

## Internal Revenue Service

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## Department of the Treasury

Washington, DC 20224

Person to Contact:

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Refer Reply To:

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Date:

February 21, 2001

### LEGEND:

Parent =

Purchaser =

Target =

Sellers =

Date A =

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Date B =

Date C =

State M =

State N =

Business X =

Business Y =

Purchaser's  
Tax Professional =

This is in response to a letter dated October 17, 2000, requesting an extension of time to make a joint election pursuant to §§ 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations. All citations in this letter to regulations under § 338 are to the regulations as in effect for Date A. The material information submitted for review is summarized below.

Parent (as common parent of the consolidated group of which Purchaser is a member) and Sellers request an extension to file a “§ 338(h)(10) election” pursuant to § 338 (h)(10) of the Internal Revenue Code and § 1.338(h)(10)-1(d) of the Income Tax Regulations (the “Election”), regarding Purchaser’s acquisition of Target on Date A.

Parent is the common parent of a consolidated group and Purchaser is a member of the group. Purchaser is incorporated in State M and is engaged in Business X. Target is incorporated in State N and has elected to be treated as an S corporation for Federal income tax purposes. Target is engaged in Business Y. Sellers own all of the Target stock.

On Date A, Sellers and Purchasers entered into a stock purchase agreement whereby Purchaser acquired all of the Target stock in exchange for cash in a fully taxable transaction. It is represented that the stock purchase between Purchaser and Sellers is a “qualified stock purchase” as defined in § 338(d)(3). It is further represented that Purchaser and Sellers are not related within the meaning of § 338(h)(3).

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Parent and Sellers intended to make the Election. The Election was due on Date B. However, for various reasons the Election was not made. On Date C (which is after the due date for the Election), Purchaser's Tax Professional 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, Target's, or Sellers' taxable year(s) 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" under § 338(g), 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), be attributed to the person acquiring such stock.

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. The sale of stock included in the qualified stock purchase generally is ignored. 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). Gain or loss on the deemed sale is included on the consolidated return of the selling group (unless the target corporation is a member of a selling affiliated group filing separate returns or an S corporation). Section 1.338(h)(10)-1(d) provides that a § 338(h)(10) election may be made for the target corporation if the purchasing corporation makes a "qualified stock purchase" of the target corporation stock. Section 1.338(h)(10)-1(d)(3) provides that if a § 338(h)(10) election is made for the target corporation, it is irrevocable and a § 338 election is deemed made for the target corporation.

Section 1.338(h)(10)-1(d)(2) provides that a § 338(h)(10) election is jointly made

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by a purchaser and the selling consolidated group (or the selling affiliate or the S corporation shareholders) on Form 8023 in accordance with the instructions to the form. The regulations further provide that the election must be made not later than the 15<sup>th</sup> day of the ninth month beginning after the month in which the acquisition date occurs. The instructions to Form 8023 provide that a § 338(h)(10) election must be made jointly by the purchasing corporation and the common parent of the selling consolidated group (or selling affiliate or S corporation shareholders). The instructions provide that the form must be signed by a person authorized to act on behalf of each corporation, and if made for as S corporation, it must be signed by each S corporation shareholder who sells target stock in the qualified stock purchase. The instructions further provide that the signatures, dates and titles (if applicable) of those persons must be provided in a "signature attachment", and they provide specific details as to the preparation of the "signature attachment" and its attachment to Form 8023.

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 6 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. 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 Parent and Sellers to file the Election, provided Parent and Sellers 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.

Affidavits, representations and information submitted from Parent, Purchaser, Target, Sellers and Purchaser's Tax Professional explain the circumstances surrounding the failure to make the Election. This information also establishes that the

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taxpayers relied on a qualified tax professional, the request for relief was initiated before the failure to make the Election was discovered by the Internal Revenue Service, and that the government will not be prejudiced if relief is granted. See §§ 301.9100-3(b)(1)(i) and (v).

Based on the facts and information submitted, and representations made, we conclude the taxpayers have shown they acted reasonably and in good faith in failing to make the Election, the requirements of §§ 301.9100-1 and 301.9100-3 have been met, and granting relief will not prejudice the government. Therefore, an extension of time is granted under § 301.9100-1, until 30 days from the date of issuance of the letter for Parent and Sellers to file the Election with respect to the purchase of Target stock on Date A.

The above extension of time is conditioned on (1) the filing, within 120 days of the issuance of this letter, of all returns and amended returns (if any) necessary to report the transaction in accordance with the Election; and (2) the fact it will not produce a lower tax liability for the Parent group, Target and Sellers, in the aggregate for all years to which the Election applies, than it would have had the Election been timely made (taking into account the time value of money). A determination thereof will be made upon audit of the Federal income tax returns involved. No opinion is expressed as to the taxpayers' tax liability for the years 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 and Sellers must file the Election in accordance with § 1.338(h)(10)-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 to the form. A copy of this letter should be attached to the Election form. Parent and Sellers, having reported the acquisition as a "§ 338(h)(10)" transaction, must amend their applicable returns to attach a copy of the Election (and the information required therewith) and a copy of this letter.

We express no opinion regarding: (1) whether the acquisition/sale of 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; (3) if § 338(h)(10) is applicable, as to the amount of gain or loss, if any, recognized by Target on its deemed asset sale; or (4) whether Parent, Purchaser, and Target are members of a consolidated group. In addition, we express no opinion as to the tax effects or consequences of filing the Election later 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. However, all essential facts are subject to verification. In addition, notwithstanding that an extension is granted under § 301.9100-1 to file the Election, penalties and interest, if any, that would

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otherwise be applicable still apply.

This letter is directed only to the taxpayers who requested it. Section 6110(k)(3) provides that it may not be used or cited as precedent.

Sincerely yours,  
Associate Chief Counsel (Corporate)

By *Filiz Serbes*  
Chief, Branch 3