Internal Revenue Service

Department of the Treasury

Washington, DC 20224

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Person to Contact:

Telephone Number:

Refer Reply To:
CC:CORP:4 PLR-113410-00

Date:
December 7, 2000

LEGEND:

Purchaser =

Target =

Sellers =

Company Official =

Tax Professional =

Authorized
Representative 1 =

Authorized
Representative 2 =

Date A =
Date B =
Date C =

Business D =

This is in response to your letter dated December 14, 1999, requesting, on behalf of the above-referenced taxpayers, an extension of time under §§ 301.9100-1 through 301.9100-3 of the Procedure and Administration Regulations to file an election. Purchaser and Sellers are requesting the extension of time to file a "section 338(h)(10) election" under § 338(h)(10) of the Internal Revenue Code and § 1.338(h)(10)-1(d) of the Income Tax Regulations with respect to Purchaser's Date A acquisition of the stock of Target (the "Election"). All citations in this letter to regulations under § 338 are to the regulations as in effect on Date A. Additional information was received in letters dated April 3 and July 7, 2000. The material information submitted is summarized below.

Purchaser is the common parent of a consolidated group that includes various subsidiary companies. Purchaser uses the accrual method of accounting, has a tax

year ending on October 31, and engages primarily in Business D. Prior to the Acquisition (as defined below), Target was an S corporation within the meaning of § 1361, and was wholly owned by Sellers. Target filed on the basis of a calendar tax year, was a stand-alone corporation with no subsidiaries, and engaged in Business D.

On Date A, Purchaser acquired all of Sellers' Target stock for cash in a fully taxable transaction (the "Acquisition"). It has been represented that: (1) Purchaser was not related to the Sellers within the meaning of § 338(h)(3) at the time of the Acquisition, and (2) the Acquisition qualified as a "qualified stock purchase" within the meaning of § 338(d)(3). Following the Acquisition, "new" Target has filed as part of Purchaser's consolidated group.

Purchaser and Sellers intended to file the Election. The Election was due on Date B, but for various reasons was not filed. On Date C (which is after Date B), Tax Professional discovered that the Election had not been filed. Subsequently, this request for an extension of time to file the Election was submitted under § 301.9100-1. The period of limitations on assessments under § 6501(a) has not expired for Purchaser's, Sellers', or Target's taxable year(s) in which the Acquisition occurred, the taxable year in which the Election should have been filed, or for 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 acquisitions if: (1) the purchasing corporation makes or is treated as having made a "section 338 election" under § 338(g), and (2) 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 (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) (other than paragraph (4) thereof), 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 its assets and distribute the proceeds in complete liquidation. The sale of stock included in the qualified stock purchase is generally ignored. A § 338(h)(10) election may be made for target only if it is a member of a selling consolidated group, a member of a selling affiliated group filing separate returns, or an S corporation. Section 1.338(h)(10)-1(a). Gain or loss on the

deemed sale is included in the consolidated return of the selling group (unless the target corporation is a member of a selling affiliated group filing separate returns or an S corporation). Section 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) provides that if a § 338(h)(10) election is made for the target corporation, it is irrevocable.

More specifically, old target recognizes gain or loss as if, while it was a member of the selling consolidated group (or owned by the selling affiliate or S corporation shareholders), it sold all its assets in a single transaction at the close of the acquisition date (but before the deemed liquidation). Section 1.338(h)(10)-1(e)(1). Then old target is treated as if, while a member of the selling consolidated group (or owned by the selling affiliate or S corporation shareholders), it distributed all its assets in complete liquidation. If target is an S corporation immediately before the acquisition date, nothing in the § 338 provisions prevents a holder of target stock from taking the deemed sale gain into account under §§ 1366 and 1367. See §§ 331 or 332 for gain or loss recognized by the old target shareholders as a result of the deemed liquidation. Section 1.338(h)(10)-1(e)(2)(ii). No gain or loss is recognized on the sale or exchange by the selling consolidated group (or the selling affiliate or an S corporation shareholder) of target stock included in the qualified stock purchase. If target is an S corporation immediately before the acquisition date, the sale or exchange of old target stock does not result in a termination of the § 1362(a) election for the S corporation. Section 1.338(h)(10)-1(e)(2)(iv).

Section 1.338(h)(10)-1(d)(2) provides that a § 338(h)(10) election is jointly made by a purchaser and the selling consolidated group (or the selling affiliate or the S corporation shareholders) on Form 8023 in accordance with the instructions to the form. The regulations further provide that the election must be made not later than the 15th day of the ninth month beginning after the month in which the acquisition date occurs. The instructions to Form 8023 provide that a § 338(h)(10) election must be made jointly by the purchasing corporation and the common parent of the selling consolidated group (or selling affiliate or S corporation shareholders). The instructions provide that a person authorized to act on behalf of each corporation must sign the form, and if it is made for an S corporation it must be signed by each S corporation shareholder who sells target stock in the qualified stock purchase. The instructions further provide that the signatures, dates, and titles (if applicable) of those persons who must sign the election must be provided in a "signature attachment," and they provide specific details as to the preparation of the "signature attachment" and its attachment to Form 8023.

Section 1.1502-77(a) provides that the common parent of a consolidated group, for all purposes (other than for several 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.

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.

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 uses 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., by § 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 Sellers to file the Election, provided Purchaser and Sellers 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, Sellers, Company Official, Tax Professional, Authorized Representative 1, and Authorized Representative 2 explain the circumstances that resulted in the failure to timely file the Election. The information establishes that tax professionals were responsible for the Election, that Purchaser and Sellers relied on these tax professionals to timely file the Election, and that the interests of the government will not be prejudiced if relief is granted. See § 301.9100-3(b)(1)(v).

Based on the facts submitted and representations made, we conclude that Purchaser and Sellers have shown 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. Accordingly, an extension of time is granted under § 301.9100-1, until 60 days from the date of issuance of this letter for Purchaser and Sellers to file the Election with respect to the Acquisition.

The above extension of time is conditioned on: (1) the filing, within 120 days of the issuance of this letter, of all returns and amended returns (if any) necessary to report the transaction in accordance with the Election; (2) Purchaser, Target, and each of the Sellers treating the Acquisition as a § 338(h)(10) transaction, and each of the Sellers not using the installment method to report income recognized on the Acquisition, or, as necessary, filing amended returns that are consistent with not reporting such income using the installment method; and (3) the taxpayers' (Purchaser's, Sellers', and Target's) tax liability (if any) not being 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 appropriate District Director's 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 taxpayer's liability is lower. Section 301.9100-3(c).

Purchaser and the Sellers must file the Election in accordance with § 1.338(h)(10)-1(d). That is, a new election on Form 8023 must be executed on or after the date of this letter and filed in accordance with the instructions on the form. A copy of this letter should be attached to the election form. Purchaser, Sellers, and Target must also amend their applicable tax returns to attach thereto a copy of the Election and a copy of this letter. Pursuant to § 1.338(h)(10)-1(e)(2)(iv), Target's S election is not terminated. Accordingly, Target is not required to file an S short year return (i.e., a year that ended the day before the Acquisition) nor a one day short return as a non-affiliated C corporation.

We express no opinion as to: (1) whether Target qualified as an S corporation on Date A, (2) whether the Acquisition qualified as a "qualified stock purchase" under § 338(d)(3), (3) whether the Acquisition qualified for § 338(h)(10) treatment, and (4) if § 338(h)(10) was applicable, as to the amount and character of gain or loss, if any, recognized by Target (and, thus by Sellers) on Target's deemed asset sale and deemed liquidation.

In addition, we express no opinion as to the tax 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 this letter. For purposes of granting relief under § 301.9100-1, we relied on certain factual statements and representations made by the taxpayers. However, the District Director(s) 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 taxpayers who requested it. Section 6110(k)(3) provides that it may not be used or cited as precedent.

Copies of this letter are being sent to Purchaser and Authorized Representative 2 pursuant to powers of attorney on file with this office. Authorized Representative 1 and Authorized Representative 2 should furnish each of the Sellers with a copy of this letter.

Sincerely,
Associate Chief Counsel (Corporate)
By: Ken Cohen
Acting Chief
Branch 3