

Internal Revenue Service

Department of the Treasury

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Person to Contact:

Telephone Number:

Refer Reply To:

CC:CORP:B05--PLR-111277-00

Date:

November 27, 2000

LEGEND:

Parent =

Sub 1 =

Sub 2 =

Sub 3 =

Purchaser =

Holding =

Sub X =

Seller =

Target =

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Company Officials &
Tax Professionals =

Outside Tax
Professional =

Business A =

Business B =

Date A =

Date B =

Date C =

Date D =

This is in response to your letter dated May 26, 2000, requesting an extension of time under §§ 301.9100-1 through 301.9100-3 of the Procedure and Administration Regulations to file an election. Parent (as the common parent of the consolidated group of which Sub 3, the United States shareholder of Purchaser, the foreign “purchasing corporation,” is a member) is requesting the extension of time to file a “section 338(g) 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 the stock of Target (sometimes hereinafter referred to as the “Election”), on Date B. (All citations in this letter to regulations under § 338 are to the regulations as in effect on Date B). Additional information was received in letters dated July 26 and August 18, 2000. 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 September 30 and that uses the accrual method of accounting. Purchaser is a wholly subsidiary of Sub 3, which is a wholly owned subsidiary of Sub 2, which is a wholly owned subsidiary of Sub 1, which is a wholly owned subsidiary of Parent. Sub 1,

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Sub 2 and Sub 3 are domestic corporations, and Purchaser is a foreign corporation. Purchaser was not required under § 1.6012-2(g) to file a United States income tax return for its taxable year that includes Date B. Sub 1, Sub 2, Sub 3 and Purchaser are included in Parent's consolidated return (i.e., the foreign corporation by being listed on Form 5471, Information Return of U.S. Persons with Respect to Certain Foreign Corporations). Parent and its subsidiaries are engaged in Business A.

Holding is the common parent of a consolidated group. Prior to the subject acquisition, Target was a wholly owned subsidiary of Seller, which was a wholly owned subsidiary of Sub X, which was a wholly owned subsidiary of Holding. Sub X is a domestic corporation, and Seller and Target are foreign corporations. Target is engaged in Business B and does not have any subsidiaries.

On Date A, Parent and Holding entered into an Asset Purchase Agreement that provided Parent and its subsidiaries would acquire certain assets of Holding and its subsidiaries, including, inter alia, all of Seller's stock of Target. On Date B, pursuant to the Asset Purchase Agreement, Purchaser acquired all of the stock of Target from Seller for cash in a fully taxable transaction. It is represented that Purchaser's acquisition of Seller's Target stock qualified as a "qualified stock purchase," as defined in § 338(d)(3), and that Parent was not related to Holding, within the meaning of § 338(h)(3). Following the acquisition, Target was included in Parent's consolidated return by being listed on Form 5471.

Parent intended to file the Election. The Election was due on Date C. However, for various reasons the Election was not filed. On Date D (which is after the due date for the Election), some of Company Officials & Tax Professionals, and Outside Tax Professional, discovered that Election had not been filed. Subsequently, this request was submitted, 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 the 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 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.

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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 (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 no 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’s taxable year that includes the acquisition date.

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

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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 regulation (*i.e.*, § 1.338-1(d)). Therefore, the Commissioner has discretionary authority under § 301.9100-1 to grant an extension of time for Parent (as the common parent of the consolidated group of which Sub 3, the United States shareholder of Purchaser, the foreign “purchasing corporation,” is a member) to file the Election, provided Parent shows that it acted reasonably and in good faith, the requirements of §§ 301.9100-1 through 301.9100-3 are satisfied, and granting relief will not prejudice the interests of the government.

Information, affidavits and representations submitted by Parent, Company Officials & Tax Professionals, and Outside Tax Professional, 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 they 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 made, we conclude that Parent has shown that it acted reasonably and in good faith in failing to file the Election, the requirements of §§ 301.9100-1 through 301.9100-3 have been satisfied, and that granting relief will not prejudice the interests of the government. Accordingly, an extension of time is granted 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' (*i.e.*, Parent's consolidated group'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 filed (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 or examination 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 taxpayers' liability is lower. Section 301.9100-3(c).

Parent should file the Election in accordance with § 1.338-1(d) (*i.e.*, 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 to the form). A copy of this letter should be attached to the election form. Parent and Target must report the

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transaction as a § 338 transaction on their applicable returns (including the applicable separate return for Target), if they have not already filed accordingly, and they must attach to such returns (or amend the applicable returns, if they have already filed accordingly, to attach) a copy of the election form and a copy of this letter.

We express no opinion regarding: (1) whether the acquisition of the stock of Target qualifies as "qualified stock purchase" under § 338(d)(3); (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 (if any) recognized by Target on the deemed asset sale.

In addition, we express no opinion as to the tax treatment or consequences of filing the Election late under the provisions of any other section of the Code and regulations, or the tax treatment of any conditions existing at the time of, or effects 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 and its employees. However, the District Director should verify all essential facts and computations. Moreover, notwithstanding that an extension is granted under § 301.9100-1 to file the Election, any penalties and interest that would otherwise be applicable shall still apply.

This ruling 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

Ken Cohen
Acting Chief, Branch 3