

Internal Revenue Service

Department of the Treasury

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Person to Contact:

Telephone Number:

Refer Reply To:
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Date:
November 30, 1999

Legend:

Purchaser =

Sellers =

Target #1 =

Target #2 =

Date A =

Date B =

Date C =

Purchaser's
Company Official =

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Outside Tax
Professional =

Authorized
Representatives =

Business A =

Business B =

Business C =

Country X =

Y =

Z =

This letter responds to your Authorized Representatives' letter dated August 6, 1999, requesting an extension of time under §§ 301.9100-1 through 301.9100-3 of the Procedure and Administration Regulations to file an election. The extension is being requested by Purchaser 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 Purchaser's acquisition of the stocks of Target #1 and Target #2 (sometimes hereinafter referred to collectively as the "Elections" or "Election") on Date A. Additional information was received on September 17, 1999. The material information submitted for consideration is summarized below.

Purchaser is the common parent of a consolidate group that has a taxable year ending on June 30 and uses the accrual method of accounting. Target #1 and Target #2 are Country X corporations (the specific country of incorporation is set forth above in the redacted legend); Target #1 was wholly owned by Sellers, and Sellers owned Z

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(over 80) percent of Target #2. Sellers are individuals who are citizens and residents of Country X, and it is represented that each of the Sellers is not a United States shareholder, as defined in § 951(b). Purchaser, Target #1 and Target #2 are engaged in Businesses A, B and C respectively.

Prior to the below described acquisitions, Sellers and Targets did not file U.S. income tax returns and they were not subject to U.S. income taxation. Further, neither Target #1 nor Target #2 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, Sellers and Purchaser entered into two Stock Purchase Agreements for Purchaser to acquire all of Sellers' stock of Target #1 and Target #2. Also on Date A, Purchaser acquired all of the Sellers' stock of Target #1, pursuant to the Stock Purchase Agreements, for cash, Y shares of Purchaser's stock, and contingent payments of Purchaser's stock in a fully taxable transaction. Also on Date A, Purchaser acquired all of the Sellers' stock of Target #2 in exchange for cash and a contingent payment of Purchaser's stock in a fully taxable transaction. The Elections were due on Date B. However, for various reasons the Elections were not filed. On Date C (which is after the due date for the Elections), Authorized Representatives discovered that the Elections had not been filed. Subsequently, this request was submitted, under § 301.9100-1, for an extension of time to file the Elections.

It is represented that (1) Purchaser was not related to Sellers within the meaning of § 338(h)(3), and (2) Purchaser's acquisition of the stock of Target #1 and Target #2 each qualified as a "qualified stock purchase," as defined in § 338(d)(3). The period of limitations on assessments under § 6501(a) has not expired for Purchaser's, Target #1's and Target #2's taxable year(s) in which the acquisition occurred, the taxable years in which the Elections should have been filed, or any taxable year(s) 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)(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

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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 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.

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 time for filing the Elections is fixed by the regulations (*i.e.*, §§ 1.338-1(d) and 1.338-1(g)). Therefore, the Commissioner has discretionary authority under § 301.9100-1 to grant an extension of time for Purchaser to file the Elections, 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 Professional, and Authorized Representatives explain the

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circumstances that resulted in the failure to file valid Elections. The information establishes that tax professionals were responsible for the Elections, that Purchaser relied on the tax professionals to timely make the Elections, and that the government will not be prejudiced if relief is granted. See § 301.9100-3(b)(1)(iv).

Based on the facts and information submitted, including the representations that have been made, we conclude that Purchaser has established that it 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 Purchaser to file the Elections with respect to the acquisition of the stock of Target #1 and Target #2, as described above.

The above extension of time is conditioned on the taxpayers' (Purchaser's, and (and, if they have any U.S. tax liability) Sellers') tax liability 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 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' tax liability is lower. Section 301.9100-3(c).

Purchaser should file the Elections in accordance with §§ 1.338-1(d) and 1.338-1(g). That is, new elections on Forms 8023 (not Forms 8023-A) 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 forms. Purchaser (and Target #1 and Target #2) must file or amend (if and as applicable) its applicable returns to report the acquisitions as "section 338 transactions," and to attach a copy of the Forms 8023 and a copy of this letter. See §§ 1.338-1(e) and 1.338-1(g), and Announcement 98-2, 1998-2 I.R.B. 38.

No opinion is expressed as to: (1) whether Purchaser's acquisition of the Target #1 and Target #2 stock qualifies as a "qualified stock purchase," (2) whether the acquisition of the Target #1 and Target #2 stock qualifies for § 338(a) treatment, and (3) if the acquisition of the Target #1 and Target #2 stock qualifies for § 338(a) treatment, as to the amount of gain or loss recognized (if any) by such target corporations 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 resulting from, filing the Elections late that are not specifically set forth in the above

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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.

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.

Pursuant to powers of attorney on file in this office, a copy of this letter is being sent to the authorized representative who is first listed on the powers.

Sincerely yours,

Assistant Chief Counsel (Corporate)

by: Bernita Thigpen

Deputy Assistant Chief
Counsel (Corporate)