

Internal Revenue Service

Department of the Treasury

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Washington, DC 20224

Person to Contact:

Telephone Number:

Refer Reply To:
CC:CORP:1-PLR-106721-00
Date:
July 14, 2000

Re:

Legend:

Group Parent =

Parent =

Purchaser #1 =

Purchaser #2 =

Target =

FHoldCo =

Sellers =

Company Official =

Tax Professional =

Date A =

Date B =

Date C =

Date D =

Business W =

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Country X =

This letter responds to your authorized representative's letter dated March 13, 2000, requesting an extension of time under §§ 301.9100-1 through 301.9100-3 of the Procedure and Administration Regulations to file an election. Group Parent (as common parent of the consolidated group of which Parent, the United States shareholder of Purchaser #1 and Purchaser #2, and the foreign purchasing companies, are members) is requesting the extension 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, with respect to the acquisition of the stock of Target (sometimes hereinafter referred to as the "Election"). Additional information was received in letters dated May 3, May 12, July 11 and July 21, 2000. The information submitted for consideration is summarized below. All citations in this letter refer to regulations as in effect for Date A.

Group Parent is the common parent of a consolidated group that has a 52/53 week taxable year and uses the accrual method of accounting. Parent is a wholly owned U.S. subsidiary of Group Parent and is included in Group Parent's consolidated federal income tax return. Purchaser #1 and Purchaser #2 are wholly owned Country X subsidiaries of Parent, and are part of the same affiliated group for purposes of §§ 338(h)(5) and 338(h)(8). Company Official is an officer of Group Parent.

Prior to the acquisition described below, Target was wholly owned by Sellers. Target is a Country X corporation. Sellers are nonresident foreign individuals. Target is engaged in Business W.

Prior to the acquisition, Sellers and Target did not file U.S. income tax returns and they were not subject to U.S. income taxation. Target was not: (1) "a controlled foreign corporation" within the meaning of § 957(a); (2) a passive foreign investment company or a foreign corporation for which an election under § 1295 is in effect; (3) a foreign investment company or a foreign corporation the stock ownership of which is described in § 552(a)(2); (4) a United States real property holding corporation; or (5) required, under § 1.6012-2(g), to file a U.S. income tax return. Additionally, it is represented that Sellers are not subject to a tax on the sale of their respective shares of Target under § 871(b).

On Date A, pursuant to a stock purchase agreement with Sellers, Purchaser #1 and Purchaser #2 acquired the stock of Target for cash in a fully taxable transaction. On Date D, Parent transferred the stock of Purchaser #1 to FHoldCo. The Election was due on Date B. However, for various reasons the Election was not filed. On Date C (which is after the due date for the Election), Tax Professional discovered that the Election had not been filed.

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It is represented that (1) Purchaser #1 and Purchaser #2 were not related to Sellers within the meaning of § 338(h)(3) and (2) the acquisition of the stock of Target qualified as a "qualified stock purchase," as defined in § 338(d)(3). The period of limitations on assessments under § 6501(a) has not expired for Group Parent's or Target's taxable year(s) in which the acquisition occurred, the taxable year in which the Election should have been filed, or any taxable year(s) 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 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.

Section 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 corporation is considered subject to United States tax (*e.g.*, is a controlled foreign corporation (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 the 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 section 951(b)) of a foreign purchasing corporation that is a CFC (as defined in section 957, taking into account section 953(c)) may file a statement of "section 338 election" on behalf of the purchasing corporation if the purchasing corporation is not required

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under section 1.6012-2(g) (other than section 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) and 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 section 338 is made for target, old target is deemed to sell target's assets and new target is deemed to acquire those assets.

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 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) and 1.338-1(g)). Therefore, the Commissioner has discretionary authority under § 301.9100-1 to grant an extension of time for Group Parent to file the Election, provided Group 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 Company Official and Tax Professional explain the circumstances that resulted in the failure to file a valid Election. The information establishes that a tax professional was responsible for the

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Election, that Group Parent relied on the Tax Professional to timely make or advise the taxpayer to 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 Group Parent has established that it 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 Group Parent to file the Election with respect to the acquisition of the stock of Target, as described above.

The above extension of time is conditioned on the taxpayers' (Group Parent's consolidated group's) tax liability 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 taxpayer's 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' tax liability is lower. Section 301.9100-3(c).

Group Parent should file the Election in accordance with §§ 1.338-1(d) and 1.338-1(g). That is, a new election on Forms 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 forms. Group Parent (and Target) must file or amend (if and as applicable) its applicable returns to report the acquisition as a "section 338 transaction," and to attach a copy of the Form 8023 and a copy of this letter. See §§ 1.338-1(e) and 1.338-1(g).

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

No opinion is expressed with regard to the application of §§ 367(a) and (b), §§ 367(a)-3(b) (including the issue of the necessity for a gain recognition agreement) and § 367(b)-4, or any other section of the Code or regulations, to the transfer of the stock of Purchaser # 1 by Parent to FHoldCo.

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

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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.

The rulings contained in this letter are based upon information and representations submitted by the taxpayer and accompanied by a penalty of perjury statement executed by an appropriate party. While this office has not verified any of the material submitted in support of the request for rulings, it is subject to verification on examination.

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.

Pursuant to the power of attorney on file in this office, a copy of this letter is being sent to your authorized representative.

Sincerely yours,
Philip J. Levine
Deputy Associate Chief Counsel (Corporate)