

## Internal Revenue Service

## Department of the Treasury

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**July 28, 1999**

### LEGEND:

Parent =

Sub #1 =

Sub #2 =

Sub #3 =

Purchaser =

Target #1 =

Target #2 =

Target #3 =

Business A =  
Sellers =

Company Officials and  
Tax Professionals =

Outside  
CPAs =

Authorized  
Representatives =

Date #A =

Date #B =

Date #C =

Date X =

Dear :

This letter responds to your letter dated March 30, 1999, requesting an extension of time under §§ 301.9100-1 through 301.9100-3 of the Procedure and Administration Regulations to file an election. The extension is being requested by Parent (as the common parent of the consolidated group of which the United States shareholder of the controlled foreign purchasing corporation, and of the deemed controlled foreign purchasing corporation, is a member) to file elections under § 338(g) of the Internal Revenue Code and §§ 1.338-1(d) and 1.338-1(g) of the Income Tax Regulations, with respect to Purchaser's acquisition of the stocks of Target #1 and Target #2 and the deemed acquisition of the stock of Target #3 (sometimes hereinafter referred to

collectively as the “Election” or “Elections”) on Date #A. The material information submitted for consideration is summarized below.

Parent is the common parent of a consolidated group that has a taxable year ending on June 30 and uses the accrual method of accounting. Purchaser is a wholly owned subsidiary of Sub #3, which, in turn, is a wholly owned subsidiary of Sub #2, which, in turn, is a wholly owned subsidiary of Sub #1, which, in turn, is a wholly owned subsidiary of Parent. Parent, Sub #1 and Sub #2 are domestic corporations, and Sub #3 and Purchaser are foreign corporations (their applicable country of formation is indicated in the above redacted legend). All of the corporations named in the immediate preceding sentence (along with other subsidiaries of Parent that are not relevant for purposes of this request) are included in Parent’s consolidated income tax return (i.e., the domestic corporations by being directly included, and the foreign corporations by being listed on Form 5471, Information Return With Respect to a Foreign Corporation). All of the shares of stock of Target # 3 were owned by Target #1 and Target #2. All of the shares of stock of Target #1 and Target #2 were owned by Sellers (as indicated in the above redacted legend). Sellers are foreign citizens and residents (whose country of residency and citizenship is indicated in the above redacted legend). Target #1, Target #2 and Target #3 are foreign corporations (their country of formation is indicated in the above redacted legend) and sometimes hereinafter referred to collectively as the “Target” or “Targets”. Parent and its subsidiaries, and the Targets are engaged in Business A. Purchaser was formed to acquire the Targets. It is represented that none of the Targets were subject to United States taxation, none were required to file United States tax returns, and none were passive investments companies that made a § 1295 election.

On Date #A, Parent, Purchaser and Sellers entered into a stock purchase agreement for Purchaser to acquire all of the outstanding stock of the Target #1 and Target #2 (including Target #3). Also on Date #A, Purchaser acquired all of the stock of Target #1 and Target #2 (including Target #3) from Sellers, for cash, in fully taxable transactions. It is represented that Purchaser was not related to Sellers, within the meaning of § 338(h)(3), and that the acquisition, and deemed acquisition, of each of the Targets, constituted a “qualified stock purchase,” within the meaning of § 338(d)(3). After the acquisitions (i.e., on Date X) Target #1 and Target #2 were amalgamated into Purchaser. Also, after the acquisitions the Targets (and their successor) were included in Purchaser’s consolidated income tax return (i.e., by being listed on Form 5471, Information Return With Respect to a Foreign Corporation). Parent timely filed its return for the year in which the acquisitions occurred, and the return was filed consistent with the Election. Although a copy of the Election was not attached to the return, a statement was attached that an extension of time had been requested under § 301.9100-1 to make the “formal” Election.

Parent always intended to make the Election. The Election was due on Date #B (which is after Date #A), but for various reasons it was not filed. On Date #C (which is after Date #B), Company Officials and Tax Professionals, Outside CPAs and Authorized

Representatives discovered that the Election was not 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 Parent's (and its subsidiaries') or the Targets' taxable year(s) in which the acquisitions occurred, the taxable year(s) in which the Election should have been filed, or any taxable year(s) that would have been affected by the Election had it been timely made. Moreover, the Service has not discovered the failure to make the Election and, in fact, the subject returns have not been examined by the Service.

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 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.

Sections 1.338-1(g)(1)(i) and (v) provide, inter alia, that a foreign purchasing corporation or deemed foreign purchasing corporation is not eligible for the special rule under § 1.338-1(g)(1) (i.e., which specifies a filing date for the election that is later than the filing date required by § 338(g) and § 1.338-1(d)) if such foreign corporation is considered subject to United States tax (e.g., is a CFC or is required to file a United States income tax return). Section 338(h)(3)(A)(iii) 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.

Section 1.338-1(g)(3) provides that the United States shareholders (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 "section 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 in accordance with the instructions to the form, and a copy of the form must be attached to Form 5471 (Information Return With Respect to Foreign Corporation) and filed with respect to the purchasing corporation by each United States shareholder for the purchasing corporation.

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), and that if a target affiliate is acquired in a qualified stock purchase, it is also a target. 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. 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 and purchase of the other corporation's assets is considered to take place after the deemed sale and purchase of target's assets.

Section 1.338-2(c)(4)(i) 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. Under § 1.338(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 ("QSP") 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 and purchase of the other corporation's assets is considered to take place after the deemed sale and purchase of target's 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 § 301.9100-1(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. 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 the regulations (i.e., § 1.338-1(d) and 1.338-1(g)). 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.

Information, affidavits, and representations submitted by Company Officials and Tax Professionals, Outside CPAs, and Authorized Representatives explain the circumstances that resulted in the failure to file a valid Election. The information establishes that Parent requested relief before the Service discovered that the Election was not filed, that Parent's applicable returns have not been examined, and that no returns have been filed that are not consistent with the Election. The information also establishes that tax professionals were responsible for the Election, that Purchaser and Target relied on the tax professionals to timely make the Election, and that the government will not be prejudiced if relief is granted. See § 301.9100-3(b)(1)(i) and (iv).

Based on the facts and information submitted, including the representations that have been made, we conclude that Parent has established that 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 Parent (as the common parent of the consolidated group of which the United States shareholder of the controlled foreign purchasing corporation, and of the deemed controlled foreign purchasing corporation, is a member) to file the Election with respect to the acquisition, and deemed acquisition, of the stocks of the Targets, as described above.

The above extension of time is conditioned on: (1) Parent making the Election for Target #1, Target #2 and Target #3 (rather than just for Target #3), and (2) the taxpayers' (Parent's and its subsidiaries', Targets', and (and, if they have any U.S. tax liability) Sellers') 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' tax liability is lower. Section 301.9100-3(c).

Parent, as the common parent of the group, should file the Elections in accordance with §§ 1.338-1(d) and 1.339-1(g). That is, new elections on Forms 8023 (not Forms 8023-A) 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. Purchaser and "old" Targets must file or amend (if and as applicable) their applicable return(s) (to report the acquisitions as "section 338 transactions"), and to attach a copy of the Forms 8023 and a copy of this letter. More specifically, "old" Targets must file separate final returns (if and as applicable) and the "new" Targets must be included in Parent's return (by being listed on Form 5471, Information Return With Respect to a Foreign Corporation) for the first year following the acquisitions. Also, a copy of this letter should be attached to the election forms. See §§ 1.338-1(e) and 1.338-1(g), and Announcement 98-2, 1998-2 I.R.B. 38.

No opinion is expressed as to: (1) whether Purchaser's acquisition of the Targets' stocks qualify as a "qualified stock purchase," (2) whether the acquisition of Targets' stocks qualify for § 338(a) treatment, and (3) if the acquisition of Targets' stocks qualify for § 338(a) treatment, as to the amount of gain or loss recognized (if any) by the Targets 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 the authorized representatives listed on your powers of attorney on file in this office.

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Sincerely yours,

Assistant Chief Counsel (Corporate)

by \_\_\_\_\_  
Richard Todd  
Counsel to the Assistant  
Chief Counsel (Corporate)