

Internal Revenue Service

Department of the Treasury

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Person to Contact:

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May 23, 2000

LEGEND:

Parent =

Sub =

Purchaser =

Target =

Target
Affiliate #1 =

Target
Affiliate #2 =

Sellers =

Company
Official =

Outside Tax
Professional =

Authorized
Representatives =

Business A =

Business B =

Business C =

Business D =

Date A =

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Date B =

Date C =

This letter responds to your Authorized Representatives' letter dated January 10, 2000, requesting an extension of time under §§ 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations to file elections. The extension is being requested by Parent (Parent is the common parent of the consolidated group of which Purchaser is a member; Purchaser is the acquiring corporation of Target and the United States shareholder of "new" Target, and "new" Target is the deemed foreign purchasing corporation of Target Affiliate #1 and Target Affiliate #2), to file elections under § 338(g) of the Internal Revenue Code and §§ 1.338-1(d) and 1.338-1(g) of the Income Tax Regulations with respect to the acquisition and deemed acquisition of the Target, Target Affiliate #1 and Target Affiliate #2 stocks (sometimes hereinafter referred to collectively as the "Elections" or 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 correspondence dated April 10, April 20, and May 15, 2000. The material information submitted for consideration is summarized below.

Parent is the common parent of a consolidated group that uses the accrual method of accounting and has a calendar year taxable year. Purchaser is a wholly owned subsidiary of Sub, which, in turn, is a wholly owned subsidiary of Parent; and Purchaser and Sub are domestic subchapter C corporations and members of the Parent consolidated group. Prior to the transaction, Target Affiliate #1 and Target Affiliate #2 were wholly owned subsidiaries of Target, and Target was wholly owned by Sellers. Target, Target Affiliate #1 and Target Affiliate #2 are foreign corporations (the applicable country of formation and residency is set forth in the above redacted legend), and sometimes hereinafter they are collectively referred to as the "Targets." Sellers are individuals and trusts, who are not United States persons within the meaning of § 7701(a)(30). Parent, Purchaser, and Target are engaged in Business A. Sub, Target Affiliate #1, and Target Affiliate #2 are engaged in Businesses B, C, and D, respectively.

Prior to the acquisition, neither Sellers nor Targets filed United States income tax returns, were subject to United States income taxation, or were required, under § 1.6012-2(g), to file a United States income tax return. Further, prior to the acquisition, none of the Targets was: (1) a controlled foreign corporation within the meaning of § 957(a); (2) a passive foreign investment company; or (3) a foreign investment company or a foreign corporation the stock ownership of which is described in § 552(a)(2).

On Date A, Parent, Purchaser, and Sellers entered into a Stock Purchase Agreement for Purchaser to acquire all of the Sellers' Targets stocks. Also on Date A, Purchaser acquired all of the Sellers' Targets stocks for cash and an "earn out," in a fully taxable transaction (the "earn out" is contingent on certain "goals" being met in a

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“short” period subsequent to the acquisition and provides that cash will be the only additional payment). It is represented that: (1) Parent, Sub, and Purchaser were not related to Sellers within the meaning of § 338(h)(3); and (2) the acquisition of the stock of Target qualified as a “qualified stock purchase” within the meaning of § 338(d)(3).

Parent intended to file the Elections. The Elections were due on Date B, but for various reasons they were not filed. On Date C (which is after Date B), Outside Tax Professional discovered that the Elections had not been filed. Subsequently, this request was submitted, under § 301.9100-1, for an extension of time to file the Elections.

It is represented that the period of limitations on assessments under § 6501(a) has not expired for Parent's, Sub's, Purchaser's, or Targets' taxable year in which the acquisition and deemed acquisitions occurred, the taxable year in which the Elections should have been filed, or for any taxable years that would have been affected by the Elections had they 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 (1) 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); (2) 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 (3) 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.

Section 1.338-1(c)(14) provides that the term “target affiliate” has the same meaning as in § 338(h)(6), applied without § 338(h)(6)(B)(i), and that if a target affiliate is acquired in a qualified stock purchase, it is also a target. Section 1.338-2(b)(4)

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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. Under § 338(h)(3)(B), new target's deemed purchase of stock of another corporation is a purchase for purposes of § 338(d)(3) on the acquisition date of target. If new target's deemed purchase causes a qualified stock purchase of the other corporation and if a § 338 election is made for the other corporation, the acquisition date for the other corporation is the same as the acquisition date of target. However, the deemed sale and purchase of the other corporation's assets is considered to take place after the deemed sale and purchase of target's assets.

Section 1.338-1(g)(3) provides that the United States shareholders (as defined in § 951(b)) of a foreign purchasing corporation that is a controlled foreign corporation (as defined in § 957, taking into account § 953(c)) may file a statement of "section 338 election" on behalf of the purchasing corporation if the purchasing corporation is not required under § 1.6012-2(g) (other than § 1.6012-2(g)(2)(i)(b)(2)) to file a United States income tax return for its taxable year that includes the acquisition date. Form 8023 must be filed as described in the form and its instructions, and also must be attached to Form 5471 (Information Return With Respect To Foreign Corporation) filed with respect to the purchasing corporation by each United States shareholder for the purchasing corporation.

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 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 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 Elections was fixed by the regulations (i.e., § 1.338-1(d)). Therefore, the Commissioner has discretionary authority under

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§ 301.9100-1 to grant an extension of time for Parent to file the Elections, provided Parent 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 Parent, Sub, Purchaser, Sellers, Company Official, Outside Tax Professional, and Authorized Representatives explain the circumstances that resulted in the failure to file the Elections. The information establishes that competent tax professionals were responsible for the Elections and were aware of all relevant facts, that Parent relied on the tax professionals to make the Elections, and that the interests of 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 that have been made, we conclude that Parent acted reasonably and in good faith in failing to timely file the Elections, 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 Parent to file the Elections with respect to the acquisition and deemed acquisitions of the stocks of Targets, as described above.

The above extension of time is conditioned on: (1) any additional consideration paid directly or indirectly, pursuant to the "earn out," consist only of cash and that same is received by the Sellers within the "short period" discussed in the submission; and (2) the taxpayers' (Parent's, Sub's, Purchaser's, Targets', and Sellers' (to the extent they have any U.S. tax liability) tax liability (if any) being not lower, in the aggregate, for all years to which the Elections apply, than it would have been if the Elections 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).

Parent should file the Elections in accordance with § 1.338-1(d). That is, new elections 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 of this letter should be attached to the election form. Parent and the Targets must amend (or file) their applicable returns to report the transactions as § 338 transactions, and to attach thereto a copy of this letter and a copy of the election form. New Targets must be included in Parent's consolidated return (by being listed on Form 5471) for the first year following the acquisition. See §§ 1.338-1(e), 1.338-1(g) and 1.338-5.

No opinion is expressed as to: (1) whether the acquisition, or deemed acquisition, of the stock of each of the Targets qualifies as a "qualified stock purchase";

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(2) whether the acquisition, or deemed acquisition, of the stock of each of the Targets qualifies for § 338(a) treatment; or (3) if the acquisition, or deemed acquisition, of the stock of each of the Targets qualifies for § 338(a) treatment, as to the amount of gain or loss recognized (if any) by the applicable Targets on their deemed asset sales.

In addition, no opinion is expressed as to the tax effects or consequences of filing the Elections 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 Elections 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 Parent, 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 Elections, penalties and interest that would otherwise be applicable, if any, continue to apply (e.g., penalties and interest on the tax would have been due, but not paid, if any, if the Elections been timely made -- also note the very limited waiver in § 1.338-1(f)).

A copy of this letter is being sent to the Authorized Representatives designated on your power of attorney.

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

Sincerely yours,
Philip J. Levine
Assistant Chief Counsel (Corporate)