

**Internal Revenue Service**

Department of the Treasury

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Person to Contact:

Telephone Number:

Refer Reply To:

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Date:  
February 22, 2001

Parent =  
Target =  
Date A =  
Date B =  
Date C =  
Date D =  
Tax Professionals =  
Company Official =  
Authorized Representative =

This responds to your October 24, 2000 letter, submitted on behalf of Parent, requesting an extension of time under §§ 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations for Parent to file an election. The extension is requested for Parent to file an election under § 338(g) of the Internal Revenue Code and § 1.338-1(d) of the Income Tax Regulations, with respect to the acquisition of the stock of Target (sometimes hereinafter referred to as the "Election"), on Date A. The information provided in this request and in later correspondence is summarized below.

Parent is the common parent of a consolidated group that has a fiscal year ending Date B and uses the accrual method of accounting. On Date A, Parent purchased all the stock of Target, a foreign corporation, from unrelated foreign third parties (Sellers) in a fully taxable transaction.

Prior to the acquisition, Target and Sellers did not file U.S. income tax returns and they were not subject to U.S. income taxation. Further, Target was not: (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 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.

It is represented that: (1) Parent's acquisition of the stock of Target qualified as a "qualified stock purchase" as defined under § 338(d)(3); and (2) Parent was not related to Sellers within the meaning of § 338(d)(3). The period of limitations on

assessments under § 6501(a) has not expired for Parent's or Target's taxable year in which the acquisition occurred, the taxable year in which the Election should have been filed, or any taxable year that would have been affected by the Election had it been timely filed.

Parent intended to file the Election that was due on Date C. However, for various reasons the Election was not filed. In Date D (which was after the due date for the Election), it was 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 acquisitions if: (1) the purchasing corporation makes or is treated as having made a "§ 338 election" under § 338(g); and (2) the acquisition is a "qualified stock purchase." Section 1.338-1(c)(10) provides that a "§ 338 election" is an election to apply § 338(a) to target.

Section 338(g) specifies the requirements for making a "§ 338 election." 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 1 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 1.338-1(d) provides that a purchasing corporation makes a "§ 338 election" for target by filing a statement of "§ 338 election" on Form 8023 in accordance with the instructions on the form. The "§ 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 "§ 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.

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.*, § 1.338-1(d)). Therefore, the Commissioner has discretionary authority under § 301.9100-1 to grant an extension of time for Parent to file the Election, provided Parent 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 Tax Professionals, Company Official, and Authorized Representative explain the circumstances that resulted in the failure to file the Election. The information 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 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 to file the Election with respect to the acquisition of the stock of the Target, as described above.

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, and (2) the taxpayers' (Parent's consolidated group's, Target's, and Seller's) United States 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 made timely (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 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 should file the Election in accordance with § 1.338-1(d). That is, a new election on 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. A copy

of this letter should be attached to the election form. Parent and Target must file, or amend their returns, as applicable, reporting the acquisition/sale as a "§ 338 transaction," and attach thereto a copy of this letter and a copy of the election form.

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

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. This office has not verified any of the facts or representations submitted in support of the request for a ruling. Verification of the information, representations, and other data may be required as part of the audit process. 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.

Under the power of attorney on file in this office, copies of this letter are being sent to Parent and Parent's other authorized representative.

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,  
Associate Chief Counsel (Corporate)  
By: Vicki J. Hyche  
Chief, Branch 4