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Department of the Treasury

Washington, DC 20224

Person to Contact:

Telephone Number:

Refer Reply To:

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Date:

January 13, 2000

LEGEND

Holding =

Seller =

Target =

Parent =

Purchaser =

Date 2 =

Date 3 =

Date 4 =

Company Officials =

Outside Tax
Professional =

This responds to your authorized representative's November 19, 1999 letter, requesting an extension of time under §§ 301.9100-1 through 301.9100-3 of the Procedure and Administration Regulations to file an election. Parent (as common parent of a consolidated group of which Purchaser is a member) and Holding (as common parent of a consolidated group of which Seller is a member) 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) of the Income Tax Regulations (the "Election"), with respect to Purchaser's acquisition of all of the stock of Target from Seller on Date 2. The information submitted in that letter and in subsequent correspondence is summarized below.

On Date 1, Holding wholly owned Seller, and Seller wholly owned Target. Each were domestic corporations and members of a consolidated group of which Holding was the common parent.

On Date 2, Seller sold all of its Target stock to Purchaser solely for cash (the "Stock Sale"). At the time of the Stock Sale, Purchaser was wholly owned by Parent, and each was a domestic corporation and member of a consolidated group of which Parent was the common parent. The parties have represented that: (1) the Stock Sale was a fully taxable transaction, (2) Purchaser was not related to Seller within the meaning of § 338(h)(3), and (3) but for the filing of the Election, the Stock Sale qualified as a "qualified stock purchase" as defined in § 338(d)(3).

Parent (as common parent of the consolidated group of which Purchaser was a member) and Holding (as common parent of the consolidated group of which Seller was a member) intended to file the Election. The Election was due on Date 3 (which is after Date 1 and Date 2). However, for various reasons, the Election was not filed. On Date 4 (which is after Date 1, Date 2, and Date 3), Outside Tax Professional discovered that the Election had not been filed. The period of limitations on assessments under § 6501(a) has not expired for Parent's and Holding's taxable year in which the Stock Sale occurred, the taxable year in which the Election should have been filed, or for any taxable year that would have been affected by the Election had it been timely 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 corporations to jointly elect to treat the target corporation as deemed to sell all its assets and distribute the proceeds in complete liquidation. The sale of 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's 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 the purchaser and the selling consolidated group (or the selling affiliate or the S corporation shareholders) on Form 8023 in accordance with the instructions provided on that 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 provide that a § 338(h)(10) election must be made jointly by the purchasing corporation (or the common parent of the consolidated group of which the purchasing corporation is a member, or the selling affiliate or S corporation shareholders) and the selling corporation (or the common parent of the consolidated group of which the selling corporation is a member, or the selling affiliate or S corporation shareholders). The instructions provide that the form must be signed by a person authorized to act on behalf of each corporation, and if 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.

Section 1.338-2(b)(4) provides that if an election under § 338 is made for target, old target is deemed to have sold target's assets, and new target is deemed to have acquired those assets.

Section 1.1502-77(a) provides that the common parent, for all purposes (other than for several purposes not here relevant), 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, 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.

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. 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 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 Parent (as common parent of the consolidated group of which Purchaser is a member) and Holding (as common parent of the consolidated group of which Seller is a member) to file the Election, provided Parent and Holding 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 Holding, Seller, Target, Parent, Purchaser, Company Officials, and Outside Tax Professional explain the circumstances that resulted in the failure to timely file the Election. The information establishes that tax professionals were responsible for timely filing the Election, that the request for relief was made before the Service discovered that the Election had not been timely filed, and that the government will not be prejudiced if relief is granted. The

information also establishes that the parties will report the Stock Sale consistent with the Election. See § 301.9100-3(b)(1)(v).

Based on the facts and information submitted, and representations made, we hold that Parent (as common parent of the consolidated group of which Purchaser is a member) and Holding (as common parent of the consolidated group of which Seller is a member) have shown that they acted reasonably and in good faith, that the requirements of §§ 301.9100-1 and 301.9100-3 are satisfied, and that 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 Parent (as common parent of the consolidated group of which Purchaser is a member) and Holding (as common parent of the consolidated group of which Seller is a member) to file the Election with respect to the Stock Sale.

The above extension of time is conditioned on (i) Parent and Holding signing the Election, (ii) Parent and Holding treating the Stock Sale as a § 338(h)(10) transaction, and (iii) the taxpayer's 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 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 taxpayer's liability is lower. Section 301.9100-3(c).

Parent (as common parent of the consolidated group of which Purchaser is a member) and Holding (as common parent of the consolidated group of which Seller is a member) must file the Election in accordance with § 1.338(h)(10)-1(d) (i.e., a new election on Form 8023 must be executed on or after the date of this letter and filed in accordance with the instructions provided on the form). A copy of this letter must be attached to the Election form. Parent and Holding (as common parent's of their respective consolidated groups) must file their returns to report the Stock Sale 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 (1) whether the Stock Sale qualifies as a "qualified stock purchase" under § 338(d)(3), (2) whether the Stock Sale qualifies for § 338(h)(10) treatment, and (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 the Holding consolidated group) 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 have relied upon certain statements and

representations made by the above-mentioned parties. However, the District Directors should verify all essential facts. In addition, notwithstanding that an extension of time is granted under § 301.9100-1 to file the Election, penalties and interest that would otherwise be applicable, continue to apply.

This ruling 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.

Pursuant to a power of attorney on file in this office, a copy of this letter is being sent to your authorized representatives.

Sincerely,

Assistant Chief Counsel (Corporate)

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