

Internal Revenue Service

Department of the Treasury

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Person to Contact:

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Telephone Number:

Refer Reply To:

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Date:

April 17, 2000

Legend

Parent =

Target =

Sub X =

Sub Y =

Sub Z =

State A =

Country B =

Date A =

Date B =

Date C =

Date D =

Date E =

Date F =

X percent =

Y percent =

Outside CPA =

Authorized
Representative =

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Other Authorized
Representative =

Parent Officials =

Entity X =

Entity Y =

Dear :

This responds to Authorized Representative's (also Outside CPA) letter dated December 13, 1999, submitted on your behalf, requesting an extension of time under §§ 301.9100-1 through 301.9100-3 of the Procedure and Administration Regulations to file an election. Parent (as common parent of the consolidated group of which Sub X is a member) is requesting an extension to file an election under § 338(g) of the Internal Revenue Code with respect to the acquisition of Target and Target's Subs (hereinafter such election is referred to as "the Election"). All citations in this letter to regulations under § 338 are to the regulations as in effect for Date C. The material information submitted for consideration is summarized below.

Sub X, a State A corporation, is a first-tier, wholly owned subsidiary of Parent, a State A corporation. Parent, was (and is) the common parent of a consolidated group. Parent has a taxable year ending June 30 and uses the accrual method of accounting.

Sub X owns 100 percent of Sub Y, a corporation incorporated under the laws of Country B. Sub X also owns one share of Sub Z, a corporation incorporated under the laws of Country B. Sub Y owns the remaining shares of Sub Z. Target is a corporation formed under the laws of Country B. Prior to its acquisition by Sub Z, the stock of Target was widely held by the public of Country B.

Target has numerous wholly owned non-United States subsidiary corporations (hereinafter collectively referred to as "Target's Subs"), and one United States subsidiary corporation ("U.S. Sub"). Target and Target's Subs were not (1) controlled foreign corporations within the meaning of § 957(a); (2) passive foreign investment companies for which an election was made under § 1295; (3) foreign investment companies the ownership of which is described in § 552(a) or (4) required under § 1.6012-2(g) to file a United States income tax return.

This request for an extension of time to make the § 338(g) election is made with respect to Target and Target's Subs. No request for an extension of time to make a § 338(g) election is being requested for U.S. Sub.

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On Date A, Sub Z began to purchase shares of Target on the open market of Country B pursuant to a public tender offer. The public tender offer was contingent on the tendering of at least 80 percent of the outstanding Target shares by the Target shareholders within approximately 60 days. By Date B, Sub Z had purchased approximately X percent of the outstanding shares of Target. On Date C, Sub Z purchased a block of shares constituting Y percent of the shares of Target. This Y percent block of shares was acquired in two separate transactions occurring on the same date. Thus, by Date C, Sub Z had acquired more than 80 percent of the outstanding shares of Target. By Date F, Sub Z acquired the balance of the outstanding shares of Target. Prior to making the public tender offer for the stock of Target, Parent determined that it would file an election pursuant to the provisions of § 338(g) to treat the acquisition of the stock of Target and Target's Subs as the purchase of the assets of Target and Target's Subs. Parent also determined that it would not file a § 338 election for U.S. Sub.

It has been represented that (1) all of the acquisitions of Target stock made by Sub Z were acquired for cash in fully taxable transactions (collectively referred to as the "Purchase"); (2) neither Parent nor any members of the Parent affiliated group was related to the Target shareholders within the meaning of § 338(h)(3); and (3) the acquisition of the stock of Target was a "qualified stock purchase" within the meaning of § 338(d)(3).

Shortly after the acquisition of Target, Parent caused Sub Z and Target to be converted from Entity X to Entity Y under Country B law. For United States income tax purposes, it has been represented that these conversions qualified under § 368(a)(1)(F). Subsequently, Parent caused the appropriate shareholders to make "check the box" elections for Sub Y, Sub Z, Target, and certain of Target's Subs, resulting in their treatment as disregarded entities. It has been represented that such elections resulted in such corporations being treated as having liquidated into their respective shareholder corporations under § 332.

The Election was due for Target and Target's Subs on Date D. However, for various reasons the Election was not filed on the applicable due date. On Date E (which is after Date D and, thus, after the due date for the Election for Target and Target's Subs), Outside CPA discovered that the Election was not timely filed. Subsequently, this request was submitted, under § 301.9100-1(a), for an extension of time to file the Election. The statute of limitations under § 6501 has not run for the tax year in which the acquisitions occurred, the taxable years 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.

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 1.338-

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1(c)(10) provides that a "§ 338 election" is an election to apply § 338(g) to target.

Section 338(g) specifies the requirements for making a "§ 338 election." 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 1 corporation is acquired by another corporation by purchase during the 12-month acquisition period.

Sections 1.338-1(g)(1)(i) and (v) provide that for purposes of § 1.338-1(g)(1) (i.e., qualifying for the special rule which provides a later filing date for an election under § 338(g) than ordinarily required), a foreign corporation is considered subject to United States tax (i.e., is not eligible for the special rule) if it is a controlled foreign corporation.

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) (other than paragraph (4) thereof), be attributed to the person acquiring such stock.

Section 1.338-1(d) provides that a purchasing corporation makes a "§ 338 election" for target by filing a statement of "§ 338 election" on Form 8023 in accordance with the instructions on the form. The "§ 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 "§ 338 election" is irrevocable.

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.

Section 1.338-2(c)(1) provides that the purchasing corporation may make an election under § 338 for target even though target is liquidated on or after the acquisition date. Section 1.338-2(c)(2) provides that an election 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.

The term target affiliate has the same meaning as in § 338(h)(6) (applied without § 338(h)(6)(B)(i)). Thus, a corporation described in § 338(h)(6)(B)(i) is considered a

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target affiliate for all purposes of § 338. If a target affiliate is acquired in a qualified stock purchase, it is also a target. See § 1.338-1(c)(14). 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. See § 1.338-2(b)(4).

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 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 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 Parent (as the common parent of the consolidated group that includes Sub X) to file the Election, provided Parent shows that Sub X 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 Parent, Parent Officials, Outside CPA (and Authorized Representative) and Other Authorized Representative explain the circumstances that resulted in the failure to timely file the valid Election.

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The information establishes that the request for relief was initiated before the failure to make the regulatory election was discovered by the Internal Revenue Service, that Parent reasonably relied on a qualified tax professional, and that the interests of 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, including the representations made, we conclude that Parent and Sub X 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. Accordingly, an extension of time is granted 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 that includes Sub X) to file the Election with respect to the acquisition of Target and Target's Subs.

The above extension of time is conditioned on the taxpayers' 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 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' liability is lower. Section 301.9100-3(c).

Parent (as common parent of the consolidated group that includes Sub X) should file the Election in accordance with § 1.338-1(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 on the election form (together with any information that is required to be attached to the election form). A copy of this letter should be attached to the election form. Parent must amend its consolidated return for its first taxable year following the acquisitions to attach a copy of this letter and the election form (and any information required therewith) and to show that the acquisitions were reported as § 338 transactions. Also, Parent must file "final returns" for Target and Target's Subs (if and as applicable) reporting the acquisitions as § 338 transactions and attach thereto a copy of this letter and the election form. See §§ 1.338-1(e) and (g) and Announcement 98-2, 1998-1 C.B. 282.

No opinion is expressed as to: (1) whether the acquisition of the stock of Target or Target's Subs qualifies as a "qualified stock purchase"; (2) whether the acquisition of the stock of Target or Target's Subs qualifies for § 338(a) treatment; or (3), if the acquisition of the stock of Target and/or Target's Subs qualifies for § 338(a) treatment, as to the amount of gain or loss recognized (if any) by any of Target or Target's Subs on the deemed asset sales. Further, no opinion is expressed as to the validity of any elections to be treated as disregarded entities for United States income tax purposes.

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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 tax effects or consequences 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(s) 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 Parent, pursuant to the power of attorney on file in this office.

Sincerely yours,
By: Philip J. Levine
Assistant Chief Counsel (Corporate)