

**Internal Revenue Service**

Department of the Treasury

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Person to Contact:

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Date:

July 29, 1999

Parent =

Purchaser =

Target 1 =

Target 2 =

Target  
Affiliates =

Sellers =

Company Officials =

Tax Professionals =

Authorized  
Representatives =

Business X =

Date A =

Date B =

Date C =

Country X =

This letter responds to your letter dated April 5, 1999, requesting, on behalf of the taxpayers identified in the above legend, 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 for Parent (as the United States shareholder and the common parent of an affiliated group of which the foreign purchasing corporation is a member) to file 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 Parent and Purchaser's acquisition of the stock of Target 1 and Target 2 and the deemed acquisition of the Target Affiliates on Date A. Sometimes hereinafter such elections are referred to collectively as the "Election" or "Elections." Similarly, Target 1, Target 2, and the Target Affiliates are sometimes hereinafter referred to collectively as "Target" or "Targets". Parent's returns for the taxable year in which the acquisition was consummated is presently being examined by the applicable Appeals office, and this request has been coordinated with Appeals pursuant to Rev. Proc. 99-1 and 99-2, 1999-1 I.R.B. 6 and 73, respectively. Additional information was received in a letter dated July 28, 1999. The material information submitted for consideration is summarized below.

Parent is the common parent of a consolidated group that has a calendar taxable year and uses the accrual method of accounting. Purchaser, a foreign corporation (the country of formation is indicated in the above redacted legend), is a wholly owned

subsidiary of Parent and is included in Parent's consolidated income tax return (*i.e.*, by being listed on Form 5471, Information Return With Respect to a Foreign Corporation). Target Affiliates are wholly owned subsidiaries of Target 2 and Target 1 and Target 2 were owned by Sellers. Target Affiliates and Target 1 and Target 2 are Country X companies.

It is represented that none of the Targets 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. Furthermore, prior to the acquisition, none of the Targets and none of the Sellers filed a U.S. income tax return or were subject to U. S. income taxation.

On Date A, Parent and Purchaser acquired over 80 % of the stock of Target 1 and Target 2 (and Target Affiliates) from Sellers, for Parent stock and cash, in fully taxable transactions. It is represented that Parent and Purchaser were not related to Sellers, within the meaning of § 338(h)(3), and that the acquisition, and deemed acquisition, of each of the Targets, constituted a "qualified stock purchase," within the meaning of § 338(d)(3). After the acquisitions the Targets were included in Purchaser's consolidated income tax return (*i.e.*, by being listed on Form 5471, Information Return With Respect to a Foreign Corporation).

The Elections were due on Date B. However, for various reasons a valid Election was not made. On Date C (which is after the due date for the Election), Company Officials, Tax Professionals, and Authorized Representatives discovered that the Election had not been properly filed. Subsequently, this request was submitted to the Service, under § 301.9100-1, for an extension of time to file the Election. The period of limitations on assessments under § 6501(a) has not expired for Parent's taxable year(s) 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.

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.

Sections 1.338-1(g)(1)(i) and (v) provide, *inter alia*, that a foreign purchasing corporation or deemed foreign purchasing corporation is not eligible for the special rule under § 1.338-1(g)(1) (*i.e.*, which specifies a filing date for the election that is later than the filing date required by § 338(g) and § 1.338-1(d)) if such foreign corporation is

considered subject to United States tax (e.g., is a CFC or is required to file a United States income tax return). 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 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 or 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 1.338-2(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.

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 and 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).

The time for filing the Election is fixed by the regulations (*i.e.*, §§ 1.338-1(d) and 1.338-1(g)(3)). Therefore, the Commissioner has discretionary authority under § 301.9100-1 to grant an extension of time for Parent to file the Election, provided Parent establishes 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 Parent, Company Officials, Tax Professionals, and Authorized Representatives explain the circumstances that resulted in the failure to file a valid Election. The information also establishes that tax professionals were responsible for the Election, that Parent 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)(1)(v).

Based on the facts and information submitted, including the representations that have been made, we conclude that Parent has established it 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 Parent (as the common parent of the consolidated group and United States shareholder of the controlled foreign purchasing corporation) to file the Election, with respect to the acquisitions and deemed acquisitions of the Targets, as described above.

The above extension of time is conditioned on the taxpayers' 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).

Parent (as the common parent of the consolidated group and United States shareholder of the controlled foreign purchasing corporation) should file the Election in accordance with §§ 1.338-1(d) and 1.338-1(g). 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 any information that is required to be attached to the election form). In accordance with the instructions on Form 8023-A and Form 8023 regarding "Election for Multiple Targets" a single form may be used to make the Election for Target 2 and the Target Affiliates; a separate form must be filed for Target 1. A copy of this letter should be attached to the election forms, and a copy of this letter and the election forms should be attached to the applicable amended returns. See, Announcement 98-2, 1998-2 I.R.B. 38, and § 1.338-1(g). Also, the taxpayer must give a copy of the Election and amended returns to the applicable Appeals officer.

No opinion is expressed as to (1) whether the acquisitions qualify as a "qualified stock purchase", (2) whether the acquisitions qualify for § 338(a) treatment, and (3) if the acquisitions qualify for § 338(a) treatment, as to the amount of gain or loss recognized (if any) 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 and Appeals officer 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.

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 designated Company Official, pursuant to a power of attorney on file in this office.

Sincerely yours,

Assistant Chief Counsel (Corporate)

by Richard Todd

Richard Todd  
Counsel to the Assistant Chief Counsel  
(Corporate)