

## Internal Revenue Service

## Department of the Treasury

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Washington, DC 20224

Person to Contact:

Telephone Number:

Refer Reply To:

CC:CORP:B02-PLR-105425-00  
Date:

August 17, 2000

### LEGEND:

Parent =

Sub #1 =

Sub #2 =

Sub #3 =

Sellers =

Target #1 =

Target Affiliate #4 =

Target Affiliate #5 =

Target Affiliate #6 =

Target Affiliate #7 =

Target Affiliate #8 =

Target Affiliate #9 =

Date A =

Date B =

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Date C =

Date D =

Country E =

Country F =

Business H =

Company Official =

In-House Tax

Professional =

Outside Tax Professional =

Authorized

Representatives =

Dear:

This is in response to your Authorized Representatives' letter dated March 2, 2000, requesting an extension of time under §§ 301.9100-1 through 301.9100-3 of the Procedure and Administration Regulations to file an election. Parent (as United States shareholder of the "foreign purchasing corporation") is requesting the extension of time to file a "section 338(g) election" under § 338(g) of the Internal Revenue Code and §§ 1.338-1(d) and (g) of the Income Tax Regulations with respect to the acquisition of the stock of Target #1 and the deemed acquisition of the stock of Target Affiliate #4, Target Affiliate #5, Target Affiliate #6, Target Affiliate #7, Target Affiliate #8, and Target Affiliate #9 (sometimes hereinafter collectively referred to as the "Target Affiliates" or the "Target Affiliate"), on Date B. Such election with respect to the acquisition of the stock of Target #1 and the deemed acquisition of the stock of each of the Target Affiliates is sometimes hereinafter referred to as the "Election." (All citations in this letter to regulations under § 338 are to the regulations as in effect on Date B). Additional information was received in a letter dated May 9, 2000. The material information submitted is summarized below.

Parent is the common parent of a consolidated group that files a federal income tax return on the basis of a taxable year ending April 30. Sub #1, a Country E corporation that Parent has elected to treat as a disregarded entity, is a wholly-owned subsidiary of Parent. Sub #2, a Country F corporation, is a wholly owned subsidiary of Sub #1. Sub #3 is a Country F corporation and a wholly-owned subsidiary of Sub #2.

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Prior to the acquisitions, Target #1 was wholly-owned by Sellers (individuals who are citizens of country F, and who are not United States shareholders within the meaning of § 951(b)), and over 80% of the stock of the Target Affiliates was owned by Target #1 (the exact ownership is set forth in the above redacted Legend).

Target #1 and Target Affiliates were Country F corporations at the time of the acquisition. It is represented that neither Target #1 nor any of the Target Affiliates filed United States income tax returns or were subject to United States taxation. It is also represented that neither Target #1 nor any of the Target Affiliates: (1) was a controlled foreign corporation within the meaning of § 957(a); (2) was a passive foreign investment company for which an election under § 1295 was in effect; (3) was a foreign corporation the stock ownership of which is described in § 552(a)(2); or (4) was required under § 1.6012-2(g) to file a U.S. income tax return.

On Date A, Sellers and Parent entered into a Stock Purchase Agreement for Parent or its subsidiaries to acquire all of the Sellers' stock of Target #1 (including the stock of the Target Affiliates held by Target #1). On Date B, pursuant to the Stock Purchase Agreement, Sub #3 acquired all of the stock of Target #1 from the Sellers for cash in a fully taxable transaction. It is represented that the acquisition of the stock of Target #1 (and deemed acquisition of the stock of the Target Affiliates) each qualified as a "qualified stock purchase," as defined in § 338(d)(3), and that Parent was not related to Target #1, Target Affiliates or Target #1 shareholders, within the meaning of § 338(h)(3). Following the acquisitions, Sub #3 merged into Target #1 under Country F law. Parent, Target #1, and Target Affiliates are all engaged in Business H.

Parent intended to file the Election. The Election was due on Date C. However, for various reasons a valid Election was not filed. On Date D (which is after the due date for the Election), In-House Tax Professional 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 period of limitations on assessments under § 6501(a) has not expired for the taxable year in which the acquisition occurred, the taxable year in which the Election should have been filed, or for any taxable years that would have been affected by the Election had it been timely filed. Further, it is represented that: (1) all returns were filed as if a valid Election had been made and it was disclosed on such returns that relief was being requested under § 301.9100-3 to make such election, (2) the applicable taxable year(s) has not been examined and (3) the Service has not discovered that the Election was not timely filed.

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 "§ 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

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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), be attributed to the person acquiring such stock.

Section 1.338-1(d) provides that a purchasing corporation makes a “§ 338 election” for target by filing a statement of “§ 338 election” on Form 8023 in accordance with the instructions on the form. The “§ 338 election” must be filed no later than the 15<sup>th</sup> day of the ninth month beginning after the month in which the acquisition date occurs. A “§ 338 election” is irrevocable.

Section 1.338-1(g)(3) provides that a United States shareholder (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 “§ 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 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.

Section 1.338-1(c)(14) provides that the term target affiliate has the same meaning as in § 338(h)(6) (applied without § 338(h)(6)(B)(i)). Thus, a corporation described in § 338(h)(6)(B)(i) is considered a target affiliate for all purposes of § 338. If a target affiliate is acquired in a qualified stock purchase, it is also a target. Under § 338(h)(3)(B), new target’s deemed purchase of stock of another corporation is a purchase for purposes of § 338(d)(3) on the acquisition date of target. If new target’s deemed purchase causes a qualified stock purchase of the other corporation and if a § 338 election is made for the other corporation, the acquisition date for the other corporation is the same as the acquisition date of target. However, the deemed sale

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and purchase of the other corporation's assets is considered to take place after the deemed sale and purchase of target's assets. See § 1.338-2(b)(4).

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 for the consolidated return year. See also Form 8023 and the instructions thereto.

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 is fixed by regulation (i.e., § 1.338-1(d)). Therefore, the Commissioner has discretionary authority under § 301.9100-1 to grant an extension of time for Parent (as United States shareholder of the "foreign purchasing corporation") to file the Election, provided Parent shows that it acted reasonably and in good faith, the requirements of §§ 301.9100-1 through 301.9100-3 are satisfied, and granting relief will not prejudice the interests of the government.

Information, affidavits and representations submitted by Parent, Company Official, In-House Tax Professional, Outside Tax Professional and Authorized Representatives explain the circumstances that resulted in the failure to file the Election. The information establishes that: (1) all returns were filed as if a valid Election had been made and it was disclosed on such returns that relief was being requested under § 301.9100-3 to make such election, (2) the applicable taxable year(s) has not been examined and (3) the Service has not discovered that the Election was not timely filed. The information also establishes that competent tax professionals were responsible for the Election and were aware of all relevant facts, that Parent relied on the tax professionals to make the Election, and that the interests of the government will

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not be prejudiced if relief is granted. See §§ 301.9100-3(b)(1)(i) and 301.9100-3(b)(1)(v).

Based on the facts and information submitted, including the representations made, we conclude that Parent has shown that it acted reasonably and in good faith in failing to file the Election, the requirements of §§ 301.9100-1 through 301.9100-3 have been satisfied, and that 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 to file the Election with respect to the acquisition of the stock of Target #1 and deemed acquisition of the stock of the Target Affiliates, as described above.

The above extension of time is conditioned on the taxpayers' (i.e. Parent's, Sub #1's, Sub #2's, Sub #3's, Target #1's, Target Affiliates' and Sellers') 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 filed (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 or examination 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 taxpayers' liability is lower. Section 301.9100-3(c).

Parent should file the Election in accordance with § 1.338-1(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 forms. Parent, Target #1 and Target Affiliates must report the transactions as § 338 transactions on their applicable returns (including the applicable separate returns for Target #1 and Target Affiliates), if they have not already so filed, and they must attach to such returns (or amend the applicable returns if they have already been filed to attach thereto) a copy of the election form and a copy of this letter.

We express no opinion regarding: (1) whether the acquisition of the stock of Target #1 and deemed acquisition of the stock of Target Affiliates qualify as "qualified stock purchases" under § 338(d)(3); (2) whether the acquisition of the stock of Target #1 and deemed acquisition of the stock of Target Affiliates qualify for § 338(a) treatment; (3) if the acquisition of the stock of Target #1 and deemed acquisition of the stock of Target Affiliates qualify for § 338(a) treatment, as to the amount of gain or loss (if any) recognized by Target #1 and Target Affiliates on the deemed asset sale, or whether, for purposes of § 338, Sub #2 or Sub #3 is the "corporate purchaser" (assuming that there is a purchase) of the stock of Target #1 -- note, however, that same will not by itself affect qualification for § 338 treatment because under either alternative there will be a "corporate purchaser."

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In addition, we express no opinion as to the tax treatment or consequences of filing the Election late under the provisions of any other section of the Code and regulations, or 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 taxpayer and its employees. However, the District Director should verify all essential facts and computations. Moreover, notwithstanding that an extension is granted under § 301.9100-1 to file the Election, any penalties and interest that would otherwise be applicable shall still apply.

This ruling 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.

Copies of this letter are being sent to the representatives you designated on your power of attorney.

Sincerely yours,

Associate Chief Counsel (Corporate)

by \_\_\_\_\_  
Ken Cohen  
Acting Chief (Branch 3)

cc: