

Internal Revenue Service

Department of the Treasury

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Person to Contact:

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Legend

Parent =

Sub #1 =

Purchaser =

Seller =

Target =

Company Officials
& Tax Professionals =

Authorized
Representatives =

Business A =

Business B =

Date A =

Date B =

Date C =

Date X =

Date Y =

Dear :

This letter responds to your letter dated March 12, 1998, on behalf of the above taxpayers, requesting an extension of time under §§ 301.9100-1 and 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 consolidated group of which the purchasing corporation and United States shareholder, Purchaser, is a member) to file an election under § 338(g) of the Internal Revenue Code and §§ 1.338-1(d) and 1.338-1(g) of the Income Tax Regulations with respect to Purchaser's acquisition of the stock of Target (sometimes hereinafter referred to as the "Election") on Date A. Additional information was received in a letter dated May 18, 1999. The material information submitted for consideration is summarized below.

Parent is the common parent of a consolidated group that has a calendar taxable year and uses the accrual method of accounting. Purchaser is a domestic corporation, all of the shares of which are owned by Sub #1, except for preferred shares, which are publicly held; and Sub #1 is a domestic corporation, all of the shares of which are owned by Parent, except for preferred shares, which are owned by indirect subsidiaries of Parent. Purchaser and Sub #1 (along with other subsidiaries of Parent that are not relevant for purposes of this request) are included in Parent's consolidated income tax return. Target is a foreign corporation (whose country of formation is listed above in the redacted legend) that was wholly owned by Seller. Seller, a foreign corporation whose identity and country of formation is recorded in the above redacted legend, is not a United States shareholder, as defined in § 951(b). Target does not

have any subsidiaries. Parent and its subsidiaries are engaged in Business A; and Target is engaged in Business B.

Prior to the below described acquisition, Seller and Target did not file United States income tax returns, and they were not subject to United States income taxation. Further, neither Seller nor Target was: (1) a controlled foreign corporation within the meaning of § 957(a) (a "CFC"); (2) a passive foreign investment company for which an election under § 1295 was in effect; (3) a foreign investment 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.

On Date A, Purchaser acquired from Seller, for cash in a fully taxable acquisition, 100% of the stock of Target. It is represented that the acquisition of Target constituted a qualified stock purchase within the meaning of § 338(d)(3), and that Purchaser was not related to Seller within the meaning of § 338(h)(3). The period of limitations on assessments under § 6501(a) has not expired for Parent's, Sub #1's, Purchaser's or Target's taxable year in which the acquisition occurred, the taxable years in which the Election should have been filed, or any taxable years that would have been affected by the Election had it been timely filed.

The Election was due on Date B. However, for various reasons the Election was not filed. On Date C (which is after the due date for the Election), Company Officials & Tax Professionals and Authorized Representatives discovered that the Election had not been filed. Subsequently, this request was submitted, under § 301.9100-1, for an extension of time to file the Election.

On Date X (which is after the date that the Election was due (*i.e.*, it was due on Date B), and which is in a taxable year subsequent to the taxable year in which the due date of the Election is in, and which is subsequent to the date the omission was discovered (*i.e.*, omission was discovered on Date C)), Target made an election under § 301.7701-3 (by filing Form 8832, Entity Classification Election) to treat Target as a partnership effective on Date Y (which is after the date the Election was due, on Date B).

Section 338(a) permits certain stock purchases to be treated as asset purchases if the purchasing corporation makes or is treated as having made a "section 338 election" under § 338(g) and 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.

Sections 1.338-1(g)(1)(i) and (v) provide, *inter alia*, that a foreign purchasing corporation or deemed foreign purchasing corporation is not eligible for the special rule

under § 1.338-1(g)(1) (i.e., which specifies a filing date for the election that is later than the filing date required by § 338(g) and § 1.338-1(d)) if such foreign corporation is considered subject to United States tax (e.g., is a CFC or is required to file a United States income tax return). 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 1.338-1(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.

Section 1.338-1(g)(3) provides that the United States shareholders (as defined in § 951(b)) of a foreign purchasing corporation that is a controlled foreign corporation (as defined in § 957, taking into account § 953(c)) may file a statement of "section 338 election" on behalf of the purchasing corporation if the purchasing corporation is not required under § 1.6012-2(g) (other than § 1.6012-2(g)(2)(i)(b)(2)) to file a United States income tax return for its taxable year that includes the acquisition date. Form 8023-A and Form 8023, as applicable, must be filed as described in the form and its instructions, and also must be attached to Form 5471 (information return with respect to foreign corporation) filed with respect to the purchasing corporation by each United States shareholder for the purchasing corporation.

Section 1.338-1(c)(14) provides that the term "target affiliate" has the same meaning as in § 338(h)(6), applied without § 338(h)(6)(B)(i), and that if a target affiliate is acquired in a qualified stock purchase, it is also a target. 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. Under § 338(h)(3)(B), new target's deemed purchase of stock of another corporation is a purchase for purposes of § 338(d)(3) on the acquisition date of target. If new target's deemed purchase causes a qualified stock purchase of the other corporation and if a § 338 election is made for the other corporation, the acquisition date for the other corporation is the same as the acquisition date of target. However, the deemed sale and purchase of the other corporation's assets is considered to take place after the deemed sale and purchase of target's assets.

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(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 Election was 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 Elections, provided Parent shows it 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 Company Officials & Tax Professionals and Authorized Representatives explain the circumstances that resulted in the failure to file the Election. The information establishes that tax professionals were responsible for the Elections, that Parent relied on the tax professionals to timely make the Election, and that the government will not be prejudiced if relief is granted. The information also establishes that no returns have been filed that are not consistent with the Election, and that relief was requested before the failure to make the Election was discovered by the Service. See §§ 301.9100-3(b)(1)(i) and (v).

Based on the facts and information submitted, including the representations that have been made, we conclude that Parent 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 (as the common parent of the consolidated group of which Purchaser, the United States shareholder and the purchasing corporation, is a member) to file the Election with respect to the acquisition of the stock of Target, as described above.

The above extension of time is conditioned on the taxpayers' (Parent's and its subsidiaries' (including Sub #1's and Purchaser's), Target's and Seller's (to the extent they have any US tax liability)) tax liability being not lower, in the aggregate for all years to which the Election apply, 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 effect, if any, if it is determined that the taxpayers' liability is lower. Section 301.9100-3(c).

Parent should file the Election in accordance with §§ 1.338-1(d) and 1.338-1(g). That is, a new election on Form 8023 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. A copy of this letter should be attached to the election form. Parent must file its return (and Target must file a final return, if and as applicable) reporting the acquisition/sale as a "section 338 transaction," and attach thereto a copy of this letter and a copy of the election form (also see §§ 1.338-1(g) and 1.338-5). That is, "old" Target must file a separate final return (if and as applicable) and "new" Target must be included in Parent's return (by being listed on Form 5471, information return with respect to a foreign corporation) for the first year following the acquisition. See, §§ 1.338-1(e) and 1.338-1(g), and Announcement 98-2, 1998-2 I.R.B. 38.

No opinion is expressed as to: (1) whether the acquisition of Target stock qualifies as "qualified stock purchase"; (2) whether the acquisition of Target stock qualifies for § 338(a) treatment; or (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 tax effects or consequences 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.

A copy of this letter is being sent to the company official designated on your power of attorney.

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.

Sincerely yours,

Assistant Chief Counsel (Corporate)

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