

Internal Revenue Service

Department of the Treasury

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Person to Contact:

Telephone Number:

Refer Reply To:

CC:DOM:CORP:5 PLR-113223-98

Date:

December 22, 1998

Re:

Parent =

Purchaser =

Target =

Authorized
Representative =

Date A =

Date B =

Date C =

Company Officials
Tax Professional =

Dear

This responds to your Authorized Representative's letter dated June 25, 1998, 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 Parent (as the common parent of the consolidated group that included Purchaser on the acquisition date) to file a "section 338 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 on Date A (hereinafter referred to as "the Election"). Additional information was received in a letter dated September 23, 1998. The material information submitted for consideration is summarized below.

Parent is the common parent of a consolidated group that has a 52-53 week taxable year and uses the accrual method of accounting.

Purchaser is a wholly owned subsidiary of Parent and a member of its consolidated group.

Target was a domestic corporation that became a member of Parent's consolidated group upon being acquired by Purchaser on Date A.

Purchaser acquired 100 percent of the outstanding stock of Target in exchange for cash in a fully taxable transaction on Date A. The transaction was structured as a "reverse cash merger". It is represented that Purchaser was not related to Target within the meaning of § 338 (h) (3) (c). It is also represented that Purchaser's acquisition of the Target stock qualified as a "qualified stock purchase", as defined in § 338 (d) (3).

Parent intended to make a timely § 338 (g) election for the Target acquisition. The due date for the Election was Date B, but for certain reasons it was not filed. On Date C (which is after the due date for the Election), Company Officials and Tax Professionals discovered that the Election was not timely filed. The statute of limitation under § 6501 has not expired for Parent's, Purchaser's, or Target's taxable year in which the acquisition/sale was consummated, or for any year (s) that would be affected by the Election.

Section 338 (a) permits certain stock purchases to be treated as asset

acquisitions if (1) the purchasing corporation makes a “section 338 election” under § 338 (g) (or is treated as having made the election under § 338 (e)) 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 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-A in accordance with the instructions on the form. The “section 338 election” must be filed not later than the 15th day of the 9th 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.

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 the instructions thereto.

Under § 301.9100-3, the Commissioner has discretion to grant a reasonable extension of time to make a regulatory election, 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.

In this case, Parent (as the common parent of the consolidated group that

included Purchaser on the acquisition date) was required by §1.338-1 (d) to file the Election on Date B. However, for various reasons a valid Election was not timely filed. Subsequently, Parent filed this request under §§ 301.9100-1, and 301.9100-3 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 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.

Section 301.9100-1 and 301.9100-3 provide that requests for extensions of time to file elections will be granted when the taxpayer (s) provides evidence (including the affidavits described in § 301.9100-3 (e)) establishing that the taxpayer (s) acted reasonably and in good faith, and that granting relief will not prejudice the interests of the government. Information, affidavits, and representations submitted by Parent and Company Officials and Tax Professionals explain the circumstances that resulted in the failure to file the Election. The information also establishes that tax professionals were responsible for the Election and Parent relied on them to timely make the Election, and granting an extension will not prejudice the interests of the government.

Based on the facts and information submitted, including the representations made, we conclude that Parent has shown it acted reasonably and in good faith in failing to timely file the Election, the requirements of §§ 301.9100-1 and 301.9100-3 have been 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 Parent (as the common parent of the consolidated group that included Purchaser on the acquisition date), to file the Election with respect to the acquisition of Target's stock on Date A, as described above.

The above extension of time is conditioned on: (1) § 338 (a) applying to the transaction; and (2), taxpayers' (Parent's, Purchaser's and Target's) 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 Directors' offices 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 that included Purchaser on the acquisition date), must file the election in accordance with § 1.338-1 (d) [i.e., a new election for Target 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 form (together with the information that is required to be attached to the election form)].

A copy of this letter must be attached.

Parent (and Purchaser, Target, and “new” Target as applicable) must report the acquisition as a “section 338 transaction”, on amended returns for the applicable tax year (s) and on Form 8023 [i.e., “old” Target must file a separate “final return” for the acquisition date, as otherwise applicable (see § 1.338-1(e)); and “new” Target must be included in Parent’s consolidated return year following the acquisition (i.e., included in Parent’s return from the day after the acquisition for that portion of Parent’s taxable year that included “new” Target). See § 1.338-1 (e) and the instruction to Form 8023. A copy of the information that is required to be attached to the election form, along with a copy of this letter, should be attached to the applicable return (s).

No opinion is expressed: (1) as to whether § 338 (a) is applicable to the transaction; (2) as to whether the above-described acquisition of Target’s stock qualifies as a “qualified stock purchase” and/or for § 338 (a) treatment; and (3), if the acquisition of Target’s stock, qualifies as a “qualified stock purchase” and for § 338 (a) treatment, as to the amount, if any, of gain or loss recognized on its 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 effects 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, their 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, shall 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.

A copy of this letter is being sent to your first and second named authorized representatives, pursuant to the instruction of the power of attorney for this request.

Sincerely yours,
Assistant Chief Counsel (Corporate)

By _____
Bernita L. Thigpen
Deputy Assistant Chief Counsel
(Corporate)