

**Internal Revenue Service**

Department of the Treasury

Index Number: 9100.07-00

Washington, DC 20224

Number: **200020041**  
Release Date: 5/19/2000

Person to Contact:

Telephone Number:

Refer Reply To:

CC:DOM:CORP:4--PLR-115143-99

Date:

February 18, 2000

LEGEND

Purchaser =

Target 1 =

Target 2 =

A =

Date B =

Date C =

Company Official &  
Tax Professional =

Outside Tax  
Professionals =

This responds to your Authorized Representatives' letter dated September 10, 1999, 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 file elections. Purchaser and Sellers are requesting an extension to file "section 338(h)(10) elections" under §§ 338(g) and 338(h)(10) of the Internal Revenue Code and § 1.338(h)(10)-1(d) of the Income Tax Regulations with respect to Purchaser's acquisition of the stock of Target 1 and Target 2 (the "Elections"), on Date A. Additional information was received in a letter dated January 12, 2000. The material information is summarized below.

Purchaser, which at the time of the below described acquisitions was publicly traded, is a subchapter C corporation, and is the common parent of a consolidated group that has a calendar taxable year and uses the accrual method of accounting. Prior the below described acquisitions Target 1 and Target 2 were wholly owned by Sellers (individuals, whose names, addresses and ownership interests are set forth in the above redacted legend), and were subchapter S corporations within the meaning of § 1361. Both targets had a calendar taxable year, used the cash method of accounting, and did not have any subsidiaries.

It is represented that on Date A, Purchaser acquired all of the stock of Target 1 and Target 2 from Sellers, for a combination of cash and stock of Purchaser, in fully taxable transactions. It is also represented that: (1) Purchaser was not related to Sellers within the meaning of § 338(h)(3); (2) Sellers' receipt of stock of Purchaser did not qualify in whole or part under § 351; and (3) Purchaser's acquisition of Target #1 and Target #2 stocks qualified as "qualified stock purchases," as defined in § 338(d)(3). Following the acquisitions, Target 1 and Target 2 were included in Purchaser's consolidated return as C corporations.

Parent and Sellers intended to file the Elections. The Elections were due on Date B. However, for various reasons valid Elections were not filed. On Date C (which is after the due date for the Elections), Company Official & Tax Professional, Outside Tax Professionals, Sellers, and Authorized Representatives discovered that valid Elections had not been filed. Subsequently, this request was submitted, under § 301.9100-1, for an extension of time to file the Elections. The period of limitations on assessments under § 6501(a) has not expired for Parent's (and its related entities'), Target #1's, Target #2's, or the Sellers' taxable year(s) in which the acquisitions occurred, the taxable year in which the Elections should have been filed, or for any taxable years that would have been affected by the Elections had they been timely filed. Further, the applicable taxable years have not been examined and the Service has not discovered that the Elections were not timely made, and all returns were filed as if valid Elections had 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 1.338-1(c)(10) provides that a "section 338" election is an election to apply section 338(a) to target. Section 338(g) specifies the requirements for making a "section 338 election." Section 1.338(h)(10)-1(d)(3) provides that if a § 338(h)(10) election is made for Target, a "section 338 election" is deemed made for Target. 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 1 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) (other than paragraph (4) thereof), be attributed to the person acquiring such stock.

Section 338(h)(10) permits the purchasing and selling corporations to elect jointly to treat the target corporation as deemed to sell all of 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 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 a purchaser and the selling consolidated group (or the selling affiliate or the S corporation shareholders) on Form 8023 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 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 QSP. 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 1.1502-77(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. 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 Elections 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 Purchaser and the Sellers to file the Elections, provided Purchaser and Sellers 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, Target #1, Target #2, Company Official & Tax Professional, Outside Tax Professionals, Sellers, and Authorized Representatives explain the circumstances that resulted in the failure to timely file valid Elections. The information establishes that the taxpayers filed their returns as if valid Elections had been made, that their returns have not yet been examined, and that the Service has not discovered that the Elections have not been filed. The information also establishes that competent tax professionals were responsible for the Elections and were aware of all relevant facts, that Parent and Sellers relied on the tax professionals to make the Elections, and that the interests of the government will not be prejudiced if relief is granted. See §§ 301.9100-3(b)(1)(i) and (v).

Based on the facts and information submitted, including the representations made, we conclude that Purchaser and Sellers 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 Purchaser and the Sellers to file the Elections with respect to

the acquisition of the stock of Target 1 and Target 2, as described above.

The above extension of time is conditioned on; (1) Purchaser having acquired the applicable Sellers' Target #1 and Target #2 stocks in "qualified stock purchases," within the meaning of § 338(d)(3), on Date A; (2) Purchaser and all of the applicable Sellers signing the Elections; (3) Purchaser and all of the applicable Sellers treating the acquisition/sale of the Target 1's and Target 2's stock as § 338(h)(10) transactions; and (4) the taxpayers' (Sellers', Purchaser's, and Target 1's, and Target 2's) tax liability (if any) being not lower, in the aggregate, for all years to which the Elections apply, than it would have been if the Elections 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).

Purchaser and the Sellers must file the Elections in accordance with § 1.338(h)(10)-1(d). That is, new Elections 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 to the form (a separate form for each target is necessary). See Announcement 98 -2, 1998 -2 I.R.B. 38. A copy of this letter should be attached to the election forms. Purchaser and the Sellers must amend their returns (since they reported the transactions as § 338(h)(10) transactions) for the year in which the transactions were consummated to attach to the return a copy of this letter and the Elections.

We express no opinion as to whether (1) the acquisition/sale of Target 1 and Target 2 stocks qualify as "qualified stock purchases" under § 338(d)(3); (2) whether the acquisition/sale of Target 1 and Target 2 stocks qualify 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 1 and Target 2 (and, thus, by the applicable Sellers) on Target 1's and Target 2's deemed asset sales and deemed 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 the first and second listed authorized representative, pursuant to the powers of attorney on file in this office.

Sincerely yours,  
Assistant Chief Counsel (Corporate)

By \_\_\_\_\_  
Bernita Thigpen  
Deputy Assistant Chief Counsel  
(Corporate)