

## Internal Revenue Service

Department of the Treasury

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Person to Contact:

Telephone Number:

Refer Reply To:

CC:CORP:2 - PLR-120760-01

Date:

July 23, 2001

### Legend

Parent =

Target =

US Sub =

Purchaser =

Sellers =

Disregarded Sub 1 =

Disregarded Sub 2 =

Company Official =

Tax Professional =

Date B =

Date C =

State A =

Country B =

Country C =

Country D =

c =

This letter responds to a letter dated April 3, 2001 submitted on behalf of Parent, who is requesting an extension of time under §§ 301.9100-1 through 301.9100-3 of the Procedure and Administration Regulations to file an election on behalf of Purchaser. Parent is requesting an extension to file a “§ 338 Election” under § 338(g) of the Internal Revenue Code with respect to Purchaser’s acquisition (through Disregarded Sub 1 and Disregarded Sub 2) of the stock of Target (sometimes hereinafter referred to as the “§ 338 Election”), on Date B. (All citations in this letter to regulations under § 338 are to the regulations as in effect on Date B.) The material information submitted for consideration is summarized below.

Parent, a state A corporation, is the common parent of a consolidated group of corporations. US Sub is a member of Parent’s consolidated group. Purchaser, a corporation incorporated under the laws of Country B, is a controlled foreign corporation that is wholly-owned by US Sub. Purchaser is not engaged in the conduct of a trade or business within the United States. Target is a corporation formed under the laws of Country C. Prior to its acquisition by Purchaser, the stock of Target was owned by Sellers.

Purchaser owned all of the shares of stock of Disregarded Sub 1 (a Country D corporation) and Disregarded Sub 1 owned all of the shares of stock of Disregarded Sub 2 (a Country C corporation). Prior to Date B, Disregarded Subs 1 and 2 had each filed elections under § 301.7701-3 of the Procedure and Administration Regulations to be disregarded for federal income tax purposes.

On Date B, Purchaser (through Disregarded Sub 1 and Disregarded Sub 2) purchased all of the outstanding shares of Target for an aggregate cash purchase price of \$c. It has been represented that the acquisition of the stock of Target was a “qualified stock purchase” within the meaning of § 338(d)(3).

Prior to the acquisition, neither Target nor Sellers filed a United States income tax return, were subject to United States income taxation, nor were required, under § 1.6012-2(g), to file a United States income tax return. In addition, 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; nor (3) a foreign investment company or foreign corporation the stock ownership of which is described in § 552(a).

Parent, on behalf of Purchaser, subsequently filed a Form 8832 (Entity Classification Election) to make a retroactive election with respect to Target. The Form 8832 specified an effective date of Date B. Sellers did not sign the Form 8832.

Parent, on behalf of Purchaser, intended to file the § 338 Election. The § 338 Election was due on Date C, but for various reasons a valid § 338 Election was not filed. After the due date for the § 338 Election, it was discovered that the § 338 Election had not been filed. Subsequently, this request was submitted, under §

301.9100-1, for an extension of time to file the § 338 Election. The period of limitations on assessment under § 6501(a) has not expired for Parent's, Purchaser's or Target's taxable years in which the acquisition occurred, the taxable years in which the § 338 Election should have been filed, or any taxable years that would have been affected by the § 338 Election had it been timely filed.

## **Law and Analysis**

Target is a foreign eligible entity. Parent has represented that all of the members of Target have limited liability within the meaning of § 301.7701-3(b)(2)(ii).

Section 301.7701-3(b)(2)(i) provides that unless a foreign eligible entity elects otherwise, the entity is: (A) a partnership if it has two or more members and at least one member does not have limited liability; (B) an association if all members have limited liability; or (C) disregarded as an entity separate from its owners if it has a single owner that does not have limited liability.

Section 301.7701-3(b)(2)(ii) provides that for purposes of § 301.7701-3(b)(2)(i), a member of a foreign eligible entity has limited liability if the member has no personal liability for the debts of or claims against the entity by reason of being a member.

Section 301.7701-3(c)(1)(i) allows an eligible entity to elect to change its classification by filing Form 8832 (Entity Classification Election) with the service center designated on that Form. Section 301.7701-3(c)(1)(iii) provides that all such elections become effective on the date specified by the entity on Form 8832 or on the date filed if no effective date is specified. The specified effective date must not be earlier than 75 days prior to the filing date of Form 8832, nor later than 12 months after that filing date.

Section 301.7701-3(c)(2)(i) generally provides that an election made under § 301.7701-3(c)(1)(i) must be signed by each member of the electing entity who is an owner at the time the election is filed, or any officer, manager, or member of the electing entity who is authorized (under local law or the entity's organizational documents) to make the election and who represents to having such authorization under penalties of perjury. Section 301.7701-3(c)(2)(ii) provides that if an election is to have a retroactive effective date, each person who was an owner between the date the election is to be effective and the date the election is filed, and who is not an owner at the time the election is filed, must also sign the election.

Accordingly, in the present case, Target is treated as an association taxable as a corporation unless a different treatment is elected. Under the facts presented, the entity classification election filed with respect to Target was filed with a retroactive effective date of Date B. Therefore, for the entity classification election to have been valid, the signatures of the prior owners of Target (i.e., Sellers) were required. In addition to other deficiencies in the entity classification election filed with respect to Target, the signatures of the Sellers were not obtained. There is no authority under the

regulations to treat an election that fails to comply with § 301.7701-3(c)(2)(ii) as valid. Accordingly, Target retained its default classification as an association.

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” or a “338(h)(10) election”; and (2) the acquisition is a “qualified stock purchase.”

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.

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 § 338 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 § 338 Election, provided Parent 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 and Tax Professional explain the circumstances that resulted in the failure to timely file a valid § 338 Election. The information establishes that a qualified tax professional was responsible for the § 338 Election and was aware of all relevant facts, that Parent relied on the tax professional to make the § 338 Election, 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 made, we conclude that Parent has shown 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. Accordingly, an extension of time is granted under § 301.9100-1, until 45 days from the date on this letter, for Parent (on behalf of Purchaser) to file the § 338 Election with respect to the acquisition of the stock of Target, as described above.

The above extension of time is conditioned on (1) the filing, within 120 days of

the date on this letter, of all returns and amended returns (if any) necessary to report the transaction in accordance with the § 338 Election, and (2) the Purchaser's, Parent's consolidated group's, and Target's tax liability (if any) being not lower, in the aggregate, for all years to which the § 338 Election applies, than it would have been if the § 338 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 applicable 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, on behalf of Purchaser, must file the § 338 Election in accordance with §§ 1.338-1(d) and (g). That is, a new election on Form 8023 must be executed on or after the date on this letter, which grants an extension, and filed in accordance with the instructions to the form. A copy of this letter must be attached to the election form. Parent must file or amend, as applicable, its returns to report the transaction as a § 338 transaction for the taxable year in which the transaction was consummated (and for any other affected taxable year), and to attach to the returns a copy of this letter and a copy of the § 338 Election.

We express no opinion as to (1) whether the acquisition of the Target stock qualifies as a "qualified stock purchase" under § 338(d)(3); or (2) any other tax consequences arising from the § 338 Election.

The Form 8023 must be attached to Form 5471 (Information Return of U.S. Persons with Respect to Certain Foreign Corporations) for Purchasing for the year of the qualified stock purchase of Target. In addition, as of the date of this letter, no Form 5471 has been filed with respect to Target since Target was acquired. The Form 5471 and schedules are used to satisfy the reporting requirements of §§ 6035, 6038 and 6046 and the regulations thereunder. The information required under § 6038(a)(1) is to be furnished for the annual accounting period of the foreign business entity ending with or within the United States person's taxable year. Section 6038(b) provides a dollar penalty for failure to furnish information required under § 6038(a) within the prescribed time. We express no opinion as to any penalties that may be applied as a result of U.S. Sub failing to timely file the Forms 5471 for Target.

In addition, we express no opinion as to the tax consequences of filing the § 338 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 § 338 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 Director should verify all essential facts. In addition, notwithstanding that an extension is granted under § 301.9100-1 to file the § 338 Election, penalties and interest that would otherwise be applicable, if any, continue to apply.

This letter is directed only to the taxpayer(s) requesting it. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.

Pursuant to a power of attorney on file in this office, a copy of this letter ruling is being sent to your authorized representative.

Sincerely yours,  
Associate Chief Counsel (Corporate)  
By: Ken Cohen  
Senior Technician Reviewer, Branch 3