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November 27, 1998

Parent =

Purchaser =

Seller =

Target =

Purchaser's =

Authorized
Representative =

Date A =

Date B =

Date C =

This responds to your Authorized Representative's letter dated July 27, 1998, requesting an extension of time under §§ 301.9100-1 through 301.9100-3 of the Procedure and Administration Regulations to file an election. Parent (an S corporation, and Purchaser, its "qualified subchapter S

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subsidiary" ("QSSS") within the meaning of § 1361(b)(3) of the Internal Revenue Code) and Seller are requesting an extension to file a "section 338(h)(10) election" under §§ 338(g) and 338(h)(10) and § 1.338(h)(10)-1(d) of the Income Tax Regulations (the "Election"), with respect to the acquisition of Target on Date A. Additional information was received in letters dated October 22, 1998, November 5, 1998, and November 9, 1998. The material information is summarized below.

Currently, and on Date A, Parent, an S corporation, owned all of the issued and outstanding stock of Purchaser, a QSSS. Parent has a calendar taxable year and uses the accrual method of accounting. Target was an S corporation, and was wholly owned by Seller, an individual. Target had a calendar taxable year and used the accrual method of accounting.

On Date A, Purchaser and Seller entered into a stock purchase agreement for Purchaser to acquire all of Seller's Target stock. Also on Date A, Purchaser acquired all of Seller's Target stock for cash and notes in a fully taxable acquisition. It is represented that (1) Parent was not related to Seller within the meaning of § 338(h)(3), and (2) Parent's (Purchaser's) acquisition of Target stock qualified as a "qualified stock purchase," as defined in § 338(d)(3).

Parent and Seller intended to file the Election. The Election was due on Date B, but for various reasons it was not filed. On Date C (which is after the due date for the Election), Purchaser's Outside Accountant discovered that the Election was not timely filed. The period of limitations on assessments under § 6501(e) has not expired for Parent's, Target's or Seller's taxable year(s) in which the acquisition/sale was consummated, the year the Election was due, or for any year(s) that would be affected by the Election had it been timely made.

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)

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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), 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 of its assets and distribute 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 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. Sections 1.338(h)(10)-1(d)(2) and (3) provide that if a § 338(h)(10) election is made for the target corporation, it is irrevocable and a § 338 election is deemed made for the target corporation.

Section 1.338(h)(10)-1(d)(2) provides that a § 338(h)(10) election is jointly made by Purchaser and the S corporation shareholders on Form 8023-A (or 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-A (or Form 8023) provide that if a § 338(h)(10) election is made for an S corporation, Form 8023-A (or Form 8023) 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-A (or Form 8023).

Section 1.338-2(b)(4) provides that if an election under § 338 is made for target, old target is deemed to sell target's assets and new target is deemed to acquire those assets.

Section 1361(a)(1) provides that the term "S corporation"

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means, with respect to any taxable year, a small business corporation for which an election under § 1362(a) is in effect for such year.

Section 1361(b)(3) provides that a QSSS is not treated as a separate corporation, and all assets, liabilities, and items of income, deduction, and credit of a QSSS are treated as assets, liabilities, and such items (as the case may be) of the S corporation.

Under § 301.9100-1, the Commissioner has discretion to grant a reasonable extension of time to make a regulatory election, 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.

In this case, Parent and Seller were required by § 1.338(h)(10)-1(d)(2) to file the Election on Date B. However, for various reasons the Election was not filed. Subsequently, Parent and Seller filed this request, under § 301.9100-1, for an extension of time to file the Election. The time for filing the Election is fixed by the regulations (*i.e.*, § 1.338(h)(10)-1(d)). Therefore, the Commissioner has discretionary authority under § 301.9100-1 to grant an extension of time for Parent and Seller to file the Election, provided Parent and Seller 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 Seller, Parent, Purchaser's Outside Accountant, and Authorized Representative explain the circumstances that resulted in the failure to timely file a valid Election. The information also establishes that tax professionals were responsible for the Election, that Seller and Parent relied on them to timely make the Election, that Parent and Seller filed their returns consistent with the Election and requested this relief before the omission was discovered by the Service, and that the government will not be prejudiced if relief is granted. See §§ 301.9100-3(b)(1)(i) and (v).

Based on the facts and information submitted, including the representations made, we conclude that Parent and Seller have shown they acted reasonably and in good faith, the requirements of §§ 301.9100-1 and 301.9100-3 are satisfied, and that granting

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relief will not prejudice the interests of the government. Accordingly, an extension of time is granted under § 301.9100-1, until 30 days from the date of issuance of this letter, for Parent and Seller to file the Election with respect to the acquisition of Target as described above.

The above extension of time is conditioned on (1) Parent and Seller signing the Election; (2) Parent and Seller treating the acquisition/sale of Target stock as a § 338(h)(10) transaction; (3) Seller not using the installment method to report the transactions; (4) Parent qualifying as an S corporation under § 1361(a) and Purchaser qualifying as a QSSS under § 1361(b)(3); and (5) the taxpayers' (Seller's, Parent's, and Target's) tax liability (if any) being not 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 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' liability is lower. Section 301.9100-3(c).

Parent and Seller must file the Election in accordance with § 1.338(h)(10)-1(d). That is, a new election on Form 8023-A (or 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. See Announcement 98-2, 1998-2 I.R.B. 38. A copy of this letter should be attached to the election form. Parent and Seller must file or amend, as applicable, their returns to report the transaction as a "section 338(h)(10)" transaction (including Seller amending his return by retracting his Form 6252 and not reporting this transaction on the installment method), and attach a copy of the Election (and the information required therewith) and a copy of this letter.

We express no opinion as to (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; and (3) if § 338(h)(10) is applicable, as to the amount and character of gain or loss, if any, recognized by Target (and, thus, by Seller) on Target's deemed asset sale.

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

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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 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 taxpayer(s) who requested it. Section 6110(k)(3) provides that it may not be used or cited as precedent.

A copy of this letter is being sent to Authorized Representative, pursuant to the power of attorney on file in this office, and to Seller.

Sincerely yours,

Assistant Chief Counsel

(Corporate)

Bernita L. Thigpen
By Bernita L. Thigpen
Deputy Assistant Chief
Counsel (Corporate)