

## Internal Revenue Service

## Department of the Treasury

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Date:

September 28, 2001

### LEGEND:

Partners =

Partnership =

Sub 1a =

Sub 2a =

Seller =

Purchaser =

Target 1 =

Target 2 =

Target 2a =

Target 2b =

Company Official =

Outside Tax

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Professional =

Date A =

Date C =

Date D =

Date X =

Date Y =

This is in response to a letter dated April 9, 2001, submitted on behalf of Partnership, requesting an extension of time under §§ 301.9100-1 through 301.9100-3 of the Procedure and Administration Regulations to file an election. Partnership is requesting the extension of time to file a “§ 338(g) election” under § 338(g) of the Internal Revenue Code and §§ 1.338-1(d) and (g) of the Income Tax Regulations with respect to the deemed acquisition of the stock of Target 2a and Target 2b (sometimes hereinafter referred to as the “Elections”), on Date A. (All citations in this letter to regulations under § 338 are to the regulations as in effect on Date A). A separate request has made to the Office of Associate Chief Counsel (Passthroughs and Special Industries) for an extension of time for Target 2b to make an election under § 301.7701-3(c) to be treated as a disregarded entity for federal tax purposes effective after its deemed acquisition by Target 2. Additional information was received in letters dated June 4, 12, and 21, and July 26, 2001. The material information submitted for consideration is summarized below.

Partnership is a domestic limited liability company. Partnership owns all of Sub 1a, which owns all of Sub 2a, which owns all of Purchaser. Sub 1a and Sub 2a are foreign entities. On Date X, Partnership made an election under § 301.7701-3 (by filing Form 8832, Entity Classification Election) to disregard Sub 1a and Sub 2a as separate entities for United States tax purposes, effective on Date Y (which is before the below described acquisition (the “Acquisition”)). Other than the disregarded entity elections made for Sub 1a and Sub 2a and the intended disregarded entity election for Target 2b, no other disregarded entity elections have been made or will be made for any acquired target or their subsidiaries effective as of the date of the Acquisition.

Purchaser is a foreign corporation. Prior to the Acquisition, Purchaser was a controlled foreign corporation within the meaning of § 957(a) (a “CFC”) and was not required under § 1.6012-2(g) to file a U.S. income tax return.

Prior to the Acquisition, Target 1 and Target 2 were both wholly owned subsidiaries of Seller. Seller, Target 1 and Target 2 are foreign corporations. Target 2 has two subsidiaries, Target 2a and Target 2b. Target 2 also owns various other foreign subsidiaries not subject to this ruling request. Prior to the Acquisition, Seller, Target 1 and Target 2 did not file U.S. income tax returns and they were not subject to

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U.S. income taxation. Further, neither Target 1, Target 2, Target 2a, nor Target 2b was: (1) a CFC; (2) a passive foreign investment company for which an election under § 1295 was in effect; (3) a foreign investment company or a foreign corporation the stock ownership of which is described in § 552(a)(2); or (4) required, under § 1.6012-2(g), to file a U.S. income tax return.

On Date A, pursuant to a Stock Purchase Agreement dated Date A, Purchaser acquired all of Seller's stock of Target 1 and Target 2 for cash and the assumption of Target 1's and Target 2's liabilities in fully taxable transactions. It is represented that Purchaser's acquisition of the stock of Target 1 and Target 2 each qualified as a "qualified stock purchase," as defined in § 338(d)(3). The period of limitations on assessment under § 6501(a) has not expired for Purchaser's, Target 1's, Target 2's, Target 2a's or Target 2b's taxable year(s) in which the Acquisition occurred, the taxable years in which the Elections should have been filed, or any taxable year(s) that would have been affected by the Elections had they been timely filed.

Section 338(g) elections for Target 1 and Target 2 were timely filed. The Elections for Target 2a and Target 2b, wholly owned subsidiaries of Target 2, were due on Date C. However, for various reasons the Elections for Target 2a and Target 2b were not timely filed. On Date D (which is after the due date for the Elections), Company Official and Outside Tax Professional discovered that the Elections for Target 2a and Target 2b had not been filed. Subsequently, this request was submitted, under § 301.9100-1, for an extension of time to file the Elections.

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 1.338-1(g)(3) provides that 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 "§ 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 filed with respect to the purchasing corporation by each United States shareholder for the purchasing corporation's taxable year that includes the acquisition date.

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) generally defines the term "regulatory election" as including an election whose due date is prescribed by a regulation, revenue ruling,

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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 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 Elections is fixed by regulation (*i.e.*, § 1.338-1(d)). Therefore, the Commissioner has discretionary authority under § 301.9100-1 to grant an extension of time for Partnership to file the Elections, provided Partnership shows that it acted reasonably and in good faith, the requirements of §§ 301.9100-1 through 301.9100-3 are satisfied, and granting relief will not prejudice the interests of the government.

Information, affidavits and representations submitted by Partnership, Company Official, and Outside Tax Professional, explain the circumstances that resulted in the failure to file the Elections for Target 2a and Target 2b. The information establishes that the request for relief was filed before the failure to make the Elections was discovered by the Internal Revenue Service and that the interests of the government will not be prejudiced if relief is granted. See § 301.9100-3(b)(1)(i).

Based on the facts and information submitted, including the representations made, we conclude that Partnership has shown that it acted reasonably and in good faith in failing to make the Elections, the requirements of §§ 301.9100-1 through 301.9100-3 have been satisfied, and that granting relief will not prejudice the interests of the government. Accordingly, and provided that the § 338(g) election made for Target 2 is valid, an extension of time is granted under § 301.9100-1, until 45 days from the date on this letter, for Partnership to file the Elections with respect to the acquisition of the stock of Target 2a and Target 2b, as described above.

The above extension of time is conditioned on (1) the filing, within 120 days of the date on this letter, of all returns and amended returns (if any) necessary to report the transaction in accordance with the Elections, and (2) the taxpayers' (Partnership's partners, Purchaser, Target 2, Target 2a, and Target 2b's) 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 with respect to Target 2a and Target 2b (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).

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Partnership should file the Elections in accordance with §§ 1.338-1(d) and (g) (i.e., a new Election on Form 8023 must be executed on or after the date on this letter, which grants an extension, and filed in accordance with the instructions to the form). A copy of this letter should be attached to the election form. Partnership, Purchaser, Target 2, Target 2a and Target 2b, as applicable, must report the transaction as a § 338 transaction on their returns, if they have not already filed accordingly, and they must attach to such returns (or amend the applicable returns, if they have already filed accordingly, by attaching) a copy of the election form and a copy of this letter.

We express no opinion regarding: (1) whether the acquisition of the stock of Target 2 or the deemed acquisition of the stock of Target 2a and Target 2b qualify as "qualified stock purchases" under § 338(d)(3), or (2) any other tax consequences arising from the Elections.

In addition, we express no opinion as to the tax treatment or consequences of filing the Elections late under the provisions of any other section of the Code and regulations, or the tax treatment of any conditions existing at the time of, or effects 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 taxpayer and its employees. However, the Director should verify all essential facts. Moreover, notwithstanding that an extension is granted under § 301.9100-1 to file the Elections, any penalties and interest that would otherwise be applicable shall still apply.

This ruling 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.

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

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