

Internal Revenue Service

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Department of the Treasury

Washington, DC 20224

Person to Contact:

Telephone Number:

Refer Reply To:

CC:CORP:B02-PLR-109469-00

Date:

August 30, 2000

LEGEND:

Purchaser =

Target =

Sellers =

Country X =

Business Y =

Purchaser's
Company Official =

Outside Tax
Professional =

Date A =

Date B =

Date C =

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Dear:

This letter responds to your letter dated April 20, 2000, 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 Purchaser to file an election under § 338(g) of the Internal Revenue Code and § 1.338-1(d) of the Income Tax Regulations, with respect to Purchaser's acquisition of the stock of Target (sometimes hereinafter referred to as the "Election"), on Date A. (All citations in this letter to regulations under § 338 are to the regulations as in effect on Date A). Additional information was received in letters dated May 30, and August 21, 2000. The material information submitted for consideration is summarized below.

Purchaser is the common parent of a consolidated group that files its return on the basis of a calendar taxable year and that uses the accrual method of accounting. Target is a Country X corporation that was wholly owned by Sellers. Sellers are individuals who are citizens and residents of Country X and it is represented that each of the Sellers is not a United States shareholder, as defined in § 951(b). Purchaser, through its wholly-owned subsidiaries, and Target are engaged in Business Y. Target does not have any subsidiaries.

Prior to the acquisition, Target and Sellers did not file U.S. income tax returns and they were not subject to U.S. income taxation. Further, Target was not: (1) a controlled foreign corporation within the meaning of § 957(a); (2) a passive foreign investment company for which an election under § 1295 was in effect; (3) a foreign investment company or a foreign corporation the stock ownership of which is described in § 552(a)(2); or (4) required, under § 1.6012-2(g), to file a U.S. income tax return.

On Date A, Purchaser acquired all of the Target stock from Sellers, for cash and stock of Purchaser, in a fully taxable transaction. It is represented that the stock received by Sellers did not qualify under § 351 because Purchaser was a pre-existing corporation and the amount of Purchaser's stock received was very small as a percentage of the stock outstanding. After the acquisition, "new" Target was included in Purchaser's first return subsequent to the acquisition, by being listed on Form 5471 (Information Return of U.S. Persons with Respect to Certain Foreign Corporations). It is represented that: (1) Purchaser was not related to Sellers within the meaning of § 338(h)(3), and (2) Purchaser's acquisition of the stock of Target constituted a "qualified stock purchase" within the meaning of § 338(d)(3).

Purchaser intended to file the Election. The Election was due on Date B. However, for various reasons the Election was not filed. On or about Date C (which is after the due date for the Election), Purchaser's Company Official discovered that the

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Election had not been made. Subsequently, this request was submitted, under § 301.9100-1, for an extension of time to file the Election.

It is represented that the period of limitations on assessments under § 6501(a) has not expired for Purchaser's or Target's taxable year in which the acquisition occurred, the taxable year in which the Election should have been filed, or any taxable year(s) 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 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 (i) 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); (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), 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.

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

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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 Purchaser to file the Election, provided Purchaser 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 Purchaser, Purchaser's Company Official, and Outside Tax Professional explain the circumstances that resulted in the failure to file a valid Election. 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 competent tax professionals were responsible for the Election, that they were aware of all relevant facts, and that Purchaser relied on the tax professionals to timely make the Election. 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) and (v).

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

The above extension of time is conditioned on: (1) the filing, within 120 days of the issuance of this letter, all returns and amended returns (if any) necessary to report the transaction in accordance with the Election; and (2) the taxpayers' (i.e., Sellers', Purchaser's, and Target'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 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).

Purchaser 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

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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. Purchaser and Target should file, or amend, as applicable, their returns to report the acquisition as a "section 338 transaction," and to attach a copy of Form 8023 and a copy of this letter.

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, and (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 its deemed asset sale.

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 ruling 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.

Sincerely,

Associate Chief Counsel (Corporate)

by: _____
Ken Cohen, Acting Chief, Branch 3