

Internal Revenue Service

Department of the Treasury

Number: **200228015**
Release Date: 7/12/2002
Index Number: 338.01-02; 9100.06-00

Washington, DC 20224

Person to Contact:

Telephone Number:

Refer Reply To:
CC:CORP:6-PLR-167280-01
Date:
April 8, 2002

TY:

LEGEND

- Parent =
- Purchaser =
- Corp1 =
- Target2 =
- Target3 =
- Target4 =
- Target5 =
- Target6 =
- Target7 =
- Target8 =
- Target9 =
- Corp10 =
- Target2Sub1 =
- Target2Sub2 =
- Target2Sub3 =
- Target4Sub1 =

PLR-167280-01

Target7Sub1 =

Seller =

Date A =

Date B =

Date C =

Parent Official =

Tax Professional =

w =x =y =z =

Dear

This letter responds to a letter dated December 4, 2001, submitted on behalf of Parent, the common parent of the consolidated group of which Purchaser is a member, requesting an extension of time under §§ 301.9100-1 through 301.9100-3 of the Procedure and Administration Regulations to file an election. Parent is requesting an extension to file a “§ 338 election” under § 338(g) with respect to the acquisition or deemed acquisition, on Date B, of the stock of: Target2, Target3, Target4, Target5, Target6, Target7, Target8, Target9, Target2Sub1, Target2Sub2, Target2Sub3, Target4Sub1, and Target7Sub1 (sometimes hereinafter referred to as the “Targets”). For convenience, the foregoing “§ 338 election” is sometimes hereinafter referred to as the “Election.” All of Targets are foreign corporations. All citations in this letter to regulations under § 338 are to regulations in effect on Date B. Additional information was received in letters transmitted via facsimile dated February 19, 2002 and April 1, 2002. The material information is summarized below.

Parent is the common parent of a consolidated group. Purchaser is an indirect subsidiary of Parent and joins in filing a consolidated return with Parent.

Immediately before the acquisitions described herein on Date B, Seller, a foreign corporation, wholly owned Target2, Target3, Target4, Target5, Target6, Target7, and Target8. Target 9 was owned w% by Seller, x% by Target2, and y% by Corp10 (w% plus x% comprising over 80% of the Target9 stock and w% plus x% plus y% comprising 100% of the Target9 stock). Target2 wholly owned Target2Sub1, Target2Sub2, and

PLR-167280-01

Target2Sub3. Target7 wholly owned Target7Sub1. Target 4 owned \underline{z} % of Target4Sub1.

On Date A, Parent and Seller entered into a purchase agreement for Parent (or an affiliate of Parent, which included Purchaser) to acquire from Seller all of the stock of Target2 through Target9 owned by Seller in exchange for cash and the assumption of debt. On Date B, Purchaser acquired from Seller all of the stock of Target2 through Target8. It is represented that the acquisitions of the stock of Target2 through Target8 all qualified as "qualified stock purchases" within the meaning of § 338(d)(3). Also on Date B, Purchaser acquired from Seller all of the stock of Corp1, a foreign corporation, which acquired \underline{w} % of the stock of Target9 and all the stock of Corp10, a foreign corporation. Section 338(g) elections with respect to the acquisitions of Corp1 and Corp10 were filed on Date C.

It is represented that prior to their acquisition, none of Targets filed a United States income tax return, was subject to United States income taxation, nor was required, under § 1.6012-2(g), to file a United States income tax return. In addition, none of Targets was (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; or (3) a foreign investment company or a foreign corporation the stock ownership of which is described in § 552(a).

Parent intended to file the Election with respect to Targets. The Election was due on Date C, but for various reasons a valid Election was not filed. After the due date for the Election, it was 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 assessment under § 6501(a) has not expired for Parent's or Targets' taxable years 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" 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

PLR-167280-01

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.*, § 1.338-2T(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 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, Parent Official and Tax Professional explain the circumstances that resulted in the failure to timely file a valid Election. The information establishes that Parent reasonably relied on a qualified tax professional who failed to make, or advise Parent to make, the Election, the request for relief was filed before the failure to make the Election 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 Election 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 date on 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's consolidated group's and Targets') 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 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 Election in accordance with § 1.338-2T(d). 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 Election.

We express no opinion as to: (1) whether the acquisition of Targets' stock

PLR-167280-01

qualifies as a "qualified stock purchase" under § 338(d)(3); or (2) any other tax consequences arising from the Election; or (3) the efficacy of the § 338(g) elections made with respect to Corp1, Corp10, or any other corporations purchased or deemed purchased by Parent and/or its affiliates.

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 taxpayer. However, the 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(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, the original of this letter is being sent to Parent's authorized representative and a copy of this letter is being sent to Parent.

Sincerely yours,

Ken Cohen

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

cc: