Internal Revenue Service

Department of the Treasury

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Person to Contact:

Telephone Number:

Refer Reply To:
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Date:
October 21, 1999

Parent =

Purchaser =

Seller =

Target =

State X =

State Y =

Business A =

Business B =

Purchaser's Company Officials =

Target's Company Official =

Tax Preparer =

Date 1 =

Date 2 =

Date 3 =

Dear :

We respond to your letter dated June 23, 1999, in which you requested, on behalf of Parent and Seller, an extension of time under § 301.9100-1 and § 301.9100-3 of the Procedure and Administration Regulations to file a late election. Parent (as the common parent of the consolidated group that includes Purchaser) and Seller are requesting an extension to file a § 338(h)(10) election under §§ 338(g) and 338(h)(10) of the Internal Revenue Code and § 1.338(h)(10)-1(d) of the Income Tax Regulations with respect to Purchaser's acquisition of the Target stock on Date 1 (the "Election"). The information submitted for our review is summarized below.

Purchaser, a State X corporation, is engaged in both Business A and Business B. Purchaser files its returns on a consolidated basis with its parent, Parent. Target, a State Y corporation, also joins in the consolidated returns of its parent, Seller. Target is engaged in Business A.

For business reasons, on Date 1 Purchaser acquired all of the issued and outstanding stock of Target for cash. The stock purchase agreement provided that at Purchaser's option, Seller would join with Purchaser in making an election under § 338(h)(10) with respect to the purchase of Target. The Election was due on Date 2. The stock purchase agreement, however, did not indicate the due date for the Election and Purchaser failed to make the Election. In addition, Purchaser's Chief Financial Officer who had extensive knowledge of the stock purchase agreement abruptly left the company. The missed Election was discovered on Date 3.

Purchaser has represented that the acquisition of Target constituted a qualified stock purchase within the meaning of § 338(d)(3), and that Purchaser was not related to Target within the meaning of § 338(h)(3). The period of limitations on assessments under § 6501(a) has not expired for Parent's (and its related entities'), Target's, or any of the Seller's taxable year(s) in which the acquisition occurred, the taxable years in which the Election should have been filed, or any taxable years 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 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 ("QSP"). Section 1.338-1(c)(10) provides that a "section 338 election" is an election to apply section 338(a) to Target. Section 338(g) specifies the requirements for making a “section 338 election.” Section 1.338(h)(10)-1(d)(3) provides that if a § 338(h)(10) election is made for Target, a “section 338 election” is deemed made for Target. Section 338(d)(3) defines a QSP as any transaction or series of transactions in which stock (meeting the requirements of § 1504(a)(2)) of a 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) 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) (other than paragraph (4) thereof), be attributed to the person acquiring such stock.

Section 338(h)(10) permits the purchasing and selling corporations to jointly elect to treat the target corporation as selling all of its assets and distributing the proceeds in complete liquidation. The sale of stock included in the QSP is generally 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 QSP 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. More specifically, Target is treated as if, while a member of the selling group (or owned by the selling affiliate), it distributed all of its assets in complete liquidation.

Section 1.338(h)(10)-1(d)(2) provides that a § 338(h)(10) election is jointly made by a purchaser and the selling consolidated group (or the selling affiliate) on 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 provide that a § 338(h)(10) election must be made jointly by the purchasing corporation (or the common parent of the consolidated group of which the purchasing corporation is a member, or the selling affiliate) and the selling corporation (or the common parent of the consolidated group of which the selling corporation is a member, or the selling affiliate). The instructions provide that the form must be signed by each person authorized to act on behalf of each corporation. 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.

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, 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.

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. 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(h)(10)-1(d)). Therefore, the Commissioner has discretionary authority under § 301.9100-1 to grant an extension of time for Purchaser and Seller to file the Election, provided Purchaser 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 Purchaser, Seller, Target’s and Purchaser’s Company Officials and Purchaser’s Tax Preparer, explain the circumstances that resulted in the failure to timely file the Election. The information establishes that relief was requested under § 301.9100-3 before the failure to make the Election was discovered by the Service, and that no reporting position was taken by any affected party that did not conform with the Election. See § 301.9100-3(b)(1). Also, the information establishes that tax professionals were responsible for the Election, that Parent and Seller relied on them to timely make the Election, and that the government will not be prejudiced if relief is granted. See §§ 301.9100-3(a) and 301.9100-3(b)(1)(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 granting 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 (as the common parent of the consolidated group that includes Purchaser, the deemed acquiring corporation) and Seller to file the Election with respect to the acquisition of Target, as described above.

The above extension of time is conditioned on: (i) Parent and Seller signing the Election, (ii) Parent and Seller treating the acquisition/sale of the Target stock as a § 338(h)(10) transaction, and (iii) the taxpayers' (i.e., Seller's and Parent's tax liability (if any) being not lower, in the aggregate, for all years to which the Election apply, 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, must be executed on or after the date of this letter, which grants an extension, and must be 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 amend their returns to report the transaction as a § 338(h)(10) transaction for the year in with the transaction was consummated, and to attach to their returns a copy of this letter and a copy of the Election (along with the information required with the election form).

We express no opinion as to: (1) whether the acquisition/sale of Target's stock qualifies as a QSP under § 338(d)(3); (2) whether the acquisition/sale of Target's stock qualifies for § 338(h)(10) treatment; or (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 the Target's deemed asset sale.

In addition, we express no opinion as to the tax consequences of filing the late election 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 late Election 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 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.

Pursuant to a power of attorney on file in this office, a copy of this letter is being sent to the taxpayer that requested this ruling.

Sincerely yours,

Assistant Chief Counsel (Corporate)

BY:____________________
Bernita L. Thigpen
Deputy Assistant Chief Counsel
(Corporate)