

Internal Revenue Service

Department of the Treasury

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Person to Contact:

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Date:

January 5, 2000

Parent =

Purchaser =

Seller =

Selling Parent =

Target =

Foreign Seller =

Foreign Target =

Purchaser's Company
Official =

Parent's Tax
Professional =

Authorized
Representatives =

Date A =

Date B =

Date C =

This is in response to your September 22, 1999 request for an extension of time

under §§ 301.9100-1 through 301.9100-3 of the Procedure and Administration Regulations to file two elections. Parent (as the common parent of the consolidated group that includes Parent's wholly owned subsidiary, Purchaser) and Seller are requesting an extension of time to file a "section 338(h)(10) election" under §§ 338(g) and 338(h)(10) of the Internal Revenue Code and § 1.338(h)(10)-1(d) of the Income Tax Regulations (the "§ 338(h)(10) Election") regarding Purchaser's acquisition of Target on Date A. Further, Parent is requesting an extension of time to file a "section 338(g) election" under § 338(g) and § 1.338-1(c)(10) (the "§ 338(g) Election") regarding Purchaser's acquisition of Foreign Target on Date A. The information in that request and in later correspondence is summarized below.

Selling Parent wholly owns Seller, and Seller wholly owned Target before the transaction described below. All were members of Selling Parent's consolidated group. Also before the transaction, Foreign Seller wholly owned Foreign Target.

On Date A, Purchaser acquired all of Seller's Target stock and all of Foreign Seller's Foreign Target stock for cash in fully taxable transactions. It is represented that Purchaser was not related to Seller or to Foreign Seller under § 338(h)(3) and that Purchaser's acquisition of Target stock and its acquisition of Foreign Target stock each qualified as a "qualified stock purchase," as defined in § 338(d)(3).

Parent and Selling Parent intended to file the section 338(h)(10) Election on Date B but for various reasons did not. On Date C (which fell after the due date for the section 338(h)(10) Election), Purchaser's Company Official discovered that the § 338(h)(10) Election had not been timely filed. Similarly, Parent had not been advised of its ability to make the § 338(g) Election for its purchase of Foreign Target, and no § 338(g) Election was filed. The period of limitations on assessments under § 6501(a) has not expired for Parent's, Purchaser's, Seller's, Selling Parent's, Target's, Foreign Seller's, or Foreign Target's taxable year in which the acquisition/sale was consummated, the taxable year the § 338(h)(10) Election or § 338(g) Election was due, or for any year(s) that would have been affected by the § 338(h)(10) Election or the § 338(g) Election had each been timely filed.

Section 338(a) permits certain stock purchases to be treated as asset acquisitions if: (i) the purchasing corporation makes or is treated as having made a "section 338 election" under § 338(g) and (ii) the acquisition is a "qualified stock purchase." Section 1.338-1(c)(10) provides that a "section 338(g)" election is an election to apply § 338(a) to the target corporation. Section 338(g) specifies the requirements for making a "section 338 election." Section 1.338(h)(10)-1(d)(3) provides that if a § 338(h)(10) election is made for the target corporation, a "section 338 election" is deemed made for the target. 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 (I) in whole or in part by reference to the adjusted basis of the 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) (other than paragraph (4) thereof), be attributed to the person acquiring such stock.

Section 338(h)(10) permits the purchasing and selling corporations to jointly elect to treat the target corporation as selling all of its assets and distributing the proceeds in complete liquidation. Thus, the sale of target stock included in the qualified stock purchase generally is ignored. A § 338(h)(10) election may be made for the target only if it is a member of a selling consolidated group, a member of a selling affiliated group filing separate returns, or an S corporation. Section 1.338(h)(10)-1(a). Section 1.338(h)(10)-1(d)(1) provides that a § 338(h)(10) election may be made for the target corporation if the purchasing corporation makes a "qualified stock purchase" of the target corporation stock. Sections 1.338(h)(10)-1(d)(3) provides that if a § 338(h)(10) election is made for the target corporation, it is irrevocable and a § 338 election is deemed made for the target corporation.

If a § 338(g) election is made following a qualified stock purchase, the target corporation is treated as having sold all of its assets at the close of the acquisition date at fair market value in a single transaction and is treated as a new corporation that purchased all of the assets as of the beginning of the day after the acquisition date. A § 338(g) election may be made for a foreign target corporation. Section 1.338-5(b).

Section 1.338(h)(10)-1(d)(2) provides that a § 338(h)(10) election must be jointly made by a purchaser and the selling consolidated group (or the selling affiliate or the S corporation shareholders) on Form 8023 in accordance with the instructions to the form. The regulations further provide that the election must be made not later than the 15th day of the ninth month beginning after the month in which the acquisition date occurs. The instructions to Form 8023 provide that a § 338(h)(10) election must be made jointly by the purchasing corporation and the common parent of the selling consolidated group (or selling affiliate or S corporation shareholders). The instructions provide that the form must be signed by each person authorized to act on behalf of each corporation, and if made for an S corporation, must be signed by each S corporation shareholder who sells target stock in the qualified stock purchase. The instructions further provide

that the signatures, dates, and titles (if applicable) of those persons must be provided in a "signature attachment" to Form 8023.

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 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 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 time for filing the § 338(h)(10) Election and the § 338(g) Election is fixed by regulations (i.e., § 1.338(h)(10)-1(d)(2) and § 1.338-1(d), respectively). Therefore, the Commissioner has discretionary authority under § 301.9100-1 to grant an extension of time for Parent and Seller to file the § 338(h)(10) Election and Parent to file the § 338(g) Election, provided Parent and Seller show they acted reasonably and in good faith, the requirements §§ 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, Selling Parent, Purchaser's Company Official, Parent's Tax Professional, and Authorized Representatives explain the circumstances that resulted in the failure to file a valid § 338(h)(10) Election and a valid § 338(g) Election. The information also establishes that Parent normally relies on Parent's Tax Professional to timely make all required

filings related to Parent's federal income tax compliance, 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 made, we conclude that Parent and Seller have shown that they 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 30 days from the date of issuance of this letter (i) for Parent and Selling Parent to file the § 338(h)(10) Election for the acquisition of Target and (ii) for Parent to file the § 338(g) Election for the acquisition of Foreign Target.

The above extension of time is conditioned on the taxpayers' tax liability being not lower, in the aggregate, for all years to which the § 338(h)(10) Election applies, than it would have been had the § 338(h)(10) Election and the § 338(g) Election 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 the taxpayers' liability is lower. Section 301.9100-3(c). The above extension is also conditioned on (i) Parent and Selling Parent both signing the § 338(h)(10) Election and Parent signing the § 338(g) Election, (ii) Parent and Selling Parent both treating the acquisition/sale of Target stock as a § 338(h)(10) transaction, and (iii) Parent treating the acquisition/sale of Foreign Target stock as a § 338(g) transaction.

Parent and Selling Parent must file the § 338(h)(10) Election, and Parent must file the § 338(g) Election, in accordance with § 338(h)(10)-1(d) and § 1.338-1(c)(10), respectively (*i.e.*, a new election on Form 8023 must be executed on or after the date of this letter and filed in accordance with the instructions to the form). A copy of this letter should be attached to the election form. Parent and Selling Parent must amend their applicable returns to report the acquisition/sale of Target as a "section 338(h)(10)" transaction and attach a copy of the election form (and the information required therewith) and a copy of this letter to the return. Parent must amend its applicable return to report the acquisition/sale of Foreign Target as a "section 338(g) election" and attach a copy of the election (and the information required therewith) and a copy of this letter.

We express no opinion regarding (i) whether the acquisition/sale of Target stock or Foreign Target stock qualifies as a "qualified stock purchase" under § 338(d)(3), (ii) whether the acquisition/sale of Target stock qualifies for § 338(h)(10) treatment or whether the acquisition/sale of Foreign Target stock qualifies for § 338(g)

treatment, (iii) whether § 338(h)(10) is applicable as to the amount and character of any gain or loss recognized by Target on Target's deemed asset sale, or (iv) whether § 338(g) is applicable as to the amount and character of any gain and loss recognized by Foreign Target or Foreign Seller.

In addition, we express no opinion as to the tax consequences of filing the § 338(h)(10) Election and the § 338(g) 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 either election late that are not specifically set forth in the above ruling. For purposes of granting relief under § 301.9100-1, we have relied on certain statements and representations made by the taxpayers. However, the District Director(s) should verify all essential facts. In addition, notwithstanding that an extension is granted under § 301.9100-1 to file both elections, 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 the taxpayer.

Sincerely yours,
Assistant Chief Counsel (Corporate)
By Wayne T. Murray
Senior Technician/Reviewer
Branch 4