an election under § 362(e)(2)(C) should contact Mr. Singer at (202) 622-7530 (not a toll-free call). Taxpayers with comments or questions about CFCs making an election under § 362(e)(2)(C) should contact Christopher Trump of the Office of Associate Chief Counsel (International) at (202) 622-3860 (not a toll-free call).