

Internal Revenue Service

Department of the Treasury

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Person to Contact:

Telephone Number:

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Date:

April 24, 2000

Purchaser =

Seller =

Target =

Target Affiliates =

Date A =

Date B =

Date C =

Date D =

Purchaser's
Company Official =

Purchaser's
In-House
Tax Professional =

Outside
Tax Professional =

Authorized
Representatives =

This responds to your Authorized Representatives' letter dated December 21, 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 an election. Purchaser and Seller 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 deemed acquisition of the stock of the Target Affiliates in connection with Purchaser's acquisition of Target on Date B. (All citations in this letter to regulations under § 338 are to regulations in effect on Date B). Additional information was received in a letter dated March 28, 2000. The material information is summarized below.

Purchaser is the common parent of a consolidated group that has a calendar taxable year and uses the accrual method of accounting. Target was a member of Seller's consolidated group before the transaction, and also had a number of wholly owned subsidiaries (the Target Affiliates), which were included in Seller's consolidated group. Target and Target Affiliates had a calendar taxable year and used the accrual method of accounting.

On Date A, Purchaser and Seller entered into a Stock Purchase Agreement for Purchaser to acquire all of Seller's Target stock. On Date B, Purchaser acquired all of Seller's Target stock, pursuant to the Stock Purchase Agreement, for cash and Purchaser's assumption of certain liabilities of Target in a fully taxable transaction. Following the acquisition, Target and the Target Affiliates were included in Purchaser's consolidated group. It is represented that (1) Purchaser was not related to Seller within the meaning of § 338(h)(3), and (2) Purchaser's acquisition of the stock of Target qualified as a "qualified stock purchase," as defined in § 338(d)(3).

Purchaser and Seller intended to file an Election for both Target and the Target Affiliates. Purchaser and Seller timely filed an Election for Target on or before Date C. However, for various reasons there was no Election for any of the Target Affiliates filed on or before Date C. On or near Date D (which is after the due date for the Election), Outside Tax Professional discovered that the Election had not been properly filed for the Target Affiliates. Subsequently, this request was submitted, under § 301.9100-1, for an extension of time to file the Election. The period of limitations on assessments under § 6501(a) has not expired for Purchaser's, Target's, Target Affiliates', or Seller's taxable year(s) in which the acquisition occurred, the taxable years in which the Election should have been filed, or any taxable years 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 "§ 338 election" under § 338(g); and (2) the acquisition is a "qualified stock purchase." Section 1.338-1(c)(10) provides that a "§ 338" election is an election to apply § 338(a) to target. Section 338(g) specifies the requirements for making a "§ 338" election." Section 1.338(h)(10)-1(d)(3) provides that if a § 338(h)(10) election is made for Target,

a "§ 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. Section 1.338(h)(10)-1(d)(3) provides that if a § 338(h)(10) election is made for the target corporation, it is irrevocable.

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 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 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 1.338-1(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. 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(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.

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 Purchaser and Seller to file the Election, provided Purchaser and the 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, Seller, Purchaser's Company Official, and Authorized Representatives explain the circumstances that resulted in the failure to timely file a valid Election that included

Election for the Target Affiliates. The information also establishes that Purchaser's In-House Tax Professional was responsible for the Election, that Purchaser and Seller relied on Purchaser's In-House Tax Professional to timely make the Election, and that the government will not be prejudiced if relief is granted. See § 301.9100-3(b)(1)(v).

Based on the facts and information submitted, including the representations made, we conclude that Purchaser and Seller 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, we grant an extension of time under § 301.9100-1, until 30 days from the date of issuance of this letter, for Seller (as the common parent of the selling consolidated group) and Purchaser (as the common parent of the purchasing consolidated group) to file the Election with respect to Purchaser's deemed acquisition of the stock of the Target Affiliates on the acquisition date, as described above.

The above extension of time is conditioned on the taxpayers' (Seller's, Purchaser's, Target's and Target Affiliates') tax liability (if any) 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. Section 301.9100-3(c). The above extension is also conditioned on: (i) Purchaser and Seller signing the Election, and (ii) Purchaser and Seller treating the acquisition/sale of Target's stock, and Purchaser's deemed acquisition of the Target Affiliates' stock, as § 338(h)(10) transactions.

Purchaser and Seller must file the Election in accordance with § 1.338(h)(10)-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 to the form. A copy of this letter should be attached to the election form. Purchaser and Seller 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 Election (along with the information required with the election form).

We express no opinion as to (1) whether the transaction qualifies as a "qualified stock purchase" under § 338(d)(3); (2) whether the acquisition/sale of the Target's or Target Affiliates' stock qualifies 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 the Seller's consolidated group, Target, or Target Affiliates on the deemed asset sales.

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 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 Election, penalties and interest that would otherwise be applicable, if any, continue to apply.

This ruling 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 representatives, pursuant to the powers of attorney on file in this office.

Sincerely yours,

Philip J. Levine
Assistant Chief Counsel
(Corporate)