Internal Revenue Service

Department of the Treasury

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Person to Contact:

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Date:
May 11, 2000

Parent	=
Sub 1	=
Sub 2	=
Sub 3	=
Acquisition Co.	=
Survivor Co.	=
Target 1	=
Target 2	=
Target 3	=
Target 4	=
M Co.	=
V Co.	=
Individual M	=
Individual V	=

Country A =

Seller 1 =

Date A =

Date B =

Date C =

Date D =

Date E =

Date F =

Date G =

Date H =

a =

b =

c =

d =

e =

f =

Y =

Tax Professionals =

Company Official =

This responds to your authorized representative's April 25, 2000 letter requesting an extension of time under §§ 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations for Parent (as common parent of the consolidated group of

which Sub 1, Sub 2, and Sub 3 are members) to file an election. The extension is requested for Parent 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 1 (sometimes hereinafter referred to as the "Election"), on Date A. The information provided in this request and in later correspondence is summarized below.

All citations in this letter to regulations under § 338 are to the regulations as in effect for Date A.

Parent is the common parent of a consolidated group that has a calendar taxable year and uses the accrual method of accounting. On Date B, Sub 1, a wholly-owned domestic subsidiary of Parent purchased the assets that make up Sub 1 in a fully taxable purchase from Seller 1, a U.S. partnership. Among the assets purchased was a percent of the outstanding stock of Target 1, a Country A holding company, which owned b percent of the stock of Target 2, the operating company that is engaged in various businesses. The remaining stock of Target 1 and c percent of the stock of Target 2 was held by Target 3, a Country A holding company, which was wholly owned by M Co., a Country A holding company, which was wholly owned by Individual M, a Country A citizen. The remaining d percent of the stock of Target 2 was held by Target 4, which was wholly owned by V Co., a Country A holding company, which was wholly owned by Individual V, a Country A citizen.

On Date C, Sub 1 formed two wholly owned domestic subsidiaries, Sub 2 and Sub 3. Sub 1 transferred cash to Sub 2 in exchange for all of the stock of Sub 2. Sub 1 transferred cash and its a percent of the stock of Target 1 to Sub 3 in exchange for all of the stock of Sub 3.

On Date D, Sub 2 formed a wholly owned foreign corporation, Acquisition Co., which is not a corporation as defined in § 301.7701-2(b), has a single owner, and is disregarded for U.S. tax purposes under § 301.7701-2(c)(2). Pursuant to foreign law, the owners of Acquisition Co. have unlimited liability upon the winding up of the company in the event company assets are insufficient to satisfy the claims against the company.

On Date E, Target 1 and Target 2 were each reincorporated in Y. The owners of Target 1 and Target 2 do not have unlimited liability. These transactions were changes in the province of incorporation, and it is represented that each transaction qualified as a tax-free reorganization under § 368(a)(1)(F).

On Date F, Acquisition Co. purchased all of the stock of Target 4 from V Co. and all of the stock of Target 3 from M Co. The only assets of Target 3 were the stock of Target 1 and Target 2. The only asset of Target 4 was the stock of Target 2.

Immediately following the Date F purchase, there was an amalgamation of Acquisition Co.,Target 1, Target 2, Target 3, and Target 4 pursuant to the laws of Y. After the stock purchases of Target 1, Target 2, Target 3, and Target 4, the shares of the companies were registered under Y law, and the amalgamation became effective at that time. The resulting entity, Survivor Co. is a Y corporation owned by Sub 2 and Sub 3 in the same proportion as their ownership of Target 2 immediately prior to the amalgamation, e percent and f percent, respectively. Survivor Co. is treated as a foreign corporation having two partners, Sub 2 and Sub 3, for U.S. tax purposes because it is specifically excluded from being a corporation (as defined in § 301.7701-2(b)(8)(i) and (ii)) and it has two owners (§ 301.7701-2(c)(1)).

It is represented that: (1) neither Parent nor any member of Parent's consolidated group (the "Purchaser") was related to Seller 1, M Co., or V Co. within the meaning of § 338(h)(3), (2) Purchaser's acquisition of the stock of Target 1, Target 2, Target 3, and Target 4 qualified as a "qualified stock purchase" as defined under § 338(d)(3), (3) Acquisition Co. is a disregarded entity pursuant to § 301.7701-(2)(c)(2), and Acquisition Co. has not filed a Form 8832 to make a check-the-box election, (4) Survivor Co. is treated as a partnership for U.S. tax purposes pursuant to § 301.7701-2(c)(1) and has not filed a Form 8832 to elect to be treated as a corporation, (5) Survivor Co. is a separate unit (within the meaning of § 1.1503-2(c)(3) and (4)) treated as a dual resident corporation (within the meaning of § 1.1503-2(c)(2)), (6) Neither Target 1 nor Target 2 was a controlled foreign corporation as defined in § 957(a) prior to the acquisition of the remainder of their stock on Date F, (7) Neither Target 1, Target 2, Target 3, nor Target 4 was a passive foreign investment company ("PFIC") as defined in § 1297(a) on the date of their acquisition by the Parent Group, nor was any of them a PFIC immediately thereafter, (8) Prior to the acquisition, neither Target 1, Target 2, Target 3, Target 4, Individual M, nor Individual V owned a U.S. real property interest as defined in § 897(c), (9) Neither Target 1, Target 2, Target 3, nor Target 4 have any assets involved in a U.S. trade or business either directly or indirectly, (10) There have not been nor currently are any loans, royalties, management fees, or other intercompany transactions between Acquisition Co. and Target 1, Target 2, Target 3, and Target 4, (11) Neither Individual M, Individual V, M Co., V Co., Target 3, nor Target 4, is required to file a U.S. income tax return, and (12) The period of limitations on assessments under § 6501(a) has not expired for Purchaser's or Target 1'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.

The Election was due on Date G. However, for various reasons the Election was not filed. In Date H (which was after the due date for the Election), Tax Professionals and Company Official 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.

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 1.338-1(c)(10) provides that a “§ 338 election" is an election to apply § 338(g) to target.

Section 338(g) specifies the requirements for making a “§ 338 election.” 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.

Sections 1.338-1(g)(1)(i) and (v) provide that for purposes of § 1.338-1(g)(1) (i.e., qualifying for the special rule which provides a later filing date for an election under § 338(g) than ordinarily required), a foreign corporation is considered subject to United States tax (i.e., is not eligible for the special rule) if it is a controlled foreign corporation.

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 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 the 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.

Section 1.338-1(g)(3) provides that the United States shareholders (as defined in § 951(b)) of a foreign purchasing corporation that is a controlled foreign corporation (as defined in § 957, taking into account § 953(c)) may file a statement of "§ 338 election" on behalf of the purchasing corporation if the purchasing corporation is not required under § 1.6012-2(g) (other than § 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 as described in the form and its instructions, and also must be attached to Form 5471 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 § 338 is made for target,

old target is deemed to sell target's assets and new target is deemed to acquire those assets.

Section 1.338-2(c)(1) provides that the purchasing corporation may make an election under § 338 for target even though target is liquidated on or after the acquisition date. Section 1.338-2(c)(2) provides that an election may be made for target after the acquisition of assets of the purchasing corporation by another corporation in a transaction described in § 381(a), provided that the purchasing corporation is considered for tax purposes as the purchaser of the target stock. The acquiring corporation in the § 381(a) transaction may make an election under § 338 for target.

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 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).

Information, affidavits, and representations submitted by Tax Professionals and Company Official explain the circumstances that resulted in the failure to file the Election. The information establishes that tax professionals were responsible for the Election, that Parent relied on the tax professionals to timely make the Election, and that the government will not be prejudiced if relief is granted. The information also establishes that no returns have been filed that are not consistent with the Election, and that relief was requested before the failure to make the Election was discovered by the Service. See §§ 301.9100-3(b)(1)(i) and (v).

Based on the facts and information submitted, including the representations that have been made and provided that an election under § 338(g) has been made regarding the acquisition of Target 3, we conclude that Parent 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 Parent to file the Election with respect to the acquisition of the stock of the Target 1, as described above.

The above extension of time is conditioned on the taxpayers' (to the extent they have any U.S. tax liability)) 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 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 should file the Election in accordance with §§ 1.338-1(d) and 1.338-1(g). 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 on the election form. A copy of this letter should be attached to the election form. Parent must file its return (and Target 1 must file its final return, if and as applicable) reporting the acquisition/sale as a "section 338 transaction," and attach thereto a copy of this letter and a copy of the election form (See also §§ 1.338-1(g) and 1.338-5).

No opinion is expressed as to: (1) whether the acquisition of the Target 1 stock qualifies as a "qualified stock purchase", (2) whether the acquisition of the Target 1 stock qualifies for § 338(a) treatment, (3) if the acquisition of the Target 1 stock qualifies for § 338(a) treatment, as to the amount of gain or loss recognized (if any) by Target 1

on the deemed asset sale, (4) whether Acquisition Co. is in fact a disregarded entity for federal income purposes, (5) whether any or all of the above-referenced foreign corporations are passive foreign investment companies (within the meaning of § 1297(a) of the Code and the regulations to be promulgated thereunder, (6) the application of §§ 1291 through 1298 if it is determined that any or all of such foreign corporations are passive foreign corporations, and (7) whether Survivor Co. is a dual resident corporation (within the meaning of § 1.1503-2(c)(2). As a result, the limitation under §1.1503-2(b) on the use of a dual consolidated loss to offset the income of any domestic affiliate will be followed.

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. This office has not verified any of the facts or representations submitted in support of the request for a ruling. Verification of the information, representations, and other data may be required as part of the audit process. 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.

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

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,

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Phillip J. Levine
Assistant Chief Counsel (Corporate)