

Internal Revenue Service

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Department of the Treasury

Washington, DC 20224

Person to Contact:

Telephone Number:

Refer Reply To:

CC:DOM:CORP:3-PLR-116927-98

Date:

March 30, 1999

Parent =

Sub X =

Sub Y =

Sub Z =

Purchaser #1 =
PLR-116927-98

Purchaser #2 =
PLR-100014-99

Purchaser #3 =
PLR-100022-99

Purchaser #4 =
PLR-100024-99

Purchaser #5 =
PLR-100026-99

PLR-116927-98

Purchaser #6 =
PLR-100033-99

Target #1 =
Target #2 =

Target #3 =

Target #4 =
Target #5 =
Target #6 =
Target #7 =

Target #8 =
Target Affiliate #1 =

Target Affiliate #2 =

Target Affiliate #3 =
Target Affiliate #4 =

Target Affiliate #5 =

Target Affiliate #6 =

Target Affiliate #7 =
Target Affiliate #8 =
Target Affiliate #9 =

Target Affiliate #10 =

Target Affiliate #11 =
Target Affiliate #12 =
Target Affiliate #13 =
Target Affiliate #14 =
Target Affiliate #15 =
Target Affiliate #16 =
Target #9 =
Target #10 =
Target #11 =

PLR-116927-98

Target Affiliate #17 =

Target Affiliate #18 =

Target Affiliate #19 =

Target Affiliate #20 =

Target Affiliate #21 =

Target Affiliate #22 =

Target Affiliate #23 =

Target Affiliate #24 =

Target #12 =

Sellers =

Country A =

Country B =

Country C =

Country D =

Acquisition Date #1 =

Acquisition Date #2 =

Acquisition Date #3 =

Acquisition Date #4 =

Acquisition Date #5 =

Acquisition Date #6 =

Due Date #1 =

Due Date #2 =

Due Date #3 =

Due Date #4 =

Due Date #5 =

Due Date #6 =

Date A =

Business X =

PLR-116927-98

Company Official =

Outside Tax
Professional =Authorized
Representative =

This letter responds to your letter dated August 28, 1998, requesting, on behalf of the taxpayers identified in the above legend, 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 for Parent (as the common parent of the consolidated group of which the purchasing corporations and deemed purchasing corporations are members, and as the United States shareholder of the controlled foreign purchasing corporations and deemed controlled foreign purchasing corporations) 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 applicable purchasing corporations' (Purchaser #1 through Purchaser #6, which are sometimes hereinafter referred to collectively as the "Purchasers" or "Purchaser") acquisition of the stock of the applicable target corporations (Target #1 through Target #12, which are sometimes hereinafter referred to collectively as the "Targets" or "Target") and the deemed acquisition of the stock of the applicable target affiliates (Target Affiliate #1 through Target Affiliate #24, which are sometimes hereinafter referred to collectively as the "Target Affiliates" or "Target Affiliate"), on the applicable acquisition dates (Acquisition Date #1 through Acquisition Date #6, which are sometimes hereinafter referred to collectively as the "Acquisition Dates" or "Acquisition Date") described below. Sometimes hereinafter such elections are referred to collectively as the "Elections" or "Election." Parent's returns for the taxable years in which the acquisitions were consummated are presently being examined by the applicable Appeals Office, and this request has been coordinated with Appeals pursuant to Rev. Procs. 99-1 and 99-2, 1991-1 I.R.B. 6 and 73, respectively. We have been informed that a "statutory notice" has been issued with respect to matters wholly unrelated to this request, and that the "statutory notice" will not be affected whether we

PLR-116927-98

grant or deny the requested extensions. Additional information was received in letters dated November 12 and December 23, 1998, and February 2 and 24, 1999. The material information submitted for consideration is summarized below.

Parent is the common parent of a consolidated group that has a taxable year ending on October 31 and uses the accrual method of accounting. Sub X and Sub Y are wholly owned subsidiaries of Parent; Purchaser #1 through Purchaser #3 are wholly owned subsidiaries of Sub X; Purchaser #4 is owned by Parent and Sub X; Purchaser #5 was a wholly owned subsidiary of Sub Z; and Sub Z and Purchaser #6 are wholly owned subsidiaries of Sub Y. Target #1 through Target #12 were owned by Sellers (which are non-U.S. persons that are residents and citizens of the same country of which the applicable targets are incorporated, except as specified in the above legend); immediately after being acquired Target Affiliate #1 through Target Affiliate #17 were owned 99.9% or more by Target #8; Target Affiliate #18 is a wholly owned subsidiary of Target #9; Target Affiliate #19 through Target Affiliate #23 are wholly owned subsidiaries of Target #11; and Target Affiliate #24 is a wholly owned subsidiary of Target Affiliate #19. Sub X, Sub Y and Purchaser #1 through Purchaser #3 are domestic corporations; during their existence, Target #1 through Target #7 were Country A corporations (see discussion below regarding mergers and liquidations); Purchaser #4, Target #8 and Target Affiliate #1 through Target Affiliate #17 are Country B corporations; Sub Z, Purchaser #5, Target #9 through Target #11 and Target Affiliate #17 through Target Affiliate #23 are Country C corporations; and Purchaser #6 and Target #12 are Country D corporations. Sub Y, Sub Z and Purchaser #1 through Purchaser #6 are special acquisition corporations or holding companies that were newly formed shortly before the applicable acquisitions. Parent, Targets and Target Affiliates are engaged in Business X.

It is represented that none of the above described Targets, with the possible exception of Target #7, 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 of which is described in § 552(a)(2), or (4) required under § 1.6012-2(g) to file a U.S. income tax return. Furthermore, prior to the acquisition none of the above described targets and none of their respective Sellers filed a U.S. income tax return or were subject to U. S. income taxation.

On Acquisition Date #1 Purchaser #1 acquired all of the stock of Target #1 through Target #3 from the applicable Sellers; on Acquisition Date #2 Purchaser #2 acquired all of the stock of Target #4 through Target #6 from the applicable Sellers; on Acquisition Date #3 Purchaser #3 acquired all of the stock of Target #7 from the applicable Sellers; on Acquisition Date #4 Purchaser #4 acquired 99.9% of the stock of Target #8 (including the stock of Target Affiliate #1 through Target Affiliate #17) from the applicable Sellers; on Acquisition Date #5 Purchaser #5 acquired all of the stock of Target #9 through Target #11 (including Target Affiliate #18 through Target Affiliate

PLR-116927-98

#24) from the applicable Sellers; and on Acquisition Date #6 Purchaser #6 acquired all of the stock of Target #12 from the applicable Sellers. Parent has represented as follows: (1) each acquisition was for cash in a fully taxable transaction; (2) each acquisition (and deemed acquisition) constituted a qualified stock purchase within the meaning of § 338(d)(3); and (3) Purchaser #1 through Purchaser #6 were not related to any of the Sellers, within the meaning of § 338(h)(3). Moreover, there was no common or cross ownership among the Sellers of the Targets, and the Sellers of one Target were not related to the Sellers of any other Target. After the acquisitions, the Targets and Target Affiliates were included in Parent's consolidated return; the domestic corporations were directly included and the foreign corporations were listed on Form 5471 (information return with respect to a foreign corporation).

Except as otherwise noted below, none of the Purchasers, Targets or Target Affiliates has disposed of any of their assets (other than in the ordinary course of business or except for small amounts, or as indicated below), and each of the applicable Purchasers is still in existence as a direct or indirect wholly owned subsidiary of Parent (or of the applicable subsidiary of Parent). The Targets and Target Affiliates are still in existence as a wholly owned subsidiary of the applicable Purchaser. However, subsequent to the applicable acquisition, the following changes have occurred: Purchaser #2, Purchaser #6, Target Affiliate #4, Target Affiliate #5, and Target Affiliate #6 changed their names (as indicated in the above legend); Targets #1, #2, and #3 merged into Purchaser #1; Targets #4, #5, and #6 merged into Purchaser #2; Target #7 merged into Purchaser #3; Purchaser #1 merged into Purchaser #2; Purchaser #3 merged into another subsidiary of Parent and then changed its name (as indicated in the legend); Target #8 liquidated into Purchaser #4; Target Affiliate #14 merged into Target Affiliate #15; Target Affiliate #7 merged into Target Affiliate #1; Target Affiliate #5 merged into Target Affiliate #4; Target Affiliates #15, #8, #13 and #2 merged into Target Affiliate #6; and a "check the box" election to disregard the entity was made on Form 8832 with respect to Target #12, Target Affiliate #1, Target Affiliate #4, Target Affiliate #6, and Target Affiliate #16 (i.e., foreign to foreign, within the same country). It is represented that each of the mergers qualified either as a § 368(a)(1) reorganization or a § 332 liquidation and that § 381(a) applied. See § 1.338-2(c).

The Elections were due on Due Date #1 through Due Date #6, as applicable, but for various reasons were not filed. On or about Date A (which is after the due date for the Elections), Company Official, Outside Tax Professional and Authorized Representative discovered that the Elections were not filed. Subsequently, this request was submitted to the Service, under § 301.9100-1, for an extension of time to file the Elections. The period of limitations under § 6501(a) has not run for any of the above corporations' taxable year in which the acquisitions occurred, the taxable year in which the Elections were due, or any taxable years that would have been affected by the Elections had they been timely filed.

PLR-116927-98

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 transaction 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.

Sections 1.338-1(g)(1)(i) and (v) provide that for purposes of § 1.338-1(g)(1) (qualifying for the special rule when a foreign purchasing corporation or deemed purchasing corporation must file an election, which is a later filing date than the "ordinary" filing date required by § 338(g)), a foreign corporation is considered subject to United States tax (not eligible for the special rule) if it is a CFC. Section 338(h)(3)(A)(iii) 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-A 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(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-A 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 1.338-1(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)

PLR-116927-98

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 1.1502-77(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 of the consolidated return year. See also Form 8023-A 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, 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, provided the taxpayer demonstrates to the satisfaction of the Commissioner that:

- (1) the taxpayer acted reasonably and in good faith, and,
- (2) granting relief will not prejudice the interests of the government.

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 (§ 1.338-1(d)). Therefore, the Commissioner has discretionary authority under § 301.9100-1 to grant an extension of time for Parent to file the Elections, provided Parent establishes 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.

PLR-116927-98

Information, affidavits, and representations submitted by Parent, Company Official, Outside Tax Professional and Authorized Representative explain the circumstances that resulted in the failure to file the Elections. The information also establishes that tax professionals were responsible for the Elections, that Parent relied on the tax professionals to timely make the Elections, and that the government will not be prejudiced if relief is granted. See § 301.9100-3(b)(v).

Based on the facts and information submitted, including the representations that have been made, we conclude that Parent has established 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 (as the common parent of the consolidated group of which the purchasing corporations and deemed purchasing corporations are members, and as the United States shareholder of the controlled foreign purchasing corporations and the deemed controlled foreign purchasing corporations) to file the Elections with respect to the applicable purchasing corporations' (i.e., Purchaser #1's through Purchaser #6's) acquisition of the stock of the applicable target corporations (i.e., Target #1 through Target #12) and the deemed acquisition of the stock of the applicable target affiliates (i.e., Target Affiliate #1 through Target Affiliate #24), on the applicable acquisition dates (i.e., Acquisition Date #1 through Acquisition Date #6), as described above.

The above extension of time is conditioned upon the following: (1) the period of limitations under § 6501(a) not having run for any of the above corporations' taxable year in which the acquisitions occurred, the taxable year in which the Elections were due (the original due date), or any taxable years that would have been affected by the Elections had they been timely filed (e.g., years to which a loss resulting from the Elections may be carried back); and (2) the taxpayers' (Parent's, Sub X's, Sub Y's, Sub Z's, Purchaser #1's through Purchaser #6's, Target #1's through Target #12's, and Target Affiliate #1's through Target Affiliate #24's) tax liability 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 (as the common parent of the consolidated group of which the purchasing corporations and deemed purchasing corporations are members, and as the United States shareholder of the controlled foreign purchasing corporations and the deemed controlled foreign purchasing corporations) should file the Elections in accordance with § 1.338-1(d). That is, new elections on Form 8023-A (not Form 8023) must be

PLR-116927-98

executed on or after the date of this letter, which grants an extension, and filed in accordance with the instructions on the election form (together with the information that is required to be attached to the election form). In accordance with the instructions on Form 8023-A regarding "Election for Multiple Targets," a single Form 8023-A may be used to make the Elections, rather than a separate form for each target and target affiliate. However, a separate election form must be filed for each taxable year in which acquisitions were made and/or in which an election, or multiple elections, is due. Parent must amend its applicable returns, and the "old" targets must file returns, to report the acquisitions (and deemed acquisitions) as § 338(g) transactions, if and as applicable. A copy of this letter should be attached to the election forms, and a copy of this letter and the election forms should be attached to the applicable returns. See Announcement 98-2, 1998-2 I.R.B. 38, and § 1.338-1(g). Also, the taxpayer must give a copy of the Elections and amended returns to the applicable Appeals Officer.

No opinion is expressed as to the following: (1) whether the acquisition of the applicable Targets' stock (and deemed acquisition of the applicable Target Affiliates' stock) qualifies as a "qualified stock purchase"; (2) whether the acquisition of the applicable Targets' stock (and deemed acquisition of the applicable Target Affiliates' stock) qualifies for § 338(a) treatment; and (3) if the acquisition of the applicable Targets' stock (and deemed acquisition of the applicable Target affiliates' stock) qualifies for § 338(a) treatment, as to the amount of gain or loss recognized (if any) by the applicable Targets (and/or by the applicable Target Affiliates) 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 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, the District Director and the Appeals officer 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.

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 Company Official, pursuant to a power of attorney on file in this office.

Sincerely yours,

Assistant Chief Counsel (Corporate)

by Richard Todd

Richard Todd
Counsel to the Assistant Chief Counsel
(Corporate)