

**Internal Revenue Service**

Department of the Treasury

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Person to Contact:

Telephone Number:

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Date:  
February 22, 1999

Purchaser =

Target =

Sellers =

Country X =

Purchaser's  
Company Official =

Outside Tax  
Professionals =

Authorized

Representatives =

Business A =

Business B =

Date A =

Date B =

Date C =

X =

Dear :

This letter responds to your Authorized Representatives' letter dated September 11, 1998 requesting an extension of time under §§ 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations to file an election. The extension is being requested for Purchaser to file an election 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 its acquisition of the stock of Target (sometimes hereinafter referred to as the "Election"), on Date A. Additional information was received in a letter dated February 22, 1999. The material information submitted for consideration is summarized below.

Purchaser is a publically traded domestic corporation that is the common parent of a consolidated group and has a taxable year ending on X. Target is a Country X corporation that was wholly owned by Sellers (individuals who are citizens and residents of Country X). Target has one or more subsidiaries (Country X corporations), but an extension of time to make a § 338(g) election for them is not being requested. Purchaser and Target are engaged in Business A and Business B, respectively.

Prior to the below described acquisition, Sellers and Target (including Target's subsidiaries) did not file U.S. income tax returns, and they were not subject to U.S. income taxation. Further, neither Target or its subsidiaries 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, Purchaser acquired from Sellers, for cash in fully taxable acquisitions, 80% of the stock of Target.

It is represented that the acquisition of Target constituted a qualified stock purchase within the meaning of § 338(d)(3), and that Purchaser was not related to Sellers within the meaning of § 338(h)(3). The period of limitations on assessments under § 6501(a) has not expired for Purchaser's or Target's taxable year(s) in which the acquisition occurred, the taxable years in which the Election should have been filed, or any taxable years that would have been affected by the Election had it been timely filed.

The Election was due on Date B. However, for various reasons the Election was not filed. On Date C (which is after the due date for the Election), Purchaser's Company Official, Outside Tax Professionals and Authorized Representatives discovered that the Election had not been filed. Subsequently, this request was submitted, under § 301.9100-1, for an extension of time to file the Election.

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 transaction 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)(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. 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 purchasing corporation of the target stock. The acquiring corporation in the section 381(a) transaction may make an election under section 338 for target. Section 1.338-2(b)(4)(ii), example 2, 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 Election 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 Purchaser to file the Election, provided Purchaser 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 Purchaser's Company Official, Outside Tax Professionals and Authorized Representatives explain the circumstances that resulted in the failure to file a valid Election. The information establishes that tax professionals were responsible for the Election, that Purchaser relied on the tax professionals to timely make the Election, 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 Purchaser acted reasonably and in good faith in failing to timely file the Election, 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 Purchaser 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' (Purchaser's, Target'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 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 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).

Purchaser should file the Elections in accordance with § 1.338-1(d). That is, a new election on Form 8023-A or 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 (together with the information that is required to be attached to the election form). A copy of this letter should be attached to the election form. Purchaser must file or amend its return (along with the target corporation, if and as applicable), to report the acquisition as a "section 338 transaction," and to attach a copy of this letter, the election form and the information required therewith. That is, the "old" target must file a separate final return (if and as applicable) and the "new" target must be included in Purchaser's return (by being listed on Form 5471, information return with respect to a foreign corporation) for the first year following the acquisition. See: Announcement 98-2, 1998-2 I.R.B. 38, and § 1.338-1(g), with regard to which election form to use.

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

In addition, no opinion is expressed as to the tax effects or 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 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.

A copy of this letter is being sent to Purchaser's Company Official and the authorized representatives requested, pursuant to the power of attorney on file in this office.

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  
Counsel to the Assistant  
Chief Counsel (Corporate)