

Internal Revenue Service

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Department of the Treasury

Washington, DC 20224

Person to Contact:

Telephone Number:

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Date:

November 24, 1999

Parent =

Purchaser =

Target =

Sub =

Sellers =

Country X =

Company
Officials =

Authorized
Representatives =

Business A =

Business B =

Business C =

Business D =

Day X =

Y =

Date A =

Date B =

Date C =

Date D =

Date E =

Date F =

This letter responds to your representative's letter dated August 2, 1999, requesting an extension of time under §§ 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations to file elections. The extension is being requested by Parent (as the common parent of the consolidated group of which Purchaser was a member, the successor in interest of Purchaser, and the United States Shareholder of Purchaser) to file Elections under § 338(g) of the Internal Revenue Code and §§ 1.338-1(d) and (g) of the Income Tax Regulations, with respect to Purchaser's acquisition of Target and Sub stock on Date A (hereinafter referred to collectively as the

"Elections"). Additional information was received in a letter dated September 27, 1999. The material information submitted for consideration is summarized below.

Parent is the common parent of a consolidated group that uses the accrual method of accounting and has a 52-53 week taxable year ending on Day X. Purchaser, Target, and Sub are Country X corporations. Parent wholly owned Purchaser on Date A. Target owned Y percent of the stock of Sub on Date A. On Date A, Purchaser acquired from Sellers all of the stock of Target and all the stock of Sub not owned by Target (together, Sellers and Target had owned all of the stock of Sub). Parent and the members of its consolidated group were engaged in Business A. Purchaser, Target, and Sub were engaged in Businesses B, C, and D, respectively.

Prior to the acquisition, Sellers, Purchaser, Target, and Sub neither filed United States income tax returns, nor were subject to United States income taxation, nor were required, under § 1.6012-2(g), to file a United States income tax return. Further, with respect to Target and Sub, neither was, prior to the acquisition: (1) a controlled foreign corporation within the meaning of § 957(a); (2) a passive foreign investment company; or (3) a foreign investment company or a foreign corporation the stock ownership of which is described in § 552(a)(2). Sellers were foreign individuals who are represented not to be United States Shareholders within the meaning of § 951(b).

On Date A, Purchaser acquired from Sellers, for cash in fully taxable transactions, all of the stock of Target and all of the stock of Sub that Target did not own. Parent represents that the acquisition of Target constituted a qualified stock purchase within the meaning of § 338(d)(3), and that neither Parent, nor Purchaser, were related to Sellers within the meaning of § 338(h)(3). Parent represents that the period of limitations on assessments under § 6501(a) has not expired for Parent's, Purchaser's, Target's, or Sub's taxable years in which the acquisition occurred, the taxable years in which the Elections should have been filed, or any taxable years that would have been affected by the Elections had they been timely filed. Returns were filed consistent with making the Elections (albeit without attaching a copy of the Elections). After the acquisition, "new" Target and Sub were included in Parent's consolidated return by being listed on Form 5471 (information return with respect to a foreign corporation). Purchaser was liquidated, for U.S. tax purposes, on Date B; Target was liquidated on Date C; and Sub was liquidated on Date D.

The Elections were due on Date E. However, for various reasons the Elections were not filed. On Date F (which is after Date E), Company Officials discovered that the Elections had not been filed. Subsequently, this request was submitted, under § 301.9100-1, for an extension of time to file the Elections.

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

Sections 1.338-1(g)(1)(i) and (ii) provide, inter alia, that a foreign purchasing corporation or deemed foreign purchasing corporation is not eligible for the special rule under § 1.338-1(g)(1) (i.e., which specifies a filing date for the election that is later than the filing date required by § 338(g) and § 1.338-1(d)) if, during the relevant acquisition period, such foreign corporation has, as a member of its affiliated group (as defined at § 338(h)(5) and § 1.338-1(c)(2)) any corporation that is not a foreign corporation or that is subject to United States taxation.

Section 1.338-1(g)(3) provides that the United States shareholders (as defined in § 951(b)) of a foreign purchasing corporation that is a controlled foreign corporation (as defined in § 957, taking into account § 953(c)) may file a statement of "section 338 election" on behalf of the purchasing corporation if the purchasing corporation is not required under § 1.6012-2(g) (other than § 1.6012-2(g)(2)(i)(b)(2)) to file a United States income tax return for its taxable year that includes the acquisition date. Form 8023 must be filed as described in the form and its instructions, and also must be attached to Form 5471 (information return with respect to foreign corporation) filed with respect to the purchasing corporation by each United States shareholder for the purchasing

corporation.

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 and the instructions thereto.

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.

Under § 301.9100-1(c), the Commissioner has discretion to grant a reasonable extension of time under the rules set forth in § 301.9100-3 to make a regulatory election, for 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 301.9100-3 provides extensions of time for making regulatory elections that do not meet the requirements of § 301.9100-2 (for automatic extensions). 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 Elections was fixed by the regulations (i.e., §§ 1.338-1(d) and (g)). Therefore, the Commissioner has discretionary authority under § 301.9100-1 to grant an extension of time for Parent to file the Elections, provided Parent shows it 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 Company Officials explain the circumstances that resulted in the failure to file the Elections. The information establishes that tax professionals were responsible for the Elections, that

Parent relied on them for the Elections, and that the government will not be prejudiced if relief is granted. The information also establishes that no returns have been filed that are not consistent with the Elections, and that relief was requested before the failure to make the Elections was discovered by the Service. See §§ 301.9100-3(b)(1)(i) and (v).

Based on the facts and information submitted, including the representations that have been made, we conclude that Parent acted reasonably and in good faith in failing to timely file the Elections, 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 Parent to file the Elections with respect to the acquisition of the stock of Target and Sub, as described above.

The above extension of time is conditioned on Parent's, Purchaser's, Target's, Sub's and Sellers' (to the extent they have any US tax liability) tax liability being not lower, in the aggregate for all years to which the Elections apply, than it would have been if the Elections had been timely made (taking into account the time value of money). No opinion is expressed as to these parties' tax liabilities 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 parties' aggregate liability is lower. Section 301.9100-3(c).

Parent should file the Elections in accordance with §§ 1.338-1(d). That is, new elections 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. A copy of this letter should be attached to the election form. Parent, Purchaser, Target, and Sub must amend their returns (in-as-much-as the transaction was reported as a § 338(g) transaction, Target and Sub each must file a final return, if and as applicable) to attach thereto a copy of this letter and a copy of the election form. That is, "old" Target and Sub must file separate final returns (if and as applicable) and "new" Target and Sub must be included in Parent's consolidated return (by being listed on Form 5471, Information Return with respect to a Foreign Corporation) for the first year following the acquisition. See § 1.338-1(e). Also see §§ 1.338-1(g) and 1.338-5. A combined election form may be used for Target and Sub.

No opinion is expressed as to: (1) whether the acquisition of either Target or Sub stock qualifies as "qualified stock purchase"; (2) whether the acquisition of either Target or Sub stock qualifies for § 338(a) treatment; or (3) if the acquisition of either Target or Sub stock qualifies for § 338(a) treatment, as to the amount of gain or loss recognized (if any) by Target or Sub on their deemed asset sales.

In addition, no opinion is expressed as to the tax effects or consequences of filing the Elections 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 Elections 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 Parent, 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 Elections, penalties and interest that would otherwise be applicable, if any, continue to apply.

A copy of this letter is being sent to the Authorized Representative designated on your power of attorney.

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.

Sincerely yours,

Assistant Chief Counsel (Corporate)

by: Richard Todd

Richard Todd
Counsel to the Assistant
Chief Counsel (Corporate)