

Internal Revenue Service

Department of the Treasury

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Person to Contact:

Telephone Number:

Refer Reply To:
CC:DOM:CORP:2-PLR -- 109174-99
Date:
July 14, 1999

LEGEND:

Purchaser =

Seller =

Target =

Company Official =

Tax Professionals =

Outside Attorney =

Date A =

CC:DOM:CORP:2-PLR-109174-99

Date B =

Date C =

Date D =

State W =

State X =

Business Y =

Business Z =

Dear :

This responds to your Authorized Representative's letter, dated May 4, 1999, requesting an extension of time under §§ 301.9100-1 through 301.9100-3 of the Procedure and Administration Regulations to file an election. Purchaser and Seller are requesting an extension 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 "Election"), with respect to Purchaser's acquisition of Target on Date A. The material information submitted for consideration is summarized below.

Purchaser is a State W corporation engaged in Business Y. Purchaser has a taxable year ending on Date B and uses the accrual method of accounting. Target was a State X subchapter S corporation, within the meaning of § 1361, that was engaged in Business Z. Target used the accrual method of accounting and had a calendar year end. Target was wholly owned by Seller, an individual residing in State X. It is represented that Purchaser was not related to Seller, within the meaning of § 338(h)(3).

On Date A, Purchaser and Seller entered into a stock purchase agreement for Purchaser to acquire all of Seller's Target stock. Also on date A, pursuant to the stock purchase agreement, Purchaser acquired all of Target's outstanding stock from Seller for cash, a note and the assumption of Target debt in a fully taxable transaction. It is represented that Purchaser's acquisition of Target stock qualified as a "qualified stock purchase," as defined in § 338(d)(3).

Purchaser and Seller intended to file the Election. The Election was due on Date C, but for various reasons it was not filed. On Date D (which is after the due date for the Election), Purchaser, Target, Seller, Company Official, and Tax Professionals discovered the election was not filed. The period of limitations on assessment under

CC:DOM:CORP:2-PLR-109174-99

§ 6501(a) has not expired for Purchaser's, Target's, or Seller's taxable year in which the transaction occurred or for any taxable year(s) 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 acquisitions if the purchasing corporation makes 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 a purchase by a corporation, during the 12 month acquisition period, of another corporation's stock, which represents at least 80 percent of the total combined voting power of all classes of stock entitled to vote, and which has a value equal to at least 80 percent of the total value of all of the stock of such corporation.

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 338(h)(10) permits the purchasing and selling corporations to elect jointly to treat the target corporation as deemed to sell all of its assets and distribute the proceeds in complete liquidation. Section 1.338(h)(10)-1(a) permits an election to be made for an S corporation by its shareholders. Gain or loss on the deemed sale is included in the returns of the selling S corporation shareholders, and gain or loss on the actual sale of the target corporation stock is ignored. Sections 1.338(h)(10)-1(a) and (e). Further, § 1.338(h)(10)-1(d) 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. Section 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.

Under § 1.338(h)(10)-1(d)(2), a "section 338(h)(10) election" is jointly made by Purchaser and the S corporation shareholders on Form 8023-A in accordance with the instructions to the form. The election must be made not later than the 15th day of the 9th month beginning after the month in which the acquisition date occurs.

Under §§ 301.9100-1(c) and 301.9100 -3, the Commissioner has discretion to grant a reasonable extension of time to make a regulatory election, under all subtitles of the Internal Revenue Code except subtitles E, G, H, and I, provided the taxpayer

CC:DOM:CORP:2-PLR-109174-99

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 Election is fixed by the regulations (*i.e.*, § 1.338(h)(10)-1(d)). Therefore, the Commissioner has discretionary authority under § 301.9100-1 to grant an extension of time for Purchaser and Seller to file the Election, provided that Purchaser and Seller show 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.

Information, affidavits, and representations submitted by Purchaser, Seller, Target, Company Official, Tax Professionals, and Outside Attorney explain the circumstances that resulted in the failure to file the Election. The information also establishes that tax professionals were responsible for the Election, that Purchaser and Seller relied on them to timely make the Election, 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 the taxpayers have shown that they acted reasonably and in good faith in failing to timely file the Election, the requirements of §§ 301.9100-1 and 301.9100-3 have been 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, for Purchaser and Seller to file the Election with respect to the acquisition of Target, as described above.

The above extension of time is conditioned on the taxpayers’ (Purchaser’s, Seller’s, and Target’s) 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

CC:DOM:CORP:2-PLR-109174-99

taxpayers' tax liability for the years involved. A determination thereof will be made by the District Directors' offices 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' tax liability is lower. Section 301.9100-3(c). The above extension is also conditioned on (1) Purchaser and Seller signing the Election; (2) Purchaser and Seller treating the acquisition/sale of Target stock as a § 338(h)(10) transaction; (3) Seller taking into account his applicable portion of gain or loss on Target's deemed asset sale, pursuant to §§ 1366, 1367 and 331, and paying all taxes, interest and penalties (as applicable) thereon; and (4) Seller not using the installment method to report the transactions.

Purchaser and Seller should make and file the Election in accordance with § 338(h)(10)-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 form. See Announcement 98-2, 1998-2 I.R.B. 38. A copy of this letter should be attached to the election form. Purchaser must amend its return for its first tax year following the acquisition date to attach a copy of the Election and a copy of this letter (and to report the transaction as a deemed asset acquisition under § 338(h)(10) if it has not been so reported). Seller must amend his return for the period that included the acquisition date to attach thereto a copy of the Election and a copy of this letter (and to report the transaction as a deemed asset sale under § 338(h)(10); i.e., to include his applicable portion of gain or loss from Target's deemed asset sale, pursuant to §§ 1366, 1367 and 331). Seller's amended return would also include his retraction of his Form 6252, if any, and not reporting this transaction on the installment method.

We express no opinion regarding: (1) whether the acquisition/sale of Target stock qualifies as a "qualified stock purchase" under § 338(d)(3); (2) whether the acquisition/sale of Target stock qualifies for § 338(h)(10) treatment; or (3) if § 338(h)(10) is applicable, as to the amount and character of gain or loss, if any, recognized by Target (and, thus, by Seller) on Target's deemed asset sale. In addition, we express no opinion 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 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 have relied on certain statements and representations made by Purchaser and Seller (and their officials and representatives). However, the District Director should verify all essential facts (including the retraction of Seller's Form 6252, if any). 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.

This letter is directed only to the taxpayer(s) who requested it. Section 6110(k)(3) provides that it may not be used or cited as precedent.

CC:DOM:CORP:2-PLR-109174-99

Pursuant to a power of attorney on file in this office, a copy of this letter is being sent to your authorized representative.

Sincerely yours,

Assistant Chief Counsel (Corporate)

By:

Charles M. Levy
Counsel to the Assistant
Chief Counsel (Corporate)