

## Internal Revenue Service

## Department of the Treasury

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Washington, DC 20224

Person to Contact:

Telephone Number:

Refer Reply To:

CC:CORP:B03 - PLR-116427-01

Date:

April 30, 2001

### Legend:

Purchaser =

Target =

Sellers =

Date A =

Date B =

Date C =

Date D =

State M =

State N =

Purchaser's  
Tax Professional =

This is in response to a letter dated March 15, 2001, 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.

Purchaser 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

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Income Tax Regulations (the "Election"), regarding Purchaser's acquisition of Target on Date A.

Purchaser is a C corporation incorporated in State M. Target was incorporated in State N and had elected to be treated as an S corporation for Federal income tax purposes. Sellers owned all of the Target stock.

On Date A, Purchaser and Sellers entered into a stock purchase agreement whereby Purchaser acquired all of the Target stock in exchange for cash in a fully taxable transaction. On Date B, Purchaser liquidated Target. It is represented that the stock purchase between Purchaser and Sellers is a "qualified stock purchase" as defined in § 338(d)(3).

Purchaser and Sellers intended to make the Election. The Election was due on Date C. However, for various reasons the Election was not made. On or about Date D (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 assessment under § 6501(a) has not expired for Purchaser'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" or a "§ 338(h)(10) election"; and (2) the acquisition is a "qualified stock purchase."

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. 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).

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.

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

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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 Purchaser and Sellers to file the Election, provided Purchaser 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 Purchaser, Sellers and Purchaser's Tax Professional explain the circumstances surrounding the failure to make the Election. This information also establishes that the 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 Purchaser 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 Purchaser, 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).

Purchaser 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

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form. A copy of this letter should be attached to the Election form. Purchaser 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; or (3) any other tax consequences arising from the Election. In addition, we express no opinion 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 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 otherwise be applicable still apply.

Purchaser must provide Sellers with a copy of this letter.

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.

Pursuant to a power of attorney on file in this office, a copy of this letter is being sent to your authorized representative.

Sincerely yours,  
Associate Chief Counsel (Corporate)

By: Ken Cohen  
Senior Technician Reviewer, Branch 3