Internal Revenue Service

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Department of the Treasury

Washington, DC 20224

Person to Contact:

Telephone Number:

Refer Reply To:
CC:DOM:CORP:1-PLR-117945-99
Date:
April 18, 2000

Legend

Purchaser =

Sub#1 =

Sub#2 =

Corporation =

Target =

Company Official =

Tax Professional =

Date A =

Date B =

Date C =

Date D =

Date E =

Country 1 =

:

This letter responds to your authorized representative's letter, dated November 1, 1999, on behalf of the above taxpayers, requesting an extension of time under §§ 301.9100-1 through 301.9100-3 of the Procedure and Administration Regulations to file an election. Additional information was submitted on February 3, 2000 and March 2, 2000. The extension is being requested for Purchaser (as common parent of the consolidated group of which Sub#1, the United States shareholder of Sub#2, the foreign purchasing company, is a member) to file an election under § 338(g) of the Internal Revenue Code and §§ 1.338-1(d) and 1.338-1(g) of the Income Tax Regulations. All citations in this letter to regulations under § 338 are to the regulations as in effect for Date A.

Purchaser is the common parent of a consolidated group that has a calendar taxable year and uses the accrual method of accounting. Purchaser wholly owns Sub#1, a U.S. corporation, which wholly owns Sub#2, a Country 1 corporation. Corporation is a Country 1 corporation that owns 60% of Target, another Country 1 corporation.

On Date A, Sub#2 acquired 100% of the stock of Corporation from three individual residents of Country 1 and a Country 1 corporation. Purchaser intends to characterize the acquisition of Corporation as an asset acquisition pursuant to § 338(g). On Date B, Sub#2 acquired from two Country 1 residents (Sellers) solely for cash in a fully taxable acquisition, the remaining 40% of the stock of Target. The stock acquisition of Target was made with the intent of electing to characterize the acquisition as an asset acquisition under § 338(g) (the “Election”). It is represented that the acquisition of Target constituted a qualified stock purchase within the meaning of § 338(d)(3) and that neither Purchaser, Sub#1 nor Sub#2 were related to the sellers within the meaning of § 338(h)(3). The period of limitations on assessments under § 6501(a) has not expired for Purchaser's, or Sub#1's taxable year(s) in which the acquisition occurred, the taxable year in which the Election should have been filed, or any taxable years that would have been affected by the Election had they been timely filed.

Additionally, Purchaser has made the following representations with respect to this transaction:

a. Sellers are not United States persons, within the meaning of §7701(a)(30), for U.S. federal income tax purposes. Furthermore, none of the Sellers are subject to tax on the sale of such stock in Target under §871(b).

b. Target is a foreign corporation, within the meaning of § 7701(a)(3) and (5) and Target does not intend to file an election under § 301.7701-3(c) to be treated as either a disregarded entity or a partnership for U.S. federal income tax purposes.

c. Target had not been a “controlled foreign corporation” (“CFC”), within the meaning of § 957(a), at any time during the five-year period immediately preceding the date of its acquisition by Sub#2 (i.e., the direct purchase of 100% of Corporation by Sub#2 on Date A, resulted in an indirect 60% purchase of Target).

d. Immediately after the acquisition by Sub#2 of an indirect 60% interest in Target on Date A, Target became a CFC, within the meaning of § 957(a), and was a

CFC on Date B when Sub#2 purchased the remaining 40% of the outstanding stock of Target.

e. Immediately after the acquisition by Sub#2 of an indirect 60% interest in Target on Date A, Target was not a “foreign personal holding company”, within the meaning of §552, and was not a foreign personal holding company on Date B when Sub#2 purchased the remaining 40% of the outstanding stock of Target.

f. Target did not own a “U.S. real property interest,” within the meaning of §897(c), immediately prior to Sub#2's acquisition of all the remaining 40% of the outstanding common stock of Target.

g. Target will not be required under §1.6012-2(g) to file a U.S. income tax return for its Date E short year in connection with the deemed sale of all of its assets at the close of the acquisition date under §338(a)(1).

h. Foreign income taxes attributable to the foreign taxable income earned by Target during the foreign taxable year will be allocated to old target and new target in accordance with the principles of §1.338-5(d).

The Election was due on Date C. However, for various reasons, the Election was not made. On Date D, Company Official and Tax Professional 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 purchases if the purchasing corporation makes or is treated as having made a "section 338 election" under § 338(g) and 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.

Sections 1.338-1(g)(1)(i) and (v) provide, inter alia, that a foreign purchasing corporation or deemed foreign purchasing corporation is not eligible for the special rule under § 1.338-1(g)(1) (i.e., which specifies a filing date for the election that is later than the filing date required by § 338(g) and § 1.338-1(d)) if such foreign corporation is considered subject to United States tax (e.g., is a CFC or is required to file a United States income tax return).

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 in whole or in part by reference to the adjusted basis of such stock in the hands of the person from whom acquired, or 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 1.338-1(d) provides that a purchasing corporation makes a "section 338 election" for target by filing a statement of "section 338 election" on Form 8023 in accordance with the instructions on the form. The "section 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 "section 338 election" is irrevocable.

Section 1.338-1(g)(3) provides that the United States shareholders (as defined in § 951(b)) of a foreign purchasing corporation that is a CFC (as defined in § 957, taking into account § 953(c)) may file a statement of "section 338 election" on behalf of the purchasing corporation if the purchasing corporation 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. Form 8023 must be filed in accordance with the instructions to the form, and a copy of the form must be attached to Form 5471 (Information Return With Respect to Foreign Corporation) filed with respect to the purchasing corporation by each United States shareholder for the purchasing corporation.

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. The term target affiliate has the same meaning as in § 338(h)(6) (applied without § 338(h)(6)(B)(i)). Thus, a corporation described in § 338(h)(6)(B)(i) is considered a target affiliate for all purposes of § 338. If a target affiliate is acquired in a qualified stock purchase, it is also a target. See § 1.338-1(c)(14). If an election under § 338 is made for target, old target is deemed to sell the target's assets and new target is deemed to acquire those assets. Under § 338(h)(3)(B), new target's deemed purchase of stock of another corporation is a purchase for purposes of § 338(d)(3) on the acquisition date of target. If new target's deemed purchase causes a qualified stock purchase of the other corporation and if a § 338 election is made for the other corporation, the acquisition date for the other corporation is the same as the acquisition date of target. However, the deemed sale and purchase of the other corporation's assets is considered to take place after the deemed sale and purchase of target's assets. See § 1.338-2(b)(4).

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 of 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 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. See § 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. See § 301.9100-3(a).

In this case, the time for filing the Election was 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 Purchaser (as common parent of the consolidated group of which Sub#1, the United States shareholder of Sub#2, the foreign purchasing company, is a member) to file the Election, provided Purchaser shows that Sub#1 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 the Company Official and tax Professional explain the circumstances that resulted in the failure to file the Election. The information establishes that Purchaser reasonably relied on a qualified tax professional and that relief was requested before the failure to make the Election was discovered by the Service. See § 301.9100-3(b)(1)(i) and (v).

Based on the facts and information submitted, including the representations that have been made, we conclude that Purchaser and Sub#1 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, subject to the below conditions, and provided that a § 338 election is made with respect to Sub#2's acquisition of Corporation, we grant an extension of time under § 301.9100-1, until 30 days from the date of issuance of this letter, for Purchaser (as the common parent of the consolidated group of which Sub#1, the United States shareholder of the foreign purchasing company and deemed foreign purchasing corporation, is a member) to file the Election with respect to the acquisition of the stock of Target as described above.

The above extension of time to file the Election is conditioned on the taxpayers' (Purchaser and its subsidiaries and Target) and Sellerss (to the extent they have any U.S. tax liability)) tax liability 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 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).

Purchaser (as common parent of the consolidated group of which Sub#1, the United States shareholder of Sub#2, the foreign purchasing company, is a member) should file the Election in accordance with §§ 1.338-1(d) and 1.338-1(g). 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. Purchaser must file and amend its return (and Target must file a final return, if and as applicable) to report the stock acquisition/sale as a "section 338 transaction," and attach thereto a copy of this letter and a copy of the election form (also see §§ 1.338-1(g) and 1.338-5). That is, the "old" Target must file a separate final return (if and as applicable) and the "new" Target must be included in Purchaser's return (by being listed on Form 5471) for the first year following the acquisition. See §§ 1.338-1(e) and 1.338-1(g), and Announcement 98-2, 1998-1 C.B. 282.

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

No opinion is expressed about the tax treatment of any conditions existing at the time of, or effects resulting from, the purchase of the stock of Target not specifically covered by the above rulings.

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. However, the District Director 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.

A copy of this letter is being sent to the authorized representatives designated on your power of attorney.

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,
Philip J. Levine
Assistant Chief Counsel (Corporate)