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Person to Contact:

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Date:

March 6, 2001

LEGEND

Purchaser =

Acquisition Corp =

Target =

Sellers =

Date A =

Date B =

Date C =

Tax Professional 1 =

Tax Professional 2 =

Dear:

This letter responds to your letter dated October 16, 2000, 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 “§ 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 with respect to Purchaser’s acquisition of the stock of Target (sometimes hereinafter referred to as the “Election”), on Date A. (All citations in this letter to regulations under § 338 are to regulations in effect on Date A.) Additional information was received in letters dated January 2 and February 13, 2001. The material information is summarized below.

Purchaser is the common parent of an affiliated group that files a consolidated income tax return for federal income tax purposes. Purchaser has a calendar taxable year and uses the accrual method of accounting. Target was an S corporation within the meaning of § 1361, all the stock of which was owned by Sellers (individuals). Target did not have any subsidiaries.

On Date A, Purchaser, Acquisition Corp (a corporation formed solely for purposes of this transaction), and Sellers entered into a purchase agreement for Purchaser to acquire all of the Target stock from Sellers. The transaction was structured as a reverse subsidiary merger whereby Acquisition Corp merged into Target, with Target surviving the merger. On that date, Purchaser acquired all of the stock of Target from Sellers in exchange for cash and Purchaser stock in a fully taxable transaction, pursuant to the purchase agreement. Following the acquisition, "new" Target was included in Purchaser's consolidated group as a Subchapter C corporation. It is represented that: (1) Purchaser was not related to Sellers within the meaning of § 338(h)(3); and (2) Purchaser's acquisition of the stock of Target qualified as a "qualified stock purchase," as defined in § 338(d)(3). See Rev. Rul. 90-95, 1990-2 CB 67.

Purchaser and Sellers intended to file the Election. The Election was due on Date B, but for various reasons a valid Election was not filed. On or about Date C (which is after the due date for the Election), Tax Professional 1 discovered that the Election had not been filed. Subsequently, this request was submitted, under § 301.9100-1, for an extension of time to file the Election. The period of limitations on assessments under § 6501(a) has not expired for Purchaser's, Target's, or any of the Sellers' taxable years in which the acquisition occurred, the taxable years 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: (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 1.338(h)(10)-1(d)(3) provides that if a § 338(h)(10) election is made for Target, a "§ 338 election" is deemed made for Target. 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 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 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)(3) provides that if a § 338(h)(10) election is made for the target corporation, it is irrevocable.

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 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 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 a person authorized to act on behalf of each corporation, and if 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.

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.

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.

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(h)(10)-1(d)). Therefore, the Commissioner has discretionary authority under § 301.9100-1 to grant an extension of time for Purchaser and Sellers to file the Election, provided Purchaser and Sellers 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, Target, Sellers, Tax Professional 1, and Tax Professional 2 explain the circumstances that resulted in the failure to timely file a valid Election. The information establishes that a competent tax professional was responsible for the Election and was aware of all relevant facts, that Purchaser, and Sellers relied on the tax professional to make the Election, 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 made, we conclude that Purchaser and Sellers 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 Sellers to file the Election with respect to the acquisition of the stock of Target, as described above.

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' (Purchaser's consolidated group's, Sellers', and Target's) 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 by the applicable 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' tax liability is lower. Section 301.9100-3(c).

Purchaser and Sellers must file the Election in accordance with § 1.338(h)(10)-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 to the form. A copy of this letter must be attached to the election form. Purchaser and Sellers must file or amend, as applicable, their returns to report the transaction as a § 338(h)(10) transaction for the taxable year in which the transaction was consummated (and for any other affected taxable year), and to attach to the returns a copy of this letter and a copy of the Election.

We express no opinion as to: (1) whether the "acquisition/sale" of the 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; or (3) if § 338(h)(10) is applicable, the amount and character of gain or loss, if any, recognized on Target's deemed asset sales and deemed liquidation (or the amount of the deemed sale gain, if any, the S shareholders will take into account under §§ 1366 and 1367, or the amount, if any, of gain or loss recognized by the S shareholders as a result of the deemed liquidation under § 331). See § 1.338(h)(10)-1(e).

In addition, we express no opinion as to the tax 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 relied on certain statements and representations made by the taxpayers. However, the Director should verify all essential facts. 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.

Purchaser must provide each of the Sellers with a copy of this letter.

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: Mark S. Jennings
Chief, Branch 1