

Internal Revenue Service

Department of the Treasury

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Date:

March 29, 2002

LEGEND

Purchaser =

Target =

Seller =

Company Official =

Tax Professional =

Date A =

Date B =

Dear

This letter responds to a letter dated November 15, 2001, submitted on behalf of Purchaser and Seller by their authorized representatives, 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 Seller 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)-1T(c) of the Income Tax Regulations with respect to Purchaser's Date A acquisition of the stock of Target (sometimes referred to herein as the "Election"). All citations in this letter to regulations under § 338 are to regulations in effect on Date A. Additional information was received in a letter dated February 4, 2002. The material information is summarized below.

Purchaser is a domestic corporation and common parent of an affiliated group of

corporations that files a consolidated return.

Prior to its acquisition by Purchaser, Target was a domestic S corporation that was wholly owned by Seller.

Pursuant to a Stock Purchase Agreement, Purchaser, on Date A, acquired all of the Target stock from Seller in exchange for cash. It is represented that Purchaser's acquisition of the 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 B, but for various reasons was not filed. After the due date for the Election, it was 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 assessment under § 6501(a) has not expired for the Purchaser's, Target's, or Seller's taxable years in which the acquisition occurred, the taxable years in which the Election should have been filed, or any taxable year 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" or a "§ 338(h)(10) election" and (2) the acquisition is a "qualified stock purchase."

Section 338(h)(10) permits the purchasing corporation and the seller(s) to elect jointly to treat the target corporation as deemed to sell all of its assets and distribute the proceeds in complete liquidation. A § 338(h)(10) election may be made for the target corporation only if purchaser acquires stock meeting the requirements of § 1504(a)(2) from a selling consolidated group, a selling affiliate, or the S corporation shareholders in a qualified stock purchase. Section 1.338(h)(10)-1T(c)(1).

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.

Sections 301.9100-1 through 301.9100-3 provide the standards the Commissioner uses 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 only when the taxpayer provides evidence establishing 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)-1T(c)(2)). Therefore, the Commissioner has discretionary authority under § 301.9100-1 to grant an extension of time for Purchaser and Seller to file the

Election, provided Purchaser and Seller demonstrate 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, Seller, Company Official, and Tax Professional explain the circumstances that resulted in the failure to timely file the Election. The information establishes that the taxpayers reasonably relied on a qualified tax professional and the interests of the government will not be prejudiced if relief is granted. See § 301.9100-3.

Based on the facts and information submitted, including the representations made, we conclude that Purchaser and Seller have demonstrated 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 45 days from the date of issuance of this letter, for Purchaser and Seller to file the Election with respect to the acquisition of Target stock described above.

This 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 acquisition in accordance with the Election, and (2) the taxpayers' (Purchaser's consolidated group, Seller's, and Target's) tax liability (if any) not being 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. Furthermore, 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 Seller must file the Election in accordance with § 1.338(h)(10)-1T(c)(2). That is, a new election on Form 8023 must be executed on or after the date of this letter, which grants the 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 Seller must file or amend (as applicable) their federal tax 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 attach to these returns a copy of this letter and the Election.

We express no opinion on: (1) whether Purchaser's acquisition of the Target stock qualified as a "qualified stock purchase" under § 338(d)(3); (2) whether Purchaser's acquisition of the Target stock qualified for § 338(h)(10) treatment; (3) any other tax consequences arising from the Election; and (4) whether Target qualified as an S corporation prior to its acquisition by Purchaser.

In addition, we express no opinion as to the federal 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 taxpayer. 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 Seller with a copy of this letter.

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.

A copy of this letter is being sent to the authorized representatives listed on the power of attorney submitted in this matter.

Sincerely,
Ken Cohen
Senior Technician Reviewer, Branch 3
Office of Associate Chief Counsel (Corporate)