

Internal Revenue Service

Department of the Treasury

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Person to Contact:

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Date:
February 29, 2000

Legend

Partnership =

Partner A =

Partner B =

Purchaser =

Foreign Sub =

Sellers =

Company Officials
& Tax Professionals =

Authorized
Representative =

Date Y =

Date A =

Date B =

Date C =

State A =

Country X =

Dear :

This letter responds to your letter dated September 9, 1999, on behalf of the above taxpayers, requesting an extension of time under §§ 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations to file an election. The extension is being requested for Partner A (as the United States shareholder of Purchaser, the foreign purchasing corporation) to file an election 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 Purchaser's acquisition of the stock of Foreign Sub (sometimes hereinafter referred to as the "Election") on Date A. Additional information was received in letters dated October 18, 1999, and February 15, 17, 18, and 22, 2000. The material information submitted for consideration is summarized below.

Partner A and Partner B, S corporations and State A corporations, were partners in Partnership on Date A. On Date Y (a date subsequent to Date A), Partner B merged into Partner A in a transaction represented to qualify as a tax-free reorganization under § 368(a)(1)(A), terminating Partnership. On Date A through Date Y, Partnership owned all of the outstanding stock of Purchaser.

Purchaser, a Country X corporation, acquired for cash, on Date A, in a fully taxable transaction, 100% of the stock of Foreign Sub, a Country X corporation, from Sellers who were domiciled outside of the United States and two of whom are not and one of whom is a United States shareholder, as defined in § 951(b). The United States

shareholder owned 37.5% of Foreign Sub. Foreign Sub does not have any subsidiaries.

Prior to the acquisition, two of Sellers did not file United States income tax returns and were not subject to United States income tax, and one of Sellers did file United States income tax returns and was subject to United States income tax. Further, Foreign Sub was not: (1) a controlled foreign corporation within the meaning of § 957(a) (a "CFC"); (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 United States income tax return.

On Date A, Purchaser acquired from Sellers, for cash in a fully taxable acquisition, 100% of the stock of Foreign Sub. It is represented that the acquisition of Foreign Sub constituted a qualified stock purchase within the meaning of § 338(d)(3), and that Purchaser was not related to Sellers within the meaning of § 338(h)(3). The period of limitations on assessments under § 6501(a) has not expired for Partner A's, Partner B's, Purchaser's, or Foreign Sub's taxable year 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.

The Election was due on Date B. However, for various reasons the Election was not filed. On Date C (which is after the due date for the Election), Company Officials & Tax Professionals and Authorized Representative 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.

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.

Sections 1.338-1(g)(1)(i) and (v) provide, inter alia, that a foreign purchasing corporation or deemed foreign purchasing corporation is not eligible for the special rule under § 1.338-1(g)(1) (i.e., which specifies a filing date for the election that is later than the filing date required by § 338(g) and § 1.338-1(d)) if such foreign corporation is considered subject to United States tax (e.g., is a CFC or is required to file a United States income tax return). 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 1.338-1(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 with Respect to Foreign Corporation) filed with respect to the purchasing corporation by each United States shareholder for the purchasing corporation.

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 § 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.

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, the time for filing the Election 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 Partner A to file the Election, provided Partner A 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 Company Officials & Tax Professionals and Authorized Representative explain the circumstances that resulted in the failure to file the Election. The information establishes that Company Officials & Tax Professionals were responsible for the Election, that Partner A relied on Company Officials & Tax Professionals to timely make the Election, and that 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 Partner A 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 Partner A to file the Election with respect to the acquisition of the stock of Foreign Sub, as described above.

The above extension of time is conditioned on the taxpayers' (Partner A's, Partner B's, Purchaser's, Foreign Sub's and Sellers' (to the extent they have any United States tax liability)) 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).

Partner A should file the Election in accordance with §§ 1.338-1(d) and 1.338-1(g). That is, a new election 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 (together with any information that is required to be attached to the election form). A copy of this letter should be attached to the election form. Partner A, Partner B and/or Partnership, as applicable, must file or amend, as applicable, their returns reporting the acquisition/sale as a "section 338 transaction," and attach thereto a copy of this letter and a copy of the election form (also see §§ 1.338-1(g) and 1.338-5). That is, "old" Foreign Sub must file a separate final return (if and as applicable) and "new" Foreign Sub must be included, as applicable, in Partner A's, Partner B's, and/or Partnership's return (by being listed on Form 5471) for the years following the

acquisition. See §§ 1.338-1(e) and 1.338-1(g), and Announcement 98-2, 1998-1 C.B. 282. Further, the notice requirements of § 1.338-1(g)(4), if applicable, must be satisfied.

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

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 tax effects or consequences 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.

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,

Philip J. Levine

Philip J. Levine
Assistant Chief Counsel (Corporate)