

Internal Revenue Service

Department of the Treasury

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Person to Contact:

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Date:

October 29, 1998

Parent =

Buyer =

Target =

Sellers
A =

B =

C =

D =

E =

F =

G =

H =

I =

Company
Official =

Authorized
Representative =

Business X =

Business Y =

Date A =

Date AA =

Date B =

Date C =

Dear

This responds to your Authorized Representative's letter dated April 9, 1998, requesting an extension of time under §§ 301.9100-1 through 301.9100-3 of the Procedure and Administration Regulations to file an election. Additional information was received in and with letters dated June 16, and September 10, 1998. Buyer and Target are requesting an extension to file a "section 338(h)(10) election" under §§ 338(g) and 338(h)(10) of the Internal Revenue Code and § 1.338(h)(10)-1(d) and § 1.338-1 (c) (10) of the Income Tax Regulations (the "Election"), with respect to the acquisition of Target on Date A. The material information is summarized below.

Parent, engaged in Business X, is the common parent of a consolidated group that has a fiscal year ending September 30. This consolidated group includes Buyer, engaged in Business Y.

Target, also engaged in Business Y, was an S corporation owned by individual Sellers A through I up to the date of the sale. Target was a calendar year taxpayer. The individual Sellers are calendar year cash basis taxpayers.

On Date AA, Buyer and Sellers entered into a stock purchase agreement for Buyer to acquire all of Sellers' Target stock. On Date A, Buyer acquired all of Sellers' Target stock for cash in a fully taxable acquisition. It is represented that (1) Buyer was not related to Target within the meaning of § 338(h)(3), and (2) Buyer's acquisition of Target stock qualified as a "qualified stock purchase," as defined in § 338(d)(3).

Buyer and Sellers intended to file the Election. The Election was due on Date B, but for various reasons it was not filed. On Date C (which is after the due date for the Election), Buyer and Sellers discovered that the election was not timely filed. The statute of limitations under § 6501 has not expired for Buyer's, Sellers', or Target's taxable year(s) in which the acquisition sale was consummated, or for any year(s) affected by the Election.

Section 338(a) permits certain stock purchases to be treated as asset acquisitions if (1) the purchasing corporation makes or is treated as having made a "section 338 election" under § 338(g) and (2) the acquisition is a "qualified stock purchase." Section 338(d)(3) defines a "qualified stock purchase" as any transaction or series of transactions in which stock (meeting the requirements of § 1504(a) (2)) of one corporation is acquired by another corporation by purchase during the 12 month acquisition period.

Section 338(h)(3)(A) provides that the term "purchase" means any acquisition of stock, but only if: (i) the basis of the stock in the hands of the purchasing corporation is not determined (I) in whole or in part by reference to the adjusted basis of such stock in the hands of the person from whom acquired, or (II) under § 1014(a) (relating to property acquired from a decedent); (ii) the stock is not acquired in an exchange to which § 351, 354, 355, or 356 applies and is not acquired in any other transaction described in regulations in which the transferor does not recognize the entire amount of the gain or loss realized on the transaction; and (iii) the stock is not acquired from a person the ownership of whose stock would, under § 318(a), be attributed to the person acquiring such stock.

Section 338(h)(10) permits the purchasing and selling corporations to elect jointly to treat the target corporation as deemed to sell all of its assets and distribute the proceeds in complete liquidation. Thus, the sale of target stock included in the qualified stock purchase generally is ignored. A § 338(h)(10) election may be made for target only if it is a member of a selling consolidated group, a member of a selling affiliated group filing separate returns, or an S corporation. Section 1.338(h)(10)-1(a). Section 1.338(h)(10)-1(d) provides that a §338(h)(10) election may be made for the target corporation if the purchasing corporation makes a "qualified stock purchase" of the

target corporation stock. Sections 1.338(h)(10)-1(d)(2) and (3) provide that if a § 338(h)(10) election is made for the target corporation, it is irrevocable and a § 338 election is deemed made for the target corporation.

Section 1.338(h)(10)-1(d)(2) provides that a § 338(h)(10) election is jointly made by Purchaser and the selling consolidated group (or the selling affiliate or the S corporation shareholders) on Form 8023 (or Form 8023-A) in accordance with the instructions to the form. The regulations further provide that the election must be made not later than the 15th day of the ninth month beginning after the month in which the acquisition date occurs.

Section 1.338-2(b)(4) provides that if an election under § 338 is made for target, “old target” is deemed to sell target’s assets and “new target” is deemed to acquire those assets.

Section 1.338 (h)(10)-1(e)(2)(ii) provides that “old target” is treated as if, while owned by the selling S corporation shareholders, it distributed all of its assets in complete liquidation.

Section 1.1502-77(a) provides that the common parent, for all purposes (other than for several purposes not relevant here), shall be the sole agent for each subsidiary in the group, duly authorized to act in its own name in all matters relating to the tax liability of the consolidated return year. See also Form 8023 and the instructions thereto.

Under § 301.9100-1(a), the Commissioner has discretion to grant a reasonable extension of time to make a regulatory election, under all subtitles of the Internal Revenue Code except subtitles E, G, H, and I, provided the taxpayer demonstrates to the satisfaction of the Commissioner that:

- (1) The taxpayer acted reasonably and in good faith, and
- (2) Granting relief will not prejudice the interests of the government.

In this case, Buyer and Sellers were required by § 1.338(h)(10) - 1(d)(2) to file the Election on Date B. However, for various reasons the Election was not timely filed. Subsequently, Buyer and Sellers filed this request, under § 301.9100-1, for an extension of time to file the Election. The time for filing the Election is fixed by the regulations (*i.e.*, § 1.338(h)(10) - 1(d)). Therefore, the Commissioner has discretionary authority under § 301.9100-1 to grant an extension of time for Buyer and Sellers to file the Election, provided Buyer and Sellers show they acted reasonably and in good faith, the requirements of §§ 301.9100-1 and 301.9100-3 are satisfied, and granting relief will not prejudice the interests of the Government.

Information, affidavits, and representations submitted by Sellers, Buyer,

Company Official, and Authorized Representative of Sellers explain the circumstances that resulted in the failure to timely file a valid Election. The information also establishes that tax professionals were responsible for the Election, that Sellers and Buyer relied on them to timely make the Election, and that the Government will not be prejudiced if relief is granted.

Based on the facts and information submitted, including the representations made, we conclude that Buyer and Sellers have shown they acted reasonably and in good faith, the requirements of §§ 301.9100-1 and 301.9100-3 are satisfied, and granting relief will not prejudice the interests of the Government. Accordingly, an extension of time is granted under § 301.9100-1, until 30 days from the date of issuance of this letter, for Buyer and Sellers to file the Election with respect to the acquisition of Target as described above.

The above extension of time is conditioned on the taxpayers' (Sellers', Buyer's, and Target's) tax liability (if any) being not lower, in the aggregate, for all years to which the Election applies, than it would have been if the Election had been timely made (taking into account the time value of money). No opinion is expressed as to the taxpayers' tax liability for the years involved. A determination thereof will be made by the District Director's office upon audit of the Federal income tax returns involved. Further, no opinion is expressed as to the Federal income tax affect, if any, if it is determined that the taxpayers' liability is lower. Section 301.9100-3(c). The above extension is also conditioned on: (i) Buyer and the Sellers signing the election, and (ii) Buyer and Sellers treating the acquisition/sale of Target stock as a § 338(h)(10) transaction.

Buyer and the Sellers must file the Election in accordance with § 1.338(h)(10) -1 (d). That is, a new election on Form 8023 (or Form 8023-A), must be executed on or after the date of this letter, which grants an extension, and filed in accordance with the instructions on the form, and the information that is required by the form must be attached to the election form. See Announcement 98-2, 1998-2, I.R.B. 38. A copy of this letter should be attached to the election form. Buyer and Sellers must file or amend, as applicable, their returns to report the transaction as a "section 338(h)(10)" transaction, and attach a copy of the Election (and the information required therewith) and a copy of this letter.

We express no opinion as to (1) whether the acquisition/sale of Target stock qualifies as a "qualified stock purchase" under § 338(d)(3), (2) whether the acquisition/sale of Target stock qualifies for § 338(h)(10) treatment, or (3) if § 338(h)(10) is applicable, as to the amount and character of gain or loss, if any, recognized by Target (and, thus, by Sellers) on Target's deemed asset sale.

In addition, we express no opinion as to the tax consequences of filing the Election late under the provisions of any other section of the Code and regulations, or as to the tax treatment of any conditions existing at the time of, or resulting from, filing

the Election late that are not specifically set forth in the above ruling. For purposes of granting relief under § 301.9100-1, we relied on certain statements and representations made by the taxpayers. However, the District Director(s) should verify all essential facts. In addition, notwithstanding that an extension is granted under § 301.9100-1 to file the Election, penalties and interest that would otherwise be applicable, if any, continue to apply.

This letter is directed only to the taxpayer(s) who requested it. Section 6110(k)(3) provides that it may not be used or cited as precedent.

A copy of this letter is being sent, pursuant to the power of attorney on file in this office, to the representative of the Target and Sellers.

Sincerely yours,
Assistant Chief Counsel (Corporate)

By _____
Bernita L. Thigpen
Deputy Assistant Chief Counsel (Corporate)