

Internal Revenue Service

Department of the Treasury

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Washington, DC 20224

Person to Contact:

Telephone Number:

Refer Reply To:
CC:CORP:B03 - PLR-123575-00
Date:
March 27, 2001

Re:

LEGEND:

Parent =

Purchaser =

Finance =

Target =

Sellers =

Authorized
Representatives =

Company Official =

State Z =

Country C =

Date 1 =

Date 2 =

Date 3 =

Date 4 =

Date 5 =

This letter responds to a letter dated September 19, 2000, requesting, on behalf of Parent, 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 in a letter dated March 20, 2001. The extension is being requested for Parent to file an election under § 338(g) of the Internal Revenue Code and § 1.338-1(d) of the Income Tax Regulations with respect to the acquisition of the Target stock (hereinafter referred to as the "Election"), on Date 2. All citations in this letter to regulations under § 338 are to the regulations in effect on Date 2. The material information submitted for consideration is summarized below.

Parent is a State Z corporation. Parent is a calendar year taxpayer and uses the accrual method of accounting. Purchaser, a Country C corporation, was formed on Date 1 by Parent, with Parent electing to treat Purchaser as a disregarded entity for U.S. Federal income tax purposes (the election was effective Date 3). Finance also is a wholly-owned Country C subsidiary of Parent.

On Date 2, Parent and Purchaser jointly acquired all of the shares of Target, a Country C corporation, from Sellers, in a fully taxable transaction. It is represented that the acquisition of Target constituted a qualified stock purchase within the meaning of § 338(d)(3) and that Parent and Sellers were unrelated within the meaning of § 338(h)(3). Prior to the acquisition, Target did not file a United States income tax return, was not subject to United States income taxation, nor was required, under § 1.6012-2(g), to file a United States income tax return. Further, it is represented that prior to the acquisition, Target was not: (1) a controlled foreign corporation within the meaning of § 957(a), (2) a passive foreign investment company, or (3) a foreign investment company or a foreign corporation the stock ownership of which is described in § 552(a)(2).

As part of an integrated plan, it was originally contemplated that Parent would effect the following transfers (collectively referred to herein as the "Putative Transfers"): (1) Parent would contribute its shares of Target stock to Purchaser; and (2) Parent would contribute its shares of Purchaser stock to Finance. However, the Putative Transfers were never consummated.

Parent intended to file the Election. The Election was due on Date 4. However, for various reasons, a valid Election was not filed. On Date 5 (which is after Date 4), it was discovered that a valid Election was not filed. Subsequently, this request was

submitted, under § 301.9100-1, for an extension of time to file the Election. The period of limitations on assessment under § 6501(a) has not expired for Parent's or Target's taxable year in which the acquisition/sale was consummated, the taxable year in which the Election should have been filed, or for any taxable year(s) that would have been affected by the Election had it been timely filed.

Section 338(a) permits certain stock acquisitions to be treated as asset acquisitions if: (1) the purchasing corporation makes or is treated as having made a "§338 election" or a "§ 338(h)(10) election"; 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 1 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 in whole or in part by reference to the adjusted basis of 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 "§338 election" for target by filing a statement of "§338 election" on Form 8023 in accordance with instructions on the form. The "§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 "§338 election" is irrevocable.

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 excepts 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)). Therefore, the Commissioner has discretionary authority under § 301.9100-1 to grant an extension of time for Parent to file the Election, provided Parent establishes 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 Parent, Company Official, and Authorized Representatives explain the circumstances that resulted in the failure to timely file the valid Election. The information establishes that a tax professional was responsible for the Election, that Parent relied on the tax professional to timely 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 Parent has established 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 on this letter, for Parent to file the Election with respect to the acquisition of the stock of Target on Date 2, as described above.

The above extension of time is conditioned on (1) the filing, within 120 days of the issuance of this letter, of all returns and amended returns (if any) necessary to report the transaction in accordance with the Election, and (2) the taxpayers' (Parent's and Target's) United States tax liability, if any, not being lower, in the aggregate for all years to which the Election applies, than it would have been if the Election had been made timely (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 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 should file the Election in accordance with §§ 1.338-1(d) and 1.338-1(g)(4). This 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 (together with the information that is required to be attached to the election form). Parent's returns must be amended, if and as applicable, to report the acquisition as a "§ 338 transaction." A copy of this letter should be attached to the election form and the election form should be attached to the returns.

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

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 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, all of the essential facts must be verified. 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 who requested it. Section 6110(k)(3) provides that it may not be used or cited as precedent.

Sincerely yours,
Associate Chief Counsel (Corporate)
By *Filiz Serbes*
Chief, Branch 3