

Internal Revenue Service

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Department of the Treasury

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December 13, 2001

LEGEND

Purchaser =

Target =

Target Affiliate #1 =

Target Affiliate #2 =

Sellers =

Date A =

Date B =

Date C =

Date D =

Company Official =

Tax Professional =

Country X =

Country Y =

a =

b =

This letter responds to a letter dated September 4, 2001, submitted on behalf of Purchaser, requesting an extension of time under §§ 301.9100-1 through 301.9100-3 of the Procedure and Administration Regulations to file elections. Purchaser is requesting an extension to file “§ 338 elections” under § 338(g) with respect to Purchaser’s acquisition of the stock of Target and the deemed acquisition of the stock of Target Affiliate #1 and Target Affiliate #2 (sometimes hereinafter referred to as the “Elections”), on Date C. (All citations in this letter to regulations under § 338 are to regulations in effect on Date C.) Additional information was received in a letter dated November 14, 2001. The material information is summarized below.

Purchaser is the common parent of an affiliated group of corporations that files a consolidated federal income tax return. Target is a Country X corporation. Immediately before the transaction described below, all of the stock of Target was owned by Sellers. Target Affiliate #1, also a Country X corporation, is a wholly-owned subsidiary of Target. Target Affiliate #2, a Country Y corporation, is an a%-owned (i.e., at least 80%-owned) subsidiary of Target.

On Date A, Purchaser and Sellers entered into a purchase agreement for Purchaser to acquire all of the Target stock from Sellers. On Date B, Purchaser and Sellers entered into a supplemental purchase agreement. On Date C, pursuant to the purchase agreement as supplemented in the supplemental purchase agreement, Purchaser acquired all of the stock of Target from Sellers in exchange for b shares of Purchaser common stock and payment by Purchaser on behalf of Sellers of certain expenses, including payments for legal services unrelated to the acquisition of Target. It is represented that Purchaser’s acquisition of the stock of Target qualified as a “qualified stock purchase,” as defined in § 338(d)(3).

Prior to the acquisition, neither Target, Target Affiliate #1, nor Target Affiliate #2 filed a United States income tax return, was subject to United States income taxation, or was required under § 1.6012-2(g) to file a United States income tax return. In addition, neither Target, Target Affiliate #1, nor Target Affiliate #2 was (1) a controlled foreign corporation within the meaning of § 957(a); (2) a passive foreign investment company for which an election under § 1295 was in effect; or (3) a foreign investment company or a foreign corporation the stock ownership of which is described in § 552(a).

The Elections were due on Date D, but for various reasons valid Elections were not filed. After the due date for the Elections, it was discovered that the 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 assessment under § 6501(a) has not expired for Purchaser’s consolidated group’s, Target’s, Target Affiliate #1’s, or Target Affiliate #2’s taxable years in which the acquisition occurred, the taxable years in which the Elections should have been filed, or any taxable years 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 "§ 338 election" or a "§ 338(h)(10) election"; and (2) the acquisition is a "qualified stock purchase."

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). 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. 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.

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 Elections 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 Purchaser to file the Elections, provided Purchaser 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, Company Official, and Tax Professional explain the circumstances that resulted in the failure to timely file valid Elections. The information establishes that Purchaser reasonably relied on a qualified tax professional who failed to make, or advise Purchaser to make, the Elections, that the request for relief was filed before the failure to make the Elections 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) and (v).

Based on the facts and information submitted, including the representations made, we conclude that Purchaser 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 Purchaser to file the Elections with respect to the acquisition of the stock of Target and the deemed acquisitions of Target Affiliate #1 and Target Affiliate #2, 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 Elections, and (2) the taxpayers' (Purchaser's consolidated group's, Target's, Target Affiliate #1's, and Target Affiliate #2's) 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 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).

Purchaser must file the Elections in accordance with § 1.338-1(d). That is, new elections 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. Purchaser must file or amend, as applicable, its returns to report the transactions as § 338 transactions for the taxable year in which the transactions were consummated (and for any other affected taxable year), and to attach to the returns a copy of this letter and a copy of the Elections.

We express no opinion as to: (1) whether the acquisition of the Target stock and deemed acquisition of Target Affiliate #1 and Target Affiliate #2 stock qualify as "qualified stock purchases" under § 338(d)(3); or (2) any other tax consequences arising from the Elections.

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 Director 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.

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

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