

Internal Revenue Service

Department of the Treasury

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Person to Contact:

Telephone Number:

Refer Reply To:
CC:DOM:CORP:3 PLR-102575-99
Date:
July 1, 1999

Parent =

Purchaser =

Target 1 =

Target 2 =

Target 3 =

Target 4 =

Target 5 =

Target 6 =

Target 6 Sub =

DSub =

FSub1 =

FSub2 =

Sellers =

Company Official =

Authorized
Representative =

State Z =

Country C =

Date 1 =

Date 2 =

Date 3 =

Date 4 =

Date 5 =

Business x =

Business y =

! =

m =

This letter responds to your letter dated January 20, 1999, requesting, on behalf of the Parent, an extension of time under § 301.9100-1 through 301.9100-3 of the Procedure and Administration Regulations to file an election. The extension is being requested for Parent (as the common parent of the affiliated group which contains the United States shareholders of the controlled foreign purchasing corporation) to file an election under § 338(g) of the Internal Revenue Code and § 1.338-1(d) of the Income Tax Regulations, with respect to Purchaser's acquisition of the target corporations stock (hereinafter referred to as the "Election"), on Date 2. Additional information has been received in letters dated April 22, and May 7, 1999. The material information submitted for consideration is summarized below.

Parent, a State Z corporation, is the common parent of a consolidated group that has a fiscal tax year and uses the accrual method of accounting. Purchaser, a Country C corporation, was purchased on Date 1 by Parent to engage in the transaction. Purchaser became a wholly-owned subsidiary of Parent and a controlled foreign corporation (CFC), within the meaning of § 957 on Date 1.

On Date 2, Purchaser acquired all of the stock of Target 1 through Target 6 ("the Targets") from Sellers, all individuals, in a fully taxable transaction. It is represented that the acquisition of the Targets constituted a qualified stock purchase within the meaning of § 338(d)(3), and that Parent was not related to Sellers within the meaning of § 338(h)(3). Parent is engaged in business x while the Targets are engaged in business y. The Targets became CFCs on Date 2.

Prior to Date 2, none of the Targets were: (1) a controlled foreign corporation within the meaning of § 957(a), (2) a passive foreign investment company for which an election under § 1295 was in effect, (3) a foreign personal holding company or a foreign corporation the stock ownership of which is described in § 552(a)(2), or (4) required under § 1.6012-2(g) to file a U.S. income tax return or subject to United States income taxation.

On Date 3, taxpayer imposed three new corporations into the chain of ownership of Purchaser and converted Purchaser to a partnership (for Country C purposes). As a result, Parent owns all of the stock of DSub, a newly-formed State Z corporation, and all of the stock of FSub1. DSub owns all of the stock of FSub2. FSub1 owns l percent of Purchaser and FSub2 owns m percent of Purchaser. For Country C purposes, Purchaser is a partnership and FSub2 is its general partner, with FSub1 its limited partner. Purchaser, FSub1, and FSub2 are (Country C) corporations for U.S. tax purposes.

The Election was due on Date 4, but for various reasons it was not filed. On

Date 5 (which is after the due date for the Election), Company Official discovered that the Election was not filed. Subsequently, this request was submitted, under § 301.9100-1, for an extension of time to file the Election. The period of limitations on assessment under § 6501(a) has not expired for Purchaser's, the Targets' or Sellers' taxable years in which the acquisition/sale was consummated, the taxable year in which the Election should have been filed, or for any taxable year(s) that would have been affected by the Election had it been timely filed.

Section 338(h)(3)(A)(iii) provides that the term "purchase" means any acquisition of stock, but only if (1) the basis of the stock in the hands of the purchasing corporation is not determined in whole or in part by reference to the adjusted basis of such stock in the hands of the person from whom acquired, or under § 1014(a) (relating to property acquired from a decedent); (2) 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 (3) 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 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 1.338-1(d) provides that a purchasing corporation makes a "section 338 election" for target by filing a statement of "section 338 election" on Form 8023 in accordance with the instructions on the form. The "section 338 election" must be filed not later than the 15th day of the ninth month beginning after the month in which the acquisition date occurs. A "section 338 election" is irrevocable.

A foreign purchasing corporation that does not file a U.S. income tax return must file Form 8023 (or Form 8023-A) with the Office of the Assistant Commissioner (International), Attention: Chief of Examination, 950 L'Enfant Plaza South S.W., Washington, DC 20224. Section 1.338-1(g)(3). Section 1.338-1(g)(3) provides that a statement of § 338 election may be filed by United States shareholders (as defined in § 951(b)) in certain cases if the purchasing corporation is a controlled foreign corporation (as defined in § 957(a)). In such a case, each U.S. shareholder making the election must attach a copy of Form 8023 (or Form 8023-A) and its required attachments to Form 5471 (information return with respect to a foreign corporation), and file them for the foreign purchasing corporation's tax year that includes the acquisition date. The Election must be filed with the district director for the district having audit jurisdiction over the U.S. shareholder owning the largest share of the foreign purchaser's stock.

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, Parent (as the common parent of the affiliated group which contains the United States shareholders of Purchaser) was required by §§ 1.338-1(d) and 1.338-1(g)(3) to file the Election on Date 4. However, for various reasons the Election was not filed. Subsequently, Parent 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.*, § 1.338-1(d)). Therefore, the Commissioner has discretionary authority under § 301.9100-1 to grant an extension of time for Parent to file the Election, provided Parent establishes it acted reasonably and in good faith, granting relief will not prejudice the interests of the government, and the requirements of §§ 301.9100-1 and 301.9100-3 are satisfied.

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, (*i. e.*, DSub) duly authorized to act in its own name in all matters relating to the tax liability of the consolidated return year.

Information, affidavits, and representations submitted by Parent, Company Official, and Authorized Representative explain the circumstances that resulted in the failure to file a valid Election. The information establishes that a tax professional was responsible for the Election, that Parent relied on the tax professional to timely make the Election, and that the government will not be prejudiced if relief is granted. See § 301.9100-3(b)(v).

Based on the facts and information submitted, including the representations that have been made, we conclude that Parent has established it acted reasonably and in

good faith in failing to timely file the Election, the requirements of §§ 301.9100-1 and 301.9100-3 are satisfied, and granting relief will not prejudice the interests of the government. Accordingly, we grant an extension of time under § 301.9100-1, until 30 days from the date of issuance of this letter, for Parent to file the Election with respect to Purchaser's acquisition of the stock of Target on Date 2, as described above.

The above extension of time is conditioned on the taxpayers' (Parent's, Purchaser's, the Targets', and Sellers') United States tax liability, if any, not being lower, in the aggregate for all years to which the election applies, than it would have been if the Election had been made timely (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 effect, if any, if it is determined that the taxpayers' liability is lower. Section 301.9100-3(c).

Parent should file the Election and provide "notice" in accordance with §§ 1.338-1(d) and 1.338-1(g). 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 election form (together with the information that is required to be attached to the election form). Parent's returns must be amended, as applicable to report the acquisition as a "section 338 transaction." A copy of this letter should be attached to the election form and a copy of this letter and the election form should be attached to the returns. See, Announcement 98-2, 1998-2 I.R.B. 38, and § 1.338-1(g).

No opinion is expressed as to (1) whether Purchaser's acquisition of Target stock qualifies as a "qualified stock purchase", (2) whether the acquisition of Target stock qualifies for § 338(a) treatment, and (3) if the acquisition of Target stock qualifies for § 338(a) treatment, as to the amount of gain or loss recognized (if any) by Target on the deemed asset sales.

In addition, no opinion is expressed as to the tax effects or 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 taxpayer, its employees and representatives. However, the District Director 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 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 the Authorized Representative, pursuant to a power of attorney on file in this office.

Sincerely yours,

Assistant Chief Counsel (Corporate)

by Bernita L. Thigpen

Bernita L. Thigpen
Deputy Assistant
Chief Counsel (Corporate)