

Internal Revenue Service

Department of the Treasury

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Person to Contact:

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Date:

July 15, 1999

LEGEND:

Purchaser =

Seller =

Target =

Target Affiliates =

Shareholder A =

Shareholder B =

Company Official =

Tax Director =

Outside
CPA =

New Advisor =

Authorized
Representatives =

Business A =

Business B =

Country C =

Country D =

Date #1 =

Date #2 =

Date #3 =

Date #4 =

Date #5 =

Dear :

This letter responds to your Authorized Representatives' letter dated June 24, 1998, 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 Target (as the common parent of the consolidated group and as the successor to Purchaser) for Target to file a "section 338 election" under § 338(g) of the Internal Revenue Code and §§ 1.338-1(d) and 1.338(g) of the Income Tax Regulations, with respect to Purchaser's acquisition of Target stock and the deemed acquisition of Target Affiliates' stock (hereinafter collectively referred to as the "Election") on Date #2. Additional information was received in letters dated December 11, 1998, February 19, February 22, March 2, April 15, April 16, May 4, June 21 and July 8, 1999. The material information submitted for consideration is summarized below.

Purchaser was the common parent of a consolidated group that had a 52/53 week taxable year, ending on the Saturday closest to December 31, and which used the accrual method of accounting. Purchaser was newly formed on Date #1, by Shareholder A (a Country C corporation) and Shareholder B (a domestic publicly traded corporation), for the purpose of acquiring Target and becoming the holding company thereof. Target is a domestic corporation that was wholly owned by Seller, a Country C corporation; and Target Affiliates are domestic corporations that are wholly owned by Target. Purchaser and Target are engaged in Business A and Business B, respectively. It is represented that each of the Target Affiliates qualifies as a target affiliate of Target under § 1.338-1(c)(14).

On Date #2, Purchaser and Seller entered into a stock purchase agreement for Purchaser to acquire all of the outstanding stock of Target (including Target Affiliates). Also on Date #2, Purchaser acquired all of the stock of Target (including Target Affiliates) from Seller, for cash, in a fully taxable transaction. It is represented that Purchaser was not related to Seller, within the meaning of § 338(h)(3), and that the acquisition of Target, and the deemed acquisition of the Target Affiliates, each constituted a "qualified stock purchase," within the meaning of § 338(d)(3). After the

acquisition, Target and Target Affiliates were included in Purchaser's consolidated income tax return.

The Election was due on Date #3 (which is after Date #2), but for various reasons it was not filed. On Date #4 (which is after Date #3) Purchaser merged with and into Target, pursuant to applicable state law, in a transaction that is represented to qualify as a reorganization under §§ 368(a)(1)(A) and 381(a). It is further represented that Target is the successor to Purchaser and the proper party to make the Election, within the meaning of § 1.338-2(c)(2). On Date #5 (which is after Date #4), Company Official, Tax Director, New Advisor, 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 Purchaser's, Target's (the successor's), or "old" Target's taxable years 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 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 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)(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-A 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(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)(2) provides that an election under § 338 may be made for target after the acquisition of assets of the purchasing corporation by another corporation in a transaction described in § 381(a), provided that the purchasing corporation is considered for tax purposes as the purchaser of the target stock. The acquiring corporation in the § 381(a) transaction may make an election under § 338 for target.

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-A 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)). Therefore, the Commissioner has discretionary authority under § 301.9100-1 to grant an extension of time for Target to file the Election, provided Target (as the successor to Purchaser) shows Purchaser 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 Target, Company Official, Tax Director, Outside CPA, New Advisor, and Authorized Representatives explain the circumstances that resulted in the failure to file a valid Election. The information 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)(iv).

Based on the facts and information submitted, including the representations that have been made, we conclude that Target (as the successor to Purchaser) has established that Purchaser and Target 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 Target (as the common parent of the consolidated group and as the successor to Purchaser) to file the Election with respect to Purchaser's acquisition of the stock of Target on Date #2, as described above.

The above extension of time is conditioned on the taxpayers' (Purchaser's, Target's, and Seller'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' tax liability is lower. Section 301.9100-3(c). The above extension of time is also conditioned on (1) Purchaser being the purchasing corporation for tax purposes, and (2) Target being the successor to Purchaser and entitled to make the Election. See § 1.338-2(c)(2).

Target, as the common parent of the group, and as the successor corporation to Purchaser, should file the Election in accordance with § 1.338-1(d). That is, a new election on Form 8023-A (not 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). Purchaser and "old" Target must file or amend their returns, as applicable, to report the acquisition as a "section 338 transaction." A copy of this letter should be attached to the election form, and a copy of this letter and the election form should be attached to the return(s). See, Announcement 98-2, 1998-2 I.R.B. 38, and § 1.338-1(g).

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, (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, and (4) whether Purchaser is the purchasing corporation for tax purposes and Target is the successor thereto that is entitled to make the Election pursuant to § 1.338-2(c)(2).

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 your authorized representative first listed on your power of attorney on file in this office.

Sincerely yours,
Assistant Chief Counsel (Corporate)

by _____
Bernita Thigpen

Deputy Assistant Chief
Counsel (Corporate)