

**INTERNAL REVENUE SERVICE**

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February 22, 2000

Re:

LEGEND:

Purchaser =

Target =

Target Affiliate =

Country Z =

Sellers =

Company Officer =

Tax Professional =

Individual =

Date A =

Date B =

Date C =

Business X =

Business Y =

a =

b =

Dear :

This letter responds to your letter, dated October 15, 1999, requesting an extension of time under §§ 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations to file elections. Purchaser is requesting the extension to file "section 338 elections," 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 Target and deemed acquisition of Target Affiliate on Date A (sometimes hereinafter collectively referred to as the "Elections" or the "Election"). Additional information was received in letters dated December 15, 1999, January 14, January 24, and February 7, 2000. The information submitted for consideration is summarized below.

Purchaser is the common parent of a consolidated group that has a March 31 taxable year and uses the accrual method of accounting. Purchaser is engaged in Business X. Company Officer and Tax Professional are employees of Purchaser.

Prior to the acquisition, Target was wholly owned by Sellers, and Target Affiliate was owned a% by Target and b% by Individual. Target and Target Affiliate are Country Z corporations, and Sellers and Individual are nonresident foreign individuals. Target and Target Affiliate are engaged in Business Y.

It is represented that Target and Target Affiliate were not subject to U.S. taxation, and did not file U.S. income tax returns. Moreover, it is further represented that neither Target nor Target Affiliate was (1) "a controlled foreign corporation" within the meaning of § 957(a), (2) a passive foreign investment company for which an election under § 1295 is in effect, (3) a foreign investment company or a foreign corporation the stock ownership of which is described in § 552(a)(2), (4) a United States real property holding corporation," or (5) required under § 1.6012-2(g) to file a U.S. income tax return. Additionally, it is represented that Sellers and Individual are not subject to a tax on the sale of their respective shares Target and Target Affiliate stock under § 871(b).

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On Date A, pursuant to a Sale Agreement, Purchaser acquired all of the outstanding stock of the Target and all of Individual's Target Affiliate stock in exchange for cash in fully taxable transactions. It is represented that Purchaser was not related to Sellers within the meaning of § 338(h)(3)(C) and that Purchaser's acquisition of Target (and Purchaser's deemed acquisition of all of the Target Affiliate) each qualified as a "qualified stock purchase" within the meaning of § 338(d)(3). After the acquisition "new" Target and Target Affiliate were (or will be) included in Purchaser's first return subsequent to the acquisition, by being listed on Form 5471 (information return with respect to a foreign corporation).

Purchaser intended to file the Election. 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 Tax Professional discovered that the Election was not filed. The statute of limitations under § 6501 has not expired for Purchaser's taxable year in which the acquisition/sale was consummated, the taxable year in which the Election was due, or for any year(s) that would be affected by the Election had it been timely filed. Subsequently, this request was submitted, under § 301.9100-1, for an extension of time to file the Election.

Section 338(a) permits certain stock purchases to be treated as asset acquisitions if (1) the purchasing corporation makes a "section 338 election" under § 338(g) (or is treated as having made the election under § 338(e)) 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.

Section 1.338-1(c)(14) provides that the term target affiliate has the same meaning as in § 338(h)(6), but without the application of § 338(h)(6)(B)(i). A corporation so described (e.g., a foreign corporation that would be a member of the affiliated group except for § 1.1504(b)(3)) is a target affiliate for all purposes of § 338. If a target affiliate is acquired in a qualified stock purchase, it is also a target.

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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 9th month beginning after the month in which the acquisition date occurs. A "section 338 election" is irrevocable. The instructions to Form 8023 provide that foreign corporations who do not need to file a Federal income tax return make the election by filing a Form 8023 with the Office of Assistant Commissioner (International).

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) may file a statement of § 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.

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(a), 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

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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 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 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 Purchaser, Tax Professional, and Company Officer explain the circumstances that resulted in the failure to file the Election. The information also establishes that a tax professional was responsible for the Election, that Purchaser relied on the tax professional to timely make the Election, and that granting an extension will not prejudice the interests of the Government. See § 301.9100-3(b)(1)(iv)

Based on the facts and information submitted, including the representations made, we conclude that Purchaser has shown it acted reasonably and in good faith in failing to timely file the Election, the requirements of §§ 301.9100-1 and 301.9100-3 have been 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 (as the "purchaser" of Target, the U.S. shareholders of the foreign deemed "purchaser" of Target Affiliate), to file the Election with respect to the acquisition of Target's stock, and the deemed acquisition of Target Affiliate's stock, as described above.

The above extension of time is conditioned on the taxpayers' (Purchaser's, Target's and Target Affiliate'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 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 (§ 301.9100-3(c)).

Purchaser must file the Election in accordance with § 1.338-1(d) and § 1.338-1(g) (*i.e.*, a new election for Target and Target Affiliate 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 form; and the information that is required by the form must

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be attached to the election form; a combined form may be filed). See 1.338-1(e)(4), and the instructions on Form 8023. Also, a copy of this letter must be attached to the election form.

Purchaser, Target, "new" Target, Target Affiliate, and "new" Target Affiliate, as applicable, must report the acquisition as a "section 338 transaction" on their return(s), or amended return(s), as applicable (see §§ 1.338-1(g) and 1.338-5). That is, "old" Target and "old" Target Affiliate must file separate final returns and "new" Target and "new" Target Affiliate must be included in Purchaser's consolidated return (by being listed on Form 5471) for the year following the acquisition (i.e., included in Purchaser's return from the day after the acquisition).

No opinion is expressed: (1) as to whether § 338(a) is applicable to the transaction; (2) as to whether the above described acquisition of Target's stock (and/or deemed acquisition of Target Affiliate's stock) qualifies as a "qualified stock purchase" and/or for § 338(a) treatment; or (3), if the acquisition of Target's stock (and/or deemed acquisition of Target Affiliate's stock) qualifies as a "qualified stock purchase" and for § 338(a) treatment, as to the amount, if any, of gain or loss recognized on the deemed asset sale(s).

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 effects 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 taxpayers, their 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, shall 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.

Sincerely yours,  
Assistant Chief Counsel (Corporate)

by \_\_\_\_\_  
Bernita L. Thigpen  
Deputy Assistant Chief  
Counsel (Corporate)