

Internal Revenue Service

Department of the Treasury

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Person to Contact:

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CC:DOM:CORP:4 PLR-118022-98

Date:

January 14, 1999

Re:

Purchaser =

Sellers =

Target =

NewName =

Country X =

Company
Official =

Outside Tax

Professional =

Authorized
Representatives =

Business A =

Business B =

Date A =

Date B =

Date C =

Dear

This letter responds to your letter dated September 11, 1998, on behalf of Purchaser, 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 Purchaser 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 on Date A (hereinafter referred to as the "Election"). Additional information was received in a letter dated January 6, 1999. The material information submitted for consideration is summarized below.

Purchaser is the common parent ("Parent") of a consolidated group that is a calendar year taxpayer and uses the accrual method of accounting. Prior to the acquisition, Sellers owned all of the stock of Target. Sellers and Target are Country X corporations. Purchaser is engaged in Business A and Target is engaged in Business B. After the acquisition, Target changed its name to

NewName. It is represented that Target was not, prior to Date A, a controlled foreign corporation within the meaning of § 957(a) or a passive foreign investment company for which an election under § 1295 was in effect. Prior to the acquisition neither Sellers nor Target filed a U.S. income tax return or were subject to U.S. income taxation. It is represented that Target did not assume (or become jointly and severally or secondarily liable for) any liabilities of Purchaser (or any of Purchaser's subsidiaries) either in the year of acquisition or subsequently.

On Date A, Purchaser acquired all of the stock of Target from Sellers in a fully taxable transaction. It is represented that the acquisition of Target 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). After the acquisition, Target was included in Parent's return by being listed on Form 5471 (information return with respect to a foreign corporation).

The Election was due on Date B, but for various reasons it was not filed. On Date C (which is after the due date of the Election) Company Official and Outside Tax Professional 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 statute of limitations under § 6501(a) has not run for Purchaser's or Target's taxable year in which the acquisition occurred, the taxable year the Election was due, or any taxable years that would be affected by the Election if it had been timely made..

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) 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.

Under § 301.9100-1(c), the Commissioner has discretion to grant a reasonable extension of time under the rules set forth in § 301.9100-3 to make a regulatory election, for all subtitles of the Internal Revenue Code except subtitles E, G, H, and I. Section 301.9100-3(a) provides that requests for relief will be granted when the taxpayer provides the evidence (including the affidavits described in § 301.9100-3(e)) to establish to the satisfaction of the Commissioner that the taxpayer acted reasonably and in good faith, and the grant of relief will not prejudice the interests of the government.

In this case, Purchaser was required by §§ 1.338-1(d) to file the Election on Date B. However, for various reasons the Election was not filed. Subsequently, Purchaser 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 Purchaser to file the Election, provided Purchaser 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 Purchaser, Company Official, Outside Tax Professional and Authorized Representatives explain the circumstances that resulted in the failure to file a valid Election. The information establishes that: (1) the taxpayer filed its return for the relevant taxable year as if the Election had been made, and the Service had not discovered that a valid Election had not been filed, and (2) tax professionals were responsible for the Election, and Purchaser relied on the tax professionals to timely make the Election. The information also establishes that the

government will not be prejudiced if relief is granted. See § 301.9100-3.

Based on the facts and information submitted, including the representations that have been made, we conclude that Purchaser 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 Purchaser to file the Election with respect to its acquisition of the stock of Target on Date A, as described above.

The above extension of time is conditioned on the taxpayers' (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 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)(1).

Purchaser should file the Election in accordance with § 1.338-1(d). 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 the information that is required to be attached to the election form). A copy of this letter should be attached to the election form. Parent and "old" Target (having filed their returns and reported the transaction as a "section 338 transaction," and having disclosed that § 301.9100 relief was applied for) must amend their returns, as applicable, to attach a copy of this letter and a copy of the election form.

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.

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 Company Official and named Authorized Representative, 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)