

Internal Revenue Service

Department of the Treasury

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Person to Contact:

Telephone Number:

Refer Reply To:
CC:DOM:CORP:4 PLR-113589-98
Date:
February 18, 1999

Legend:

Purchaser =

Partner A =

Partner B =

Seller =

Target =

Date A =

Date B =

Date C =

Date D =

Date E =

PLR-113589-98

2

Date F =

X Taxable Year =

Purchaser's
Company Official =

Outside Tax
Professionals =

Authorized
Representatives =

Business X =

Dear

This responds to your undated letter, that was received on July 2, 1998 requesting, on behalf of the taxpayers identified above, an extension of time under § 301.9100-1 through 301.9100-3 of the Procedure and Administration Regulations to make two elections. First, Purchaser is requesting an extension to make a late election under § 301.7701-3 to be treated as an association effective as of Date B (the "Entity Classification Election"). Second, Purchaser and Seller are requesting an extension to make a late § 338(h)(10) election, under § 338(h)(10) of the Internal Revenue Code and § 1.338(h)(10)-1(d) of the Income Tax Regulations (the "§ 338(h)(10) election"), with respect to Purchaser's acquisition of the Target stock on Date C. The material information is summarized below.

Purchaser, a domestic entity, was formed as a limited liability partnership on Date A, and has two partners (*i.e.*, Partner A and Partner B). Purchaser has a calendar taxable year and uses the accrual methods of accounting. Target was an S corporation, within the meaning of § 1361, was wholly owned by Seller (an individual), and was engaged in Business X. Target had a calendar taxable year and used the cash method of accounting.

Purchaser was formed for the purpose of acquiring Target. The intent was to make an election to have Purchaser classified as a corporation, and then make an election under § 338(h)(10) with respect to Purchaser's acquisition of Target.

On Date C, Purchaser, Target and Seller entered into a Stock Purchase Agreement for Purchaser to acquire all of Seller's Target stock. Also on Date C, Purchaser acquired all of the Seller's Target stock, pursuant to the Stock Purchase Agreement, for cash in a fully taxable transaction. It is represented that (1) Purchaser was not related to Seller within the meaning of § 338(h)(3), and (2) Purchaser's acquisition of Target stock qualified as "qualified stock purchase," as defined in § 338(d)(3).

The Entity Classification Election was due on Date D, in order to be effective as of Date B. On Date F (which is after the due date for the Entity Classification Election), Purchaser's Company Official, Seller, Outside Tax Professionals, and Authorized Representatives discovered that the Entity Classification Election had not been filed. This failure caused Purchaser to be treated as a partnership for federal tax purposes. In order to qualify to make a § 338(h)(10) election, Purchaser must be classified as an association taxable as a corporation as of Date B, the day before Date C (the date Purchaser acquired the Target stock).

The § 338(h)(10) election was due on Date E, but it was not filed because Purchaser had not filed the Entity Classification Election (the due date of which by then had already expired). The period of limitations on assessment under § 6501(a) has not expired for Purchaser's, Target's or Seller's taxable years in which the acquisition/sale of Target was consummated, the taxable year in which the Entity Classification Election and § 338(h)(10) election should have been filed, or for any taxable year(s) that would

have been affected by the Entity Classification Election and/or § 338(h)(10) election had one or both been timely filed.

Section 301.7701-4(b) provides that the fact that an organization is technically cast in the trust form will not change the real character of the organization if the organization is more properly classified as a business entity under section 301.7701-2.

Section 301.7701-3(a) provides that a business entity that is not classified as a corporation under 301.7701-2(b)(1), (3), (4), (5), (6), (7), or (8) (an eligible entity) may elect its classification for federal tax purposes. Elections are necessary only when an eligible entity chooses to be classified initially as other than the default classification or when an eligible entity chooses to change its classification.

Section 301.7701-3(b)(1)(i) provides that, unless the entity elects otherwise, a domestic eligible entity is a partnership for federal tax purposes if it has two or more members.

Section 301.7701-3(c)(1)(i) provides that an eligible entity may elect to be classified other than as provided under § 301.7701-3(b) by filing Form 8832, Entity Classification Election, with the appropriate service center. Under § 301.7701-3(c)(1)(iii), this election will be effective on the date specified by the entity on Form 8832. The date specified on Form 8832 cannot be more than 75 days prior to the date on which the election is filed.

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 corporation to elect jointly to treat the target corporation as deemed to sell all of its assets and distribute the

proceeds in complete liquidation. Section 1.338(h)(10)-1(a). The sale of the 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). Gain or loss on the deemed sale is included in the consolidated return of the selling group (unless the target corporation is a member of a selling affiliated group filing separate returns or an S corporation). 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. Section 1.338(h)(10)-1(d)(2) provides 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 a 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. The instructions to Form 8023 or Form 8023-A provide that if a § 338(h)(10) election must be made jointly by the purchasing corporation and the common parent of the selling consolidated group (or selling affiliate or S corporation shareholders). The instructions provide that the form must be signed by each person authorized to act on behalf of each corporation, and if it made for an S corporation it must be signed by each S corporation shareholder who sells target stock in the "qualified stock purchase." The instructions further provide that the signatures, dates and titles (if applicable) of those persons must be provided in a "signature attachment," and they provide specific details as to the preparation of the "signature attachment" and its attachment to Form 8023 or Form 8023-A.

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. If target is an S corporation immediately before the acquisition date, nothing in this section prevents a holder of target stock from taking deemed sale gain into account under § 1366 and 1367. See § 331 or 332 for gain or loss recognized by the old target shareholders as a result of the deemed liquidation.

Under § 301.9100-1(c), the Commissioner has discretion to grant a reasonable extension of time to make a regulatory election, or a statutory election (but no more than six months except in the case of a taxpayer who is abroad), 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.

Section 301.9100-1(b) defines the term "regulatory election" as including an election whose due date is prescribed by a regulation, revenue ruling, revenue procedure, notice, or announcement. Sections 301.9100-1 through 301.9100-3 provide the standards the Commissioner will use to determine whether to grant an extension of time to make a regulatory election. Section 301.9100-1(a). Section 301.9100-2 provides automatic extensions of time for making certain elections. Section 301.9100-3 provides extensions of time for making regulatory elections that do not meet the requirements of § 301.9100-2. Requests for relief under § 301.9100-3 will be granted when the taxpayer provides evidence to establish that the taxpayer acted reasonably and in good faith, and that granting relief will not prejudice the interests of the government. Section 301.9100-3(a).

In this case, the time for filing the Entity Classification Election and the § 338(h)(10) election is fixed by the regulations (i.e., §§ 301.7701-3(c)(1)(iii) and 1.338(h)(10)-1(d), respectively). Therefore, the Commissioner has discretionary authority under § 301.9100-1 to grant an extension of time for Purchaser to make the Entity Classification Election and for Purchaser and Seller to make the § 338(h)(10) election, provided Purchaser and Seller 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 Purchaser's Company Official, Seller, Outside Tax Professionals, and Authorized Representatives explain the circumstances that resulted in the failure to timely file the Entity Classification Election and the § 338(h)(10) election. The information also establishes that tax professionals were responsible for the elections, that Seller and Purchaser relied on them to timely make the elections, and that the government will not be prejudiced if relief is granted. See § 301.9100-3(b)(1)(v).

Based on the facts and information submitted, including the representations made, we conclude that Purchaser and Seller 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 (1) Purchaser to make an Entity Classification Election under § 301.7701-3 to be treated as a corporation for federal income tax purposes effective as of Date B, and (2) for Purchaser and Seller to make a § 338(h)(10) election with respect to Purchaser's acquisition of the stock of Target on Date C, as described above.

The above extension of time is conditioned on the taxpayers' (Seller's, Purchasers', and Target's) tax liability (if any) being not lower, in the aggregate, for all years to which the both elections apply, than it would have been if both elections had

been timely made (talking 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 effect, 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) Purchaser first making the Entity Classification Election to be classified as an association taxable as a corporation effective as of Date B; (ii) then Purchaser and the Seller making the § 338(h)(10) election; and (iii) then Purchaser and Seller treating the acquisition/sale of Target stock as a § 338(h)(10) transaction or their applicable returns.

Purchaser must file the Entity Classification Election in accordance with § 301.7701-3 (an Entity Classification Election, effective as of Date B, on Form 8823 must be executed on or after the date of this letter, which grants an extension, and filed in accordance with the instructions thereto), and Purchaser and the Seller must file the § 338(h)(10) election in accordance with § 1.338(h)(10)-1(d). That is, a § 338(h)(10) 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 to the form. See Announcement 98 -2, 1998 -2 I.R.B. 38. A copy of this letter should be attached to the election forms. In addition: (1) Target must amend its return for its X Taxable Year (i.e., its short year) to file a corporate income tax return, and attach thereto a copy of the Form 8832; (2) Purchaser, Target and Seller must file or amend, as applicable, their X Taxable Year returns to report the transaction as a § 338(h)(10) transaction; and (3) Purchaser, Target and Seller must attach to their X Taxable Year returns (i) a copy of Form 8023 or Form 8023-A, (ii) the information required with Form 8023 or Form 8023-A, and (iii) 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 Seller) on Target's deemed asset sale and liquidation.

In addition, we express no opinion as to the tax consequences of filing the elections 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 elections 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 elections, 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 to Purchaser's Company Official and Seller, pursuant to the powers of attorney on file in this office.

Sincerely yours,
Assistant Chief Counsel (Corporate)

by _____
Richard Todd
Counsel to the Assistant Chief
Counsel (Corporate)