

**Internal Revenue Service**

Department of the Treasury

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Person to Contact:

Telephone Number:

Refer Reply To:  
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March 8, 2000

Legend:

Purchaser =

Parent =

Seller =

Target 1 =

Target 2 =

Target Affiliate 1 =

Target Affiliate 2 =

Target Affiliate 3 =

Date A =

Date B =

Date C =

Date D =

Parent's  
Company Official =

Purchaser's  
Company Official =

Tax Professional =

Authorized  
Representative =

This responds to your Authorized Representative's August 23, 1999 letter requesting, on behalf of the above corporations, an extension of time under §§ 301.9100-1 through 301.9100-3 of the Procedure and Administration Regulations to file elections. Parent and Purchaser are requesting the extension to file "section 338(h)(10) elections" under § 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 Target 1 and Target 2, and the deemed acquisition of Target Affiliate 1, Target Affiliate 2 and Target Affiliate 3 (sometimes hereinafter referred to collectively as the "Elections"), on Date B. Additional information was submitted in a letter dated November 5, 1999. The material information is summarized below.

Purchaser is a corporation that has a taxable year ending on January 31 and uses the accrual method of accounting. Parent is the common parent of a consolidated group that has a calendar taxable year and uses the accrual method of accounting. Included in Parent's consolidated return, prior to Date B, were: (1) Seller, a wholly owned subsidiary of Parent; (2) Target 1 and Target 2, wholly owned subsidiaries of

Seller; (3) Target Affiliate 1 and Target Affiliate 2, wholly owned subsidiaries of Target 1; and (4) Target Affiliate 3, a wholly owned subsidiary of Target 2. Sometimes hereinafter Target 1, Target 2, Target Affiliate 1, Target Affiliate 2 and Target Affiliate 3 are collectively referred to as the "Targets."

On Date A, Purchaser and Seller entered into a Stock Purchase Agreement for Purchaser to acquire all of the stock of Target 1 and Target 2 (including Target Affiliate 1, Target Affiliate 2 and Target Affiliate 3) from Seller. On Date B, pursuant to the Stock Purchase Agreement, Purchaser acquired all of the Stock of Target 1 and Target 2 (including Target Affiliate 1, Target Affiliate 2 and Target Affiliate 3) from Seller for cash in a totally taxable transaction. It is represented that: (1) Purchaser was not related to Seller, within the meaning of § 338(h)(3); and (2) Purchaser's acquisition of the stock of Target 1 and Target 2, and the deemed acquisition of the stock of Target Affiliate 1, Target Affiliate 2 and Target Affiliate 3, constituted qualified stock purchases, as defined in § 338(d)(3).

Purchaser and Parent intended to file the Elections. The Elections were due on Date C. However, for various reasons the Elections were not timely filed. On Date D (which is after the due date for the Elections), Parent, Seller, Purchaser, Purchaser's Company Official, and Tax Professional discovered that valid Elections had not been filed. Subsequently, this request was submitted, under § 301.9100-1, for an extension of time to file the Elections. The period of limitations on assessments under § 6501(a) has not expired for Purchaser's, Parent's, Seller's or the Targets' taxable year(s) in which the acquisitions occurred, the taxable year(s) in which the Elections should have been filed, or any taxable year(s) that would have been affected by the Elections had they 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. 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 (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 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.

More specifically, old target is treated as if, while a member of the selling group (or owned by the selling affiliate or S corporation shareholders), it distributed all of its assets in complete liquidation. If target is an S corporation immediately before the acquisition date, nothing in the § 338 provisions prevents a holder of target stock from taking deemed sale gain into account under §§ 1366 and 1367. See § 331 or 332 for gain or loss recognized by the old target shareholders as a result of the deemed liquidation. Section 1.338(h)(10)-1(e)(2)(ii). No gain or loss is recognized on the sale or exchange by the selling consolidated group (or the selling affiliate or an S corporation shareholder) of target stock included in the qualified stock purchase. If target is an S corporation immediately before target's acquisition date, the sale or exchange of old target stock does not result in a termination of the § 1362(a) election for the S corporation. Section 1.338(h)(10)-1(e)(2)(iv).

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 or the S corporation shareholders) 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 and the common parent of the selling consolidated group (or selling affiliate or S corporation shareholders). The instructions provide that the persons authorized to act on behalf of each corporation must sign the form, and if it is made for an S corporation it 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 who must sign the election must be provided on the form or on a "signature attachment," and the instructions provide specific details as to the preparation of the "signature attachment" and its attachment to Form 8023.

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 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.

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 Elections are 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 Parent to file the Elections, provided that Purchaser and Parent show that 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 Parent, Seller, Purchaser, Purchaser's Company Official, Parent's Company Official, Tax Professional

and Authorized Representative explain the circumstances that resulted in the failure to file valid Elections. The information establishes that a tax professional was responsible for the Elections, that Parent and Purchaser relied on the tax professional to timely make the Elections, and that the interests of 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 made, we conclude that Purchaser and Parent have shown that 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 Purchaser and Parent to file the Elections with respect to the acquisition of the Targets, as described above.

The above extension of time is conditioned on the taxpayers' (Purchaser's, Parent's, Seller's and Targets') tax liability (if any) being not lower, in the aggregate, for all years to which the Elections apply, than it would have been if the Elections 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). The above extension is also conditioned on (i) Purchaser and Parent both signing the Elections and (ii) Purchaser and Parent both treating the acquisitions/sales of the Targets' stock as § 338(h)(10) transactions.

Purchaser and Parent must file the Elections in accordance with § 1.338(h)(10)-1(d) (i.e., new elections 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 to the form). A combined election form may be used. A copy of this letter should be attached to the election form. Purchaser and Parent must amend their applicable returns, notwithstanding that they reported the transactions as "section 338(h)(10)" transactions and disclosed that they were requesting an extension of time under § 301.9100-1, to attach to their returns a copy of the "new" Elections and a copy of this letter.

We express no opinion regarding: (1) whether the acquisitions/sales of the Targets' stock qualify as "qualified stock purchases" under § 338(d)(3); (2) whether the acquisitions/sales of the Targets' stock qualify 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 the Targets (and, thus, by Parent) on the deemed asset sales and deemed liquidations.

In addition, we express no opinion as to the tax consequences of filing the Elections 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 Elections 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 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 Elections, 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.

We are sending a copy of this letter to your Authorized Representative and to Parent's Company Official, pursuant to powers of attorney on file in this office.

Sincerely yours,

*Philip J. Levine*

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Philip J. Levine  
Assistant Chief Counsel (Corporate)