Internal Revenue Service

Department of the Treasury

Washington, DC 20224

Number: **200115037**
Release Date: 4/13/2001
Index Number: 9100.07-00

Person to Contact:

Telephone Number:

Refer Reply To:
CC:CORP:B02-PLR-123841-00
Date:
January 16, 2001

LEGEND:

Parent =

Purchaser =

Seller =

Target =

State X =

Date A =
Date B =
Date C =

Parent's Company Official =

Purchaser's Company Official =

Seller's Company Officials =

Authorized Representatives =

Dear:

This responds to your authorized representative's letter dated October 31, 2000, requesting an extension of time under §§ 301.9100-1 through 301.9100-3 of the Procedure and Administration Regulations to file an election. Parent (as common parent of the consolidated group of which Purchaser was a member) 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 stock of Target (sometimes hereinafter referred to as the "Election"), on Date A. (All citations in this letter to regulations under § 338 are to the regulations as in effect on Date A). Additional information was received in letters dated December 12, and December 13, 2000 and January 3, 2001. The material information is summarized below.

Parent is the common parent of a consolidated group that uses the accrual method of accounting. At the time of the acquisition, Purchaser was a wholly-owned subsidiary of Parent and was included in Parent's consolidated federal income tax return.

Seller is the common parent of a consolidated group that uses the accrual method of accounting. Prior to the acquisition, Seller owned all of the outstanding stock of Target and Target was included in Seller's consolidated federal income tax return.

On Date A, pursuant to a stock purchase agreement, Purchaser acquired all of the outstanding stock of Target from Seller, for cash, in a fully taxable transaction. It is represented that: (1) Parent and Purchaser are not (and were not at all times relevant) related to Seller within the meaning of § 338(h)(3), and (2) Purchaser's acquisition of all of the outstanding stock of Target qualified as a "qualified stock purchase" as defined in § 338(d)(3). Following the acquisition, Purchaser merged into Target and Target was included in Parent's consolidated federal income tax return. It is represented that Parent is still in existence.

Parent and Seller intended to file the Election. The Election was due on Date B, but for various reasons it was not filed. On or about Date C (which is after the due date for the Election), Parent's, Purchaser's, and Seller's Company Officials 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.

Parent, Seller, and Target filed their returns as if the Election had been made. The period of limitations on assessment under § 6501(a) has not expired for Parent's, Purchaser's, Seller's, or Target's taxable year(s) 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. Further, the Service has not discovered that the Election has not been filed, and none of the taxpayers (or related entities or individuals) have taken a reporting position that is not consistent with making the Election.

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 "§ 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 one 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 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. Section 1.338(h)(10)-1(d)(3) provides 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.

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 form must be signed by a person authorized to act on behalf of each corporation, and if 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 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 1.338-2(b)(1) restates the § 338(d)(3) requirement that a corporation must purchase the stock of the target. The regulations further provide that facts that may indicate that a newly formed corporation is not considered to be the purchasing corporation for tax purposes include such things as the new corporation's downstream merger into the target following the purported qualified stock purchase.

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. 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 Parent and Seller to file the Election, provided Parent 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 Parent, Purchaser, Seller, Target, Company Officials and Authorized Representatives explain the circumstances that resulted in the failure to timely file a valid Election. The information establishes that the Service has not discovered that the Election has not been filed, and the taxpayers have taken a reporting position that is consistent with making the Election. The information also establishes that competent tax professionals were responsible for the Election, that they were aware of all relevant facts, and that the taxpayers relied on the tax professionals for the Election. Finally, the information also establishes that the government will not be prejudiced if relief is granted. See §§ 301.9100-3(a) and 301.9100-3(b)(1)(i) and (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 and Seller to file the Election with respect to the acquisition of Target stock, 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 consolidated group's and Seller's consolidated group's) tax liability (if any) 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 taxpayers' tax liability for the years involved. A determination thereof will be made by 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).

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 filed in accordance with the instructions to the form. A copy of this letter must be attached to the Election form. Parent and Seller, having reported the acquisition as a "§ 338(h)(10)" transaction, must amend their applicable returns to attach a copy of the Election (and the information required therewith) and a copy of this letter.

We express no opinion as to: (1) whether the acquisition of Target's stock qualifies as a "qualified stock purchase" under § 338(d)(3); (2) whether Purchaser or Parent is considered to be the purchasing corporation of the Target stock; (3) whether the acquisition of Target's stock qualifies for § 338(h)(10) treatment; or (4) if § 338(h)(10) is applicable, as to the amount and character of gain or loss, if any, recognized by Target on its deemed asset sale.

In addition, we express no opinion as to the tax 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 taxpayers. However, all essential facts are subject to verification. 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 ruling is directed only to the taxpayer(s) requesting it. Section 6110(k)(3) of the Code 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 has been sent to your authorized representative.

Sincerely yours,
Associate Chief Counsel (Corporate)
by: Edward S. Cohen
Chief, Branch 2