

Internal Revenue Service

Department of the Treasury

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Person to Contact:

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Refer Reply To:

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Date:

November 8, 2001

LEGEND

Parent =

Holding =

Purchaser =

Target =

Target Sub 1 =

Target Sub 2 =

Target Sub 3 =

Target Sub 4 =

Target Sub 5 =

Target Sub 6 =

Target Sub 7 =

Target Sub 8 =

Target Sub 9 =

Country W =

Country X =

Country Y =

Country Z =

Date A =
Date B =
Date C =
Date D =
Date E =
a =
b =
c =
d =
Company Official =
Tax Professionals =

This letter responds to a letter dated September 14, 2001, submitted on behalf of Parent, requesting an extension of time under §§ 301.9100-1 through 301.9100-3 of the Procedure and Administration Regulations to file elections. Parent is requesting an extension to file “§ 338 elections” under § 338(g) with respect to Purchaser’s acquisition of the stock of Target and the deemed acquisition of the stock of Target Sub 1 through Target Sub 9 (sometimes hereinafter referred to as the “Elections”), on Date C. (All citations in this letter to regulations under § 338 are to regulations in effect on Date C.) Additional information was received in letters dated October 24, 2001 and November 5, 2001. The material information is summarized below.

Parent is a domestic corporation. Holding is a wholly owned Country W subsidiary of Parent. Purchaser is a wholly owned Country W subsidiary of Holding. Target was a publicly traded foreign corporation formed under the laws of Country W. Target Sub 1 through Target Sub 5 are each wholly owned subsidiaries of Target and foreign corporations formed under the laws of Country W. Target owns a percent (at least 80 percent) of Target Sub 6, a foreign corporation formed under the laws of Country W. Target Sub 7 is a wholly owned subsidiary of Target Sub 2 and a foreign corporation formed under the laws of Country X. Target Sub 8 is a wholly owned subsidiary of Target Sub 2 and a foreign corporation formed under the laws of Country Y. Target Sub 9 is a wholly owned subsidiary of Target Sub 2 and a foreign corporation formed under the laws of Country Z.

On Date A, Purchaser initiated a public takeover offer to purchase the outstanding shares of Target from its owners ("Sellers"). The offer was made contingent on Purchaser's receipt of valid acceptances from Sellers representing not less than b percent of the total outstanding shares of Target stock. By Date B, Purchaser had received valid acceptances from Sellers representing c percent (at least 80 percent) of the total outstanding shares of Target stock. On Date C, Purchaser acquired for cash in a fully taxable transaction c percent of the total outstanding shares of Target stock from Sellers. By Date D, Purchaser acquired for cash in a fully taxable transaction the remaining d percent of the total outstanding shares of Target stock from Sellers. It is represented that Purchaser's acquisition of the stock of Target on Date C qualified as a "qualified stock purchase," as defined in § 338(d)(3).

Prior to the acquisition, Target and Target Sub 1 through Target Sub 9 each did not file a United States income tax return, were not 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 and Target Sub 1 through Target Sub 9 each were not: (1) controlled foreign corporations within the meaning of § 957(a); (2) passive foreign investment companies for which an election under § 1295 was in effect; or (3) foreign investment companies or foreign corporations the stock ownership of which is described in § 552(a).

Purchaser is a CFC as defined in § 957 and 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.

Parent intended to file the Elections. The Elections were due on Date E, but for various reasons valid Elections were not filed. After the due date for the Elections, it was discovered 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. The period of limitations on assessment under § 6501(a) has not expired for Parent's, Target's, or Target Sub 1 through Target Sub 9's taxable years in which the qualified stock purchase occurred, the taxable years in which the Elections should have been filed, or 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 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 Elections is fixed by the regulations (*i.e.*, § 1.338-2T(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 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 Professionals explain the circumstances that resulted in the failure to timely file valid Elections. The information establishes that Parent reasonably relied on a qualified tax professional who failed to make, or advise Parent to make, the Elections, the request for relief was filed before the failure to make the Elections was discovered by the Internal Revenue Service, and that the government will not be prejudiced if relief is granted. See §§ 301.9100-3(b)(1)(i) and (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 to file the Elections with respect to the acquisition of the stock of Target and deemed acquisition of the stock of Target Sub 1 through Target Sub 9, 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 Elections, and (2) the taxpayers' (Parent's, Target's, and Target Sub 1 through Target Sub 9's) tax liability (if any) being not lower, in the aggregate, for all years to which the Elections apply, 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 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 must file the Elections in accordance with § 1.338-2T(d) and (e)(3). That is, new elections 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 Elections.

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 Elections.

In addition, we express no opinion as to the tax 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 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 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 Elections, penalties and interest that would otherwise be applicable, if any, continue to 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.

Pursuant to the power of attorney on file in this office, a copy of this letter is being sent to Parent and its other authorized representative.

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