

26 CFR 601.201: Rulings and determination letters.

(Also Part I, §§ 338; 1.338-2, 1.338(h)(10)-1, 301.9100-3.)

## **Rev. Proc. 2003-33**

### **SECTION 1. PURPOSE**

.01 This revenue procedure grants certain taxpayers an automatic extension of time pursuant to § 301.9100-3 of the Procedure and Administration Regulations to file elections on Form 8023, *Elections Under Section 338 for Corporations Making Qualified Stock Purchases*, under § 338 of the Internal Revenue Code.

.02 A request for an automatic extension of time under this revenue procedure is the exclusive procedure available for obtaining an extension to file an election under § 338 if all persons required to file Form 8023 can make the representations and submit the affidavits described in section 5 of this revenue procedure (to the extent applicable). In all other cases, see section 7 of this revenue procedure.

### **SECTION 2. BACKGROUND**

.01 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.

.02 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 extensions of time for regulatory elections 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).

.03 Section 338 provides for elections if stock of a target corporation is acquired in a qualified stock purchase. These elections are made on Form 8023.

### SECTION 3. APPLICATION

In accordance with § 301.9100-3, an extension of 12 months from the date of discovery of the failure to file a timely election under § 338 is hereby granted to any person described in section 4 of this revenue procedure that complies with the requirements set forth in section 5 to file an election under § 338.

### SECTION 4. SCOPE

This revenue procedure applies to any person required to file Form 8023 to make a valid election under § 338 (hereafter referred to as a required filer) that has not filed Form 8023 by its due date. In the case of a controlled foreign purchasing corporation described in § 1.338-2(e)(3) of the Income Tax Regulations (which, in certain circumstances, permits the United States shareholders of the purchasing corporation, in lieu of the purchasing corporation itself, to file Form 8023), the person that files Form 8023 will be considered the required filer for purposes of this revenue procedure. If more than one person must file Form 8023 for a particular election (for example, an election under § 338(h)(10)), each required filer must comply with this revenue procedure for any required filer to obtain an extension of time to make the election.

### SECTION 5. PROCEDURE TO OBTAIN AN AUTOMATIC EXTENSION UNDER § 301.9100-3

To obtain an automatic extension under § 301.9100-3 to file an election under § 338, the required filer or filers must file Form 8023 no later than 12 months after the discovery of the failure to file the election. In addition, a single statement, filed under penalties of perjury by all required

filers, must be attached to the Form 8023. For example, in the case of an election under § 338(h)(10) in which Corporation X buys all the stock of Corporation Y, an S corporation, from its two shareholders, A and B, in a qualified stock purchase, a single statement, signed under penalties of perjury by A, B, and the individual who acts on behalf of Corporation X regarding tax matters, must be attached to the Form 8023. The statement must include the information set forth in sections 5.01 through 5.15 of this revenue procedure, which is subject to verification on examination, as provided by section 6 of this revenue procedure. In the case of an election for multiple targets for which only one Form 8023 is required, only a single statement is required.

.01 The following heading typed or legibly printed at the top of the statement: "AUTOMATIC EXTENSION OF TIME TO FILE FORM 8023 FILED PURSUANT TO REV. PROC. 2003-33."

.02 The name, address, and taxpayer identification number of each required filer.

.03 The name, address, and taxpayer identification number, if any, of the target or targets.

.04 (1) The date that the failure to timely file the election was discovered and (2) a representation that Form 8023 is being filed no later than 12 months after the discovery of the failure to timely file the election.

.05 A representation that no person filed a United States tax return treating the transaction or transactions constituting the qualified stock purchase in a manner that is inconsistent with the tax consequences that would have resulted from the election for which the extension is sought under this revenue procedure. If this representation cannot be made, identify any inconsistent United States tax returns by the name and taxpayer identification number of the taxpayer that filed them, and by form number and year, and submit a representation that all such returns will be amended to eliminate this inconsistency. Further, submit information explaining why any previous filing that is inconsistent with the election should not be considered evidence of hindsight.

.06 In the case of a foreign target, a representation that the target was not a controlled foreign corporation, a passive foreign

investment company, or a foreign personal holding company at any time during the portion of its taxable year that ends on the acquisition date (as defined in § 338(h)(2)).

.07 If no person filed a United States tax return treating the transaction or transactions constituting the qualified stock purchase in a manner that is inconsistent with the tax consequences that would have resulted from the election for which the extension is sought under this revenue procedure, a representation that an assessment for deficiency is not prevented, and will not be prevented, before the date that is 12 months after the date the statement required by this section 5 is filed, by any law or rule of law for any taxable year of any person for which the election may affect such person's United States tax liability. Otherwise, a representation that an assessment for deficiency is not prevented, and will not be prevented, before the date that is 18 months after the date the statement required by this section 5 is filed, by any law or rule of law for any taxable year of any person for which the election may affect such person's United States tax liability. Note that the relevant returns may include those of the old and new target, as well as those of required filers.

.08 One or more of the following representations:

(1) Each required filer reasonably relied on a qualified tax professional, including a tax professional employed or engaged by a required filer, who was competent to render advice on the election and was aware of all relevant facts, and who failed to make the election. If one or more (but not all) required filers relied on another required filer, rather than a qualified tax professional, to make the election, the above representation should be modified to describe which required filers relied on a qualified tax professional and which required filers relied on another required filer;

(2) Each required filer reasonably relied on a qualified tax professional, including a tax professional employed by such required filer, who was competent to render advice on the election and was aware of all relevant facts, and who failed to advise such required filer to make the election;

(3) The required filer or filers failed to make the election because, after exercising reasonable diligence (taking into ac-

count the required filer's or filers' experience and the complexity of the issue), the required filer or filers were unaware of the necessity for the election; or

(4) The Internal Revenue Service has not discovered the failure to make the election.

.09 A representation that no required filer is seeking to alter a return position for which an accuracy-related penalty has been or could be imposed under § 6662 at the time of the filing of Form 8023 (taking into account any qualified amended return filed within the meaning of § 1.6664-2(c)(3)).

.10 If each required filer was informed in all material respects of the required election and related tax consequences, a representation that no required filer chose not to file the election. If any required filer was not informed in all material respects of the required election and related tax consequences, please explain.

.11 A representation that facts have not changed since the due date for making the election that make the election advantageous to any required filer and that no required filer is using hindsight in seeking to file Form 8023.

.12 A representation that the granting of an extension to file the election will not result in any taxpayer having a lower United States tax liability in the aggregate for all taxable years affected by the election than such taxpayer would have had if the election had been timely made (taking into account the time value of money).

.13 Attached to the statement must be an affidavit and declaration from each required filer, or, if the required filer is not an individual, the individual who acts on behalf of the required filer regarding tax matters, describing in detail the events that led to the failure to make a valid election and to the discovery of the failure. If the required filer relied on a qualified tax professional for advice, the affidavit must describe the engagement and responsibilities of the professional as well as the extent to which the required filer relied on the professional. The affidavit must be accompanied by a dated declaration, signed by the required filer, or, if the required filer is not an individual, the individual who acts on behalf of the required filer, which states:

“Under penalties of perjury, I declare that I have examined the attached statement, including accompanying documents, and, to the best of my knowledge and belief, the attached statement and this affidavit contain all the relevant facts, and such facts are true, correct, and complete.” The individual who signs for a required filer must have personal knowledge of the facts and circumstances at issue. If a required filer relied on another required filer or that other required filer's tax professional to make the election, in lieu of describing the events that led to the failure to make a valid election, the discovery of the failure, and the qualified tax professional's engagement and responsibilities, its affidavit should state that the required filer relied on the other required filer or the other required filer's tax professional to make the election.

.14 Attached to the statement also must be an affidavit and declaration from the individuals having knowledge or information about the events that led to the failure to make a valid election and to the discovery of the failure. These individuals must include the required filer's return preparer and/or Form 8023 preparer, any individual (including an employee of a required filer) who made a substantial contribution to the preparation of the return and/or Form 8023, and any accountant or attorney, knowledgeable in tax matters, who advised the required filer with regard to the election. The affidavit must describe the engagement and responsibilities of the individual as well as the advice that the individual provided to the required filer. Each affidavit must include the name, current address, and taxpayer identification number of the individual, and must be accompanied by a dated declaration, signed by the individual, which states: “Under penalties of perjury, I declare that I have examined the attached statement, including accompanying documents, and, to the best of my knowledge and belief, the attached statement and this affidavit contain all the relevant facts, and such facts are true, correct, and complete.”

.15 A statement regarding whether any taxpayer's return(s) for the taxable year in which the election should have been made or any taxable years that would have been affected by the election had it been timely

made is being examined by a director, or is being considered by an appeals office or a federal court.

## SECTION 6. EFFECT OF INCORRECT OR INCOMPLETE INFORMATION ON STATEMENT REQUESTING AUTOMATIC EXTENSION OF TIME

If the Service determines that the information provided pursuant to section 5 of this revenue procedure was incorrect or incomplete in any material respect at the time Form 8023 was filed, the Service may revoke the extension of time granted pursuant to this revenue procedure at any time.

## SECTION 7. CORPORATIONS THAT DO NOT QUALIFY FOR THE AUTOMATIC EXTENSION OF TIME

If a required filer or filers cannot qualify for the automatic extension of time pursuant to section 3 of this revenue procedure, an extension of time under § 301.9100-3 may only be obtained through a letter ruling request filed in accordance with Rev. Proc. 2003-1, 2003-1 I.R.B. 1 (or similar revenue procedure applicable to a later year). Each required filer must join in the submission of the letter ruling request. The letter ruling request must include:

.01 A detailed recitation of the facts, along with any documentary support, that:

(1) Describes the facts of the transaction or transactions claimed to constitute a qualified stock purchase, including:

(a) A representation that the acquisition of the target stock qualified as a qualified stock purchase;

(b) Information describing the purchaser of the stock, the seller(s) of the stock, and the target, whether the purchaser, the seller, and/or the target was a member of a consolidated group, and if so, information describing the common parent of the consolidated group;

(c) Whether the purchasing corporation and/or the target ceased to exist after the transaction or transactions claimed to constitute a qualified stock purchase, and if the purchasing corporation and/or the target ceased to exist after such transactions, the events that gave rise to such cessation; and

(d) In the case of an acquisition by a foreign purchasing corporation for which Form 8023 is to be filed by the United States shareholders of the foreign purchasing corporation or by the common parent of the consolidated group of which the United States shareholder of the foreign purchasing corporation is a member, a representation that the foreign purchasing corporation is a controlled foreign corporation as defined in § 957 (taking into account § 953(c)) and 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.

(2) A description of the required filer's or filers' intention, on or before the due date, without extensions, of Form 8023, to make an election under § 338, referencing any documentation supporting such intention;

(3) A detailed description of the circumstances that caused the failure to make a timely election, including the specific person or persons, by name, not merely by firm, who were responsible for filing the election, and such person or persons' qualifications as a tax professional (*e.g.*, attorney or CPA);

(4) A description of the circumstances under which the failure to file the election was discovered, including the date of discovery; and

(5) One or more of the following:

(a) A discussion explaining that each required filer reasonably relied on a qualified tax professional, including a tax professional employed or engaged by a required filer, who was competent to render advice on the election and was aware of all relevant facts, and who failed to make the election. If one or more (but not all) required filers relied on another required filer, rather than a qualified tax professional, to make the election, please explain;

(b) A discussion explaining that each required filer reasonably relied on a qualified tax professional, including a tax professional employed by such required

filer, who was competent to render advice on the election and was aware of all relevant facts, who failed to advise such required filer to make the election;

(c) A discussion explaining that the required filer or filers failed to make the election because, after exercising reasonable diligence (taking into account the required filer's or filers' experience and the complexity of the issue), the required filer or filers were unaware of the necessity for the election; or

(d) A representation that the required filer or filers are requesting relief under § 301.9100-3 to make the election before the failure to make the election is discovered by the Service.

.02 The information set forth in section 5 of this revenue procedure, including the affidavits described in sections 5.13 and 5.14, and copies of any relevant documents, including stock purchase agreements. To the extent that any representation set forth in section 5 cannot be made, the letter ruling request must explain why such representation cannot be made.

## SECTION 8. EFFECTIVE DATE

This revenue procedure is generally effective for elections under § 338 filed after April 2, 2003, other than elections filed pursuant to the terms of a letter ruling that was issued prior to April 2, 2003, or that is issued on or after April 2, 2003, in response to a ruling request filed on or before April 2, 2003. For ruling requests filed on or before April 2, 2003, in response to which the Service has not issued a letter ruling prior to April 2, 2003, the Service may request that the required filer or filers submit information specified in this revenue procedure.

## SECTION 9. PAPERWORK REDUCTION ACT

The collections of information contained in this revenue procedure have been reviewed and approved by the Office of Man-

agement and Budget (OMB) in accordance with the Paperwork Reduction Act (44 U.S.C. 3507) under control number 1545-1820.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number.

The collections of information in this revenue procedure are in section 5 and section 7. This information is required to determine whether a taxpayer qualifies for an automatic extension of time to file an election under this revenue procedure. The collections of information are required to obtain a benefit. The likely respondents are purchasers and sellers of stock in taxable transactions.

The estimated total annual reporting burden is 300 hours.

The estimated annual burden per respondent varies from 2 hours to 8 hours, depending on individual circumstances, with an estimated average of 5 hours. The estimated number of respondents is 60.

The estimated annual frequency of responses is on occasion.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue tax law. Generally tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

## SECTION 10. DRAFTING INFORMATION

The principal author of this revenue procedure is Ken Cohen of the Office of Associate Chief Counsel (Corporate). For further information regarding this revenue procedure, contact Mr. Cohen at (202) 622-7790 (not a toll-free call).