

Internal Revenue Service

Department of the Treasury

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Person to Contact:

Telephone Number:

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Date:

July 10, 2000

Parent =

Purchaser =

Target =

Sellers =

Company Official =

Tax Professional =

Authorized
Representative =

Date A =

Date B =

Date C =

Country X =

This letter responds to your authorized representative's letter dated March 13, 2000, 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 an election. The extension is being requested for Parent (as 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 1.338-1(g) of the Income Tax Regulations, with respect to Purchaser's acquisition of the stock 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 20, 2000. The material information submitted for consideration is summarized below.

Parent is the common parent of a consolidated group that files its returns on the basis of a 52/53 week year ending on the last Friday in December, and that uses the accrual method of accounting. Purchaser, a Country X corporation, is a wholly owned subsidiary of Parent and is included in Parent's consolidated income tax return (i.e., by being listed on Form 5471, Information Return With Respect to a Foreign Corporation). Target, (a Country X corporation) was wholly owned by Sellers (foreign individuals and corporation) prior to the acquisition. Target does not have any subsidiaries.

Taxpayer represents that Target 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. Furthermore, before the acquisition, neither Target nor Sellers filed a U.S. income tax return nor were subject to U.S. income taxation.

On Date A, Purchaser acquired 100% of the stock of Target from Sellers, for cash, in a fully taxable transaction. It is represented that Parent and Purchaser were not related to Sellers, within the meaning of § 338(h)(3), and that the acquisition of Target constituted a "qualified stock purchase," within the meaning of § 338(d)(3). After the acquisition Target was included in Purchaser's consolidated income tax return (i.e., by being listed on Form 5471).

The Election was due on Date B. However, for various reasons a valid Election was not made. On Date C (which is after the due date for the Election), Parent's tax professionals discovered that the Election had not been properly filed. Subsequently, this request was submitted to the Service, under § 301.9100-1, for an extension of time to file the Election. The period of limitations on assessments under § 6501(a) has not expired for Parent's taxable year in which the transaction was consummated, the taxable year in which the Election should have been filed, or 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 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.

Section 338(h)(3)(A)(iii) 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 (I) in whole or in part by reference to the adjusted basis of such stock in the hands of the person from whom acquired, or (II) 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 a United States shareholder (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 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, 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 Election is 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 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.

Information, affidavits, and representations submitted by Parent, Company Official, Tax Professional, and Authorized Representative explain the circumstances that resulted in the failure to file a valid Election. The information also establishes that Tax Professional was responsible for the Election, that Parent relied on the Tax Professional, and that Tax Professional failed to make, or advise the taxpayer to make, the Election, and that 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 has established it 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 Target, as described above.

The above extension of time is conditioned on the taxpayers' (Parent's, Purchaser's and Target'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).

Parent (as the common parent of the consolidated group and United States shareholder of the controlled foreign purchasing corporation) should file the Election in accordance with §§ 1.338-1(d) and 1.338-1(g). That is, an 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. Parent, Purchaser, and Target should file or amend, as applicable, their returns to report the acquisition as a § 338 transaction, and to attach thereto a copy of Form 8023 and a copy of this letter.

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

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

Sincerely yours,
Philip J. Levine
Deputy Associate Chief Counsel
(Corporate)