

Internal Revenue Service

Department of the Treasury

Number: **200052018**
Release Date: 12/29/2000
Index Number: 9100.06-00
338.01-02

Washington, DC 20224

Person to Contact:

Telephone Number:

Refer Reply To:
CC:CORP:2-PLR-104660-00
Date:
September 20, 2000

Legend:

Parent =
Purchaser =
Target =
Sellers =
Date A =
Date B =
Date C =
Company Official =
Outside Tax
Professional =
Business A =
State X =
Country Y =
Z =

Dear:

This letter responds to your letter dated February 10, 2000, requesting an

PLR-104660-00

extension of time, on behalf of Parent, under §§ 301.9100-1 through 301.9100-3 of the Procedure and Administration Regulations to file an election. Parent is requesting the extension of time to file a "section 338(g) election" 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 the stock of Target (sometimes hereinafter referred to as the "Election") on Date A (all citations in this letter to the regulations under § 338 are to the regulations as in effect on Date A). Additional information was submitted by facsimiles dated June 20 and September 18, 2000. The material information submitted for consideration is summarized below.

Parent, a State X corporation, is the common parent of a consolidated group that has a tax year ending on June 30th and uses the accrual method of accounting. Purchaser, a wholly owned subsidiary of Parent, is a State X corporation and uses the accrual method of accounting. Target is a Country Y corporation and was wholly owned by Sellers. Sellers are individuals who are citizens and residents of Country Y, and it is represented that each of the Sellers is not a United States shareholder, as defined in § 951(b). Parent, Purchaser and Target are all engaged in Business A.

Prior to the below described acquisition, Sellers and Target did not file U.S. income tax returns and were not subject to U.S. income taxation. Further, Target was not: (1) a controlled foreign corporation within the meaning of § 957(a); (2) a passive foreign investment company for which an election under § 1295 was in effect; (3) a foreign investment company or a foreign corporation the stock ownership of which is described in § 552(a)(2); or (4) required, under § 1.6012-2(g), to file a U.S. income tax return.

On Date A, Purchaser acquired Z (an amount greater than 80%) of the Sellers' stock of Target, pursuant to a Stock Purchase Agreement, for cash and a small percentage of Parent stock in a fully taxable transaction. It is represented that (1) Purchaser was not related to Sellers 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).

The Election was due on Date B. However, for various reasons the Election was not filed. On Date C (which is after the due date for the Election), Outside Tax Professional discovered that the Election had not been filed. 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 Parent's, Purchaser's, and Target's taxable year(s) in which the acquisition occurred, the taxable years in which the Election should have been filed, or any taxable year(s) 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 purchases if the purchasing corporation makes or is treated as having made a "section 338

PLR-104660-00

election" under § 338(g) and 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 in whole or in part by reference to the adjusted basis of such stock in the hands of the person from whom acquired, or 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 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 ninth month beginning after the month in which the acquisition date occurs. A "section 338 election" is irrevocable.

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. 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

PLR-104660-00

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 Parent to file the Election, provided Parent 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 Company Official and Outside Tax Professional explain the circumstances that resulted in the failure to file a valid Election. The information establishes that a tax professional was responsible for the Election, that Parent relied on the 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 Parent has established that it acted reasonably and in good faith in failing to timely file the Election, 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 Parent to file the Election with respect to Purchaser's acquisition of the stock of Target, as described above.

The above extension of time is conditioned on: (1) the filing within 180 days of the issuance of this letter all applicable returns and amended returns necessary to report the transaction consistent with the Election; and (2) the taxpayers' (Parent's, Purchaser's, and Sellers') 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' tax liability is lower. Section 301.9100-3(c).

Parent should file the Election in accordance with §§ 1.338-1(d) and 1.338-1(g). 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 on the election form. A copy of this letter should be attached to the election form. Parent (and Target) must file or amend (if and as applicable) its applicable returns to report the acquisition as a "section 338 transaction," and to attach a copy of Form 8023 and a copy of this letter. See §§ 1.338-1(e) and 1.338-1(g).

No opinion is expressed as to: (1) whether Purchaser's acquisition of the Target

PLR-104660-00

stock qualifies as a "qualified stock purchase," (2) whether the acquisition of the Target stock qualifies for § 338(a) treatment, and (3) if the acquisition of the Target stock qualifies for § 338(a) treatment, as to the amount of gain or loss recognized (if any) by Target on its deemed asset sale.

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 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 taxpayer, its 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, continue to apply.

This 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,

Associate Chief Counsel (Corporate)

by _____
Ken Cohen
Acting Chief, Branch 3 (Corporate)

cc: