

Internal Revenue Service

Department of the Treasury

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Person to Contact:

Telephone Number:

Refer Reply To:

CC:CORP:1 PLR-116000-00

Date:

February 2, 2001

LEGEND

Parent =

Purchaser =

Target =

Target Sub =

Country X =

Date A =

Date B =

Date C =

Date D =

Date E =

Business W =

Parent's Officer =

Authorized
Representatives =

This letter responds to your authorized representative's letter dated August 9, 2000, requesting an extension of time under §§ 301.9100-1 through 301.9100-3 of the Procedure and Administration Regulations to file an election. Additional information was submitted in letters dated December 11, 2000; December 28, 2000; January 5, 2001 and January 11, 2001. Parent, as the United States shareholder of Purchaser, the foreign purchasing company, and of "new Target," the deemed foreign purchasing company is requesting the extension 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 of the stock of Target and the deemed acquisition of the stock of Target Sub (sometimes hereinafter referred to as the "Elections"). The information

submitted for consideration is summarized below. All citations in this letter to regulations under § 338 are to regulations in effect for Date B.

Parent is the common parent of an affiliated group with a calendar year and uses the accrual method of accounting. Purchaser is a wholly owned Country X subsidiary of Parent.

Prior to the acquisition described below, Target was wholly owned by foreign individuals and foreign corporations (cumulatively referred to as "Sellers"). Target Sub is a wholly owned subsidiary of Target. Target and Target Sub are Country X corporations. Target and Target Sub are engaged in Business W.

Prior to the transaction described below, neither Purchaser, Sellers, Target, nor Target Sub filed United States income tax returns nor were they subject to United States income taxation. Further, neither Target nor Target Sub was: (1) a controlled foreign corporation within the meaning of § 957(a); (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 for which is described in § 552(a)(2); or (4) required, under § 1.6012-2(g), to file a United States income tax return.

On Date A, Purchaser began acquiring by purchase the stock of Target from Sellers in a series of transactions. By Date B (less than one year after Date A), Purchaser had acquired more than 80% of the shares of Target and by Date C, Target was wholly owned by Purchaser.

After the transactions described above, Target and Target Sub were included in Parent's return by being listed on Form 5471 (Information Return of U.S. Persons With Respect to Certain Foreign Corporations). The Elections were due on Date D. However, for various reasons the Elections were not filed. On Date E (which is after the due date for the Elections), Authorized Representatives discovered that the Elections had not been filed.

It is represented that (1) Purchaser was 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," as defined in § 338(d)(3). The period of limitations on assessments under § 6501(a) has not expired for Parent'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(a) permits certain stock purchases to be treated as asset purchases if the purchasing corporation makes or is treated as having made a "§ 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 (i) 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); (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 the 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 1.338-1(d) provides that a purchasing corporation makes a "§ 338 election" for target by filing a statement of "§ 338 election" on Form 8023 in accordance with the instructions on the form. The "§ 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 "§ 338 election" is irrevocable.

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 CFC (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 in accordance with the instructions to the form and a copy of the form must be attached to Form 5471 filed with respect to the purchasing corporation by each United States shareholder for the purchasing corporation.

The term target affiliate has the same meaning as in § 338(h)(6) (applied without § 338(h)(6)(B)(i)). Thus, a corporation described in § 338(h)(6)(B)(i) is considered a target affiliate for all purposes of § 338. If a target affiliate is acquired in a qualified stock purchase, it is also a target. See § 1.338-1(c)(14). 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 1.338-2(b)(4). 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. See § 1.338-2(b)(4).

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. 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 the regulations (i.e., §§ 1.338-1(d) and 1.338-1(g)). Therefore, the Commissioner has discretionary authority under § 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's Officer and Authorized Representatives explain the circumstances that resulted in the failure to file valid Elections. The information establishes that the taxpayer discovered the failure to make the Elections before the failure to make the Elections were discovered by the Internal Revenue Service, and that the government will not be prejudiced if relief is granted. Section 301.9100-3(b)(1)(i).

Based on the facts and information submitted, including the representations that have been made, we conclude that Parent has established that it 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 of the stock of Target and the deemed acquisition of the stock of Target Sub, 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 Elections; and (2) the taxpayers' (Parent's, Target's, Target Sub's and Sellers') 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 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).

Parent should file the Elections in accordance with §§ 1.338-1(d) and 1.338-1(g). 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 forms. Parent, Target, and

Target Sub must file or amend (if and as applicable) its applicable returns to report the acquisition as a "§ 338 transaction," and to attach a copy of the Form 8023 and a copy of this letter.

No opinion is expressed as to: (1) whether the acquisition of the Target and Target Sub stock qualify as "qualified stock purchases," (2) whether the acquisition of the Target stock and the deemed acquisition of the Target Sub stock qualify for § 338(a) treatment, and (3) if the acquisition of the Target and Target Sub stock qualify for § 338(a) treatment, as to the amount of gain or loss recognized (if any) by Target or Target Sub on its deemed asset sale.

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 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, its employees and representatives. However, all essential facts are subject to verification. 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.

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.

Pursuant to the powers of attorney on file in this office, copies of this letter are being sent to Parent's Authorized Representative.

Sincerely,
Associate Chief Counsel (Corporate)

By: Mark S. Jennings
Chief, Branch 1