

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-132438-00

Date:

March 8, 2001

LEGEND:

Purchaser =

Seller =

Target =

Sub 1 =

Sub 2 =

Date A =

Date B =

Date C =

Company Official =

Outside Tax Professional #1 =

Outside Tax Professional #2 =

Dear:

This is in response to your authorized representative's letter dated December 15, 2000, requesting an extension of time under §§ 301.9100-1 through 301.9100-3 of the Procedure and Administration Regulations to file an election. Purchaser and Seller are requesting the extension of time to file a "§ 338(h)(10) election" under §§ 338(g) and 338(h)(10) of the Internal Revenue Code and § 1.338-3(h)(10)-1(d) of the Income Tax Regulations (the "Election") with respect to the Purchaser's acquisition of the stock of Target on Date A (the "Acquisition"). (All citations in this letter to regulations under § 338 are to the regulations as in effect on Date A). Additional information was received in a letter dated February 20, 2001. The material information submitted is summarized below.

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Purchaser is the common parent of a consolidated group that has a calendar taxable year and uses the accrual method of accounting. Seller is the common parent of an affiliated group that does not file a consolidated federal income tax return. Seller has a taxable year ending November 30 and uses the accrual method of accounting. At the time of the Acquisition, Seller owned all the stock of Target. Target had two subsidiaries, Sub 1 and Sub 2, neither of which was active on Date A and neither of which had any assets on that date. No election is being sought for Sub 1 or Sub 2.

On Date A, Purchaser acquired all of the shares of Target from Seller in exchange for cash, in a fully taxable transaction. The Acquisition was pursuant to a stock purchase agreement effective Date A. Following the acquisition, "new" Target was included in the Purchaser group's consolidated federal income tax return. It is represented that the Acquisition qualified as a "qualified stock purchase," as defined in § 338(d)(3) and that Purchaser was not related to Seller within the meaning of § 338(h)(3).

Purchaser and Seller intended to file the Election. The Election was due on Date B. However, for various reasons a valid Election was not filed. On Date C (which is after the due date for the Election), Purchaser learned 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 Purchaser's, Seller's, or Target's taxable years 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 have been or will be filed as if a valid Election had been made and it has been or will be 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 (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(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

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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) (other than paragraph (4) thereof), 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 in the consolidated return of the selling group (unless the target corporation is 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 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 15th 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 an 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.

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

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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(h)(10)-1(d)). Therefore, the Commissioner has discretionary authority under § 301.9100-1 to grant an extension of time for Purchaser and Seller to file the Election, provided Purchaser and Seller show that they 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 Purchaser, Seller, Company Official, Outside Tax Professional #1, and Outside Tax Professional #2 explain the circumstances that resulted in the failure to file the Election. The information establishes that: (1) the applicable taxable year(s) has not been examined and (2) the Service has not discovered that the Election was not timely filed. The information also establishes that the interests of the government will not be prejudiced if relief is granted. See § 301.9100-3(b)(1)(i).

Based on the facts and information submitted, including the representations made, we conclude that Purchaser 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 Purchaser and Seller to file the Election with respect to the acquisition of the stock of Target as described above.

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 taxpayers' (Purchaser's consolidated group's, Target's, and Seller's) 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 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 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).

Purchaser and Seller must file the Election in accordance with § 1.338(h)(10)-1(d). That is, an 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. Purchaser, having reported the transaction as a "§ 338(h)(10)" transaction, must amend its applicable returns to attach a copy of the Election (and the information required therewith) and a

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copy of this letter. Seller and Target must attach a copy of the Election (and the information required therewith) and a copy of this letter to their applicable returns when filed.

We express no opinion regarding: (1) whether the acquisition of the stock of Target qualifies as a "qualified stock purchase" under § 338(d)(3); (2) whether the acquisition of the stock of Target qualifies for § 338(h)(10) treatment; or (3) if § 338(h)(10) is applicable, as to the amount and character of gain or loss (if any) recognized by Target on the deemed asset sale and deemed liquidation.

In addition, we express no opinion as to the tax 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 taxpayer and its employees. However, all essential facts and computations are subject to verification. 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, shall still apply.

Purchaser must provide Seller a copy of this letter.

This ruling letter is directed only to the taxpayer(s) requesting it. Section 6110(k)(3) of the Code 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 has been sent to your authorized representative.

Sincerely yours,
Associate Chief Counsel (Corporate)
By: Edward S. Cohen
Chief, Branch 2