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THE SUBCHAPTER S ELECTION: FRIEND OR FOE?

DONALD R. LEVI*

Small business corporations can retain limited liability status yet receive pseudo-partnership tax treatment by electing to be taxed under subchapter S of the Internal Revenue Code.¹ Only domestic corporations which are not eligible to file a consolidated return with another corporation qualify for this election.² In addition, the corporation can have no more than ten shareholders³ and can have only one class of stock outstanding.⁴

Because of the government's position that loans to a subchapter S corporation constitute a second class of "preferred" stock and because of difficulties involved in making tax-free distributions of previously taxed income, many attorneys have been reluctant to advise clients to make the election. Recent decisions and legislation have relaxed these restrictions somewhat and require a re-evaluation of the opportunities offered by subchapter S.

I. ELIGIBLE CORPORATIONS

A. *The Shareholder Test*

To be eligible for the subchapter S election, the corporation can have no more than ten shareholders, *each of whom is either an individual or an estate.*⁵ As a general rule, one determines who is a shareholder by looking to see who would report taxable dividends declared on the stock.⁶ However, even though beneficiaries of a trust and individual partners in a partnership might ordinarily report such dividends on their personal tax returns, the trust and the partnership are considered the shareholders for subchapter S purposes, and the presence of either prevents the corporation from making the election.⁷

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1. INT. REV. CODE OF 1954, §§ 1371-78. The Internal Revenue Code is hereinafter cited as I.R.C.

2. I.R.C. § 1371(a); Treas. Reg. § 1.1371-1(c) (1959).

3. I.R.C. § 1371(a)(1).

4. I.R.C. § 1371(a)(4).

5. I.R.C. § 1371(a)(1), (2). A corporation does not qualify if it has an alien shareholder. I.R.C. § 1371(a)(3).

6. Treas. Reg. § 1.1371-1(d)(1) (1959).

7. *Ibid.*

If stock is owned concurrently by either joint tenancy or tenancy in common, each individual tenant is considered to be a shareholder.⁸ However, if it is community property, or if a husband and wife are the sole owners in concurrent tenancy, they are deemed to be one shareholder whether they are tenants by entireties, joint tenants, or tenants in common.⁹

For the purposes of the ten shareholder limitation, the personal representative of an estate is considered the owner of the stock even though applicable state law may technically place legal title in others.¹⁰ However, when the executor or administrator has completed his duties he ceases to be the owner for subchapter S purposes even though he has not yet sought a discharge. This rule was invoked in a recent decision to terminate an election where the stock was to be transferred to a trust when administration was completed.¹¹ The same result follows if the individuals inheriting the stock, together with all other shareholders, total more than ten.¹²

B. *The One Class of Stock Test*

In addition to the shareholder test, a corporation can have only one class of stock *outstanding* if it is to qualify for the subchapter S election.¹³ A second class of stock will not disqualify the corporation if it is held in its entirety by the corporation as either unissued or treasury stock.¹⁴

The application of this requirement is illustrated by a recent ruling. A partnership of eight active and two limited partners incorporated. The corporation issued only one class of stock, but the former limited partners gave the other shareholders irrevocable proxies to vote their shares. The Internal Revenue Service held that this disqualified the corporation for the election because two classes of stock were present. Its reasoning was the "rights and interest" of the former limited partners were not identical to those of the remaining shareholders.¹⁵

A loan by a shareholder to the corporation may also constitute a

8. *Ibid.*

9. Treas. Reg. § 1.1371-1(d)(2) (1959), as amended, T.D. 6667, 1963-2 CUM. BULL. 343.

10. Rev. Rul. 62-116, 1962-2 CUM. BULL. 207.

11. *Old Virginia Brick Co., Inc.*, 44 T.C. 724 (1965), *aff'd*, 367 F.2d 276 (4th Cir. 1966).

12. Treas. Reg. § 1.1372-4(b)(3) (1959).

13. I.R.C. § 1371(a)(4).

14. Treas. Reg. § 1.1371-1(g) (1959).

15. Rev. Rul. 63-226, 1963-2 CUM. BULL. 341.

second class of stock.¹⁶ However, this problem will be discussed in greater detail at a later part of this article.

II. EXTENT AND CHARACTERISTICS OF INCOME TO SHAREHOLDERS

A. *Treatment of Income*

If the corporation has elected subchapter S treatment each shareholder reports his share of corporate income on his personal return. Any salary or dividends distributed to him constitute taxable income, and he is also taxed on his share of the corporation's undistributed taxable income.¹⁷

As a general rule, *all* corporate income is taxable to the individual shareholders even though a portion of such income might have been exempt from corporate taxation.¹⁸ For example, a shareholder is taxed on his pro rata share of income which would have been exempt from corporate taxation under sections 242 (interest) and 243 (dividends received by the corporation).

However, if income is long-term capital gain to the corporation, it retains this characteristic in the hands of the shareholder.¹⁹ After aggregating long-term capital gains with short-term capital loss at the *corporate level* the shareholder is entitled to treat his pro rata share of such income (based on stock ownership) as long-term capital gain on his personal return.²⁰

In the past some small business corporations, wishing to avoid the one year limitation on liquidation under section 337, have elected subchapter S treatment in order to assure capital gain treatment upon disposition of the corporate assets, following such disposal with a dissolution of the corporation. Others have made the election for a year in which a large long-term capital gain was anticipated in order to take advantage of the lower capital gain rates available to individuals, terminating the election at the end of the taxable year.

Recent legislation is designed to discourage this "one-shot" use of the subchapter S election.²¹ It basically provides for an additional tax to be assessed at the corporate level if: (1) corporate net long-term capital gain exceeds net short-term capital loss by \$25,000; and (2) other corporate income is less than this excess; and (3) the corporation's taxable

16. Treas. Reg. § 1.1371-1(g) (1959).

17. I.R.C. § 1373(b).

18. Treas. Reg. § 1.1373-1(c)(2) (1959).

19. I.R.C. § 1375(a).

20. *Ibid.*

21. I.R.C. § 1378.

income is more than \$25,000.²² If these limitations are exceeded, a tax is assessed at the lower of (1) 25 percent of the net capital gain in excess of \$25,000 or (2) the regular corporate rates for subchapter C corporations under section 11.²³ Although there are specific exceptions, as a general rule this section will not apply if the corporation has had subchapter S status for the past three taxable years.²⁴

This additional tax on capital gains may discourage the "one-shot" use of subchapter S, but it is doubtful that it will eliminate such use entirely. The first \$25,000 of net long-term capital gain is still taxable only at the shareholder level, and contracts can be drawn which will permit a corporation to avoid the corporate tax entirely by keeping the aggregate of net long-term capital gain over net short-term capital loss to less than \$25,000. Therefore, while section 1378 may trap the unwary, in the long run it may more often result in lower taxes being paid because it is somewhat of an incentive to take advantage of the installment contract provisions of section 458. Under the new legislation those who are patient will still be rewarded.

B. Net Operating Loss Carryover

In addition to the special treatment of income under subchapter S, a major factor influencing the election is often the prospect of passing through corporate net operating losses to the individual shareholders. Each shareholder received his pro rata share of net operating losses for entry on his personal return.²⁵ Since the shareholders can carry these losses both *backward* and forward, this may be particularly attractive to new corporations which expect substantial net operating losses during the first few years of operation. Established corporations anticipating substantial net operating losses may also realize substantial tax savings by electing subchapter S treatment.

C. Special Considerations

The subchapter S election cannot be used to juggle income by shifting ownership of shares among family members. The Code gives the Commissioner the same power to allocate income among family members with respect to subchapter S corporations that he has with respect to partnerships.²⁶

22. I.R.C. § 1378(a).

23. I.R.C. § 1378(b).

24. I.R.C. § 1378(c)(1).

25. I.R.C. § 1373(d)(1).

26. I.R.C. § 1375(c). This section allows the Commissioner to allocate income to accurately reflect the value of services performed by each member of the family.

In a recent case a father created a corporation and elected subchapter S treatment. He assigned stock to his wife as custodian for his two minor sons, but retained complete control. Dividends allegedly paid were never actually received by the sons; the father filled out tax returns and paid the tax for his children. The court held that the father failed to prove that the stock transfers were of substance, and all income was taxable to the father.²⁷

Under the subchapter S provisions, income received by a retired shareholder from a subchapter S corporation is not treated as earnings from self-employment for social security purposes.²⁸ Thus, it alone will not reduce social security benefits.²⁹

On the other hand, shareholders of an electing corporation will lose their dividend exclusion. Dividends paid by a subchapter S corporation are not the type which qualify for the dividend exclusion *unless* they come from corporate income earned in a year in which the election was not in effect.³⁰ The same rule applies with regard to the retirement income credit.³¹

Thought should be given also to the selection of the taxable year for a subchapter S corporation. The shareholder will be taxed on both undistributed corporate income and dividend distributions made during the corporation's taxable year.³² If the corporation's taxable year is different from that of the shareholder, it *may* be necessary for a shareholder to file an amended return every year since the total corporate long-term capital gain and his pro rata share thereof cannot be determined until the end of the corporate taxable year. Thus, for pure simplicity it would seem desirable to make the taxable year of the corporation coincide with that of the shareholders.

III. DISTRIBUTIONS OF PREVIOUSLY TAXED INCOME

Once a shareholder has been taxed on his share of undistributed corporate income the distribution thereof will not constitute taxable income to him *unless* the corporation has failed to retain the election during the complete interim period.³³ Even though the election has been re-

27. Henry D. Duarte, 44 T.C. 193 (1965).

28. Rev. Rul. 59-221, 1959-1 CUM. BULL. 225.

29. Sewel v. Celebrezze, 216 F. Supp. 192 (D.S.D. 1963); Gant v. Celebrezze, 1 CCH UNEMPLOYMENT INS. REP. ¶ 12,459.53 (N.D.N.C. 1964).

30. I.R.C. § 1375(b).

31. *Ibid.*

32. I.R.C. § 1373(b).

33. Treas. Reg. § 1.1375-4(a) (1959).

tained, a completely tax-free distribution cannot be achieved if the distribution exceeds a shareholder's basis in his stock. Such excess is taxed at capital gain rates.³⁴

If the corporation has not retained the election during the interim, the provisions of subchapter C will dictate the character of any distributions made to shareholders. Such distributions will be dividends to the extent of earnings and profits. Only after the earnings and profits account has been exhausted can a tax-free distribution of previously taxed income be achieved.

Under subchapter S the only tax-free distribution of previously taxed income is one which is made in money.³⁵ A distribution of property does not qualify for tax-free treatment. Since current year corporate earnings and profits first must be applied against any distributions of cash,³⁶ the corporation must make money distributions to the extent of current year earnings and profits *before* a tax-free distribution of previously taxed income can occur. This provision has served as an incentive for subchapter S corporations to distribute all taxable income in the year earned in order to avoid the possibility of previously taxed income being "locked in" the corporation.

Tax-free distributions of previously taxed income are more easily achieved under recent legislation. The Code now permits certain distributions to be treated as non-dividend distributions of the preceding year's income if made within the first two months and fifteen days of the taxable year.³⁷ Such distributions can be made only to persons who were shareholders on the last day of the preceding taxable year, and the distribution to each shareholder cannot exceed his share of the corporation's undistributed taxable income for that year.³⁸ Distributions made after the two month and fifteen day period are subject to the same limitations which existed prior to the enactment of section 1375(f); current year earnings and profits are applied first against such distributions, with only the excess being a tax-free distribution of previously taxed income.

In addition section 1375(f) may be applied retroactively by electing corporations. The corporation designates a particular taxable year, and any distribution which was made during the *first three and one-half months* thereof is treated the same as distributions made within the first

34. *Ibid.*

35. Treas. Reg. § 1.1375-4(b) (1959).

36. Treas. Reg. § 1.1373-1(d) (1959).

37. I.R.C. § 1375(f). Effective April 16, 1966.

38. *Ibid.*

two months and fifteen days in a prospective application of the statute.³⁹ Such retroactive application applies automatically to all taxable years subsequent to the one designated, preventing the corporation from electing such treatment only for years in which refunds would be realized. To elect retroactive application all shareholders, past or present, whose tax liability may be altered must consent to the election.⁴⁰

While these new provisions have not completely eliminated the possibility of previously taxed income being locked in the corporation, the limitations on making a tax-free distribution of previously taxed income have been considerably eased.

IV. BASIS IN STOCK AND LOANS

The basis of a shareholder's stock in a subchapter S corporation is determined in a manner similar to that used to determine a partner's basis in a partnership. Undistributed corporate income increases his basis by the amount of such income reported, and the distribution of this income then reduces his basis in the amount of the distribution.⁴¹ Any deductible losses will further reduce the basis.⁴² Should such losses exceed the shareholder's basis in his stock, the excess is applied to reduce the basis of any loans made by the shareholder to the corporation.⁴³ Payment of the loan will yield a capital gain on the difference between the loan basis and the amount received.⁴⁴

V. ELECTION OF SUBCHAPTER S TREATMENT

To take advantage of the subchapter S provisions, the corporation must file Form 2553 with the consent of each shareholder attached.⁴⁵ The required consent is that of each shareholder of record on the first day of the corporate taxable year unless the election is made later, in which case it refers to those of record on the date of election. A valid election can be made at any time during the month preceding or the month following the beginning of the corporate taxable year.⁴⁶ Once made, the election

39. The special rules for the application of § 1375(f) are set out in Pub. L. No. 389, 89th Cong., 2d Sess. § 1(d)(1) (April 14, 1966).

40. *Ibid.*

41. I.R.C. § 1376(a).

42. I.R.C. § 1376(b)(1).

43. I.R.C. § 1376(b)(2).

44. Rev. Rul. 64-162, 1964-1 CUM. BULL. 304.

45. Treas. Reg. § 1.1372-2(a) (1959).

46. Treas. Reg. § 1.1372-2(b) (1959).

remains in effect for all subsequent taxable years unless revoked or automatically terminated.⁴⁷

The cases illustrate that strict compliance with the stated rules are essential to make a valid election. A corporation whose taxable year began January 1 made a resolution of election on November 14, but the election was not filed until February 17. The Tax Court held that it was not effective for any year.⁴⁸ Another election was held invalid because it was filed too late when it was personally delivered to the Director's office, even though it would have been valid as within the time limitation if it had been mailed the day before and arrived the day after the personal delivery.⁴⁹ In yet another case three years of net operating losses were disallowed because failure to file shareholder consents with Form 2553 did not constitute a valid election.⁵⁰

New shareholders acquiring their stock after the first day of the corporate taxable year, or after the election is filed, must file their consent twice. They must file with the District Director within thirty days of becoming a shareholder and then must file again with the corporate return at the close of the taxable year.⁵¹ The appointment of the personal representative is the time at which the thirty day period begins to run if the new shareholder is an estate.⁵²

VI. VOLUNTARY AND INVOLUNTARY TERMINATION OF ELECTION

The election can be voluntarily revoked at any time *after* the first taxable year in which the election became effective by filing a statement of revocation with the consent of all shareholders of record on the date of revocation.⁵³ It is not effective for the taxable year in which made unless filed within the first month.⁵⁴ Once made it is effective for all subsequent years,⁵⁵ and the corporation will thereafter be subject to the provisions of subchapter C.

If the election is automatically or involuntarily terminated it dates back to the beginning of the taxable year in which the event causing termination occurred.⁵⁶ Continued operation as a subchapter S corporation

47. Treas. Reg. § 1.1372-1(b)(1) (1959).

48. William Pestcoe, 40 T.C. 195 (1963).

49. *Simons v. United States*, 208 F. Supp. 744 (D.Conn. 1962).

50. M. H. McDonnell, 24 CCH Tax Ct. Mem. 647 (1965).

51. Treas. Reg. § 1.1372-3(b) (1959).

52. *Ibid.*

53. I.R.C. § 1372(e)(2).

54. I.R.C. § 1372(e)(2)(A).

55. I.R.C. § 1372(e)(2).

56. I.R.C. § 1372(e)(3).

under the delusion that the election is still in effect does not extend the effective period of the election. Automatic termination may occur when a new shareholder fails to file his consent;⁵⁷ when the corporation ceases to be a small business corporation because it has more than ten shareholders, more than one class of stock, or a non-qualifying corporation, trust, or partnership as a shareholder;⁵⁸ or when the corporation violates either of the two income tests.⁵⁹ Since distributions by a corporation to its shareholders under subchapter C are treated differently from those made under subchapter S, extreme caution should be used to avoid automatic termination. Of the methods listed above, the second class of stock and income tests are particularly hazardous and merit special attention.

A. Shareholder Loans as a Second Class of Stock

One of the greatest pitfalls in the subchapter S election is the possibility that shareholder loans to the corporation may be called a second class of "preferred" stock and result in automatic termination of the election. The Code merely states that small business corporations qualify for the election so long as they have no more than one class of stock.⁶⁰

However, the last sentence of Regulation 1.1371-1(g) states, "If an instrument purporting to be a debt obligation is actually stock, it will constitute a second class of stock."⁶¹ Although the regulations do not define the term "actually stock," the Commissioner has used this sentence as the basis to assert an almost automatic "second class of stock" argument against subchapter S corporations obtaining credit from their shareholders. The Commissioner's criterion for determining what loans are "actually stock" has been essentially the same as that applied to the thin corporation problem under subchapter C. That is, the sole test is whether shareholder loans were bona fide debt obligations or, in reality, equity investments.

This was considered the critical issue in both the *Catalina Homes*⁶² and *Henderson*⁶³ decisions. Both were resolved in favor of the Commis-

57. I.R.C. § 1372(e)(1).

58. I.R.C. § 1372(e)(3).

59. I.R.C. §§ 1372(e)(4), (5). In general, these subsections provide for termination of an election if the corporation derives more than 80% of its gross receipts from sources outside the United States or more than 20% from personal holding company income.

60. I.R.C. § 1371(a)(4).

61. Treas. Reg. § 1.1371-1(g) (1959). This sentence was eliminated and the regulation amended on Dec. 27, 1966, by T.D. 6904.

62. *Catalina Homes, Inc.*, 23 CCH Tax Ct. Mem. 1361 (1964).

63. *Henderson v. United States*, 245 F. Supp. 782 (M.D. Ala. 1965). This decision has been appealed.

sioner, with shareholder loans being characterized as a second class of "preferred" stock. Their outcome served as a serious deterrent to electing subchapter S treatment, since many small business corporations were potentially vulnerable. Some were thinly capitalized from their inception; others became so in an effort to avoid the possibility of previously taxed income being "locked-in" the corporation (*i.e.*, to assure a tax-free distribution, all income was distributed in the year earned, and shareholders then loaned money back to the corporation).

The subchapter S election has been made more attractive by a recent Tax Court decision which seriously limits, and perhaps eliminates, the Commissioner's automatic "second class of stock" argument against corporations borrowing from shareholders.⁶⁴ In the *Gamman* case, two persons created a corporation. They planned to take advantage of the expected housing boom caused by the World's Fair in Seattle by erecting an apartment motel, operating it while the Fair was in progress, and selling it when the Fair closed. They each paid in \$200 for stock and loaned the corporation over \$5,000 on six per cent demand notes, making the corporation thinly capitalized from its inception. Several additional loans of significant size were made on a *pro rata basis*, and the total of all shareholder loans amounted to \$252,000 the last year in issue.

The shareholders had never exercised any rights under the demand notes and had received no interest on them. It is doubtful that the corporation could have paid anything on either the principal or the interest, since it had suffered substantial losses. The Commissioner took the position that this arrangement disqualified the corporation for subchapter S treatment, arguing that the shareholder loans represented equity investments and, therefore, constituted a second class of "preferred" stock which was forbidden by the Regulations.

However, the taxpayer took a different approach than that taken in *Catalina Homes* and *Henderson*. He argued that the last sentence of Regulation 1.1371-1(g),⁶⁵ upon which the government's position was based, was invalid because its promulgation exceeded the Commissioner's power. The majority of the Tax Court agreed, stating:

[W]e find nothing in the law . . . [or] committee reports . . . [which] justify holding arbitrarily and *per se*, that all instruments which purport to be debt obligations but which in fact rep-

64. *W. C. Gamman*, 46 T.C. No. 1, CCH TAX CT. REP. Dec. 27,900 (Apr. 4, 1966).

65. See quoted material at note 61 *supra*.

resent equity capital, must be treated as a second class of stock for the purposes of section 1371.⁶⁶

The majority felt that Congress had anticipated that shareholder loans could be made to the corporation without disqualifying it for the election, since section 1376 provides for an adjustment in the basis of loans when corporate net operating losses are passed through to shareholders.⁶⁷

The second issue facing the court was this: Even though the last sentence of Regulation 1.1371-1(g) was invalid, did these particular loans constitute a second class of stock? A second class is present any time the outstanding shares of stock are not identical with respect to the rights and interest which they convey in the control, profits, and assets of the corporation.⁶⁸ Therefore, the corporation does not qualify for subchapter S treatment if the outstanding stock differs as to voting rights, dividend rights, or *liquidation preferences*.

The court recognized that the loans were not true debt obligations, but rather were advanced at the "risk of the business." However, the majority held that these shareholder loans were not a second class of "preferred" stock because the shareholders had ignored their rights thereunder (*i.e.*, there was no intent to present the demand notes for payment; therefore, no preference existed).⁶⁹

A concurring opinion would have resolved the *Gamman* case on a much simpler basis. The concurring judges felt it was not even necessary to question the validity of the regulations because the loans were not "actually stock" under any theory.⁷⁰

Five judges dissented in *Gamman*, believing that the regulation did not go beyond the Commissioner's power. They felt that the rights under the demand notes should not be ignored since the shareholders could exercise these rights if the corporation acquired earnings and profits in the future. Therefore, they would have held that the notes were a second class of "cumulative non-participating redeemable preferred stock."⁷¹

B. The Income Tests

A second ground for caution is that automatic termination of the election occurs when the corporation fails to meet either of the two

66. W. C. Gamman, *supra* note 64, CCH TAX CT. REP. at 2212. *Probate Court in America*, 42 MICH. L. REV. 965 and 43 MICH. L. REV. 113 (1944).

67. *Ibid.*

68. Treas. Reg. § 1.1371-1(g) (1959).

69. W. C. Gamman, *supra* note 64, CCH TAX CT. REP. at 2213.

70. *Id.* at 2215.

71. *Id.* at 2216.

income tests. At least twenty per cent of gross receipts must come from sources within the United States,⁷² and no more than twenty per cent of gross receipts can be passive investment income⁷³ (*i.e.*, royalties, rents, dividends, interest, annuities, and sales and exchanges of stock or securities). The latter test is not applied the first taxable year the corporation exists if passive investment income totals less than \$3,000 per year.⁷⁴

The twenty per cent test on passive investment income can be troublesome, since "gross receipts" is not synonymous with "gross income." For the purposes of this test, *any* returns from the use of money (*e.g.*, tax exempt interest) are considered as interest.⁷⁵ Likewise, one must include all gains on the sale of stock, but losses on such transactions are excluded.⁷⁶

A recent automatic termination case of interest involved the twenty per cent passive investment income rule.⁷⁷ A 1962 audit of a corporation electing subchapter S treatment for the years 1958 through 1961 disclosed that the passive investment income rule had been violated in both 1960 and 1961. The shareholders filed a claim for refund of 1958 taxes after March 15, 1963 (the date on which the statute of limitations had run for 1958 corporate returns), and before April 15, 1963 (the date on which the statute of limitations would have run on their individual returns). If the claim had been approved, neither the corporation nor the shareholders would have had to pay any tax for 1958. The claim for refunds was refused on the grounds that it was unjust and inequitable.

An interesting "parallel" with social security cases is also involved in the passive investment income test. Rent from real estate is not considered rent income for the test if significant services are rendered to an occupant.⁷⁸ It would seem that rents received by a farm landlord under a "material participation" lease arrangement satisfy the significant services requirement and thus are not the type of rents discouraged by the passive investment income test.⁷⁹

VII. RE-ELECTION AFTER TERMINATION

Once an election has been terminated, whether voluntarily or involuntarily, a new election cannot be made in the year of termination or for

72. I.R.C. § 1372(e)(4).

73. I.R.C. § 1372(e)(5).

74. *Ibid.*

75. Treas. Reg. § 1.1372-4(b)(5) (1959).

76. *Ibid.*

77. See the discussion of *Gonyou v. United States* in O'BRYNE, FARM INCOME TAX MANUAL (Cum. Supp. 1966, § 917, at 151).

78. Treas. Reg. § 1.1372-4(b)(5) (1959).

79. Rev. Rul. 61-112, 1961-1 CUM. BULL. 399. But see O'BRYNE, FARM INCOME TAX MANUAL 605 (3d ed. 1964), who feels that "significant services" may mean something more than "material participation."

the next four taxable years *unless* the Commissioner consents to an earlier election.⁸⁰ The regulations indicate such consent will be granted if the corporation can prove that termination occurred beyond the control of its controlling stockholders, or if the corporation is controlled by different shareholders than at the time of termination.⁸¹ The creation of a successor corporation owned by the same shareholder is not effective to avoid or shorten the five-year ban against a new election.⁸²

VIII. SUMMARY

Many practitioners have considered the subchapter S election too hazardous for use by their clients. However, the election now appears less treacherous because of recent developments. Three areas deserve special attention because of significant changes which have occurred therein. They are the "one-shot" use of the election for capital gain purposes, the tax-free distribution of previously taxed income, and the possibility that shareholder loans may be characterized as a forbidden second class of stock.

Recent legislation somewhat curtails the "one-shot" use of the election to pass capital gains through to shareholders. However, it should not entirely eliminate utilizing the election for this purpose. The second tax imposed at the corporate level by this legislation can be avoided if corporate contracts are drawn so that capital gains will not exceed \$25,000 per year. Therefore, the legislation may induce even greater tax savings than was achieved under the "one-shot" use of subchapter S, since the \$25,000 limitation should encourage the use of installment sale contracts under section 458. A recent ruling makes it clear that a subchapter S corporation can elect installment sale contract treatment and pass capital gains through to the shareholders as the installments are received.⁸³

The fear that previously taxed income may be "locked-in" the corporation has somewhat lessened with the addition of section 1375(f) to the Code. Prior to the enactment of this section, distributions in the amount of current year earnings and profits had to be made before a tax-free distribution of previously taxed income could be achieved. The current law allows a tax-free distribution of income which was taxed but not distributed in the prior year, if such distributions are made within two months and fifteen days after the end of the taxable year.

Some relief is also provided for corporations which have seen a por-

80. I.R.C. § 1372(f).

81. Treas. Reg. § 1.1372-5(a) (1959).

82. Treas. Reg. § 1.1372-5(b) (1959).

83. Rev. Rul 65-292, 1965-2 CUM. BULL. 319.

tion of their income become "locked-in," since they can now elect to apply section 1375(f) retroactively. Any distributions which were made within the first three months and fifteen days is a tax-free distribution of the prior year's income when retroactive application is elected. This should alter the tax liability of numerous subchapter S shareholders and release a substantial amount of previously taxed income formerly considered to be essentially "locked-in" the corporation.

Perhaps the most significant of recent developments is the serious limitation placed on the Commissioner's automatic argument that shareholder loans constitute a second class of stock if the advancements represent an equity investment. Under the *Gamman* case, shareholder loans do not constitute a second class of preferred stock if they are made on a pro rata basis, and if shareholder rights under the loans are ignored. It appears that *Gamman* will become firmly entrenched, as a memorandum decision handed down approximately one month later follows its rationale and holds that pro rata loans do not constitute a second class of stock where they give the shareholders no rights and interests different from those already existing by virtue of stock ownership.⁸⁴

While it is clear that loans representing bona fide debt obligations,⁸⁵ and pro rata loans under which shareholder rights are ignored, will not disqualify a corporation from subchapter S treatment, the *Gamman* decision does seem to leave taxpayers in somewhat of a dilemma. That is, should shareholder rights under pro rata loans be ignored in order to assure the protection of *Gamman*, or should interest be periodically paid as is done in the thin corporation area to give them an aura of authenticity? *Gamman* does seem illogical to this extent, unless the rationale of the thin corporation problem has no application in the subchapter S area. This may well be the ultimate conclusion, although the cases do not clearly so indicate at the present.

84. *Lewis Bldg. & Supplies, Inc.*, CCH TAX CT. REP. (25 CCH Tax. Ct. Mem.) Dec. 28,031 (M) (June 30, 1966).

85. See the discussion of *Seventy-Six Ranch Co. v. Kennedy*, in O'BRYNE, *op. cit. supra* note 77, at 152.