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Person to Contact:

Telephone Number:

Refer Reply To:

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Date:

March 18, 1999

Parent =

Purchaser =

Target =

Sellers =

Date A =

Date B =

Date C =

State W =

State X =

Authorized
Representatives =

This responds to your Authorized Representatives' letter, dated November 13, 1998, 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 Sellers are requesting an extension to file a "section 338(h)(10) election" under §§ 338(g) and 338(h)(10) of the Internal Revenue Code and § 1.338(h)(10)-1(d) of the Income Tax Regulations (the "Election"), with respect to Purchaser's acquisition of Target on Date A. Additional information was received in a letter dated March 3, 1999. The material information is summarized below.

Purchaser is a State W C corporation and a subsidiary of Parent, which is the common parent of an affiliated group filing consolidated returns. Purchaser uses the accrual method of accounting and has a fiscal year ending on Date B. Target was a State X subchapter S corporation, within the meaning of § 1361. Target used the accrual method of accounting and had a calendar year end. The Sellers are individuals who owned all of the stock of Target. They reside in State X and use the cash method of accounting.

On Date A, Sellers and Purchaser entered into a stock purchase agreement for Purchaser to acquire all of Sellers' Target stock, and, Purchaser did so for cash and warrants in a fully taxable transaction. It is represented that Purchaser's acquisition of Target stock qualified as a "qualified stock purchase" within the meaning of § 338(d)(3).

Purchaser and Sellers intended to file the Election as evidenced by the stock purchase agreement. The Election was due on Date C. However, while the Election was filed by Date C, the Form 8023 was not properly executed pursuant to Income Tax Regulations § 1.338(h)(10)-1(d) since it was signed by only one of the Sellers.

The Form 8023 was sent to the Purchaser for signature with instructions to then forward it to the Sellers for their signatures. Authorized Representatives prepared the filing instructions for the form but advised verbally that the form need only be signed by one of the Target shareholders.

After the due date, Purchaser and Sellers discovered that the Election was not properly filed. Subsequently, Authorized Representatives submitted a request for relief under Procedure and Administration Regulations § 301.9100 on behalf of Purchaser and Sellers. The statute of limitations on assessment under § 6501(a) has not expired for Purchaser's, Target's or Sellers' taxable year in which the transaction occurred or for any taxable year(s) that would have been affected had the Election 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 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 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 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 the 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 a 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. Sections 1.338(h)(10)-1(d)(2) and (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 Purchaser and 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 if a § 338(h)(10) election is made for an S corporation, Form 8023 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" to Form 8023.

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 1.1502-77(a) provides that the common parent, for all relevant purposes 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.

Under § 301.9100-1, 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, provided the taxpayer demonstrates to the satisfaction of the Commissioner that:

- (1) The taxpayer acted reasonably and in good faith, and
- (2) Granting relief will not prejudice the interests of the government.

In this case, Parent (as the common parent of the affiliated group of which Purchaser is a member) and Sellers were required by § 1.338(h)(10)-1(d)(2) to file the Election by Date C. However, for various reasons, the Election was not filed. Subsequently, Parent, Purchaser and Seller filed this request, under § 301.9100-1, for an extension of time to file the Election. The time for filing the Election is fixed by the regulations (§ 1.338(h)(10)-1(d)). Therefore, the Commissioner has discretionary authority under § 301.9100-1 to grant an extension of time for Parent and Sellers to file the Election, provided Parent and Sellers show that they acted reasonably and in good faith, that the requirements of §§ 301.9100-1 and 301.9100-3 are satisfied, and that granting relief will not prejudice the interests of the government.

Information, affidavits, and representations submitted by Parent, Purchaser, Sellers, and Authorized Representatives explain the circumstances that resulted in the failure to file a valid Election. The information also establishes that tax professionals were responsible for the Election, that Parent, Purchaser and Sellers relied on them to timely make the Election, that Purchaser and Sellers reported the transaction consistent with the election and requested relief before the omission was discovered by the Service, that they are not under audit or examination, and that 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, Purchaser and Sellers have shown that they acted reasonably and in good faith, that the requirements of §§ 301.9100-1 and 301.9100-3 are 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 Parent and Sellers to file the Election with respect to Purchaser's acquisition of Target stock, as described above.

The above extension of time is conditioned on (1) Parent and Sellers signing the

Election; (2) Parent, Purchaser and Sellers treating the acquisition/sale of Target stock as a § 338(h)(10) transaction; (3) the taxpayers' (Parent's, Purchaser'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); (4) Parent, Purchaser, Target and Sellers agreeing to extend the statute of limitations with respect to the § 338(h)(10) transaction to the date ending three years immediately following the issuance of this letter.

Parent, Purchaser and Sellers must file the Election in accordance with § 1.338(h)(10)-1(d) (i.e., 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 form). A copy of this letter should be attached to the election form. Parent, Purchaser and Sellers must file or amend, as applicable, their returns to report the transaction as a "section 338(h)(10)" transaction, and attach a copy of the Election (and the information required therewith) and a copy of this letter.

We express no opinion as to the taxpayers' tax liability for the years involved. A determination thereof will be made by the District Directors' offices 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).

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

In addition, we express no opinion 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 have relied on certain statements and representations made by Parent, Purchaser and Sellers. However, the District Director(s) should verify all essential facts. In addition, notwithstanding that an extension is granted under § 301.9100-1 to the 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.

Pursuant to a power of attorney on file in this office, a copy of this letter is being sent to your authorized representatives.

Sincerely yours,

Assistant Chief Counsel (Corporate)

Charles M. Levy

By Charles M. Levy
Counsel To The Assistant
Chief Counsel (Corporate)