

Internal Revenue Service

Department of the Treasury

Number: **200127020**
Release Date: 7/6/2001
Index Number: 9100.07-00, 338.01-02

Washington, DC 20224

Person to Contact:

Telephone Number:

Refer Reply To:
CC:CORP:B06-PLR-103267-01
Date:
April 3, 2001

LEGEND

Purchaser = .

Parent =

Seller =

Target =

Executive B =

Executive S =

Date A =

Date C =

Date F =

Date G =

Date H =

State A =

State C =

B% =

Outside
Professional =

This is in response to a letter dated December 6, 2000, submitted by your authorized representative, requesting an extension of time to make a joint election pursuant to §§ 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations. Additional information was submitted in a letter dated March 26, 2001. Purchaser and Seller's Parent request an extension to file a "§ 338(h)(10) election" pursuant to § 338(h)(10) of the Internal Revenue Code ("Code") and § 1.338(h)(10)-1(d) of the Income Tax Regulations (the "Election"), regarding Purchaser's acquisition of Target on Date A. All citations in this letter to regulations under § 338 are to the regulations as in effect for Date A. The material information submitted for review is summarized below.

Both Purchaser and Seller's Parent are the common parents of consolidated groups. Purchaser is incorporated in State A. Seller and Seller's Parent are both incorporated in State C. Target is incorporated in State C. Prior to Date A, Target was a wholly owned subsidiary of Seller, who was a wholly owned subsidiary of Seller's Parent. As such, Target was a member of Seller's consolidated group.

On Date A, Purchaser purchased B% of the stock of Target with cash and a note payable. According to the representations provided by the taxpayer:

- 1) Purchaser was not related to Seller or Seller's Parent within the meaning of § 338(h)(3).
- 2) The transaction meets the requirements of a qualified stock purchase as defined under § 338(d)(3).

At the time of the purchase of Target, all parties intended to make the Election. The Election was due on Date E. However, for various reasons the Election was not made.

On or about Date G (a date after Date E), Outside Professional's personnel discovered that the Election was not filed in a timely manner. Outside Professional immediately contacted Executive B of this failure to effect the Election in a timely manner. At that time, Executive B instructed Outside Professional to begin the preparation of the request for relief.

Both Seller's Parent and Purchaser filed income tax returns as if a valid § 338(h)(10) election had been made.

The parties have represented that the period of limitations on assessment under § 6501(a) has not expired for Purchaser's, Seller's Parent's, Seller's, or Target's taxable years in which the acquisition occurred, the taxable years 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 acquisitions if: (1) the acquisition is a "qualified stock purchase" which is defined under § 338(d)(3) 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, and (2) the purchasing corporation makes or is treated as having made a "§ 338 election" or a "§ 338(h)(10) election."

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 selling all of its assets and distributing the proceeds in complete liquidation. The sale of stock included in the qualified stock purchase generally is 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 on 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)(3) provides that if a § 338(h)(10) election is made for the target corporation, it is irrevocable.

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 (Elections Under Section 338 for Corporations Making Qualified Stock Purchases) 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 the form must be signed by a person authorized to act on behalf of each corporation, and if 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 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, 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 for the consolidated return year. See also 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 6 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. 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 under § 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's Parent to file the Election, provided Purchaser and Seller's Parent show that 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.

The affidavits, representations and information submitted from Purchaser, Seller's Parent, Executive B, Executive S, and Outside Professional explain the circumstances surrounding the failure to make the Election. The information establishes that a competent tax professional was responsible for the Election and was

aware of all relevant facts, that Purchaser and Seller's Parent relied on the tax professional to make the Election, and that the interests of the government will not be prejudiced if relief is granted. Section 301.9100-3(b)(1)(v).

Based on the facts and information submitted and the representations made by the taxpayers, we conclude the taxpayers have shown they acted reasonably and in good faith, the requirements of §§ 301.9100-1 and 301.9100-3 have been met, and granting relief will not prejudice the interests of the government. Therefore, an extension of time is granted under § 301.9100-1, until 30 days from the date of issuance of the letter, for Purchaser and Seller's Parent to file the Election with respect to the acquisition of Target.

The above extension of time is conditioned on the fact it will not produce a lower tax liability for Purchaser's group, Seller's Parent's group and Target, 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 Industry 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).

Purchaser and Seller 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, which grants an extension, and filed in accordance with the instructions to the form.

A copy of this letter should be attached to the Election form. Purchaser and Seller's Parent, having reported the acquisition as a "§ 338(h)(10)" transaction, must amend their applicable returns within 30 days of the issuance of this letter ruling to attach a copy of the Election (and the information required therewith) and a copy of this letter.

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 of gain or loss, if any, recognized by Target on its 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 relied on certain statements and

representations made by the taxpayers. However, the Industry Directors should verify all essential facts. In addition, notwithstanding that an extension is granted under § 301.9100-1 to file the Election, penalties and interest, if any, that would otherwise be applicable still apply.

Except as expressly provided herein, no opinion is expressed or implied concerning the tax consequences of any aspect of any transaction or item discussed or referenced in this letter.

This ruling is directed only to the taxpayers requesting it. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.

Purchaser must provide Seller's Parent with a copy of this letter.

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

Sincerely,
Associate Chief Counsel (Corporate)

By: Ken Cohen

Senior Technician Reviewer, Branch 3