

## Internal Revenue Service

## Department of the Treasury

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Washington, DC 20224

Person to Contact:

Telephone Number:

Refer Reply To:

CC:CORP:BR:06-PLR-131744-01

Date:

OCTOBER 1, 2001

### Legend

Parent =

Subsidiary 1 =

Subsidiary 2 =

Subsidiary 3 =

EIN:

Corp 1 =

Corp 2 =

Corp 3 =

Date 1 =

Date 2 =

Date 3 =

Date 4 =

Date 5 =

Date 6 =

Date 7 =

Date 8 =

Year 1 =

Year 2 =

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#a	=
#b	=
#c	=
#f	=
#g	=
Company Official	=
Tax Professional	=

This letter responds to your letters dated April 24, 2001, August 8, 2001, and August 21, 2001, requesting an extension of time under §§ 301.9100-1 through 301.9100-3 of the Procedure and Administration Regulations to file the waiver statement under Rev. Proc. 91-71, 1991-2 C.B. 900, with respect to the inclusion of Subsidiary 3 in Parent's consolidated federal income tax return for Year 2 (the "Election"). The information submitted for consideration is summarized below.

Parent is the common parent of an affiliated group of corporations that files a consolidated federal income tax return on a calendar year basis. In Year 1, Parent organized Subsidiary 1 as a wholly owned subsidiary for the purpose of merging with Corp 1, at the time an unrelated domestic corporation.

Corp 1 was a holding company whose only significant asset was #a (at least 80%) of the stock of Subsidiary 2, a domestic corporation. Subsidiary 2, also a holding company, owned approximately #b (at least 80%) of the outstanding common stock of Subsidiary 3, a domestic corporation. This was Subsidiary 3's only issued and outstanding class of stock. The remaining Subsidiary 3 stock was owned by public shareholders. Corp 1 was a subsidiary of Corp 2 which was a subsidiary of Corp 3. Corp 1, Corp 2, Corp 3, Subsidiary 2, and Subsidiary 3 were members of a consolidated group of which Corp 3 was the common parent.

On Date 1, Parent and Subsidiary 1 entered into an agreement with Corp 1 and its shareholder, Corp 2, whereby Corp 1 would be merged with and into Subsidiary 1 ("the Merger") and Corp 1's shareholder, Corp 2, would receive shares of Parent common stock and cash in the Merger. The effective date of the Merger was Date 2. On that date, Corp 1 merged with and into Subsidiary 1 in a merger intended to qualify as a section 368(a)(1)(A)/(a)(2)(D) reorganization. On the merger date, Subsidiary 2 owned approximately #c (at least 80%) of the stock of Subsidiary 3. Thus, Subsidiary 2 and Subsidiary 3 became members of Parent's affiliated group and were required to join in Parent's consolidated return beginning Date 3. On Date 4, certain events occurred which reduced Subsidiary 2's stock ownership of Subsidiary 3 below 80%.

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Thus, beginning Date 5, Subsidiary 3 was no longer a member of Parent's affiliated group.

On Date 6, Subsidiary 2 acquired #f shares of voting Series A Participating Preferred stock of Subsidiary 3 for an aggregate purchase price of #g. These shares together with the shares of Subsidiary 3 common stock already owned by Subsidiary 2, increased Subsidiary 2's ownership to at least 80% of the value and voting power of Subsidiary 3's outstanding stock. Thus, Subsidiary 3 again became a member of Parent's affiliated group, beginning on Date 7.

Section 1504(a)(3)(A) provides that if a corporation is included in a consolidated federal income tax return filed by an affiliated group and such corporation ceases to be a member of such group, the corporation (and any successor of such corporation) may not thereafter be included in any consolidated return filed by the affiliated group (or by another affiliated group with the same common parent or a successor of such common parent) before the 61<sup>st</sup> month beginning after its first taxable in which it ceased to be a member of the affiliated group.

Section 1504(a)(3)(B) provides that the Secretary may waive the application of §1504(a)(3)(A) to any corporation for any period subject to such conditions as the Secretary may prescribe. Rev. Proc. 91-71 provides procedural rules for obtaining a waiver from the application of §1504(a)(3)(A). If certain procedural requirements are satisfied, including the filing of the statement described in section 5 of Rev. Proc. 91-71, section 3.01 of Rev. Proc. 91-71 grants a waiver for any corporation that left a consolidated group and rejoined the "same" group (i.e., the consolidated group that remained in existence within the meaning of § 1.1502-75(d)). The waiver of section 3.01 of Rev. Proc. 91-71 is available in this case because the deconsolidated subsidiary that is the subject of such waiver, Subsidiary 3, is rejoining the same consolidated group, i.e., the Parent group.

Although Parent included Subsidiary 3 in its Year 2 consolidated federal income tax return, Parent failed to file the waiver statement under Rev. Proc. 91-71 with such return. Pursuant to section 7 of Rev. Proc. 91-71, the waiver statement was required to be filed on or before the due date (including extensions) of the Parent Year 2 consolidated return; i.e., the waiver statement was required to be filed on or before Date 8. Parent has therefore applied for an extension of time under § 301.9100-3 to file the waiver statement with respect to the inclusion of Subsidiary 3 in its Year 2 consolidated federal income tax return.

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.

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

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regulatory election. Section 301.9100-1(a). Section 301.9100-2 provides automatic extensions of time for making certain elections. 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 Rev. Proc. 91-71. Therefore, the Commissioner has discretionary authority under § 301.9100-1 to grant an extension of time for Parent to file the Election, provided Parent 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 and Tax Professional explain the circumstances that resulted in the failure to timely file a valid Election. The information establishes that Parent relied on a qualified tax professional, that the professional failed to make, or advice Parent 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 made, we conclude that Parent has shown 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. Accordingly, an extension of time is granted under § 301.9100-1, until 45 days from the date on this letter, for Parent to file the Election, by amending its consolidated return to include the Election, including all the information required by Rev. Proc. 91-71. A copy of this letter must also be attached.

The above extension of time is conditioned on the taxpayers' (Parent's consolidated group's, and Subsidiary 3's tax liability (if any) 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 applicable 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' tax liability is lower. Section 301.9100-3(c).

We express no opinion as to whether Subsidiary 3 (or any other corporation) was a member (or not a member) of Parent's affiliated group for any time period described in this letter.

In addition, we express no opinion as to the tax 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

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made by the taxpayers. However, the 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(s) who requested it. Section 6110(k)(3) provides that it may not be used or cited as precedent.

Pursuant to the power of attorney on file in this office, a copy of this letter is being sent to your authorized representative.

Sincerely yours  
Associate Chief Counsel (Corporate)  
By Ken Cohen  
Senior Technician Reviewer, Branch 3