

## Internal Revenue Service

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## Department of the Treasury

Washington, DC 20224

Person to Contact:

Telephone Number:

Refer Reply To:

CC:DOM:CORP:2-PLR-112533-99

Date:

November 17, 1999

### Legend:

Purchaser =

Seller =

Target =

Purchaser's  
Company Official =

Purchaser's  
Tax Professional =

Seller's Tax  
Professionals =

Purchaser's  
Authorized

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Representatives =

Target's  
Authorized  
Representatives =

Date A =

Date B =

Date C =

Date D =

Business X =

This responds to your letter dated June 16, 1999, requesting, on behalf of the taxpayers identified above, an extension of time under §§ 301.9100-1 through 301.9100-3 of the Procedure and Administration Regulations to file an election. Target (as successor to Purchaser) and Seller are requesting the extension to file a "section 338(h)(10) election" under §§ 338(g) and 338(h)(10) of the Internal Revenue Code and § 1.338(h)(10)-1(d) of the Income Tax Regulations (the "Election"), with respect to Purchaser's acquisition of Target on Date A. Additional information was submitted in letters dated September 20, September 28 and November 9, 1999. The material information is summarized below.

Target is an S corporation, within the meaning of § 1361, and was wholly owned by Seller (an individual) and engaged in Business X. Purchaser was a subchapter C corporation that was formed for the purpose of acquiring Target. Target uses the accrual method of accounting and has calendar taxable year and Purchaser used the accrual method of accounting and had a calendar taxable year.

On Date A, Seller and Purchaser entered into a stock purchase agreement for Purchaser to acquire all of Seller's Target stock. Also on Date A, pursuant to a stock purchase agreement, Purchaser acquired all of Seller's Target stock for cash and notes (which Seller did not report under § 453) in a fully taxable acquisition. It is represented that (1) Purchaser was not related to Seller within the meaning of § 338(h)(3), and (2) Purchaser's acquisition of Target stock qualified as a "qualified stock purchase," as defined in § 338(d)(3). On Date B (which is many months after Date A), Purchaser was merged with and into Target, pursuant to applicable state law, in a transaction that is represented to qualify as a reorganization under §§ 368(a)(1)(A) and 381(a). It is also

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represented that Target is successor in interest to Purchaser pursuant to § 1.338-2(c)(2).

Purchaser and Seller intended to file the Election. The Election was due on Date C. However, for various reasons the Election was not timely filed. On Date D (which is after the Election was due) the parties discovered that the Election was not timely filed. Subsequently, this request was submitted, under § 301.9100-1, for an extension of time to file the Election. The period of limitations on assessments under § 6501(a) has not expired for Purchaser's, Target's, or Seller's taxable year(s) 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 "section 338 election" under § 338(g); and (2) 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.

Section 338(h)(3)(A) provides that the term "purchase" means any acquisition of stock, but only if: (i) the basis of the stock in the hands of the purchasing corporation is not determined (I) in whole or in part by reference to the adjusted basis of such stock in the hands of the person from whom acquired, or (II) under § 1014(a) (relating to property acquired from a decedent); (ii) 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 (iii) the stock is not acquired from a person the ownership of whose stock would, under § 318(a)(other than paragraph (4) thereof), be attributed to the person acquiring such stock.

Section 338(h)(10) permits the purchasing and selling corporations to elect jointly to treat the target corporation as deemed to sell all of its assets and distribute the proceeds in complete liquidation. The sale of stock included in the qualified stock purchase generally is ignored. A § 338(h)(10) election may be made for target only if it is a member of a selling consolidated group, a member of a selling affiliated group filing separate returns, or an S corporation. Section 1.338(h)(10)-1(a). Gain or loss on the deemed sale is included in the consolidated return of the selling group (unless the target corporation is a member of a selling affiliated group filing separate returns or an S corporation). Section 1.338(h)(10)-1(d) provides that a § 338(h)(10) election may be made for the target corporation if the purchasing corporation makes a "qualified stock purchase" of the target corporation stock. Sections 1.338(h)(10)-1(d)(2) and (3) provide that if a § 338(h)(10) election is made for the target corporation, it is irrevocable and a § 338 election is deemed made for the target corporation.

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Section 1.338(h)(10)-1(d)(2) provides that a § 338(h)(10) election is jointly made by a purchaser and the selling consolidated group (or the selling affiliate or the S corporation shareholders) on Form 8023 in accordance with the instructions to the form. The regulations further provide that the election must be made not later than the 15th day of the ninth month beginning after the month in which the acquisition date occurs. The instructions to Form 8023 provide that if a § 338(h)(10) election must be made jointly by the purchasing corporation and the common parent of the selling consolidated group (or selling affiliate or S corporation shareholders). The instructions provide that each person authorized to act on behalf of each corporation must sign the form, and if it made for an S corporation it must be signed by each S corporation shareholder who sells target stock in the QSP. The instructions further provide that the signatures, dates and titles (if applicable) of those persons must be provided in a "signature attachment," and they provide specific details as to the preparation of the "signature attachment" and its attachment to Form 8023.

Section 1.338-2(c)(2) provides that an election under § 338 may be made for target after the acquisition of assets of the purchasing corporation by another corporation in a transaction described in § 381(a), provided that the purchasing corporation is considered for tax purposes as the purchaser of the target stock. The acquiring corporation in the § 381(a) transaction may make an election under § 338 for target.

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,
- (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. § 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. § 301.9100-3(a).

In this case, the time for filing the Election is fixed by the regulations (i.e.,

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§ 1.338(h)(10)-1(d)). Therefore, the Commissioner has discretionary authority under § 301.9100-1 to grant an extension of time for Target (as successor to Purchaser) and Seller to file the Election, provided Target (as successor to Purchaser) and Seller show that Purchaser and Target 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 and representations submitted by Seller, Purchaser, Purchaser's Company Official, Purchaser's Tax Professionals, Seller's Tax Professionals, Purchaser's Authorized Representatives and Seller's Authorized Representatives explain the circumstances that resulted in the failure to timely file a valid Election. The information also establishes that tax professionals were responsible for the Election, that Seller and Purchaser relied on them 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 made, we conclude that Target (as successor to Purchaser) and Seller have shown that Purchaser and Target 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 30 days from the date of issuance of this letter for Target (as successor to Purchaser) and Seller to file the Election with respect to the acquisition of Target, as described above.

The above extension of time is conditioned on: (i) Purchaser, in fact, being the purchasing corporation for tax purposes and Target, in fact, being the successor in interest to Purchaser (see §§ 1.338-2(b) and (c)(2); (ii) Target (as successor to Purchaser) and Seller treating the acquisition/sale of Target stock as a § 338(h)(10) transaction; (iii) Target (as successor to Purchaser) and Seller signing the Election; and (iv) The taxpayers' (Seller's, Purchaser's, and Target's) 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 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).

Purchaser and Seller must file the Election in accordance with § 338(h)(10)-1(d) (i.e., 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 to the form). A copy of this letter should be attached to the election form. Purchaser and Seller must amend their applicable returns (they reported the transaction as a "section 338(h)(10)" transaction and disclosed that they were requesting an extension of time under

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§ 301.9100-1) to attach a copy of the "new" Election (and the information required therewith) and a copy of this letter.

We express no opinion regarding: (1) whether the acquisition/sale of Target stock qualifies as a "qualified stock purchase" under § 338(d)(3); (2) whether the acquisition/sale of Target stock qualifies for § 338(h)(10) treatment; or (3), if § 338(h)(10) is applicable, as to the amount and character of gain or loss, if any, recognized by Target and Seller on Target's deemed asset sale and deemed liquidation.

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 taxpayers. However, the District Director(s) 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 powers of attorney on file in this office we are sending copies to Purchaser's Company Official, Seller's Company Official and the specified authorized representatives.

Sincerely yours,  
Assistant Chief Counsel (Corporate)  
By Richard Todd  
Counsel to the Assistant Chief  
Counsel (Corporate)