

INTERNAL REVENUE SERVICE

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January 20, 1999

Parent =

Purchaser =

Target =

Sellers =

Purchaser's
Company
Official =

Authorized
Representative =

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Outside Tax
Professionals =

Date A =

Date B =

Date C =

Date D =

Business X =

Country Y =

X =

Business Z =

This responds to your letter dated June 30, 1998 requesting, on behalf of the taxpayers identified above, an extension of time under §§ 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations to file an election. Parent (as the common parent of the consolidated group of which the purchasing corporation is now a member) 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 (hereinafter referred to as the "Election"), with respect to Purchaser's acquisition of Target on Date A. Additional information was received in letters dated October 19 and December 10, 1998

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and January 5, 1999. The material information submitted for consideration is summarized below.

Parent, is a publicly traded domestic corporation and the common parent of a consolidated group that has a taxable year ending on June 30, and uses the accrual method of accounting. Purchaser is a domestic corporation that, prior to its acquisition by Parent, had a taxable year ending on March 31 and used the accrual method of accounting. Purchaser is engaged in Business X.

Prior to its acquisition by Purchaser, Target, a Country Y corporation, was wholly owned by Sellers (i.e., three Country Y holding companies, which were owned by citizens and residents of Country Y). Target is engaged in Business Z. Target did not have a permanent establishment in the United States prior to or after its acquisition by Purchaser. Neither Target nor the Sellers were subject to United States taxation and, accordingly, they have not filed United States income tax returns. None of the Sellers were United States shareholders as that term is defined in § 951(a) and, therefore, Target was not a controlled foreign corporation within the meaning of § 957(a) prior to Purchaser's acquisition. Moreover, Target was not a passive foreign investment company for which an election under § 1295 was in effect, a foreign investment company, or a foreign corporation the stock ownership of which is described in § 552(a)(2), and was not required under § 1.6012-2(g) to file a U. S. income tax return.

On Date A, Purchaser and Sellers entered into a Stock Purchase Agreement for Purchaser to acquire all of the Target stock from Sellers. Also on Date A, pursuant to the Stock Purchase Agreement, Purchaser acquired all of the Target stock from Sellers for cash, notes, and x shares of Purchaser's common stock in a fully taxable transaction. It is represented that Purchaser was not related to Sellers, within the meaning of § 338(h)(3), and that Purchaser's acquisition of Target qualified as a "qualified stock purchase" within the meaning of § 338(d)(3). Following Purchaser's acquisition of Target, "new" Target was a controlled foreign corporation, as defined in § 957(a), of Purchaser and was included in Purchaser's first return subsequent to the acquisition by being listed on Form 5471 (information return with respect to a foreign corporation).

Purchaser and Sellers intended to file the Election. The Election was due on Date B, but for various reasons it was not filed. On or about Date C (which is after the due date for the Election), Purchaser's Company Official, Outside Tax Professionals, and Authorized Representative discovered that the Election was not timely filed. On Date D, Parent acquired Purchaser's stock for cash in a taxable transaction. Subsequently, Parent filed this request, under § 301.9100-1, for an extension of time to file the Election. The period of limitations on assessment under § 6501(a) has not expired for Parent's, Purchaser's, or Target's taxable year in which the acquisition/sale was consummated, the taxable year in which the Election should have been filed, or for

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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 acquisitions if (1) the purchasing corporation makes a "section 338 election" under § 338(g) (or is treated as having made the election under § 338(e)) 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) (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 "section 338 election" for target by filing a statement of "section 338 election" on Form 8023-A in accordance with the instructions on the form. The "section 338 election" must be filed not later than the 15th day of the 9th month beginning after the month in which the acquisition date occurs. A "section 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 1.1502-77(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-A 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, provided the taxpayer demonstrates to the satisfaction of the Commissioner that:

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

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 section 301.9100-2. Requests for relief under section 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 can show that Parent and Purchaser 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's Company Official, Outside Tax Professionals and Authorized Representative explain the circumstances that resulted in the failure to timely file a valid Election. The information also establishes that tax professionals were responsible for the Election, that Purchaser relied on them to timely make the Election, and that the government will not be prejudiced if relief is granted. See § 301.9100-3(b)(1)(v).

Based on the facts and information submitted, including the representations made, we conclude that Parent and Purchaser have shown they 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 of which the purchasing corporation is now a member) to file the Election with respect to the acquisition of Target, as described above.

The above extension of time is conditioned on the taxpayers' (Purchaser's, Target's, and Parent's) tax liability 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

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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).

Parent (as the common parent of the consolidated group of which the purchasing corporation is a member) should file the Election in accordance with § 1.338-1(d). That is, a new election on Form 8023-A (not 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 the information that is required to be attached to the election form). Parent and "old" Target must amend (or file) their returns, as applicable, to report the acquisition as a "section 338 transaction(s)," and to attach to such returns a copy of the Election, the information that is required to be attached thereto, and a copy of this letter. Also, a copy of this letter should be attached to the election form. Also see, Announcement 98-2, 1998-2 I.R.B. 38, and § 1.338-1(g).

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, (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 the deemed asset sales, and (4) as to Parent's acquisition of Purchaser and the affects on the Election, if any.

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 effects 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 Purchaser and Parent, their employees and representatives. 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, if any, that would otherwise be applicable shall still apply.

This letter is directed only to the taxpayers who requested it. Section 6110(k)(3) provides that it may not be used or cited as precedent.

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Pursuant to a power of attorney on file in this office, a copy of this letter is being sent to the taxpayer.

Sincerely yours,
Assistant Chief Counsel (Corporate)

By Richard Todd
Richard Todd
Counsel to the Assistant
Chief Counsel (Corporate)