

**Internal Revenue Service**

Department of the Treasury

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Person to Contact:

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Refer Reply To:  
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Date:  
February 18, 2000

LEGEND:

Parent =

Purchaser =

Seller =

Target =

Target Affiliate =

Date A =

Date B =

Date C =

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Parent's Company Official =

Seller's Company Official =

Outside Tax Professional =

Authorized Representatives =

This is in response to your Authorized Representatives' letter dated September 14, 1999, requesting an extension of time under §§ 301.9100-1 through 301.9100-3 of the Procedure and Administration Regulations to file elections. Parent (as the common parent of the consolidated group of which the purchasing corporation ("Purchaser") and the deemed purchasing corporation ("new Target") are members) and Seller are requesting the extension of time for Purchaser and Seller 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 and the deemed acquisition of the stock of Target Affiliate (sometimes hereinafter collectively referred to as the "Election" or the "Elections") on Date A. Additional information was received in letters dated November 5 and November 24, 1999. The material information submitted 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 wholly owned subsidiary of Parent and a member of the Parent consolidated group. Prior to Date A, Target was a wholly owned subsidiary of Seller, and Target Affiliate was a wholly owned subsidiary of Target. Seller was the common parent of an affiliated group that included Target and Target Affiliate.

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On Date A, Seller and Purchaser entered into a Stock Purchase Agreement for Purchaser to acquire all of Seller's Target stock (including all of the Target Affiliate stock). Also on Date A, Purchaser acquired all of Seller's Target stock (including all of the Target Affiliate stock), pursuant to the Stock Purchase Agreement, for cash in a fully taxable transaction. Following the acquisition, "new" Target and "new" Target Affiliate were included in Purchaser's consolidated group. It is represented that Purchaser was not related to Seller within the meaning of § 338(h)(3), and that Purchaser's acquisition of the stock of Target, and the deemed acquisition of the Target Affiliate stock qualified as "qualified stock purchases" within the meaning of § 338(d)(3).

Parent and Seller 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), Outside Tax Professional, Parent's Company Official, Seller's Company Official, and Authorized Representatives discovered that 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, Target's, or Seller's 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.

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) (other than paragraph 4 thereof), be attributed to the person acquiring such stock.

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Section 338(h)(10) permits the purchasing and selling corporations to jointly elect to treat the target corporation as deemed to sell all of its assets and distribute the proceeds in complete liquidation. Thus, the sale of target 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). 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 instruction to the form. The regulations further provide that the election must be made not later than the 15<sup>th</sup> 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 and the common parent of the consolidated group (or selling affiliate or S corporation shareholders).

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 for 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 (but no more than six months except in the case of 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:

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- (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 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 regulation (*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 the purchasing and deemed purchasing corporations are members) and Seller to file the Elections, provided Parent and Seller show that they acted reasonably and in good faith, the requirements of §§ 301.9100-1 through 301.9100-3 are satisfied, and granting relief will not prejudice the interests of the government.

Information, affidavits, and representations submitted by Parent, Seller, Outside Tax Professional, Parent’s Company Official, Seller’s Company Official, and Authorized Representatives explain the circumstances that resulted in the failure to file the Elections. The information establishes that the taxpayers filed their returns as if the 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 Seller 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 Parent and Seller have shown that they acted reasonably and in good faith in failing to file the Elections, that the other requirements of §§ 301.9100-1 through 301.9100-3 have been 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 the purchasing and deemed purchasing corporations are members) and Seller to file the Elections with respect to

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the acquisition of Target stock and deemed acquisition of Target Affiliate stock, as described above.

The above extension of time is conditioned on the taxpayers' (i.e. Parent's, Purchaser's, Seller's, Target's, and Target Affiliate's) tax liability 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 filed (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 or examination 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. Further, no opinion is expressed as to the federal income tax effect, if any, if it is determined that taxpayers' liability is lower. Section 301.9100-3(c). The above extension is also conditioned on (i) Parent and Seller both signing the Elections, and (ii) Parent and Seller both treating the acquisition/sale of Target stock and deemed acquisition of Target Affiliate Stock as § 338(h)(10) transactions.

Parent and Seller must file the Elections in accordance with § 338(h)(10)-1(d) (i.e., 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 combined election form and a combined return may be filed. See § 1.338-1(e) and the instructions to Form 8023. A copy of this letter should be attached to the election form. Purchaser and Seller (and Target and Target Affiliate) must amend their returns (notwithstanding that they reported the acquisitions as "section 338(h)(10) transactions") to attach thereto a copy of the Elections and a copy of this letter.

We express no opinion regarding (1) whether the acquisition/sale of Target stock and deemed acquisition/sale of Target Affiliate Stock qualify as "qualified stock purchases" under § 338(d)(3); (2) whether the acquisition/sale of Target stock and deemed acquisition/sale of Target Affiliate stock 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, Target Affiliate, and Seller on Target's and Target Affiliate's deemed asset sales and deemed liquidations.

In addition, we express no opinion as to the tax treatment or consequences of filing the Elections late under the provisions of any other section of the Code and regulations, or the tax treatment of any conditions existing at the time of, or effects 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 taxpayer and its employees. However, the District Director should verify all essential facts and computations. Moreover, notwithstanding that an extension is granted under § 301.9100-1 to file the Election, any penalties and interest that would otherwise be applicable shall still apply.

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In accordance with a power of attorney on file in this office, copies of this letter are being sent to the Authorized Representatives and to Seller's Company Official.

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.

Sincerely yours,  
Assistant Chief Counsel (Corporate)

By \_\_\_\_\_

Bernita Thigpen  
Deputy Assistant Chief Counsel (Corporate)