

Internal Revenue Service

Department of the Treasury

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Person to Contact:

Telephone Number:

Refer Reply To:
CC:DOM:CORP:3, PLR-106935-99
Date:
August 16, 1999

In Re:

Parent =

Purchaser =

Seller =

Target =

Target Affiliate 1 =

Target Affiliate 2 =

Target Affiliate 3 =

Target Affiliate 4 =

Target Affiliate 5 =

Target Affiliate 6 =

Target Affiliate 7 =

Target Affiliate 8 =

Date A =Date B =Date C =X% =

Company Official =

Authorized
Representative =

This responds to your letter dated March 5, 1999, requesting, on behalf of Purchaser, 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 Purchaser to file an election under § 338(g) of the Internal Revenue Code (the "Code") and § 1.338-1(d) of the Income Tax Regulations, with respect to Purchaser's acquisition of Target stock on Date A (hereinafter referred to as the "Election"). Additional information was received in letters dated June 30 and July 21, 1999. The material information submitted for consideration is summarized below.

Parent owns all of the outstanding stock of Purchaser. Parent is treated as a partnership for U.S. income tax purposes. Parent and Purchaser file their respective federal income tax returns on a calendar year basis.

On Date A, Purchaser purchased X% of the stock of Target from Seller. It is represented that Purchaser's acquisition of Target stock qualified as a "qualified stock purchase" within the meaning of § 338(d)(3). At the time of the purchase, Target wholly owned Target Affiliate 1, Target Affiliate 2, Target Affiliate 3, Target Affiliate 4, Target Affiliate 5, Target Affiliate 6, Target Affiliate 7, and Target Affiliate 8 (collectively referred to as "Target Subs").

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), Company Official and Authorized Representative discovered that the Election was not timely 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 taxable year 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.

The taxpayer has made the following representations in connection with the ruling request:

- (a) Purchaser acquired X% of the stock of Target from Seller in a taxable transaction on Date A. Purchaser was not related to Seller within the meaning of § 338(h)(3). The acquisition satisfied the definition of "purchase" within the meaning of § 338(h)(3).
- (b) Purchaser's acquisition of the Target stock constituted a "qualified stock purchase" within the meaning of § 338(d)(3).
- (c) Target Subs qualify as "target affiliates" of Target under § 1.338-1(c)(14) of the Income Tax Regulations.
- (d) Purchaser (or a related corporation, partnership or conduit) has not acquired stock or assets from the Seller (or related corporation, partnership or conduit) during the consistency period.
- (e) Prior to Date A, Target and Target Subs were not controlled foreign corporations as that term is defined under § 957(a).
- (f) At the time of its sale of Target's stock, Seller was not a controlled foreign corporation as that term is defined under § 957(a), nor was Seller a U.S. Person as that term is defined under § 957(c).
- (g) Prior to Date A, Target and Target Subs were never owned directly or indirectly, by U.S. shareholders. Moreover, Target and Target Subs were not passive foreign investment companies and could not have been passive foreign investment companies for which an election under § 1295 was in effect.
- (h) As Target and Target Subs were never owned, directly or indirectly, by U.S. shareholders, Target and Target Subs were not foreign investment companies or foreign corporations the stock ownership of which is described in § 552(a)(2).
- (i) Prior to the acquisition, neither Seller, Target nor Target Subs filed a U.S. income tax return or were subject to U.S. income taxation. Seller was a foreign corporation and, to the best of the knowledge of Purchaser, was not subject to

U.S. taxes and did not file a U.S. tax return.

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 a purchase by a corporation, during the 12 month acquisition period, of another corporation’s stock, which represents at least 80 percent of the total combined voting power of all classes of stock entitled to vote, and which has a value equal to at least 80 percent of the total value of all of the stock of such corporation.

Section 338(h)(3)(A) 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 1.338-2(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. 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. 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.

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 standard 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, Purchaser was required by § 1.338-1(d) to file the Election on Date B. However, for various reasons the Election was not filed. Subsequently, Purchaser, 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 Purchaser to file the Election, provided Purchaser establishes it acted reasonably and in good faith, granting relief will not prejudice the interests of the government, and the procedural requirements of §§ 301.9100-1 and 301.9100-3 are satisfied.

Information, affidavits, and representations submitted by Purchaser, 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 Purchaser 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 Purchaser has established that 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 Purchaser to file the Election with respect to Purchaser’s acquisition of the stock of Target on Date A, as described above.

The above extension of time is conditioned on the taxpayer’s U.S. tax liability

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 taxpayer's 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 taxpayer's liability is lower. Section 301.9100-3(c).

Purchaser should file the Election and provide "notice" in accordance with § 1.338-1(d). 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 (together with the information that is required to be attached to the election form). Purchaser'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.

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 its 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.

Except as expressly provided herein, no opinion is expressed or implied concerning the tax consequences of any aspect of any transaction or item discussed or referenced in this letter.

This ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.

A copy of this letter must be attached to any income tax return to which it is relevant.

In accordance with the Power of Attorney on file with this office, a copy of this letter is being sent to the taxpayer.

The rulings contained in this letter are based upon information and representations submitted by the taxpayer and accompanied by a penalty of perjury statement executed by an appropriate party. While this office has not verified any of the material submitted in support of the request for rulings, it is subject to verification on examination.

Sincerely yours,

Assistant Chief Counsel (Corporate)

By: Bernita L. Thigpen

Bernita L. Thigpen
Deputy Assistant Chief Counsel