

Internal Revenue Service

Department of the Treasury

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Person to Contact:

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Date:
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Purchaser =

Acquisition
Sub =

Seller #1 =

Target #1 =

Target #2 =

Shareholder #1 =

Shareholder #2 =

Country A =

X% =

Y% =

Z% =

Company Official =

Authorized
Representatives =

Date A =

Date B =

Date C =

Date D =

Date E =

Date F =

Date G =

Date H =

Date I =

Date J =

Business A =

Business B =

Dear _____ :

This letter responds to your Authorized Representatives' letter, dated September 11, 1998, requesting 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 Purchaser (as the common parent of the consolidated group of which the purchasing corporation and deemed purchasing corporation are members, and as the United States shareholder of the controlled foreign purchasing corporation) 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 #1 and Target #2 (sometimes hereinafter referred to collectively as the "Elections" or "Election") on Date D and Date E, respectively. Additional information was received in letters dated December 3 and 10, 1998. The material information submitted for consideration is summarized below.

Target #2 is a Country A corporation, whose stock was publicly traded in Country A. Prior to the below described acquisitions, Seller #1 (a citizen and resident of Country A) owned X% (i.e., more than 20% but less than 80%) of the stock of Target #2 and the "Country A Public Shareholders" (i.e., those citizens and residents of Country A, other than Seller #1, who held Target #2 stock) owned all of the remaining stock (i.e., also more than 20% but less than 80%) of Target #2. Purchaser is the common parent of a consolidated group that has a calendar taxable year and uses the accrual method of accounting. On Date A (which is immediately before the below described acquisitions), Shareholder #1 and Shareholder #2 formed Purchaser with cash for the purposes of acquiring Target #2. Also on Date A, Purchaser formed Acquisition Sub, as a Country A corporation and wholly owned subsidiary, for the purpose of facilitating in the acquisition of Target #2. Purchaser and Target #2 are engaged in Business A and Business B, respectively.

Prior to the below described acquisitions, neither Seller #1, Target #2, or (to the best of management's knowledge) the Country A Public Shareholders did not file U.S. income tax returns, and they were not subject to U.S. income taxation. Further, it is represented that Target #2 was not: (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.

On Date B, Purchaser made a cash tender offer for all of the stock of Target #2. The tender offer had a "holding company alternative" (i.e., the shareholders could sell the stock of their holding company that held their Target #2 stock rather than directly selling their Target #2 stock). On Date C, Seller #1 formed Target #1 and transferred

all of its Target #2 stock thereto. On Date D, pursuant to the "holding company alternative" of the tender offer, Purchaser and Seller #1 entered into a share purchase agreement, and in accordance therewith Acquisition Sub acquired all of Seller #1's stock of Target #1 (i.e., which held X% of the stock of Target #2) for cash in a transaction that was fully taxable for U.S. purposes. On Date E (which is immediately after Date D): (1) Target #1 was liquidated into Acquisition Sub; and (2), pursuant to the tender offer, Acquisition Sub acquired Y% of the stock of Target #2 (Z% plus Y% equal more than 80% but less than 100% of the stock of Target #2) for cash in a fully taxable transaction. On Date F (which is shortly after Date E), pursuant to the tender offer, Acquisition Sub acquired Z% of the stock of Target #2 (Z%, X% and Y% combined equal 100% of the stock of Target #2) for cash in a fully taxable transaction. On Date G (which is just a few days after Date F), Acquisition Sub merged into Target #2, pursuant to applicable Country A law. After the acquisition "new" Target #2 was included in Purchaser's consolidated return (its first consolidated return) by being listed on Form 5471 (information return with respect to a foreign corporation).

It is represented that: (1) the acquisition of Target #1 and Target #2 constituted a qualified stock purchase within the meaning of § 338(d)(3) (provided the requested extension is granted for Target #1 to make a § 338(g) election); and (2) Purchaser was not related to Seller #1 or (to the best of management's knowledge) the Country A Public Shareholders, within the meaning of § 338(h)(3). It is also represented that Acquisition Sub was newly formed for the sole purpose of acquiring all of the Target #2 stock, and that prior to the acquisition Acquisition Sub conducted no activities other than those required for the acquisition. Compare § 1.338-2(b)(2)(ii), example 2.

The Elections were due on Date H and Date I, respectively, but for various reasons were not filed. On Date J (which is after the due date for the Elections), Company Official and Authorized Representatives discovered that the Elections were not filed. Subsequently, this request was submitted, under § 301.9100-1, for an extension of time to file the Elections. The period of limitations on assessments under § 6501(a) has not expired for Purchaser's or Target #2's (or for "old" Target #2, or Acquisition Sub's, or "new" or "old" Target #1's) taxable year in which the acquisition occurred, the taxable year in which the Elections should have been filed, or any taxable years 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 "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 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)(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) 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 1.338-2(c)(1) provides that the purchasing corporation may make an election under § 338 for target even though target is liquidated on or after the acquisition date. Section 1.338-2(c)(2) provides that an election may be made for

target after the acquisition of assets of the purchasing corporation by another corporation in a transaction described in section 381(a), provided that the purchasing corporation is considered for tax purposes as the purchasing corporation of the target stock. The acquiring corporation in the section 381(a) transaction may make an election under section 338 for target. Section 1.338-2(b)(4)(ii), example 2, illustrates how the purchase of a corporation holding target stock (provided a § 338(g) election is made therefor) and the direct purchase of the remaining target stock can be combined to make a qualified stock purchase.

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 were 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 to file the Elections, provided Purchaser 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 Purchaser, Company Official and Authorized Representatives explain the circumstances that resulted in the failure to file valid Elections. The information establishes that tax professionals were responsible for the Elections, that Purchaser 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 Purchaser (and/or Acquisition Sub, and/or Target #1) has established it (they) 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 Purchaser (as the common parent of the consolidated group of which the purchasing corporation and deemed purchasing corporation are members, and as the United States shareholder of the controlled foreign purchasing corporation) to file the Elections with respect to the acquisition of the stock of Target #1 and Target #2 on Date D and Date E, respectively, as described above.

The above extension of time is conditioned on the taxpayers' (Purchaser's, Target #2's, Acquisition Sub's, Target #1's, Shareholder #1's, Shareholder #2's, Seller #1's and Seller #2's) tax liability 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 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).

Purchaser, as the common parent of the consolidated group of which the purchasing corporation and deemed purchasing corporation are members, and as the United States shareholder of the controlled foreign purchasing corporation, should file the Elections in accordance with § 1.338-1(d). That is, new elections on Form 8023-A (not 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 (together with the information that is required to be attached to the election form). A copy of this letter should be attached to the election form. Purchaser and "old" Target #2 (and Target #1, if applicable) must file or amend their returns, as applicable, to report the acquisitions as "section 338 transactions," and to attach a copy of this letter, the election form and the information required therewith (of course if the transactions have already been reported as "section 338 transactions" then the return(s) need be amended only to attach a copy of this letter, the election form and the information required therewith). See, Announcement 98-2, 1998-2 I.R.B. 38, and § 1.338-1(g).

Also see, § 1.338-1(e) (4) with regard to filing a combined return and combined election form (and see the instruction to the form).

No opinion is expressed as to: (1) whether Purchaser or Acquisition Sub is considered for U.S. tax purposes to be the purchasing corporation of Target #1 and/or Target #2 (compare §§ 1.338-2(c)(2) and 1.338-2(b)(2)(ii), example 2); (2) whether the acquisition of Target #2 stock (and/or Target #1 stock) qualifies as a "qualified stock purchase"; (3) whether the acquisition of Target #2 stock (and/or Target #1 stock) qualifies for § 338(a) treatment; (4) if the acquisition of Target #2 stock (and/or Target #1 stock) qualifies for § 338(a) treatment, as to the amount of gain or loss recognized (if any) by Target #2 (and/or Target #1) on the deemed asset sale(s); and (5) whether Target #1 is recognized for U.S. tax purposes, or whether instead Seller #1 is considered to sell his Target #2 stock (and not his Target #1 stock) (compare § 1.338-2(b)(2)(ii), example 2).

In addition, no opinion is expressed as to the tax effects or 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, its employees and representatives. However, the District 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.

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 your authorized representative first listed on your power of attorney, that is on file in this office.

Sincerely yours,
Assistant Chief Counsel (Corporate)

by _____
Richard Todd
Counsel to the Assistant
Chief Counsel (Corporate)