

## Internal Revenue Service

## Department of the Treasury

Number: **200241030**

Release Date: 10/11/2002

Index Numbers: 338.01-02, 9100.07-00

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CC:CORP:B05 - PLR-105662-02

Date:

July 8, 2002

### LEGEND

Parent =

Purchaser =

Target =

Seller 1 =

Seller 2 =

Date A =

Date B =

Date C =

Date D =

Date E =

Company Official =

Tax Professional =

Dear

This letter responds to a letter dated January 18, 2002, submitted on behalf of Purchaser, Seller 1, and Seller 2, requesting an extension of time under §§ 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations to file an election. Purchaser and Seller are requesting an extension to file a “§ 338(h)(10) election” under §§ 338(g) and 338(h)(10) of the Internal Revenue Code and § 1.338(h)(10)-1 of the Income Tax Regulations with respect to Purchaser’s acquisition of Target stock (sometimes hereinafter referred to as the “Election”), on Date B. All citations in this letter to regulations under § 338 are to regulations in effect on Date B. Additional information was received in letters dated April 1, 2002, April 9, 2002, and April 26, 2002. The material information is summarized below.

On Date B, Purchaser was the common parent of a consolidated group. Purchaser was a publicly held corporation. After Date B, Purchaser became a wholly-owned subsidiary of Parent, the common parent of a consolidated group, through a transaction represented to qualify under § 368(a)(1)(B). Parent is a publicly traded company. Purchaser and Parent are accrual method taxpayers that use the calendar year end. Target was an S corporation. Seller 1 and Seller 2, individuals, together owned 100% of Target’s stock. Target is an accrual method taxpayer that uses a calendar year end.

On Date A, Purchaser, Seller 1, and Seller 2 entered into a stock purchase agreement for Purchaser to acquire all of the Target stock from Seller 1 and Seller 2. The stock purchase agreement provided that Purchaser, Seller 1, and Seller 2 would make the Election. On Date B, Purchaser acquired all of the Target stock from Seller 1 and Seller 2 in exchange for cash and stock of Purchaser. Purchaser represented that Seller 1 and Seller 2 received less than two and one-half percent of Purchaser’s stock as consideration for the transaction. It is represented that Purchaser’s acquisition of the stock of Target qualified as a “qualified stock purchase,” as defined in § 338(d)(3).

Purchaser, Seller 1, and Seller 2 intended to file the Election. 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, Purchaser’s, Target’s, Seller 1’s or Seller 2’s 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."

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. 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).

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 Election is fixed by the regulations (i.e., § 1.338(h)(10)-1(d)). Therefore, the Commissioner has discretionary authority under § 301.9100-1 to grant an extension of time for Purchaser, Seller 1, and Seller 2 to file the Election, provided Purchaser, Seller 1, and Seller 2 show they 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.

The interests of the government are ordinarily prejudiced if the taxable year in which the regulatory election should have been made or any year affected thereby is closed by the period of limitations on assessment under § 6501(a). See § 301.9100-3(c)(1)(ii). Section 6501(a) generally provides that a tax must be assessed within three years from the date the return is filed, whether or not such return was filed on or after the date prescribed. The period of limitations on assessment under § 6501(a) is not suspended by a request for relief under § 301.9100-3. Section 301.9100-3(d)(2). Thus, § 301.9100-3(d)(2) provides that for relief to be granted, the IRS may require the taxpayer to consent under § 6501(c)(4) to an extension of the period of limitations on assessment for the taxable year in which the regulatory election should have been made and any taxable years that would have been affected by the election had it been

timely made.

Information, affidavits, and representations submitted by Purchaser, Seller 1, Seller 2, Company Official, and Tax Professional explain the circumstances that resulted in the failure to timely file the Election. The information establishes that the request for relief was filed before the failure to make the Election was discovered by the Internal Revenue Service, and that the Purchaser reasonably relied on a qualified tax professional who failed to make, or advise Purchaser to make, the Election. See §§ 301.9100-3(b)(1)(i) and (v).

In this case, the period of limitations on assessment under § 6501(a) is near its expiration for the taxpayers' taxable years for which the regulatory election should have been made. To protect the interests of the government against prejudice by the expiration of the period of limitations on assessment under § 6501(a), the taxpayers agreed to provide valid, timely consents under § 6501(c)(4) to an extension of the period of limitations on assessment for the taxable year in which the regulatory election should have been made.

The consents are to be made on Forms 872, and are to provide extensions for the Parent, Purchaser, Target, Seller 1 and Seller 2 until Date D. The consents should be fully executed by all necessary parties including the appropriate Division Executive for the Internal Revenue Service on or before the earlier of Date E, or the date Forms 8023 are filed.

Based on the facts and information submitted, including the representations made, and provided that the conditions precedent in this letter (including the full execution of valid Forms 872 referred to above) are satisfied, we conclude that Purchaser, Seller 1, and Seller 2 have shown they 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. Accordingly, an extension of time is granted under § 301.9100-3, until 45 days from the date on this letter, for Purchaser, Seller 1, and Seller 2 to file the Election with respect to the acquisition of the stock of Target, as described above.

WITHIN 45 DAYS OF THE DATE ON THIS LETTER, Purchaser, Seller 1, and Seller 2 must file the Election on Form 8023 executed on or after the date on this letter, in accordance with § 1.338(h)(10)-1 and the instructions to the form. A copy of this letter (together with copies of all the timely executed consents) must be attached to the election form.

WITHIN 120 DAYS OF THE DATE ON THIS LETTER, all relevant parties must file or amend, as applicable, all returns and amended returns (if any) necessary to report the transaction as a § 338(h)(10) transaction for the taxable year in which the

transaction was consummated (and for any other affected taxable year). A copy of this letter (including a copy of the timely executed consents) and a copy of Form 8023 must be attached to the returns.

The above extension of time is conditioned on:

- (1) the receipt of the valid § 6501(c)(4) consents to the extension of the period of limitations on assessment under § 6501(a) referred to above, and
- (2) the taxpayers' (Parent's consolidated group's, Purchaser's consolidated group's, Target's, Seller 1's and Seller 2'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 applicable Director's office upon audit of the Federal income tax returns involved. No opinion is expressed as to the Federal income tax effect, if any, if it is determined that the taxpayers' tax liability is lower. See § 301.9100-3(c)(1)(i).

We express no opinion as to: (1) whether the acquisition/sale of the 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) any other tax consequences arising from the Election. Further, 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 § 301.9100-3, 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 § 301.9100-3 to file the Election, penalties and interest that would otherwise be applicable, if any, continue to apply.

Purchaser must provide Seller 1 and Seller 2 with a copy of this letter.

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 your authorized representatives.

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Sincerely,

*Ken Cohen*

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

cc: