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Elective Tax Classification for Qualifying Foreign and Domestic Business Entities under the Final Check-the-Box Regulations

Henry J. Lischer Jr.

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ELECTIVE TAX CLASSIFICATION FOR QUALIFYING FOREIGN AND DOMESTIC BUSINESS ENTITIES UNDER THE FINAL CHECK-THE-BOX REGULATIONS

*Henry J. Lischer, Jr.**

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* Professor of Law, Southern Methodist University, Dallas, Texas. The excellent and substantial contributions of Anne Trinklein, candidate for the degree of LL.M. (Taxation), Southern Methodist University, are gratefully acknowledged.

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I. INTRODUCTION

THIS Article analyzes business entity classification regulations recently issued by the U.S. Treasury Department. Because the new regime generally determines the U.S. federal tax status of an entity according to an election by the taxpayer on an Internal Revenue Service (IRS) form, these regulations came to be known as the "check-the-box" (CTB) regulations.¹ These CTB income tax regulations are concerned with whether an entity is to be classified as either: (1) an association subject to the corporate income tax or (2) an entity not subject to the corporate income tax (a tax "pass-through" or a tax "nothing").

A pivotal component of the U.S. federal income tax is the dichotomy between entities subject to the corporate income tax regime and entities that are not.² This fundamental dichotomy is significant because of the classical double tax system of the U.S. with respect to distributed corpo-

1. This article does not address the issue of whether the Treasury Department is authorized to adopt such an elective regime. For a discussion of whether the Treasury lawfully may do so, see STAFF OF JOINT COMM. ON TAXATION, 105TH CONG., REVIEW OF SELECTED ENTITY CLASSIFICATION AND PARTNERSHIP TAX ISSUES, ¶¶ 43-54 (Comm. Print 1997) available in LEXIS, FEDTAX Library, TNT File; WILLIAM S. MCKEE ET AL., 1 FEDERAL TAXATION OF PARTNERSHIPS AND PARTNERS ¶ 3.08 (Cum. Supp. 1997).

2. See I.R.C. §§ 11, 301-85 (1994).

rate profits. The first tax, the corporate income tax, applies at the entity level to the taxable income of the corporation.³ The second tax, the individual income tax, is imposed on the shareholder based on the dividends received by the shareholder.⁴

In contrast to the corporation, a partnership is a pass-through entity for U.S. federal income tax purposes because the partnership generally is not subject to tax.⁵ Instead, the partners report, on their individual income tax returns, their distributive shares of partnership income, deductions, credits, etc.⁶ Accordingly, partnership income is subject to tax once, at the partner level, by the individual income tax. In a similar fashion, the income of a proprietorship is subject to tax once, to the proprietor.

Because distributed corporate income is subject to a double tax system, whereas partnership and proprietorship income is subject to only one tax, the tax stakes are high with respect to the tax classification of an entity. Tax planners for multi-member entities, well aware of the significantly different tax landscape for a partnership as compared to a corporation, often sought partnership status for the entity, at least for tax purposes. Drawbacks exist as to use of the partnership, however. A significant advantage of the corporation is the limited liability generally enjoyed by all owners of the entity. In contrast, a partnership requires at least one general partner to be subject to unlimited liability. This is true with respect to both general and limited partnerships.⁷

Prior to adoption of the CTB regulations, the determination of whether a multi-member entity was a partnership or a corporation generated considerable uncertainty, extensive commentary,⁸ and some significant judi-

3. See I.R.C. § 11.

4. See I.R.C. §§ 61(a)(7), 301 (1994).

5. See I.R.C. §§ 701-61 (1994). A significant exception to the general rule is that a publicly traded partnership within the scope of Internal Revenue Code section 7704 is taxed as a corporation.

6. See I.R.C. §§ 61(a)(13), 704(b) (1994).

7. State legislatures have developed numerous business forms to satisfy taxpayers' desires to combine the benefits of both corporations and partnerships. See generally ARTHUR B. WILLIS ET AL., 1 PARTNERSHIP TAXATION ¶¶ 3.01-.04 (6th ed. 1997); Robert R. Keatinge et al., *The Limited Liability Company: A Study of the Emerging Entity*, 47 BUS. LAW. 375 (1992) (describing tax and business aspects of the limited liability company including a comparison of the limited liability company to other principal business forms); John H. Matheson & Brent A. Olson, *A Call for a Unified Business Organization Law*, 65 GEO. WASH. L. REV. 1 (1996) (discussing a variety of business forms and proposing a simplified model for business organization legislation).

8. See generally William B. Brannan, *Lingering Partnership Classification Issues (Just When You Thought It Was Safe To Go Back Into the Water)*, 1 FLA. TAX REV. 197 (1993) (analyzing practical problems in distinguishing partnerships from corporations under the *Kintner* four-factor test); Richard A. Fisher, *Classification Under Section 7701—The Past, Present, and Prospects for the Future*, 30 TAX LAW. 627 (1977) (summarizing entity classification from *Morrissey* through the regulations briefly proposed by the Treasury in January 1977); Patrick E. Hobbs, *Entity Classification: The One Hundred-Year Debate*, 44 CATH. U. L. REV. 437 (1995) (summarizing the history of the federal tax definition of "corporation" and the failure of the corporate resemblance test); Richard L. Parker, *Corporate Benefits Without Corporate Taxation: Limited Liability Company and Limited Partnership Solutions to the Choice of Entity Dilemma*, 29 SAN DIEGO L. REV. 399 (1992) (summarizing the evolution of entity classification law and the development of new business forms, and

cial decisions.⁹ However, the commentary and judicial decisions did not resolve the uncertainties and ambiguities, and tax planners had to live with some degree of uncertainty as to the tax status of an organization. Tax professionals were able to fine tune the entity's organizational documents to achieve reasonable certainty as to the tax status of an entity, generally at significant cost.¹⁰

Beginning in the late 1980s, a new form of business organization appeared, which was destined to cause a significant change of governmental policy regarding whether an entity was a corporation for U.S. federal tax purposes. This new business entity was the limited liability company (LLC), which, if properly structured, provided a very attractive combination of features: (1) limited liability for all owners; and (2) partnership treatment for federal tax purposes.¹¹ In 1988, the IRS issued its first ruling regarding the federal tax treatment of an LLC by classifying a Wyoming LLC as a partnership for federal income tax purposes.¹² In response to the popularity of LLCs in the business and legal communities, the legislatures of every state and the District of Columbia now have adopted LLC statutes.¹³

As the number of states authorizing the LLC expanded, the Treasury Department could foresee a significant reduction in the use of the corporate form of doing business because of the attractiveness of the LLC. The LLC in many ways made payment of the corporate income tax elective for a well-advised business. Essentially acknowledging this, the IRS issued several administrative pronouncements,¹⁴ culminating in the issu-

proposing an elective corporate tax regime for private businesses); Stephen B. Scallen, *Federal Income Taxation of Professional Associations and Corporations*, 49 MINN. L. REV. 603 (1965) (summarizing the evolution of pre-*Morrissey* entity classification legislation, case law, and regulations).

9. See *Morrissey v. Commissioner*, 296 U.S. 344 (1935); *United States v. Kintner*, 216 F.2d 418 (9th Cir. 1954); *Larson v. Commissioner*, 66 T.C. 159 (1976), *acq.*, 1979-1 C.B. 1; *Zuckman v. United States*, 524 F.2d 729 (Ct. Cl. 1975).

10. See Joni L. Walser & Robert E. Culbertson, *Encore Une Fois: Check-the-Box on the International Stage*, 15 TAX NOTES INT'L 53, 54 (1997).

11. See generally Lawrence H. Brenman, *Limited Liability Companies Offer New Opportunities to Business Owners*, 10 J. PARTNERSHIP TAX'N 301 (1994) (summarizing the history of entity classification and the advantages of the LLC under the existing entity classification rules); Wayne M. Gazur & Neil M. Goff, *Assessing the Limited Liability Company*, 41 CASE W. RES. L. REV. 387 (1991) (summarizing the development, structure, federal tax treatment and long-term prospects of the LLC); Susan Pace Hamill, *The Taxation of Domestic Limited Liability Companies and Limited Partnerships: A Case for Eliminating the Partnership Classification Regulations*, 73 WASH. U. L.Q. 565 (1995) (providing a historical overview of entity classification of LLCs, with a focus on guidelines set out in Rev. Proc. 95-10, which effectively treats LLC managers as general partners); Larry E. Ribstein, *The Emergence of the Limited Liability Company*, 51 BUS. LAW. 1 (1995) (summarizing the history and structure of LLC law).

12. See Rev. Rul. 88-76, 1988-2 C.B. 360.

13. See Bruce P. Ely & Joseph K. Beach, *The LLC Scoreboard*, 74 TAX NOTES 1329 (1997) (charting state tax treatment of LLCs and registered limited liability partnerships for each state and the District of Columbia).

14. See IRS Notice 95-14, 1995-1 C.B. 297; Prop. Treas. Reg. §§ 301.7701-1 to -3, 61 Fed. Reg. 21,989 (1996) (to be codified at 26 C.F.R. pt. 301) (proposed May 13, 1996).

ance of final CTB regulations in late 1996.¹⁵ The regulations allow taxpayers an election to treat a qualifying business organization as: (1) an association taxable as a corporation; (2) as a partnership (if the entity has more than one member); or (3) non-existent, i.e., it is disregarded (if the entity has only one member).

This Article provides a general introduction and overview of the CTB regulations and describes the application of the CTB regulations to both domestic and foreign entities.

II. PRE CHECK-THE-BOX CLASSIFICATION REGIME

A. STATUTORY SCHEME

The Internal Revenue Code very cryptically defines partnership and corporation. Internal Revenue Code section 7701(a)(2) defines a partnership as “a syndicate, group, pool, joint venture, or other unincorporated organization, through or by means of which any business, financial operation, or venture is carried on, and which is not, within the meaning of this title, a trust or estate or a corporation.”¹⁶ The Code further defines corporations to include “associations, joint-stock companies, and insurance companies.”¹⁷ Thus, an unincorporated association may be classified for federal tax purposes as either a partnership or a corporation depending upon whether the entity is an association, joint-stock company, or insurance company. Because of the very abbreviated statutory language in section 7701 as to the tax status of unincorporated associations, the Treasury Regulations under section 7701 have played a particularly significant role in classifying business entities for federal income tax purposes.

B. RESEMBLANCE TEST IN “KINTNER” REGULATIONS

Until the effective date of the CTB regulations, January 1, 1997,¹⁸ the rules for classifying an unincorporated association as a partnership, trust, or association taxed as a corporation were generally based on a corporate resemblance test first articulated by the Supreme Court in 1935.¹⁹ Under this resemblance test, an entity would be classified as a corporation if it

15. See T.D. 8697, 61 Fed. Reg. 66,584 (1996). See generally JOINT COMMITTEE ON TAXATION, *supra* note 1, ¶¶ 33-42; Bruce N. Davis, *International Tax Planning Under the Final Check-the-Box Regulations*, 26 TAX MGMT. INT'L J. 3 (1997); Hugh M. Dougan et al., 'Check the Box'—Looking Under the Lid, 75 TAX NOTES 1141 (1997); David S. Miller, *The Tax Nothing*, 74 TAX NOTES 619 (1997); Harvey Mogenson & David Benson, *IRS Issues Final Check-the-Box Regs—Tax Simplification Creates Planning Opportunities*, 13 TAX NOTES INT'L 2159 (1996).

16. I.R.C. § 7701(a)(2) (1994).

17. I.R.C. § 7701(a)(3) (1994).

18. The effective date provisions of the CTB regulations are discussed at *infra* part III.E.1.

19. See *Morrissey*, 296 U.S. at 344; see generally BORIS I. BITTKER & JAMES S. EUSTICE, *FEDERAL INCOME TAXATION OF CORPORATIONS AND SHAREHOLDERS* ¶ 2.02 (6th ed. 1996); WILLIAM S. MCKEE ET AL., *FEDERAL TAXATION OF PARTNERSHIPS AND PARTNERS* ¶ 3.06[1] (2d ed. 1990).

more closely resembled a corporation than a partnership or trust, based on the presence or absence of the following six factors, each of which indicated corporate status: (1) associates; (2) an objective to carry on business and divide the profits therefrom; (3) continuity of life; (4) centralized management; (5) limited liability; and (6) free transferability of interests.²⁰ The six characteristics would be applied to the entity being classified, and each characteristic would be evaluated as indicating either corporate status or non-corporate status. In 1960, the IRS attempted to simplify the fact-intensive corporate resemblance test by adopting a more objective approach known as the *Kintner* regulations, whereby an entity would not be classified as a corporation unless it had more corporate characteristics than not.²¹ The regulations, in effect, favored partnership status because a preponderance of the characteristics²² had to indicate corporate status in order for the entity to be considered a corporation.²³ Because the first two above-listed characteristics (associates and an objective to carry on business and divide the profits) are common to both corporations and partnerships, only the last four characteristics were relevant in distinguishing a corporation from a partnership.²⁴ Because the *Kintner* regulations would not characterize an entity as a corporation unless it had a majority of these four characteristics indicating corporate status, an unincorporated association was classified as a partnership if the entity lacked two or more of these four corporate characteristics.

C. DEFINITION OF DOMESTIC AND FOREIGN ENTITIES

The Internal Revenue Code defines a foreign corporation or partnership as one that is not domestic; a domestic corporation or partnership is one created or organized in the U.S. or under U.S. or any state law.²⁵ Before the CTB regulations, all foreign business organizations were considered unincorporated for U.S. federal tax purposes, even if they were considered corporations under foreign law, and then classified for U.S. tax purposes according to the four-factor corporate resemblance test.²⁶

20. See Treas. Reg. § 301.7701-2(a)(1) (as amended in 1993). For more extensive analysis of these factors, see WILLIS ET AL., *supra* note 7, ¶¶ 3.01-.04.

21. See Brenman, *supra* note 11, at 302 (citing *Kintner*, 216 F.2d at 418).

22. Each of the characteristics was weighed equally. See Treas. Reg. § 301.7701-2(a)(3) (as amended in 1993); *Larson*, 66 T.C. at 172.

23. The tilt in the regulations in favor of partnership status had the effect of reducing the likelihood that a professional association would be deemed a corporation with employees who could qualify for favorable employee benefit provisions under the Internal Revenue Code.

24. See Treas. Reg. § 301.7701-2(a)(2) (as amended in 1993).

25. See I.R.C. §§ 7701(a)(4), (5) (1994).

26. See Rev. Rul. 88-8, 1988-1 C.B. 403. See also IRS Notice 95-14, 1995-1 C.B. 297, 298. For a discussion of the corporate resemblance test as it applied to foreign entities, see BITTKER & EUSTICE *supra* note 19, ¶ 2.01; Bruce N. Davis & Steven R. Lainoff, *U.S. Taxation of Foreign Joint Ventures*, 46 TAX. L. REV. 165 (1991) (discussing entity classification under the corporate resemblance test as an initial step in determining the tax treatment of a foreign joint venture); Michael B. Nelson, *Critical Analysis and Strategies for U.S. Overseas Businesses Participating as a Foreign Joint Venture Partner*, 9 TRANSNAT'L LAW. 1 (1996) (discussing the corporate resemblance test as it applies to classification of a

Foreign law was relevant to determine whether the foreign entity possessed the requisite number of corporate characteristics under the U.S. standards,²⁷ but foreign law characterization of the entity was not, as such, relevant.

III. CHECK-THE-BOX CLASSIFICATION REGIME

A. INTRODUCTION

On April 3, 1995, the IRS issued Notice 95-14 and acknowledged that, with the emergence of hybrid entities such as the LLC, the state law differences between corporations and partnerships had narrowed to such a degree that the traditional distinctions no longer existed for many entities.²⁸ Furthermore, entity classification had become essentially elective for well-advised taxpayers who could achieve—by choice of entity and careful drafting of the organizational documents of the entity—the classification they desired under the *Kintner* regulations.²⁹ To reduce administrative costs to the IRS and to enable qualifying entities to achieve their desired classification, the IRS announced that it might replace the existing section 7701 regulations with an elective approach.³⁰ The IRS issued proposed CTB regulations on May 13, 1996.³¹ On December 17, 1996, the IRS ushered in a new entity classification era by adopting final regulations that generally have an effective date of January 1, 1997.³² The election mechanism provided by the final regulations permits a qualifying entity to elect either corporate status or non-corporate status.

Under the CTB election, the entity electing non-corporate status is viewed as having no independent tax significance. In other words, the entity electing pass-through status is either a partnership (if there are two or more members) or a tax “nothing” (if there is only one owner). The new CTB regulations recognize the following classifications of business entities: (1) if there are two or more members, the entity is either a corporation or a partnership; and (2) if there is but one owner, the entity is either a corporation or is disregarded (i.e., is a sole proprietorship, branch, or division of the sole owner).³³

foreign joint venture); Committee on Foreign Activities of U.S. Taxpayers, N.Y. State Bar Ass'n, Tax Section, *Report on Foreign Entity Characterization for Federal Income Tax Purposes*, 35 TAX L. REV. 167 (1980) (discussing the uncertainty tax planners face due to the Service's decision to apply “lack of separate interests” analysis in Rev. Rul. 77-214).

27. See Rev. Rul. 73-254, 1973-1 C.B. 613; see also BITTKER & EUSTICE, *supra* note 19, ¶ 2.01; Nelson, *supra* note 26, at 1, 9-11 (discussing classification of foreign entities in the Internal Revenue Manual prior to August 1991).

28. See IRS Notice 95-14, 1995-1 C.B. 297.

29. See *id.*

30. See *id.* at 298.

31. See Prop. Treas. Reg. §§ 301.7701-1 to -3, 61 Fed. Reg. 21,989 (1996) (to be codified at 26 C.F.R. pt. 301) (proposed May 13, 1996).

32. See Treas. Reg. §§ 301.7701-1(f), 301.7701-2(e), and 301.7701-3(f)(1) (1997). The effective date provisions of the CTB regulations are discussed *infra* part III.E.1.

33. See Treas. Reg. § 301.7701-2(a). If the single-owner business entity is a bank as defined in I.R.C. § 581, however, the special rules applicable to banks would continue to

As more fully discussed below, the CTB regulations draw a sharp distinction between domestic and foreign entities. The CTB regulations provide that pass-through entity status is elective for most domestic, unincorporated, non-publicly traded entities with more than one member.³⁴ Similarly, most closely held, non-publicly traded foreign entities are eligible to elect pass-through treatment. The Preamble to the final regulations, however, warns that the IRS "will continue to monitor carefully the uses of partnerships in the international context" and limit affirmative use of partnerships "to achieve results that are inconsistent with the policies and rules of particular Code provisions or of U.S. tax treaties."³⁵ Although the cautionary language of the CTB regulations is too general to be of much assistance from a tax planning perspective, it does serve to warn tax professionals that abusive use of a partnership (whatever that may be) may meet opposition from the IRS, notwithstanding the general principle of the CTB regulations to defer to taxpayer preference as to classification of the entity.

B. ELIGIBILITY REQUIREMENTS FOR THE ELECTION

Three requirements must be satisfied before an entity is eligible to elect classification for federal tax purposes under the CTB regulations as an "eligible entity." First, the entity must be "separate from its owners."³⁶ Second, the entity must be a "business entity" (rather than a trust).³⁷ Third, the entity must not be classified automatically as a "corporation."³⁸

1. *First Requirement: Entity Must Be Separate From Its Owners*

In order for an entity to be an eligible entity, it must exist separate from its owners for federal tax purposes. This determination is a matter of federal law and does not depend on whether local law recognizes the organization as an entity.³⁹ Accordingly, the existence of a separate juridical entity with state law powers to engage in business activities does

apply to the single owner as if the business were a separate entity. See Treas. Reg. § 301.7701-2(c)(2)(ii).

34. See JOINT COMMITTEE ON TAXATION, *supra* note 1, ¶ 7.

35. 61 Fed. Reg. 21,989, 21,990 (1996) (to be codified at 26 C.F.R. pt. 301) (proposed May 13, 1996) (preamble to proposed regulations); 61 Fed. Reg. 66,584, 66,585 (1996) (to be codified at 26 C.F.R. pts. 1, 301, 602) (preamble to final regulations).

36. See Treas. Reg. § 301.7701-1(a)(1) (1997).

37. See Treas. Reg. § 301.7701-2(a) (1997).

38. See Treas. Reg. § 301.7701-3(a) (1997).

39. See Treas. Reg. § 301.7701-1(a)(1); see also Simplification of Entity Classification Rules, 61 Fed. Reg. 66,584, 66,585 (1996) (preamble to final regulations). The regulations do not expressly define the term "entity separate from its owners," but provisions of the preamble and the CTB regulations indicate that, while not conclusive for federal tax purposes, local law should be applied to determine whether an entity is a separate entity for federal tax purposes.

For a discussion of the separate entity requirement as it applies to Japanese business entities, see Christopher H. Hanna, *Initial Thoughts on Classifying the Major Japanese Business Entities Under the Check-the-Box Regulations*, 51 S.M.U. L. REV. 75 (1997) (analyzing whether the *tokumei kumiai* is a separate entity under the CTB regulations). The

not necessarily establish an entity under the CTB regulations.⁴⁰

A joint venture that is not an entity under local law, however, may be a separate entity for federal tax purposes depending on the activities of the participants.⁴¹ The CTB regulations provide several examples that illustrate situations in which an organization may be recognized as an entity separate from its owners. First, a joint venture constitutes a separate entity for federal tax purposes "if the participants carry on a trade, business, financial operation, or venture and divide the profits."⁴²

For example, a separate entity exists . . . if co-owners of an apartment building lease space and provide services to the occupants either directly or through an agent. Nevertheless, a joint undertaking [merely] to share expenses does not create a separate entity for federal tax purposes. . . . Similarly, mere co-ownership of property that is maintained and rented or leased is not a separate entity for federal tax purposes.⁴³

Moreover, the regulations specify that qualified cost-sharing arrangements as defined in Treasury Regulation section 1.482-7 are not separate entities for federal tax purposes.⁴⁴

The CTB regulations do not provide guidance as to the domestic or foreign status of a joint venture that creates an entity.⁴⁵ The domestic or foreign status of the entity, however, might be determined by the place where the agreement is entered into, according to the choice of law provision in the agreement (if it contains such a provision), or some other mechanism.⁴⁶

Another intriguing question is whether a branch of a corporation is an entity under the CTB regulations so that it can elect to be treated as a separate corporation.⁴⁷ This issue would likely involve a U.S. branch of a foreign corporation. In most situations, an eligible entity would elect

German *stille gesellschaft* ("silent partnership") raises similar separate entity issues. See Priv. Ltr. Rul. 83-09-062 (Nov. 29, 1982); Priv. Ltr. Rul. 79-35-019 (May 29, 1979).

40. See Treas. Reg. § 301.7701-1(a)(1) (1997). Examples of entities that are not recognized as separate tax entities include organizations that are an integral part of and owned by a state or by specified incorporated Native American Tribes. See Treas. Reg. § 301.7701-1(a)(3) (1997).

The specific examples in this regulation are concerned with governmental or quasi-governmental organizations. A private juridical entity may be a sufficient entity under this regulation. See Treas. Reg. § 301.7701-2 (1997).

41. See Simplification of Entity Classification Rules, 61 Fed. Reg. 66,584, 66,585 (1996) (to be codified at 26 C.F.R. pts. 1, 301, 602).

42. Treas. Reg. § 301.7701-1(a)(2) (1997).

43. *Id.* If an owner or tenant in common of farm property lease the property to a farmer for a cash rental or a share of the crops, they do not necessarily create a separate entity for federal tax purposes. *Id.*

44. See Treas. Reg. § 301.7701-1(c) (1997).

45. Given the differences in treatment of domestic and foreign entities under the default rules discussed *infra* part III.D.2., the refusal to address the domestic or foreign status of a joint venture is surprising and potentially problematic.

46. See Dougan et al., *supra* note 15, at 1150.

47. See Anne O'Connell Devereaux et al., *International Topics Cover APAs, Check-the-Box, Electronic Commerce*, 75 TAX NOTES 910-11 (1997); Miller, *supra* note 15, at 622-23.

pass-through status to avoid the corporate income tax. A branch may prefer separate corporate status, however, for tax planning purposes.⁴⁸ If a wholly owned subsidiary elects to be treated as a tax nothing, it is treated effectively as a branch. On the basis of mutuality, therefore, arguably, a branch should be eligible for elective treatment as a separate corporation. While the CTB regulations are silent on this question, government representatives have indicated informally that the CTB election is not available to a branch.⁴⁹

2. *Second Requirement: Entity Must Be a Business Entity Rather Than a Trust*

Second, an eligible entity must be a "business entity." A "business entity" is any entity that is not a trust under Treasury Regulation section 301.7701-4.⁵⁰ In addition, the entity cannot be subject to special treatment under the Internal Revenue Code (e.g., "real estate mortgage investment conduits" under Internal Revenue Code section 860A or "qualified settlement fund" under Treasury Regulation section 1.468B).⁵¹

Trusts generally do not have associates or an objective to carry on business for profit. The common law trust, created by a will or an inter vivos trust agreement, exists to protect and conserve property for the beneficiaries of the trust. A trust does not create business associates and it does not conduct business activities for profit. Accordingly, such a trust is not a business entity.

On the other hand, Treasury Regulation section 301.7701-4 confirms that use of the trust mechanism and creation of the trustee and beneficiary legal relationship do not control the tax characterization of the entity. If the "real character" of the entity is a business entity, rather than a trust, the underlying substance as a business entity will prevail over the formal use of a trust.⁵² The facts and circumstances of each situation will determine whether the entity is a trust for federal tax purposes; no bright-line test applies.

48. See generally Philip R. West, *Foreign Law in U.S. International Taxation: The Search for Standards*, 13 TAX NOTES INT'L 987 (1996); Evan S. Blanco & Richard L. Doernberg, *What One Hand Giveth, the Other Taketh Away: The Proposed Check-the-Box Regulations and the Proposed Section 1441 Regulations*, 13 TAX NOTES INT'L 615 (1996); Susan M. Lyons, *ABA Discusses International Developments, Tax Treaties at Mid-Year Meeting*, 14 TAX NOTES INT'L 187, 188, 190-91 (1997).

49. See Walser & Culbertson, *supra* note 10, at 56.

50. See Treas. Reg. § 301.7701-2(a) (1997). The distinctions between trusts and business entities are not changed by the CTB regulations. See Simplification of Entity Classification Rules, 61 Fed. Reg. 66,584, 66,585 (1996) (to be codified at 26 C.F.R. pts. 1, 301, 602).

51. See Treas. Reg. §§ 301.7701-1(b), -2(a) (1997).

52. See Treas. Reg. § 301.7701-4 (1997); 61 Fed. Reg. 66,584, 66,585 (1996) (to be codified at 26 C.F.R. pts. 1, 301, 602). See generally BITTKER & EUSTICE, *supra* note 19, ¶ 2.02; Colleen J. Doolin, Note, *Determining the Taxable Status of Trusts that Run Businesses*, 70 CORNELL L. REV. 1143 (1985) (discussing corporate classification criteria).

3. Third Requirement: Entity Must Not Be Deemed a Corporation

Third, an eligible entity must not be classified automatically as a corporation.⁵³ The CTB regulations define a corporation to include (thus negating the CTB election with respect to): (1) an incorporated business entity under federal or state statute or under a statute of a federally recognized Native American tribe; (2) an association as defined in Treasury Regulation section 301.7701-3; (3) a joint-stock company or joint-stock association under state statute; (4) an insurance company; (5) a state-chartered bank whose deposits are insured under the Federal Deposit Insurance Act; (6) a business entity wholly owned by a state or any political subdivision thereof;⁵⁴ (7) a business entity that is taxable as a corporation under a provision of the Code other than Internal Revenue Code section 7701(a)(3);⁵⁵ and (8) a business entity included on a list of foreign entities (the "per se" list of corporate-status foreign entities).⁵⁶

A foreign entity is considered a corporation for federal tax purposes if it qualifies as a corporation under Treasury Regulation section 301.7701-2(b)(4) (relating to insurance companies), -2(b)(7) (relating to corporations under other Code provisions), or -2(b)(8) (foreign entities considered to be corporations per se). The per se list⁵⁷ generally includes limited liability foreign entities that are not closely held and whose shares can be traded on a public securities exchange.⁵⁸ The Preamble of the CTB regulations states that the Treasury in the future may modify the list of foreign entities⁵⁹ treated as corporations per se, and this may be necessary to prevent circumvention of the per se list by the simple act of a foreign country amending its domestic law to rename a business entity. If a foreign country does not like the per se classification, it may be able to create a new business entity that will avoid the per se list.

A foreign entity is not treated as a corporation⁶⁰ if it predates the CTB regulations, is a corporation per se, and qualifies for grandfather status under the transition rules discussed below.⁶¹ Such a grandfathered entity is eligible to elect its classification, but the CTB regulations permit an

53. See Treas. Reg. § 301.7701-3(a) (1997).

54. See Treas. Reg. § 301.7701-2(b)(6) seems redundant, given that state-owned entities are not recognized as separate entities under Treas. Reg. § 301.7701-1(a)(3).

55. Examples include the publicly traded partnership treated as a corporation under I.R.C. § 7704 or a I.R.C. § 7701(i) taxable mortgage pool.

56. See Treas. Reg. § 301.7701-2(b) (1997).

57. The entities on the per se list are contained in the Appendix *infra*. The regulations provide two exceptions to the list of foreign corporations per se: (1) Canadian corporations or companies that provide unlimited liability to all members and (2) certain Indian public limited companies. See Treas. Reg. § 301.7701-2(b)(8)(ii) (1997).

58. See JOINT COMMITTEE ON TAXATION, *supra* note 1, ¶ 36. According to the Joint Committee, the per se list may contain an entity that could have qualified as a partnership under the pre-CTB regulations. *Id.* ¶ 60.

59. See Simplification of Entity Classification Rules, 61 Fed. Reg. 66,584, 66,586 (1996) (to be codified at 25 C.F.R. pts. 1, 301, 602). Any such change would take the form of a notice of proposed rulemaking (requiring that public comment be solicited) and would be prospective in effect.

60. See Treas. Reg. § 301.7701-2(d)(1) (1997).

61. This transition rule is discussed *infra* part III.D.3.

election to be treated permanently as a corporation.⁶² A foreign entity is not eligible if it is a corporation per se and does not qualify for grandfather status.

C. SIGNIFICANCE OF WHETHER CLASSIFICATION IS "RELEVANT" AS OF A PARTICULAR DATE

For several purposes discussed below,⁶³ the CTB regulations require a determination of whether an entity's U.S. tax status is "relevant" as of a specific date. In order to facilitate the explication of the CTB rules below, the relevance concept will be dealt with at this point.

A foreign eligible entity's classification "is relevant when its classification affects the liability of any person for [U.S.] federal tax or information purposes."⁶⁴ Classification is relevant, for example, if U.S. income was paid to the entity and the amount of withheld income tax varies depending upon whether the entity is classified as a partnership or as an association.⁶⁵ The classification may affect the documentation that the entity must submit to the withholding agent, the type of tax or information return to file, or the preparation of the return.⁶⁶ The foreign entity's classification is relevant on the date of an event that creates an obligation to file a federal tax return, information return, or statement for the determination of the entity's classification.⁶⁷

D. POST-1996 CLASSIFICATION UNDER THE CHECK-THE-BOX REGULATIONS

An entity that satisfies the three eligibility requirements may elect its U.S. tax status on or after January 1, 1997.⁶⁸ A newly formed entity or a newly "relevant"⁶⁹ foreign entity may make an initial classification election.⁷⁰ A pre-existing entity may also make an initial classification election or a change in classification election (subject to the once-in-sixty-months limitation discussed at part III.D.1.f).

Generally, an eligible entity may elect to be a corporation or a pass-

62. See Treas. Reg. § 301.7701-2(d)(3)(i)(A) (1997).

63. See *infra* parts III.D. (a newly-relevant entity may qualify for the CTB election), III.D.3. (post-1996 classification of pre-existing foreign entity on per se list), and III.E.2.b. (pre-1997 classification of pre-existing foreign entity).

64. Treas. Reg. § 301.7701-3(d)(1) (1997). Uncertainty as to whether the entity's tax status was relevant may be ameliorated by a protective election.

65. See *id.* For a discussion of the section 1441 implications of the CTB regulations, see West, *supra* note 48, at 1002; Blanco & Doernberg, *supra* note 48, at 615.

66. See Treas. Reg. § 301.7701-3(d)(1) (as amended in 1988).

67. See *id.* For example, the foreign entity's classification is relevant on the date that an interest in the entity is acquired that obligates a U.S. person to file an information return on Form 5471. See *id.* The scope of the transition rule in the final regulations may not adequately protect transactions commenced before the effective date of the regulations. See generally Dougan et al., *supra* note 15, at 1152-53.

68. See Treas. Reg. § 301.7701-3(c)(1)(iii).

69. Whether an entity's status is "relevant" is discussed *supra* part III.C.

70. See Treas. Reg. § 301.7701-3(c)(1)(vi) ex. 1.

through.⁷¹ The election provisions of the CTB regulations are discussed below.⁷² In addition, the CTB regulations provide classification rules for eligible entities that do not exercise the proffered election. These “default” rules are also discussed below.⁷³ Furthermore, a post-1996 classification rule for certain pre-existing foreign entities on the per se list is also discussed.⁷⁴

1. Post-1996 Classification of Eligible Entities by Election

a. Permitted Elections

A multiple-member eligible entity may elect to be treated (after January 1, 1997) as either an association or a partnership. A single-owner eligible foreign entity may elect to be treated as a corporation or may be disregarded.⁷⁵ The election is entity by entity. Consequently, the election may be exercised differently for entities that are considered identical as a matter of business entity law. For example, a parent corporation may own all interests in two or more eligible entities that are identical under the business entity law of the entities' jurisdiction. The CTB election may be exercised differently as to each eligible entity.

b. Making the Election

An eligible entity may elect or change its classification by filing a completed IRS Form 8832, Entity Classification Election.⁷⁶ The election must be signed by (1) each member of the electing entity who is an owner when the election is filed; or (2) any officer, manager, or member of the electing entity who represents under penalty of perjury that he or she has the authority under local law or the entity's organizational documents to make the election.⁷⁷ In addition, in order for an election to be effective for any period prior to the time it is filed, each person who was an owner between the election date and the filing date must sign the election.⁷⁸

71. Certain grandfathered foreign corporations are per se eligible to elect their classification, but the CTB regulations only permit an election to be treated permanently as a corporation. See the discussion *infra* part III.D.3.

72. The CTB election rules are discussed *infra* part III.D.1.

73. The default rules are discussed *infra* part III.D.2.

74. The special classification rule for pre-existing foreign entities on the per se list is discussed *infra* part III.D.3.

75. See Treas. Reg. § 301.7701-3(a) (1997). In order to coordinate the new regulations with other I.R.C. sections, special rules apply to certain entities. For example, tax exempt entities under I.R.C. § 501(a) and real estate investment trusts under I.R.C. § 856(c)(1) are classified as associations. See Treas. Reg. § 301.7701-3(c)(1)(v)(A); Treas. Reg. § 301.7701-3(c)(1)(v)(B); Simplification of Entity Classification Rules, 61 Fed. Reg. 66,584, 66,587 (1996). Also, except as provided under the grandfather rules for certain foreign business entities discussed *infra* part III.D.3., an entity resulting from a partnership termination or division under I.R.C. §§ 708(b)(1)(B) or 708(b)(2)(B) is classified as a partnership. See Treas. Reg. § 301.7701-3(e) (1997).

76. See Treas. Reg. § 301.7701-3(c)(1)(i) (1997).

77. See Treas. Reg. § 301.7701-3(c)(2)(i) (1997).

78. See Treas. Reg. § 301.7701-3(c)(2)(ii) (1997). The effective date of the election may precede the date the Form 8832 is submitted. The effective date rules are discussed *infra* part III.E.1.

c. Filing the Election

An electing eligible entity that is required by the Internal Revenue Code to file a federal tax or information return for the taxable election year must attach a copy of Form 8832 to its federal tax or information return.⁷⁹ If the entity is not required to file a return for that year, a copy of Form 8832 needs to be attached to the federal income tax or information return of any direct or indirect owner of the entity for the taxable year of the owner that includes the date on which the election was effective. An indirect owner of the entity, however, does not have to attach a copy of the Form 8832 to its return if an entity in which the indirect owner has an interest files a copy of Form 8832 with its return.

The CTB regulations confirm that failure of the entity or an owner to file the IRS Form 8832 does not invalidate an otherwise valid election, but the failure may subject the non-filing party to penalties.⁸⁰ This provision may be helpful to preserve an intended election for which the Form 8832 inadvertently was not filed. It adds a further complication from an acquisitions perspective, however, because it means that the entity's tax classification under the CTB regulations is not necessarily determined by review of the target entity's tax returns.

d. Consequences of Election

Normally, an election for a newly formed entity will not generate tax consequences other than those attendant to the new entity's creation. An election for an existing entity is another matter, however, because an election (other than a protective election consistent with the default classification for the entity, as discussed at part III.D.1.g.) necessarily effects a change in the tax classification of the entity. The Preamble to the CTB regulations warns taxpayers that a change in classification, no matter how achieved, will have certain tax consequences that must be reported. Such consequences include the gain recognized on corporate liquidation when an entity changes its classification from a corporation to a partnership.⁸¹

79. Treas. Reg. § 301.7701-3(c)(1)(ii) (1997). The entity must have (or applied for) a taxpayer identifying number in order to complete the Form 8832. *See id.*

80. *See id.* The scope of this regulation is not clear. If the entity is required to file a federal tax or information return for the year and the entity "exercises" the election by completing Form 8832, but fails to file the form, has the entity properly elected its status? It is more likely that the election would be valid under this regulation if the entity is not required to file a federal tax or information return for the year and the entity "exercises" the election by appropriate entity action and completes Form 8832, but one or more of the members fail to file the form.

81. *See* Simplification of Entity Classification Rules, 61 Fed. Reg. at 66,585. The ordering of the steps in the new classification transaction has not been clarified by the IRS, and, therefore, the tax consequences are unclear. *See* Walser & Culbertson, *supra* note 10, at 60-63. An extended discussion of the tax consequences of exercising an election under the CTB regulations exceeds the scope of this Article. *See generally id.* at 60-74.

e. Effective Date of Election

Generally, an election is effective (not before January 1, 1997) on the date specified on Form 8832 or, if no effective date is specified on the election form, on the date filed.⁸² The specified effective date cannot be more than seventy-five days prior to the filing date or more than twelve months after the date on which the election is filed, however. A specified effective date that is more than seventy-five days prior to the filing date is effective seventy-five days prior, and a specified effective date that is more than twelve months after the filing date is effective twelve months after the filing date.⁸³ If an election specifies an effective date before January 1, 1997, it will be effective as of January 1, 1997.⁸⁴

f. One Election in Sixty-Month Period

Once an eligible entity changes its classification, it generally cannot change its classification again during the sixty months succeeding the election's effective date.⁸⁵ A newly formed entity or a newly "relevant"⁸⁶ foreign entity may make an initial classification election, however. If such an election is effective by the date of formation or relevance, the election is not subject to the sixty-month limitation because it is not a change of classification.⁸⁷ The sixty-month rule does not apply to an existing entity that first elected to change its classification as of January 1, 1997.⁸⁸ In addition, the sixty-month rule does not apply if the change in classification occurs because the entity's business is transferred to or merged with another entity of a different classification.⁸⁹

However, the IRS may waive the sixty-month limitation by letter ruling "if more than fifty percent of the ownership interests in the entity as of the effective date of the [new] . . . election are owned by persons that did not own any interests in the entity on the filing date or on the effective date of the entity's prior election."⁹⁰

g. Protective Election Permitted

The Preamble to the CTB regulations permits a protective election. This provides some comfort if uncertainty exists as to whether an entity is an eligible entity or as to its status under the default classification rules discussed below.⁹¹ Presumably, a protective election that is consistent

82. See Treas. Reg. § 301.7701-3(c)(1)(iii) (1997).

83. See *id.*

84. See *id.*

85. See Treas. Reg. § 301.7701-3(c)(1)(iv) (1997).

86. Whether an entity's status is "relevant" is discussed *supra* part III.C.

87. See Treas. Reg. § 301.7701-3(c)(1)(vi) ex. 1 (1997).

88. See Treas. Reg. § 301.7701-3(c)(1)(iv) (1997).

89. See Simplification of Entity Classification Rules, 61 Fed. Reg. at 66,587.

90. Treas. Reg. § 301.7701-3(c)(1)(iv) (1997). See also Simplification of Entity Classification Rules, 61 Fed. Reg. at 66,587.

91. See Simplification of Entity Classification Rules, 61 Fed. Reg. at 66,587.

with the entity's default classification would not be a change that triggers the five-year delay rule (described above at part III.D.1.f.).

2. *Post-1996 Classification of Eligible Entities Other Than by Election*

If an eligible entity does not make an election as to its tax status, the CTB regulations prescribe the post-1996 tax status of the entity pursuant to default classification rules.⁹² The default classification depends on: (1) whether the entity is domestic or foreign; (2) whether the entity existed prior to January 1, 1997; (3) the number of members of the entity; and (4) if the entity is foreign, whether any member is subject to unlimited liability.⁹³ Hoping to provide most newly formed eligible entities with the classification they would choose without requiring them to file an election, the CTB regulations provide that the default classification rules were intended to match taxpayers' expectations.⁹⁴ The existence of the default rules means that affirmative election is necessary only if: (1) a newly formed eligible entity chooses to be classified initially as other than the default classification; or (2) an eligible entity chooses to change its classification.⁹⁵

An entity that is classified under the default rules retains that classification until it elects to change its classification, regardless of later changes in the members' liability status.⁹⁶ The regulation does not distinguish changes in liability attributable to either changes in the governing substantive law regarding liability of owners or changes in the organizational documents of the entity.

a. *Non-Election Classification of Pre-Existing Eligible Entities*

If an eligible entity (domestic or foreign) was in existence prior to January 1, 1997 (a "pre-existing" entity), and it has not affirmatively elected its tax status under the CTB regulations, its previously claimed classification (if any) is continued for periods after January 1, 1997.⁹⁷ If this entity claimed multiple classifications prior to January 1, 1997, the entity's post-1996 classification is the last pre-1997 classification claimed.⁹⁸ If there is only one owner of a pre-existing and non-electing eligible entity that previously claimed to be a partnership, however, a special rule applies and the entity is disregarded for periods after January 1, 1997.⁹⁹

A pre-existing and non-electing foreign entity on the per se list that

92. The pre-1997 entity classification rules are discussed *infra* part III.E.2.

93. See Treas. Reg. § 301.7701-3(b) (1997).

94. See Simplification of Entity Classification Rules, 61 Fed. Reg. at 66,585.

95. See Treas. Reg. § 301.7701-3(a) (1997).

96. See *id.*

97. See Treas. Reg. § 301.7701-3(b)(3)(i) (1997). This continued classification rule of Treasury Regulation § 301.7701-3(b)(3)(i) does not require that the claimed classification have a reasonable basis. As discussed *infra* part III.E.2.c., this may create a trap for some entities. As to the classification of the entity for periods prior to January 1, 1997, see *infra* part III.E.1.

98. See Treas. Reg. § 301.7701-3(b)(3)(ii) (1997).

99. See Treas. Reg. § 301.7701-3(b)(3)(i) (1997).

qualifies for grandfather status¹⁰⁰ is classified as a partnership until such status terminates due to either: (1) an election to be treated as an association; or (2) the division or termination of the partnership under sections 708(b)(1)(B) or 708(b)(2)(B).¹⁰¹

b. Non-Election Classification of Domestic Entities Formed on or After January 1, 1997

A domestic eligible entity formed on or after January 1, 1997 (a “newly formed” entity), that does not exercise an election as to its status is subject to a relatively straight-forward default classification rule: (1) if the entity has two or more members, it is classified as a partnership; and (2) if the entity has only one owner, it is disregarded.¹⁰² In other words, the default rules for newly formed domestic entities favor pass-through treatment that avoids the double tax regime.

c. Non-Election Classification of Foreign Entities Formed on or After January 1, 1997

The CTB regulations also prescribe default classification rules for non-electing foreign eligible entities formed on or after January 1, 1997. The default classification for such a newly formed entity depends on the number of members and whether the member(s) enjoy limited liability.¹⁰³ A newly formed and non-electing foreign eligible entity with more than one member¹⁰⁴ will be treated: (1) as a partnership if at least one member does not have limited liability (as defined below); or (2) as an association if all members have limited liability.¹⁰⁵ A newly formed and non-electing foreign eligible entity with only one member will be: (1) disregarded as an entity separate from its owner if the owner is subject to unlimited liability or (2) treated as an association if the owner has limited

100. The special provision for a per se foreign entity qualifying for “grandfather” status is discussed *infra* part III.D.3.

101. See Treas. Reg. § 301.7701-2(d)(3)(i) (1996).

102. See Treas. Reg. § 301.7701-3(b)(1) (1997).

103. See Treas. Reg. § 301.7701-3(b)(2) (1997).

104. The CTB regulations do not prescribe minimum net worth requirements for purposes of respecting a nominal owner as a member even though comments, received in response to the proposed CTB regulations, requested guidance on the matter. See Simplification of Entity Classification Rules, 61 Fed. Reg. at 66,585. Treasury guidance on this issue seems unlikely. See Jeffrey Lear & Sheryl Stratton, *Passthrough Entities Radically Changing Corporate Landscape*, 75 TAX NOTES 897, 898 (1997).

In addition, whether an entity, owned by two wholly owned subsidiaries of a common parent corporation, would be treated as having only one member is an issue to be resolved based on all the facts and circumstances. The fact that an entity is owned by two wholly owned subsidiaries of a common parent corporation does not require the common parent corporation to be deemed the sole owner. See Simplification of Entity Classification Rules, 61 Fed. Reg. at 66,585.

105. See Treas. Reg. § 301.7701-3(b)(2)(i) (1997). Uncertainty as to whether limited liability exists may be ameliorated by a protective election, which is discussed *supra* part III.D.1.g.

liability.¹⁰⁶

Limited liability exists "if the member has no personal liability [based on the law under which the entity is organized] for the debts of or claims against the entity by reason of being a member."¹⁰⁷ If the law under which the entity is organized "allows the entity to specify in its organizational documents whether the members will have limited liability, the organizational documents may also be relevant."¹⁰⁸ Personal liability, on the other hand, exists "if the creditors of the entity may seek satisfaction of all or any portion of the debts or claims against the entity from the member,"¹⁰⁹ regardless of whether the member enters into an agreement "under which another person . . . assumes such liability or agrees to indemnify that member for any such liability."¹¹⁰ The meaning of the phrase "all or any portion" is unclear, but it suggests that any liability of a member (beyond the acquisition cost of the interest) may cause the member to be deemed not to have limited liability.

Newly formed foreign joint ventures that satisfy the entity requirement (discussed at part III.B.1.) must determine whether the members have limited liability. If, as will be true in many cases, the members enjoy limited liability, the default classification for the entity will be corporate status. Accordingly, if the joint venture participants desire pass-through status, the entity must make an affirmative election.

3. *Post-1996 Classification of Certain Pre-Existing Foreign Entities on Per Se List*

The CTB regulations contain a special post-1996 classification rule, quite narrow in scope, that provides partnership classification for a pre-existing foreign entity that otherwise would be classified as a corporation due to it being included on the list of corporations per se.¹¹¹ Such a foreign entity will not be treated as a corporation if six requirements are met:

- [(1)] [t]he entity was in existence on May 8, 1996;¹¹²
- [(2)] [t]he entity's classification was "relevant" . . . on May 8, 1996;¹¹³

106. See Treas. Reg. § 301.7701-3(b)(2)(i) (1997). Regulation § 301.7701-3(a) provides that an entity whose classification is prescribed by the default rules retains that classification (subject to a later election to change the status) notwithstanding later changes in the members' liability status.

107. Treas. Reg. § 301.7701-3(b)(2)(ii) (1997).

108. *Id.*

109. *Id.*

110. *Id.*

111. See Treas. Reg. § 301.7701-2(d) (1997). See *supra* part III.B.3. The entities on the per se list are contained in the Appendix.

112. See Treas. Reg. § 301.7701-2(d)(2) (1997). The regulations adopt a "binding contract rule," which provides that, for purposes of this grandfather rule, a foreign entity that was formed after May 8, 1996, will be considered to be in existence on May 8, 1996, if it was committed to engage in an active and substantial business operation pursuant to a written binding contract in effect on that date.

113. See Treas. Reg. § 301.7701-3(d) (1997). The language of the regulation may be inartful in referring only to May 8, 1996. Perhaps the sixty-month period preceding May 8,

[(3)] [n]o person (including the entity) for whom the entity's classification was relevant on May 8, 1996, treats the entity as a corporation for purposes of findings such person's federal income tax returns, information returns, and withholding documents for the taxable year including May 8, 1996;

[(4)] [a]ny change in the entity's claimed classification within the sixty months prior to May 8, 1996, occurred solely as a result of a change in the organizational documents of the entity, and the entity and all members of the entity recognized the federal tax consequences of any change in the entity's classification within the sixty months prior to May 8, 1996;

[(5)] [a] reasonable basis (within the meaning of section 6662) existed on May 8, 1996, for treating the entity as other than a corporation,¹¹⁴ and

[(6)] [n]either the entity nor any member was notified [by the IRS] in writing on or before May 8, 1996, that the classification of the entity was under examination.¹¹⁵

If the per se entity qualifies for classification as a partnership, such status will be recognized until the earliest of "[(1)] [t]he effective date of an election to be treated as an association . . . ; [(2)] [a] termination of the partnership under section 708(b)(1)(B) . . . ; or [(3)] [a] division of the partnership under section 708(b)(2)(B)."¹¹⁶ Upon termination of the grandfather status, the foreign entity will be classified permanently as a corporation and may not thereafter elect partnership classification.¹¹⁷

E. EFFECTIVE DATE OF CTB REGULATIONS AND TRANSITION RELIEF

1. *Effective Date*

The CTB regulations generally are effective as of January 1, 1997, but some exceptions are provided in the form of transition relief for entities in existence on January 1, 1997.¹¹⁸ An eligible entity, regardless of when formed, may elect its tax status as of January 1, 1997, or a later date (subject to the once-in-sixty-months limitation discussed at part III.D.1.f.).

1996, should be the relevant period. *See generally* Dougan et al., *supra* note 15, at 1154. As to the definition of "relevant" under the CTB regulations, see *supra* part III.C.

114. *See generally* Treas. Reg. §§ 1.6664-4(b)-(d) (as amended in 1995); Prop. Treas. Reg. §§ 1.6662, 1.6664, 60 Fed. Reg. 406 (1995) (proposing to amend the definition of "reasonable basis" under existing regulations); STEVEN C. SALCH ET AL., *TAX PRACTICE BEFORE THE IRS*, ch. 6 (1994).

115. *See* Treas. Reg. § 301.7701-2(d)(1)(i)-(iv) (1997).

116. *See* Treas. Reg. § 301.7701-2(d)(3)(i) (1997). *See also* Treas. Reg. § 301.7701-3(e) (1997). Domestic entities that result from partnership terminations and divisions under §§ 708(b)(1)(B) and 708(b)(2)(B) are classified as partnerships. *See also* Treas. Reg. § 301.7701-2(d)(3)(ii) (1997). A termination of a partnership under § 708(b)(1)(B) will not result in classification as a corporation if the sale or exchange is to related persons as defined in §§ 267(b) and 707(b), and the transfer occurs within 12 months of the formation of the entity. *See id.*

117. *See* Treas. Reg. § 301.7701-2(d)(3)(i) (1997).

118. *See* Treas. Reg. § 301.7701-3(f) (1997).

2. Pre-1997 Classification of Pre-Existing Entities

a. General Rule

Consistent with the general effective date of January 1, 1997, the CTB regulations generally do not address the pre-1997 classification of entities that are subject to the CTB regulations for periods after 1996. Accordingly, as to pre-1997 years that are not barred by the statute of limitations,¹¹⁹ the IRS may challenge the entity's classification under the *Kintner* regulations.¹²⁰

b. Pre-1997 Classification of Certain Pre-Existing Foreign Entities Whose Classification Was "Relevant" Within Sixty Months of January 1, 1997

If a pre-existing foreign eligible entity's classification is "relevant" (as discussed at part III.C.) prior to January 1, 1997, but no federal tax or information return has been filed (or the federal tax or information return does not indicate the classification of the entity), the entity's classification for the periods prior to January 1, 1997, is determined under the *Kintner* regulation classification rules.¹²¹ A foreign entity will be treated as being "in existence" prior to January 1, 1997, only if the entity's classification was relevant at any time during the sixty months prior to that date.¹²²

If the foreign eligible entity's classification was previously relevant and then ceases to be relevant for sixty consecutive months, the entity's classification will be determined under the default classification rules at the time the classification of the foreign eligible entity again becomes relevant.¹²³ The classification of a foreign eligible entity ceases to be relevant on either: (1) the date an event occurs that causes the classification to no longer be relevant; or (2) if no such event occurs during the taxable year, the first day of that taxable year.¹²⁴

c. Pre-1997 Classification of Certain Pre-Existing Entities with Reasonable Basis for Previously Reported Classification

Although the effective date for the CTB regulations generally is January 1, 1997, the CTB regulations do apply to earlier taxable years for certain entities. In the case of prescribed entities in existence prior to January 1, 1997, the entity's claimed classification (or classifications) will be respected for all periods prior to January 1, 1997, if specified requirements are satisfied.¹²⁵ First, the entity must not be described in Treasury

119. See generally I.R.C. §§ 6501-04 (West 1997).

120. The *Kintner* regulations are discussed *supra* part II.B.

121. See Treas. Reg. § 301.7701-3(b)(3)(ii) (1997). The *Kintner* regulations are discussed *supra* part II.B.

122. See *id.*

123. See Treas. Reg. § 301.7701-3(d)(2) (1997).

124. See *id.*

125. See Treas. Reg. § 301.7701-3(f)(2) (1997).

Regulation section 301.7701-2(b) (1), (3), (4), (5), (6), or (7). It is worthy of special note that per se foreign corporations, as set forth in Treasury Regulation section 301.7701-2(b)(8), are not excluded from this rule. Second, the entity must have had a reasonable basis, within the meaning of Internal Revenue Code section 6662,¹²⁶ for its claimed classification(s).¹²⁷ Third, the entity and its members must have recognized the federal tax consequences of any change in the entity's classification within the sixty months prior to January 1, 1997. Fourth, neither the entity nor any member was notified by the IRS in writing on or before May 8, 1996, that the classification of the entity was under examination.¹²⁸ If these four requirements are not satisfied, no special classification rules apply, and the IRS may challenge the pre-January 1, 1997, classification of the entity.

d. Risk of Conversion for Pre-Existing Eligible Entities

The foregoing classification and effective date rules create a potential tax trap for entities existing before January 1, 1997. As discussed at part III.D.2.a., Treasury Regulation section 301.7701-3(b)(3)(i) prescribes that the tax classification claimed by an eligible entity prior to January 1, 1997, will be its tax classification thereafter, regardless of whether the entity had a reasonable basis for the prior claimed classification. As discussed at part III.E.2.c., however, Treasury Regulation section 301.7701-3(f)(2) prescribes that the tax classification claimed by certain entities will be honored for periods prior to January 1, 1997, only if the entity had a reasonable basis for the claimed classification.

If, before January 1, 1997, an entity claimed a classification without a reasonable basis, the following could result under the CTB regulations: (1) the classification for periods after January 1, 1997, would be the previously claimed classification; (2) the previously claimed classification for periods prior to January 1, 1997, may be rejected; and (3) a deemed conversion would occur as of January 1, 1997. The deemed conversion would occur because the entity would be classified: (1) after January 1, 1997, as it was claimed previously; but (2) before January 1, 1997, not as claimed previously. The deemed conversion would involve a deemed liquidation of the "old" entity to the owner(s) followed by transfers from the owner(s) to the "new" entity. The deemed liquidation generally

126. See generally Treas. Reg. §§ 1.6664-4(b)-(d) (as amended in 1995); Prop. Treas. Reg. §§ 1.6662, 1.6664, 60 Fed. Reg. at 406 (1995) (proposing to amend the definition of "reasonable basis" under existing regulations); SALCH ET AL., *supra* note 114.

127. A pre-existing entity that cannot establish a reasonable basis for its previously-reported classification does not qualify for protection under this rule, and it may be deemed to have made a conversion of its tax status as of January 1, 1997. For a discussion of deemed conversions, see *infra* part III.E.2.d.

128. If anyone was so notified, then the entity's classification is to be determined in the examination. See Simplification of Entity Classification Rules, 61 Fed. Reg. 66,584, 66,587 (1996) (to be codified at 26 C.F.R. pt. 301).

would generate adverse tax consequences to the owner(s).¹²⁹

F. FEDERAL RULES DO NOT CONTROL STATE TAXATION

The new federal CTB regulations do not control the classification of an entity for purposes of taxation by the individual states of the United States. Accordingly, prior law entity classification rules (the multi-factor *Kintner* regulations test discussed at II.B.) may still apply for purposes of state tax law. Many states have not yet resolved whether to embrace the elective regime of the CTB regulations, and uncertainty still exists as to state tax consequences of an entity that elects its tax status for federal tax purposes.¹³⁰ The CTB rules are relatively new arrivals and most states have not yet addressed the state tax law consequences of a CTB election.¹³¹ Until all relevant states resolve whether to conform to the CTB regime, tax planning will be uncertain with respect to the state tax consequences.

129. See Walser & Culbertson, *supra* note 10, at 58. Note, however, that sections 1491 and 1494 were repealed in 1997. Taxpayer Relief Act of 1997, § 1131(a).

130. See Amy Hamilton, *Check-the-Box Chaos? The State Tax Treatment Factor*, May 29, 1997, available in LEXIS, FEDTAX Library, TNT File (discussing the California Franchise Tax Board Notice 96-5 (Dec. 6, 1996), in which California announced that it will not follow the CTB regime).

131. See generally Scott D. Smith, *What Are States Doing on the Check-The Box Regs?*, 76 TAX NOTES 973 (1997) (reviewing states' responses to the federal CTB regulations).

Post-1996 Entity Classification Rules under the CTB Regulations

Entity Type	Classification after 1996	
	By Election	Prescribed or Default Classification
I. Domestic Entities		
A. Pre-existing 1-1-97		
1. Automatic corporate status under Treas. Reg. § 301.7701-2(b)	No election available	Corporation
2. Eligible entity		
a. Multiple members	Corporation or partnership	Last classification previously claimed
b. Single member	Corporation or ignored	Last classification previously claimed under partnership classification previously claimed in which case the entity is disregarded
B. Newly formed		
1. Multiple members	Corporation or partnership	Partnership
2. Single member	Corporation or ignored	Disregarded
II. Foreign Entities		
A. Pre-existing 1-1-97		
1. Automatic corporate status under Treas. Reg. §§ 301.7701-2(b)(4), (7), (8)	No election available	Corporation ¹³²
2. Eligible entity		
a. Multiple members	Corporation or partnership	Last classification previously claimed
b. Single member	Corporation or ignored	Last classification previously claimed
B. Newly formed		
1. Multiple members	Corporation or partnership	If all members have limited liability, classified as a corporation; if at least one member does not have limited liability, classified as a partnership
2. Single member	Corporation or ignored	If member has limited liability, classified as a corporation; if member does not have limited liability, entity is disregarded

132. *But see* Treas. Reg. § 301.7701-2(d) (1997) (special grandfather rule for foreign per se corporation with reasonable basis for previously claimed non-corporate status). This rule is discussed *supra* part III.D.3.

APPENDIX

Business entities (by country) that are per se corporations pursuant to Treasury Regulation section 301.7701-2(b)(8) are listed below. Treasury Regulation section 301.7701-2(b)(8)(ii) and (iii) contain other provisions for entities under the laws of Canada, India, Cyprus, Hong Kong, Jamaica, Trinidad and Tobago.

American Samoa, Corporation
Argentina, Sociedad Anonima
Australia, Public Limited Company
Austria, Aktiengesellschaft
Barbados, Limited Company
Belgium, Societe Anonyme
Belize, Public Limited Company
Bolivia, Sociedad Anonima
Brazil, Sociedade Anonima
Canada, Corporation and Company
Chile, Sociedad Anonima
People's Republic of China, Gufen Youxian Gongsi
Republic of China (Taiwan), Ku-fen Yu-hsien Kung-szu
Colombia, Sociedad Anonima
Costa Rica, Sociedad Anonima
Cyprus, Public Limited Company
Czech Republic, Akciova Spolecnost
Denmark, Aktieselskab
Ecuador, Sociedad Anonima or Compania Anonima
Egypt, Sharikat Al-Mossahamah
El Salvador, Sociedad Anonima
Finland, Osakeyhtio/Aktiebolag
France, Societe Anonyme
Germany, Aktiengesellschaft
Greece, Anonymos Etairia
Guam, Corporation
Guatemala, Sociedad Anonima
Guyana, Public Limited Company
Honduras, Sociedad Anonima
Hong Kong, Public Limited Company
Hungary, Reszvenytarsasag
Iceland, Hlutafelag
India, Public Limited Company
Indonesia, Perseroan Terbuka
Ireland, Public Limited Company
Israel, Public Limited Company
Italy, Societa per Azioni
Jamaica, Public Limited Company
Japan, Kabushiki Kaisha
Kazakstan, Ashyk Aktsionerlik Kogham

Republic of Korea, Chusik Hoesa
Liberia, Corporation
Luxembourg, Societe Anonyme
Malaysia, Berhad
Malta, Partnership Anonyme
Mexico, Sociedad Anonima
Morocco, Societe Anonyme
Netherlands, Naamloze Vennootschap
New Zealand, Limited Company
Nicaragua, Compania Anonima
Nigeria, Public Limited Company
Northern Mariana Islands, Corporation
Norway, Aksjeselskap
Pakistan, Public Limited Company
Panama, Sociedad Anonima
Paraguay, Sociedad Anonima
Peru, Sociedad Anonima
Philippines, Stock Corporation
Poland, Spolka Akcyjna
Portugal, Sociedade Anonima
Puerto Rico, Corporation
Romania, Societe pe Actiuni
Russia, Otkrytoye Aktsionerney Obshchestvo
Saudi Arabia, Sharikat Al-Mossahamah
Singapore, Public Limited Company
Slovak Republic, Akciova Spolocnost
South Africa, Public Limited Company
Spain, Sociedad Anonima
Surinam, Naamloze Vennootschap
Sweden, Publika Aktiebolag
Switzerland, Aktiengesellschaft
Thailand, Borisat Chamkad (Mahachon)
Trinidad and Tobago, Public Limited Company
Tunisia, Societe Anonyme
Turkey, Anonim Sirket
Ukraine, Aktsionerne Tovaristvo Vidkritogo Tipu
United Kingdom, Public Limited Company
United States Virgin Islands, Corporation
Uruguay, Sociedad Anonima
Venezuela, Sociedad Anonima or Compania Anonima

