Internal Revenue Service

Department of the Treasury

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Person to Contact:

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LEGEND

Acquirer =

Parent =

Purchaser =

Target =

Sellers =

Date A =

Date B =

Date C =

Date D =

Number e =

Percent f =

Company Official =

Tax Professional =

This letter responds to a letter dated April 3, 2001, submitted on behalf of Parent 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 the United States shareholder of Purchaser, the foreign purchasing company, is requesting an extension to file a "§ 338 election" under § 338(g) with respect to Purchaser's acquisition of the stock of Target (sometimes hereinafter referred to as the "Election"),

on Date B. (All citations in this letter to regulations under § 338 are to regulations in effect on Date B.) Additional information was received in letters dated May 29, June 22, and July 10, 2001. The pertinent information is summarized below.

Parent was the common parent of a consolidated group, the control of which was acquired by Acquirer on Date D, in a merger transaction, thereby making it a member of the consolidated group of Acquirer. Purchaser, a foreign corporation, is an indirect Percent f subsidiary of Parent. Target is a foreign corporation.

On Date A, Purchaser and Sellers entered into a purchase agreement without a letter of intent for Purchaser to acquire all of the Target stock from Sellers. On Date B, Purchaser acquired all of the stock of Target from Sellers in exchange for Number e, pursuant to the purchase agreement. It is represented that Purchaser's acquisition of the stock of Target qualified as a "qualified stock purchase," as defined in § 338(d)(3).

Target and Purchaser make the representations stated below as of Date B. Target and Purchaser did not file United States income tax returns, were not subject to United States income taxation, nor were required, under § 1.6012-2(g), to file United States income tax returns. In addition, Target was not a controlled foreign corporation within the meaning of § 957(a), although Purchaser was such a corporation. Moreover, neither Target nor Purchaser was (1) a passive foreign investment company for which an election under § 1295 was in effect; or (2) a foreign investment company or a foreign corporation the stock ownership of which is described in § 552(a).

Parent intended to file the Election. The Election was due on Date C, but for various reasons a valid Election was not filed. After the due date for the Election, it was 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. The period of limitations on assessment under § 6501(a) has not expired for Parent's or Target's taxable years 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 "§ 338 election" or a "§ 338(h)(10) election"; and (2) the acquisition is a "qualified stock purchase."

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.

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., § 1.338-1(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 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 Tax Professional explain the circumstances that resulted in the failure to timely file a valid Election. The information establishes that the request for relief was initiated before the failure to make the Election was discovered by the Internal Revenue Service, and that the government will not be prejudiced if relief is granted. See § 301.9100-3(b)(1)(i).

Based on the facts and information submitted, including the representations made, we conclude that Parent has shown 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. Accordingly, an extension of time is granted under § 301.9100-1, until 45 days from the date on this letter, for Parent to file the Election with respect to the acquisition of the stock of Target, as described above.

The above extension of time is conditioned on (1) the filing, within 120 days of the date on 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 or Acquirer's consolidated group's**,** and Target'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 the applicable 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' tax liability is lower. Section 301.9100-3(c).

Parent must file the Election in accordance with §§ 1.338-1(d) and (g). That is, a new election on Form 8023 must be executed on or after the date on 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/or Acquirer, must file or amend, as applicable, its returns to report the transaction as a § 338 transaction for the

taxable year in which the transaction was consummated (and for any other affected taxable year), and to attach to the returns a copy of this letter and a copy of the Election.

We express no opinion as to: (1) whether the acquisition of the Target stock qualifies as a "qualified stock purchase" under § 338(d)(3); or (2) any other tax consequences arising from the Election.

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, specifically among others, that there was no letter of intent for the acquisition of the Target stock. However, the Director 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.

Sincerely yours,
Associate Chief Counsel (Corporate)
By: Ken Cohen
Senior Technician Reviewer, Branch 3