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Preparing US tax and information returns: Form 8832, Entity Classification Election

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Introduction

A non-US company's classification for US tax purposes is important for Foreign Account Tax Compliance Act (FATCA) compliance and US withholding tax reasons. Advisors to families with succession planning structures that include holding, operating and other companies should determine the US tax classification for each company in the structure and resulting compliance and tax implications. If the default classification is not desired, steps should be taken to elect an alternative classification for US tax and FATCA purposes. Internal Revenue Service (IRS) Form 8832, Entity Classification Election, is a very important tool when establishing succession planning structures.

Default classifications

Depending on where the entity is established and how many owners it has, the company will have a default tax classification for US tax purposes. This is sometimes referred to as the entity's Chapter 3 status. The default classification turns on whether local law provides for limited liability or unlimited liability.

Corporation

A company established under the laws of a country other than the United States (non-US company), where the laws of that other country provide that all of the owners of the non-US company have limited liability, will be classified as a corporation for US tax purposes. This means that, even when under applicable local law a limited liability company is treated as a flow through entity, it will be classified as a corporation for US tax purposes. For example, a New Zealand limited liability company, which is a flow through entity locally, is classified as a "corporation" for US tax purposes, unless it makes an entity classification election to be treated as a partnership or disregarded entity for US tax purposes as discussed below.

Partnership

A non-US company with more than one owner, where local law provides for unlimited liability of at least one such owner, will be classified as a partnership for US tax purposes. For example, an Ontario limited partnership, which has a general partner with unlimited liability, is classified as a "partnership" for US tax purposes, unless it makes an entity classification election to be treated as a corporation.

Disregarded

A non-US company with a single owner having limited liability will be classified as a corporation and will not be disregarded for US tax purposes, unless it makes an entity classification election to instead be treated as disregarded.

Alternative Entity Classification Election

Only an eligible entity may make an entity classification election. Eligible entities are specified business entities. A business entity is any entity recognised for US tax purposes that is not properly classified as a trust under the US tax regulations or otherwise subject to special treatment under the Internal Revenue Code regarding the entity's classification. Eligible entities include corporations, limited liability companies and partnerships.

To be an eligible entity, the non-US business entity must also be the type of entity that is not required to be classified as a corporation for US tax purposes (per se corporation). Per se corporations include, just to name a few:

- Canadian corporation and company;
- American Samoa, Puerto Rico and US Virgin Islands corporations;
- Central and South America *sociedad anonima*; and
- Barbados limited company.

Per se corporations cannot make an entity classification election on Form 8832.

A foreign eligible business entity where all owners have limited liability, and that is not a per se corporation, may affirmatively elect to be treated as a partnership if it has more than one owner, or as disregarded if it has only one owner.

A foreign eligible business entity classified as a partnership (at least one owner has unlimited liability) may elect to be treated as a corporation.

To make such an election, the entity applies for a US employer identification number (EIN) and files Form 8832.

Completing Form 8832

An eligible entity uses IRS Form 8832 to elect how it will be classified for federal tax purposes (ie, as a corporation, a partnership or an entity disregarded as separate from its owner). This form is commonly known as a "check-the-box election".

US tax identification number required

A foreign eligible entity must have an EIN in order to submit Form 8832. If it does not have an EIN, it must apply for one on Form SS-4, Application for Employer Identification Number (for further details please see ["Completing US tax forms: Form SS-4 – application for Employer Identification Number"](#)). The entity must have received an EIN by the time Form 8832 is filed in order for the form to be processed. A check-the-box election will not be accepted if the foreign eligible entity does not provide an EIN.

Include proper mailing address

In addition to the name of the foreign eligible entity and its EIN, Form 8832 must include the address to which all correspondence regarding the acceptance or nonacceptance of the election will be sent. Careful consideration should be given to providing an address where the company's director or the family office can be certain of receiving notices from the IRS in a timely manner. If the address has changed since filing Form SS-4, the box marked "address change" can be ticked at the top of Form 8832 to insure the IRS account is up to date.

Include appropriate effective date

The check-the-box election will take effect on the date entered on line 8 of Form 8832 or on the date filed if no date is entered on line 8. A check-the-box election can take effect no more than 75 days prior to the date the election is filed, nor can it take effect later than 12 months after the date on which the election is filed. If line 8 shows a date more than 75 days prior to the date on which the election is filed, the election will default to 75 days before the date it is filed. If line 8 shows an effective date more than 12 months from the filing date, the election will take effect 12 months after the date the election is filed.

Late election relief only in certain circumstances

Notwithstanding the above, in situations where the entity failed to obtain its requested classification as of the date of its formation (or upon the entity's classification becoming relevant) or failed to obtain its requested change in classification solely because Form 8832 was not filed timely, late election relief may be available. In addition to specified requirements regarding tax filings, the entity must have reasonable cause for its failure to timely make the entity classification election, and three years and 75 days from the requested effective date of the election cannot have passed.

Signing Form 8832

Form 8832 must be signed by:

- each member of the electing entity who is an owner at the time the election is filed; or
- any officer, manager or member of the electing entity who is authorised (under local law or the organisational documents) to make the election. The elector represents to having such authorisation under penalties of perjury.

If an election is to be effective for any period prior to the time it is filed, each person who was an owner between the date the election is to be effective and the date the election is filed, and who is not an owner at the time the election is filed, must sign.

Digital signatures permitted temporarily

Due to pandemic mail delays, the IRS has been accepting digital signatures on Form 8832 and will continue to do so until 31 October 2023. However, if not extended, the form will revert to its original wet-ink signature requirement after that date.

Filing Form 8832

Filing is by mail, not electronically

If the entity's principal business, office or agency is located in a foreign country or US possession, Form 8832 is to be sent to IRS Service Center, Ogden, UT 84201-0023. The US Postal Service or a private delivery service may be used, but regardless it is highly recommended that the filer arranges to receive a receipt confirming delivery.

An IRS determination letter will generally be received within 60 days of filing Form 8832. If not, follow-up action should be taken by calling the IRS at the number provided in the instructions to Form 8832 or sending a letter to inquire about status. Proof of filing should accompany any letter sent to the IRS or be available for faxing when calling the IRS. Acceptable proofs of filing are:

- a certified or registered mail receipt (timely postmarked) from the US Postal Service, or its equivalent from a designated private delivery service;
- Form 8832 with an accepted stamp;
- Form 8832 with a stamped IRS received date; or
- an IRS letter stating that Form 8832 has been accepted.

Practically speaking, when following up on the status of a Form 8832 filing (after the 60 days), the caller will need a Form 2848 (Power of Attorney) or Form 8821 (Tax Information Authorization). Being designated as the contact person on line 9 of Form 8832 is not enough to allow the IRS to provide that person with information on status. Although IRS agents sometime give different responses, this firm has been told that the purpose of line 9 is to provide a contact person from whom the IRS may request additional information (if needed) and not a person to whom the IRS can give information.

Initial classification election versus change of classification

This article discussed the use of Form 8832 when establishing entities within a family's succession planning structure. The newly formed entity that makes investments will be required to provide the appropriate FATCA certification form when opening financial accounts. The certification includes a statement regarding the entity's classification for US withholding tax purposes (for more information on W-8 forms please see ["Completing US tax forms: comments on new Form W-8BEN-E and some practical tips"](#) and ["Completing US tax forms: comments on new Form W-8IMY and some practical tips"](#)). If the entity is a foreign corporation, it will be subject to US withholding tax on certain US source income. If instead, it has made a check-the-box election to be disregarded or treated as a partnership, additional information will be provided on the entity's owners.

An entity that has been in existence with its default classification may be able to later decide to change that classification. This decision must be carefully considered because, if permitted, it can result in a deemed liquidation for US tax accounting purposes, even though the entity has not actually liquidated and is still in existence for local law purposes.

Comment

Although the family may not include US individuals, the US tax classification of non-US entities in the family succession planning structure is nevertheless important to consider. An entity's investments may include US debt and equities subject to US withholding tax. All financial institutions, whether located in the US or elsewhere, are required to collect FATCA certification forms when onboarding new accounts. Thus, consideration of a newly formed foreign entity's default classification for US tax and reporting purposes and what it means for the structure should be part of the planning process and, if a different classification is desired, a timely election made on Form 8832.

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