

## Internal Revenue Service

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## Department of the Treasury

Washington, DC 20224

Person to Contact:

Telephone Number:

Refer Reply To:

**CC:CORP:B03 - PLR-130463-00**

Date:

**March 22, 2001**

Re:

Parent =

Target =

Purchaser =

Sellers =

State A =

Country B =

Date A =

Date B =

Date C =

Company Official =

Company  
Employee =

Authorized  
Representative =

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Business A =

This letter responds to your letter dated December 8, 2000, submitted on behalf of Parent, requesting an extension of time under §§ 301.9100-1 through 301.9100-3 of the Procedure and Administration Regulations to file an election. Additional information was submitted in a letter dated February 14, 2001. Parent (as common parent of the consolidated group including Purchaser) is requesting an extension 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 the acquisition of Target (hereinafter referred to as the "Election"). All citations in this letter to regulations under § 338 are to the regulations as in effect for Date A. The material information submitted for consideration is summarized below.

Parent, a State A corporation, is the common parent of a consolidated group. Parent wholly owns all of the stock of Purchaser, also a State A corporation. Parent has a taxable year ending on Date B and uses the accrual method of accounting. Target is a corporation formed under the laws of Country B. Prior to its acquisition by Purchaser, the stock of Target was wholly owned by Sellers, none of whom are United States persons within the meaning of § 7701(a)(30). Parent, Purchaser and Target are engaged in Business A.

Prior to the acquisition, neither Sellers nor Target were subject to United States income taxation, or was required, under § 1.6012-2(g), to file a United States income tax return. Further, prior to the acquisition, Target was not: a controlled foreign corporation, a passive foreign investment company, a foreign investment company, or a foreign corporation the stock ownership of which is described in § 552(a)(2).

On Date A, Purchaser purchased all of the outstanding shares of Target from Sellers for cash in a fully taxable transaction. It is represented that (1) the acquisition of the stock of Target by Purchaser constituted a "qualified stock purchase" within the meaning of § 338(d)(3); and (2) Purchaser and Sellers are not related within the meaning of § 338(h)(3).

Parent and Purchaser intended to make the Election. The Election was due on Date C. However, for various reasons the Election was not filed on the applicable due date. Subsequently, this request for relief under § 301.9100-1 was submitted to allow for an extension of time to file the Election.

It is represented that the period of limitations on assessment under § 6501 has

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not expired for Parent's consolidated group'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 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 the purchasing corporation makes or is treated as having made a "§ 338 election" or a "§ 338(h)(10) election" 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 "§ 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 1.1502-77(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 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

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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 to file the Election, provided Parent shows that 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 Parent, Company Official, Company Employee, and Authorized Representative explain the circumstances that resulted in the failure to timely file the 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 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 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, an extension of time is granted under § 301.9100-1, until 30 days from the date of issuance of this letter, for Parent to file the Election with respect to the acquisition of the stock of Target.

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' (Parent's consolidated group's, Target's and Sellers') 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 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 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. A copy

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of this letter should be attached to the election form. Parent must amend its consolidated return for its first taxable year following the acquisition to attach a copy of this letter and the election form. New Target must be included in Parent's consolidated return (by being listed on Form 5471) for the first year following the acquisition.

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

Sincerely yours,  
Associate Chief Counsel (Corporate)

By Filiz Serbes  
Chief, Branch 3