

Internal Revenue Service

Department of the Treasury

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Person to Contact:

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Date:

November 20, 2000

Parent =

Sub1 =

Sub2 =

Purchaser =

Target =

Target Affiliate #1 =

Target Affiliate #2 =

Sellers =

Company Official
& Tax Professional =

Professional =

Business A =

Business B =

Business C =

Business D =

Date A =

Date B =

Date C =

This letter responds to your letter dated July 31, 2000, requesting an extension of time under §§ 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations to file elections. The extension is being requested by Parent (Parent is the common parent of the consolidated group of which Purchaser is a member; Purchaser is the acquiring corporation of Target and the United States shareholder of "new" Target, and "new" Target is the deemed foreign purchasing corporation of Target Affiliate #1 and Target Affiliate #2) to file 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 the acquisition and deemed acquisition of the Target, Target Affiliate #1 and Target Affiliate #2 stocks (sometimes hereinafter referred to collectively as the "Elections" or the "Election") on Date A. (All citations in this letter to regulations under § 338 are to the regulations as in effect on Date A). Additional information was received in letters dated September 25 and November 7, 2000. The material information submitted for consideration is summarized below.

Parent is the common parent of a consolidated group. Parent directly owns all the stock of Sub1, Sub1 directly owns all the stock of Sub2, and Sub2 directly owns all the stock of Purchaser. Sub1 and Sub2 are domestic corporations included in Parent's consolidated return. Target directly owns all the stock of both Target Affiliate #1 and Target Affiliate #2. Target, Target Affiliate #1, and Target Affiliate #2 are foreign corporations and sometimes hereinafter they are collectively referred to as the "Targets." Prior to the transaction, Sellers wholly owned Target. Sellers are foreign individuals and not United States persons within the meaning of § 7701(a)(30). Parent is engaged in Business A, Purchaser is engaged in Business B, Target is a holding company, Target Affiliate #1 is engaged in Business C, and Target Affiliate #2 is engaged in Business D.

Prior to the acquisition, neither Sellers, Target, Target Affiliate #1, nor Target Affiliate #2 filed a United States income tax return, was subject to United States income taxation, or was required, under § 1.6012-2(g), to file a United States income tax return. Further, prior to the acquisition, none of the Targets was a: (i) controlled foreign corporation within the meaning of § 957(a); (ii) passive foreign investment company; or (iii) foreign investment company or a foreign corporation the stock ownership of which is described in § 552(a)(2).

On Date A, Purchaser acquired all the stock of Target from Sellers for cash in a fully taxable transaction. It is represented that: (1) Parent and Purchaser were not related to Sellers within the meaning of § 338(h)(3); and (2) the acquisition of the stock of Target qualified as a "qualified stock purchase" within the meaning of § 338(d)(3).

Parent intended to file the Elections. The Elections were due on Date B, but for various reasons they were not filed. On Date C (which is after Date B), Company Official & Tax Professional was informed by Outside Tax Professional that the Elections had not been filed. Subsequently, this request was submitted, under § 301.9100-1, for an extension of time to file the Elections.

It is represented that the period of limitations on assessments under § 6501(a) has not expired for Parent Consolidated Group's or Targets' taxable years in which the acquisition occurred, their taxable years 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.

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

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 1.338-1(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, taking into account § 953(c)) may file a statement of "section 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. Form 8023 must be filed as described in the form and its instructions, and also must be attached to Form 5471 (Information Return of U.S. Persons with Respect to Certain Foreign Corporations) filed with respect to the purchasing corporation by each United States shareholder for the purchasing corporation.

The term "target affiliate" has the same meaning as in § 338(h)(6) (applied without § 338(h)(6)(B)(i)). Thus, a corporation described in § 338(h)(6)(B)(i) is considered a target affiliate for all purposes of § 338. If a target affiliate is acquired in a qualified stock purchase, it is also a target. See § 1.338-1(c)(14). 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. See § 1.338-2(b)(4).

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 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 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 was 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 Elections, 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 Parent, Company Official & Tax Professional, and Outside Tax Professional explain the circumstances that resulted in the failure to file the Elections. The information establishes that a competent tax professional was responsible for the Elections and was aware of all relevant facts, that Parent relied on the tax professional 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)(v).

Based on the facts and information submitted, including the representations that have been made, we conclude that Parent acted reasonably and in good faith in failing to timely file the Elections, 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 Elections with respect to the acquisition of the stock of Targets, as described above.

The above extension of time is conditioned on (1) the filing, within 120 days of the issuance of this letter, of all returns and amended returns (if any) necessary to report the transaction in accordance with the election, and (2) the taxpayers’ (Parent

Consolidated Group's, Targets' and Sellers') tax liability (if any) being not lower, in the aggregate, for all years affected by the Elections, 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).

Parent should file the Elections in accordance with §§ 1.338-1(d) and 1.338-1(g)(3). That is, 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 on the election form. A copy of this letter should be attached to the election form. Parent must amend its return to attach thereto a copy of this letter and a copy of the election form. New Targets must be included in Parent's consolidated return (by being listed on Form 5471) for the first year following the acquisition.

No opinion is expressed as to: (1) whether the acquisition of the stock of Targets qualifies as "qualified stock purchases"; (2) whether the acquisition of the stock of Targets qualifies for § 338(a) treatment; or (3) if the acquisition of the stock of Targets qualifies for § 338(a) treatment, as to the amount of gain or loss recognized (if any) by Targets on their deemed asset sales.

In addition, no opinion is expressed as to the tax effects or 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 tax effects or consequences 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 Parent and Purchaser, 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 Elections, 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