Internal Revenue Service

Department of the Treasury

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Person to Contact:

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Parent =

Sub =

Purchaser =

Target #1 =

Target #2 =

Sellers =

Public Sellers =

Company Officer =

Company Tax
Professional =

Outside Tax

Professionals =

Authorized Representatives =

Country X =
Date A =
Date B =
Date C =
Date D =
Date E =
Date F =
Date G =
Date X =
A% =
B% =
C% =
D% =
Business A =

Business B =

This responds to your January 13, 1999 letter, on behalf of the above taxpayers, requesting an extension of time, under § 301.9100-1 through 301.9100-3 of the Procedure and Administration Regulations, for Parent to make late elections. Parent (as the common parent of the consolidated group that now includes the foreign purchasing corporation and deemed foreign purchasing corporation (i.e., Purchaser and "new" Target #1, respectively) and as the United States shareholder thereof) is requesting an extension of time to make late "section 338 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 Target #1 stock and the deemed acquisition of Target #2 stock on Date B (sometimes hereinafter such elections are

collectively referred to as the "Election" or "Elections"). Additional information was received in a letter dated June 9, 1999. The material information is summarized below.

Parent is a publically traded corporation that is the common parent of a consolidated group that acquired Sub on Date G (which is more fully described below), and that has a 52-53 week taxable year and uses the accrual method of accounting. Prior to Date G, the factual background was as follows: Sub was a publicly traded corporation that was the common parent of a consolidated group that had a calendar taxable year and used the accrual method of accounting. Purchaser, a Country X corporation (the specific country of formation is set forth above in the redacted legend), was a wholly owned subsidiary of Sub. Target #1 was a Country X corporation (the specific country of formation is set forth above in the redacted legend) whose stock was 100% directly owned by Sellers; and Sellers are foreign individuals who are not United States shareholders within the meaning of § 951(b) (the individuals' names and country of citizenship are set forth above in the redacted legend). Target #2 was a Country X corporation (the specific country of formation is set forth above in the redacted legend) that was owned A% directly by Public Sellers (i.e., the Target #2 stock was traded on the stock exchange in Country X), B% directly by Sellers and C% directly by Target #1 (thus D%, which is over 80%, of the stock of Target #2 was owned directly and indirectly by Sellers). Also, Target #2 owns/owned numerous foreign subsidiaries (several of which were subsequently liquidated into Target #2), but an extension of time to make a § 338 election for any such subsidiary is not being requested and a § 338 election will not be made for any such subsidiary. Purchaser and the target corporations are engaged in Business A, and Parent is engaged in Business B.

Prior to the below described acquisition, Purchaser, Sellers, and Target #1 and Target #2 did not file U.S. income tax returns and they were not subject to U.S. income taxation. Further, neither Target #1 nor Target #2 was: (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 A, Sellers and Sub entered into a Share Purchase Agreement for Sub to acquire all of the Sellers' Target #1 stock and Target #2 stock. The Share Purchase Agreement was subsequently assigned to Purchaser. On Date B, Purchaser acquired all of the Sellers' Target #1 stock and Target #2 stock, pursuant to the Share Purchase Agreement, solely for cash in fully taxable transactions. On Date C, pursuant to a tender offer and "squeeze out" under the laws of Country X, Purchaser acquired all of the shares of Target #2 owned by the Public Sellers (thus, Purchaser had directly and indirectly acquired100% of the Target #2 stock). On Date D, Target #1 was merged into Purchaser, pursuant to the laws of Country X. After the acquisitions "new" Target #1 and "new" Target #2 were included in Sub's return by being listed on Form 5471 (information return filed with respect to a foreign corporation). It is represented that (1) Purchaser was not related to Sellers within the meaning of §338(h)(3), and (2)

Purchaser's acquisition of Target #1 stock and “new” Target #1's deemed acquisition of Target #2 stock (i.e., assuming an extension is granted and a valid Election is made for Target #1) each qualified as a "qualified stock purchase," as defined in § 338(d)(3). The period of limitations on assessments under § 6501(a) has not expired for Parent’s, Sub’s, Purchaser’s, Target #1's or Target #2's taxable year(s) in which the acquisitions occurred, the taxable year(s) in which the Elections should have been filed, or any taxable year(s) that would have been affected by the Elections had they been timely filed.

The Elections were due on Date E. Sub (as the then common parent of the consolidated group that included the foreign purchasing corporation and deemed foreign purchasing corporation, and as the United States shareholder thereof) intended to file the Elections. However, for various reasons the Elections were not filed. On Date F (which is after the due date for the Elections), Company Official, Company Tax Professional, Outside Tax Professionals and Authorized Representatives discovered that the Elections had not been filed. On Date G (which is after the acquisitions and the date the Elections were due) Parent acquired all of the stock of Sub in a transaction that is represented to be a fully taxable acquisition. Subsequently, this request was submitted, under § 301.9100-1, for an extension of time to file the Elections.

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.

Sections 1.338-1(g)(1)(i) and (v) provide that for purposes of § 1.338-1(g)(1) (i.e., qualifying for the special rule when a foreign purchasing corporation or deemed purchasing corporation must file an election, which is a later filing date than the “ordinary” filing date required by § 338(g)), a foreign corporation is considered subject to United States tax (i.e., not eligible for the special rule) if it is a controlled foreign corporation (“CFC”). 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 or Form 8023, as applicable, 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 and Form 8023, as applicable, 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 1.338-2(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.

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 purchaser of the target stock. The acquiring corporation in the section 381(a) transaction may make an election under § 338 for target. Section 1.338-2(b)(4)(ii), example 1, 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, 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, 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 times for filing the Elections were 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 (as the common parent of the consolidated group that now includes the foreign purchasing corporation and deemed foreign purchasing corporation, and as the United States shareholder thereof) to file the Elections, provided Parent shows Sub (as the then common parent of the consolidated group that included the foreign purchasing corporation and deemed foreign purchasing corporation, and as the United States shareholder thereof) 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, Company Tax Professional, Outside Tax Professionals 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 Sub (as the then common parent of the consolidated group that included the foreign purchasing corporation and deemed foreign purchasing corporation, and as the United States shareholder thereof) 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 Sub (as the then common parent of the consolidated group that included the foreign purchasing corporation and deemed foreign purchasing corporation, and as the United States shareholder thereof) 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 Parent (as the common parent of the consolidated group that now includes the foreign purchasing corporation and deemed foreign purchasing corporation, and as the United States shareholder thereof) to file the Elections with respect to the acquisition of the Target #1 stock and the deemed acquisition of the Target #2 stock, as described above.

The above extension of time is conditioned on the taxpayers' (Parent's, Sub's, Purchaser's, Target #1's, Target #2's, and Sellers' (to the extent they have any US tax liability)) tax liability being not lower, in the aggregate for all years to which the Elections apply, than it would have been if the Elections 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 that now includes the foreign purchasing corporation and deemed foreign purchasing corporation, and as the United States shareholder thereof) should file the Elections in accordance with § 1.338-1(d). That is, new elections on Forms 8023-A or Forms 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 any information that is required to be attached to the election form). A separate election form will have to be filed for Target #1 and Target #2, because they do not qualify to file a combined election form (see § 1.338-1(e)). A copy of this letter should be attached to the election forms. Parent must amend Sub's return for Sub's first taxable year following the acquisitions to attach a copy of this letter and copies of the election forms (and any information required therewith) and to show that the acquisitions were reported as "section 338 transactions"; i.e., the "new" target corporations must be included in Sub's return by being listed on Form 5471, information return with respect to a foreign corporation, for the first year following the acquisitions (i.e., for Sub's taxable year ending on Date X and schedule F of Form 5471 must reflect the Election values). Also, Parent (for Target #1 and Target #2) must file "final returns" for the applicable target corporations (if and as applicable) reporting the acquisitions as "section 338 transactions" and attach thereto a copy of this letter and copies of the election forms (or if they have already reported the transactions as § 338 transactions then merely attach thereto a copy of this letter and copies of the election forms). See §§ 1.338-1(e) and (g), and Announcement 98-2, 1998-2 I.R.B. 38, and the instructions to the election form.

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

In addition, no opinion is expressed as to the tax effects or consequences of filing the Elections 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 Elections 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.

Pursuant to the power of attorney on file in this office, a copy of this letter is being sent to the company official who approved the power of attorney and to the additional authorized representative designated on the power of attorney to receive a copy.

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,

Assistant Chief Counsel (Corporate)

By: Richard Todd

Richard Todd
Counsel to the Assistant
Chief Counsel (Corporate)