

INTERNAL REVENUE SERVICE

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May 24, 1999

Parent =

FX =

Sub =

Seller =

Target =

Purchaser =

Seller's
Company
Official =

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Authorized
Representative =

Seller's
Company
Official's
Supervisor =

Purchaser's
Company
Official =

date A =

business B =

date C =

date D =

state X =

country Y =

This responds to your letter dated February 12, 1999 requesting, on behalf of the taxpayers identified above, an extension of time under § 301.9100-1 through 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 selling corporation is a member) and Purchaser 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

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§ 1.338(h)(10)-1(d) of the Income Tax Regulations (the "Election"), with respect to Purchaser's acquisition of the Target stock on date A. Additional information was received in a letter dated March 24, 1999. The material information is summarized below.

Parent, a state X corporation, is the common parent of an affiliated group of corporations that file a consolidated federal income tax return. The Parent consolidated group consists of approximately 25 subsidiaries and is engaged primarily in business B. The members of the Parent group are component members of a controlled group whose common parent is FX, a public country Y corporation.

Parent, a holding company, owns all of the outstanding stock of Sub, a state X holding company. Sub owns all of the outstanding stock of Seller, a state X corporation. Until date A, Seller owned all of the outstanding stock of Target, a state X corporation. On date A, Seller sold all of the stock of Target to Purchaser, a country Y corporation, in a fully taxable transaction pursuant to a purchase and sale agreement of the same date (the "Agreement"). Pursuant to the Agreement, the parties agreed that Seller and Purchaser would file a joint election under § 338(h)(10) with respect to the purchase and sale of the Target stock. It is represented that (1) Purchaser was not related to Seller within the meaning of § 338(h)(3), and (2) Purchaser's acquisition of Target stock qualified as a "qualified stock purchase," as defined in § 338(d)(3).

Purchaser and Seller intended to file the Election. The Election was due on date C, but for various reasons it was not filed. On date D (which is after the due date for the Election), Purchaser, Seller, and Authorized Representative discovered that the Election was not timely filed. The period of limitations on assessment under § 6501(a) has not expired for Purchaser's, Target's or Parent's (Seller's) taxable years in which the acquisition/sale was consummated, the taxable year in which the Election should have been filed, or for 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 or is treated as having made a "section 338(h)(10) 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

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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 corporation 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 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. Section 1.338(h)(10)-1(d)(2) 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 a purchaser and the selling consolidated group (or the selling affiliate or the S corporation shareholders) on Form 8023-A 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-A provide that a § 338(h)(10) election must be made jointly by the purchasing corporation and the common parent of the selling consolidated group (or selling affiliate or S corporation shareholders). The instructions provide that the form must be signed by each person authorized to act on behalf of each corporation, and if it is made for an S corporation it 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," and they provide specific details as to the preparation of the "signature attachment" and its attachment to Form 8023-A.

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.

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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:

- (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(h)(10)-1(d)). Therefore, the Commissioner has discretionary authority under § 301.9100-1 to grant an extension of time for Parent and Purchaser to file the Election, provided Parent and Purchaser show 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.

Information, affidavits, and representations submitted by Purchaser's Company Official, Seller's Company Official, Seller's Company Official's Supervisor 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 and Parent (Seller) 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 Purchaser and Parent (as the common parent of the consolidated group which includes Seller) to file the Election with respect to the

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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 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' liability is lower. Section 301.9100-3(c). The above extension is also conditioned on: (i) Purchaser and Parent signing the Election, and (ii) Purchaser and Parent treating the acquisition/sale of Target stock as a § 338(h)(10) transaction.

Parent and Purchaser 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 Purchaser 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. *See also*, Announcement 98-2, 1998-2 I.R.B. 38, and § 1.338-1(g).

No opinion is expressed as to (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(a) treatment, or (3) if the acquisition/sale of Target stock qualifies for § 338(a) treatment, as to the amount and character of gain or loss, if any recognized by Target on Target's deemed asset sale and liquidation.

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 Seller's Company Official and Purchaser's Company Official.

Sincerely yours,

Assistant Chief Counsel (Corporate)

By Bernita L. Thigpen

Bernita L. Thigpen
Deputy Assistant Chief Counsel (Corporate)