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Person to Contact:

Telephone Number:

Refer Reply To:

CC:CORP:4 PLR-108828-00

Date:

August 16, 2000

Parent =

Sub1 =

Sub2 =

Purchaser =

Target =

Seller(s) =

Company
Official & Tax
Professional =

Authorized
Representatives =

Business A =

Date A =

Date B =

Date C =

This letter responds to your Authorized Representatives' letter dated March 29, 2000, requesting an extension of time under §§ 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations to file an election. The extension is being requested by Parent (as common parent of the consolidated group that includes the United States shareholder of the foreign purchasing corporation) to file an election under § 338(g) of the Internal Revenue Code and §§ 1.338-1(d) and (g) of the Income Tax Regulations, with respect to Purchaser's acquisition of Target (sometimes hereinafter referred to as the "Election") on Date A. (All citations in this letter to regulations under § 338 are to the regulations as in effect on Date A). Additional information was received in a letter dated June 26, 2000. The material information submitted for consideration is summarized below.

Parent is the common parent of a consolidated group that has a calendar taxable year. Parent wholly owns Sub1, Sub1 wholly owns Sub2, and Sub2 wholly owns Purchaser. Sub1 and Sub2 are domestic corporations included in Parent's consolidated return. Purchaser and Target are foreign corporations (the applicable country of formation and residency is set forth in the above redacted legend). Prior to the transaction, Sellers wholly owned Target. Sellers are individuals, who are citizens and residents of the foreign country indicated in the above redacted legend, and who are not United States persons within the meaning of § 7701(a)(30). Parent, Purchaser, and Target are engaged in Business A. Sub1 and Sub2 are holding companies.

Prior to the acquisition, neither Sellers nor Target filed United States income tax returns, were subject to United States income taxation, or were required, under § 1.6012-2(g), to file a United States income tax return. Further, prior to the acquisition, Target was not: (i) a controlled foreign corporation within the meaning of § 957(a); (ii) a passive foreign investment company; or (iii) a foreign investment company or a foreign corporation the stock ownership of which is described in § 552(a)(2). Purchaser was 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 included the acquisition date.

On Date A, Purchaser acquired all the stock of Target from Sellers. It is represented that: (1) Parent and Purchaser were 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" within the meaning of § 338(d)(3).

Parent intended to file the Election. The Election was due on Date B, but for various reasons it was not filed. On Date C (which is after Date B), Company Official & Tax Professional 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.

It is represented that the period of limitations on assessments under § 6501(a) has not expired for Parent's, Sub1's, Sub2's, Purchaser's, or Target's taxable year in which the acquisition occurred, the taxable year in which the Election should have been filed, or for any taxable years 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 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) 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 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 "section 338 election" for target by filing a statement of "section 338 election" on Form 8023 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 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 1.1502-77(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 for the consolidated return year. See also Form 8023 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 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 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 was fixed by the regulations (i.e., § 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 Election, 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, Company Official & Tax Professional, and Authorized Representatives explain the circumstances that resulted in the failure to file the Election. The information establishes that competent tax professionals were responsible for the Election and were aware of all relevant facts, that Parent relied on the tax professionals to make the Election, and that the interests of the government will not be prejudiced if relief is granted. See § 301.9100-3(b)(1)(v).

Based on the facts and information submitted, including the representations that have been made, we conclude that Parent acted reasonably and in good faith in failing to timely file the Election, 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 Election with respect to the acquisition of the stock of Target, as described above.

The above extension of time is conditioned on the taxpayers’ (Parent’s, Sub1’s, Sub2’s, Purchaser’s, Target’s and Sellers’) tax liability (if any) being not lower, in the aggregate, for all years affected by the Election, 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).

Parent should file the Election in accordance with §§ 1.338-1(d) and 1.338-1(g)(3). That is, a new election 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 form. Parent, Purchaser, and Target must amend or file, as applicable, their returns to report the transaction as a § 338 transaction, and to attach thereto a copy of this letter and a copy of the election form. New Target must be included in Parent's consolidated return (by being listed on Form 5471) for the first year following the acquisition. See §§ 1.338-1(e), 1.338-1(g) and 1.338-5.

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

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 tax effects or consequences 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 Parent, 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.

A copy of this letter is being sent to the Authorized Representative designated on your power of attorney.

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.

Sincerely yours,

Associate Chief Counsel (Corporate)

by _____
Ken Cohen, Acting Chief, Branch 3