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Internal Revenue Service

Department of the Treasury

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Washington, DC 20224

Person to Contact:

Telephone Number:

Refer Reply To:
CC:DOM:CORP:5 PLR-116207-98
Date:
January 22, 1999

Parent =

Purchaser =

Target =

Target Sub =

Sellers =

Company Officials &
Tax Professionals =

Authorized
Representatives =

Country C =

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Date A =

Date B =

Date C =

Date D =

Date E =

Business X =

Business Y =

Business Z =

L percent =

M percent =

N percent =

Dear

This responds to your letter dated August 13, 1998, requesting, on behalf of the Parent, an extension of time under § 301.9100-1 through 301.9100-3 of the Procedure and Administration Regulations to file an election. The extension is being requested for Parent (as the common parent of the consolidated group of which the purchasing corporation is a member) to file an election under § 338(g) of the Internal Revenue Code and § 1.338-1(d) of the Income Tax Regulations, with respect to Purchaser's acquisition of Target stock (hereinafter referred to as the "Election"), on Date A. Additional information was received in letters dated January 11 and 14, 1999. The material information submitted for consideration is summarized below.

Parent is the common parent of a consolidated group that has a calendar taxable year and uses the accrual method of accounting. Purchaser is a wholly owned domestic subsidiary of Parent. Purchaser is included in Parent's consolidated return,

along with other subsidiaries that are not relevant for purposes of this request. Prior to the acquisition, Target was wholly owned by Sellers. Target was a Country C corporation. Parent is engaged in Business X and Target is engaged in business Y.

It is represented that 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. Furthermore, prior to the acquisition neither Sellers nor Target filed a U.S. income tax return or were subject to United States income taxation.

On Date A, Parent, Purchaser and Sellers entered into a series of stock acquisition agreements for Purchaser to acquire all of Sellers' Target stock. On Date A, Purchaser acquired L percent of the stock of Target for cash from Sellers in a fully taxable transaction. Purchaser obtained an option to acquire the remaining M percent of Target stock. Purchaser exercised part of the option on Date D, acquiring an additional N percent of Target (M% plus N% equal more than 80% but less than 100% of the shares of Target), and Purchaser will exercise the remainder of the option on Date E, and at that time Purchaser will have acquired all of the Target shares. It is represented that the acquisition of Target constituted a qualified stock purchase within the meaning of § 338(d)(3), and that Parent was not related to Sellers within the meaning of § 338(h)(3). After the acquisition Target was domesticated and included in Parent's return.

The Election was due on Date B, but for various reasons it was not filed. On Date C (which is after the due date for the Election), Company Officials & Tax Professionals, and Authorized Representatives discovered that the Election was not 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 Purchaser's, Target's or Sellers' taxable years in which the acquisition/sale was consummated, the taxable year in which the Election should have been filed, or for 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 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 transaction 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)(iii) provides that the term "purchase" means any acquisition of stock, but only if (1) 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); (2) 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 (3) 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 1.338-2(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. Section 1.338-1(c)(14) provides that the term "target affiliate" has the same meaning as in § 338(h)(6), applied without § 338(h)(6)(B)(i), and that if a target affiliate is acquired in a qualified stock purchase, it is also a 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.

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/or Form 8023-A) 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, provided the taxpayer demonstrates to the satisfaction of the Commissioner that:

(1) The taxpayer acted reasonably and in good faith, and,

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(2) Granting relief will not prejudice the interests of the government.

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 government. Section 301.9100- 3(a).

In this case, Parent was required by § 1.338-1(d) to file the Election on Date B. However, for various reasons the Election was not filed. Subsequently, Parent filed this request, under § 301.9100-1, for an extension of time to file the Election. 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 establishes it acted reasonably and in good faith, granting relief will not prejudice the interests of the government, and the requirements of §§ 301.9100-1 and 301.9100-3 are satisfied.

Information, affidavits, and representations submitted by Parent, Company Officials & Tax Professionals, and Authorized Representatives explain the circumstances that resulted in the failure to file a valid Election. The information establishes that tax professionals were responsible for the Election, that Parent relied on the tax professionals to timely make the Election, and that the government will not be prejudiced if relief is granted. See § 301.9100-3(b)(iv).

Based on the facts and information submitted, including the representations that have been made, we conclude that Parent has established 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 (as the common parent of the consolidated group of which the purchasing corporation is a member) to file the Election with respect to Purchaser's acquisition of the stock of Target on Date A, as described above.

The above extension of time is conditioned on the taxpayers' (Parent's, Purchaser's, Target's, and Seller's) United States tax liability 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' liability is lower. Section 301.9100-3(c).

Parent (as the common parent of the consolidated group of which the purchasing corporation is a member) should file the Election in accordance with § 1.338-1(d). That is, a new election on Form 8023 (or Form 8023-A) 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 (together with the information that is required to be attached to the election form). Notwithstanding that Parent reported the transaction as a § 338 transaction and stated § 301.9100 relief was requested on its applicable return, Parent must amend its return to attach a copy of this letter and the election form. Also, a copy of this letter should be attached to the election form. See, Announcement 98-2, 1998-2 I.R.B. 38, and § 1.338-1(g).

No opinion is expressed as to (1) whether Purchaser's acquisition of Target stock qualifies as a "qualified stock purchase", (2) whether the acquisition of Target stock qualifies for § 338(a) treatment, and (3) if the acquisition of Target stock qualifies for § 338(a) treatment, as to the amount of gain or loss recognized (if any) by Target on the deemed asset sales.

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.

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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.

A copy of this letter is being sent to the first person listed under the legend "Company Official," pursuant to a power of attorney on file in this office.

Sincerely yours,

Assistant Chief Counsel (Corporate)

by _____
Richard Todd
Counsel to the Assistant
Chief Counsel (Corporate)