

Internal Revenue Service

Department of the Treasury

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Person to Contact:

Telephone Number:

Refer Reply To:
CC:DOM:CORP:4 PLR-100245-00
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June 9, 2000

LEGEND:

Parent =

Purchaser =

Sellers =

Target =

Target
Affiliate #1 =

Target
Affiliate #2 =

Target
Affiliate #3 =

Target
Affiliate #4 =

Company Official =

Outside Tax
Professionals =

Authorized
Representatives =

Day X =

a =

b =

c =

d =
Date A =
Date B =
Date C =
Date D =
Date E =
Date F =
Business A =

This letter responds to your Authorized Representative's letter dated December 29, 1999, requesting an extension of time under §§ 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations to file elections. The extension is being requested by Parent (as the United States shareholder of the foreign purchasing and deemed purchasing corporations) to file Elections under § 338(g) of the Internal Revenue Code and §§ 1.338-1(d) and (g) of the Income Tax Regulations, with respect to the acquisition of Target and deemed acquisition of Target Affiliate #1's, Target Affiliate #2's, Target Affiliate #3's, and Target Affiliate #4's stock (sometimes hereinafter referred to collectively as the "Elections" or "Election"), on Date D. (All citations in this letter to regulations under § 338 are to the regulations as in effect on Date D.) Additional information was received in letters dated May 3 and June 1 and 9, 2000. The material information submitted for consideration is summarized below.

Parent is the common parent of a consolidated group that uses the accrual method of accounting and has a taxable year ending on Day X. Purchaser is a wholly owned foreign subsidiary of Parent (the country of formation and residency is set forth in the above redacted legend). Prior to the acquisition, Target was wholly owned by Sellers; and Target Affiliate #1, Target Affiliate #2, Target Affiliate #3, and Target Affiliate #4 were wholly owned subsidiaries of Target. Target, Target Affiliate #1, Target Affiliate #2, Target Affiliate #3 and Target Affiliate #4 are foreign corporations (their country of formation and residency is set forth in the above redacted legend). Parent and its subsidiaries are engaged in Business A.

Prior to the acquisition, Target, Target Affiliate #1, Target Affiliate #2, Target Affiliate #3 and Target Affiliate #4 neither filed United States income tax returns, nor were subject to United States income taxation, nor were required, under § 1.6012-2(g), to file a United States income tax return. Further, prior to the acquisition, neither Target, Target Affiliate #1, Target Affiliate #2, Target Affiliate #3 nor Target Affiliate #4 was: (1) a controlled foreign corporation within the meaning of § 957(a); (2) a passive foreign

investment company; or (3) a foreign investment company or a foreign corporation the stock ownership of which is described in § 552(a)(2).

On Date A, Date B, Date C and Date D Purchaser acquired from Sellers, for cash in fully taxable transactions, a, b, c and d percent of the stock of Target, respectively. The preceding named acquisition dates are within a few days of one another, and Date D is the acquisition date (i.e., on Date D Purchaser acquired, in the aggregate, more than 80% of Target's stock). Parent represents that the acquisition of Target constituted a qualified stock purchase within the meaning of § 338(d)(3), and that neither Parent, nor Purchaser, were related to Sellers within the meaning of § 338(h)(3). Finally, Parent represents that: (1) it timely filed a Form 8023 with respect to Target, but inadvertently failed to include Target's subsidiaries (i.e. Target Affiliate #1, Target Affiliate #2, Target Affiliate #3 and Target Affiliate #4) on Form 8023; and (2) that it filed all returns as if valid Elections had been made.

The Elections were due on Date E. However, for various reasons the Elections were not properly filed. On Date F, Authorized Representatives discovered that the Elections had not been filed. Subsequently, this request for an extension of time to file the Elections, under § 301.9100-1, was submitted. Parent represents that the period of limitations on assessments under § 6501(a) has not expired for Parent's, Purchaser's, Target's, Target Affiliate #1's, Target Affiliate #2's, Target Affiliate #3's or Target Affiliate #4's taxable years in which the acquisition occurred, the taxable years in which the Elections should have been filed, or any taxable years that would have been affected by the Elections had they 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 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 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); (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 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 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 1.1502-77(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.

Section 1.338-1(c)(14) provides that the term "target affiliate" has the same meaning as in § 338(h)(6), applied without § 338(h)(6)(B)(i), and that if a target affiliate is acquired in a qualified stock purchase, it is also a target. 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. Under § 338(h)(3)(B), new target's deemed purchase of stock of another corporation is a purchase for purposes of § 338(d)(3) on the acquisition date of target. If new target's deemed purchase causes a qualified stock purchase of the other corporation and if a § 338 election is made for the other corporation, the acquisition date for the other corporation is the same as the acquisition date of target. However, the deemed sale and purchase of the other corporation's assets is considered to take place after the deemed sale and purchase of target's assets.

Under § 301.9100-1(c), the Commissioner has discretion to grant a reasonable extension of time under the rules set forth in § 301.9100-3 to make a regulatory election, for 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 Elections was 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 Elections, provided Parent shows 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 Company Official, Outside Tax Professionals and Authorized Representatives explain the circumstances that resulted in the failure to file the Elections. The information establishes that competent tax professionals who were aware of all the material facts were responsible for the Elections, that Parent relied on them for the Elections, and that the government will not be prejudiced if relief is granted. The information also establishes that all returns have been filed as if valid Elections had been made, and that relief was requested before the failure to make the Elections was discovered by the Service. See §§ 301.9100-3(b)(1)(i) and (v).

Based on the facts and information submitted, including the representations that have been made, we conclude that Parent 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 to file the Elections, as described above.

The above extension of time is conditioned on the taxpayers' (*i.e.*, Parent's, Purchaser's, Target's, Target Affiliate #1's, Target Affiliate #2's, Target Affiliate #3's and Target Affiliate #4's) tax liability, if any, 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 parties' tax liabilities 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 parties' aggregate liability is lower. Section 301.9100-3(c).

Parent should file the Elections in accordance with § 1.338-1(d). That is, new elections 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. A copy of this letter should be attached to the election form. Parent, Target, Target Affiliate #1,

Target Affiliate #2, Target Affiliate #3 and Target Affiliate #4 must amend their applicable returns to attach thereto a copy of this letter and a copy of the election form (and if they have not reported the transaction as a § 338(g) transaction on all returns to do so). See the instructions to Form 8023 regarding the use of one Form 8023 for multiple targets. See also §§ 1.338-1(e), 1.338-1(g) and 1.338-5.

No opinion is expressed as to: (1) whether the acquisition of Target, Target Affiliate #1, Target Affiliate #2, Target Affiliate #3 or Target Affiliate #4 stock qualifies as a "qualified stock purchase"; (2) whether the acquisition of Target, Target Affiliate #1, Target Affiliate #2, Target Affiliate #3 or Target Affiliate #4 stock qualifies for § 338(a) treatment; or (3) if the acquisition of Target, Target Affiliate #1, Target Affiliate #2, Target Affiliate #3 or Target Affiliate #4 stock qualifies for § 338(a) treatment, as to the amount of gain or loss recognized (if any) by Target, Target Affiliate #1, Target Affiliate #2, Target Affiliate #3 or Target Affiliate #4 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 tax effects or consequences 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 Parent, 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 Elections, penalties and interest that would otherwise be applicable, if any, continue to apply.

A copy of this letter is being sent to the Authorized Representatives designated on your power of attorney.

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,
Philip J. Levine

Assistant Chief Counsel (Corporate)