

Internal Revenue Service

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Department of the Treasury

Washington, DC 20224

Person to Contact:

Telephone Number:

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Date:

February 25, 2003

LEGEND

Purchaser =

Target =

Sellers =

Date A =

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Date B =

Date C =

Date D =

Dear :

This letter responds to a letter dated October 30, 2002, submitted on behalf of Purchaser and Sellers, requesting an extension of time under § 301.9100-3 of the Procedure and Administration Regulations to file an election. Purchaser and Sellers 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)-1T(c) 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 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 December 16, 2000, and January 28 and February 5, 2003. The material information is summarized below.

Parent is the common parent of a consolidated group.

Target was an S corporation. All the stock in Target was owned by Sellers.

On Date A, Purchaser and Sellers entered into a stock purchase agreement 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 cash. It is represented that Purchaser’s acquisition of the stock of Target qualified as a “qualified stock purchase,” as defined in § 338(d)(3), and that at all times, all affected parties have treated the transaction, and will continue to treat the transaction, as if a § 338(h)(10) election had been validly made and filed.

Purchaser and Sellers intended to file the Election. The Election was due on Date C, but for various reasons a valid election was not filed by Date C. Subsequently, this request was submitted, under § 301.9100-3, for an extension of time to file the Election. The period of limitations on assessment under § 6501(a) has not expired, nor will expire until at least Date D, for Purchaser’s consolidated group’s, Target’s, or Sellers’ 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.”

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Section 338(h)(10) permits the purchaser and sellers to elect jointly to treat the target corporation as deemed to sell all of its assets and distribute the proceeds in complete liquidation. A § 338(h)(10) election may be made for target only if purchaser acquires stock meeting the requirements of § 1504(a)(2) from a selling consolidated group, a selling affiliate, or the S corporation shareholders in a qualified stock purchase. Section 1.338(h)(10)-1T(c)(1).

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(h)(10)-1T(c)(2)). Therefore, the Commissioner has discretionary authority under § 301.9100-3 to grant an extension of time for Purchaser and Sellers to file the Election, provided Purchaser and Sellers 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 Purchaser and Sellers explain the circumstances that resulted in the failure to timely file a valid Election. The information establishes that the request for relief was filed before the failure to make the Election was discovered by the Internal Revenue Service and that the interests of 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 Purchaser and Sellers 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 § 301.9100-3 until 45 days from the date on this letter, for Purchaser and Sellers to file the Election with respect to the acquisition of the stock of Target, as described above.

NO LATER THAN 45 DAYS FROM THE DATE ON THIS LETTER, Purchaser and Sellers must file (a) the Election on Form 8023, in accordance with § 1.338(h)(10)-1T(c) and the instructions to the form and (b) a copy of this letter to be attached to Form 8023.

WITHIN 120 DAYS OF THE DATE ON THIS LETTER, all relevant parties must file or amend, as applicable, all returns and amended returns (if any) necessary to report the transaction as a § 338(h)(10) transaction for the taxable year in which the transaction was consummated (and for any other affected taxable year). A copy of this letter and a copy of the Form 8023 must be attached to the returns.

The above extension of time is conditioned on the taxpayers' (Purchaser's

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consolidated group's, Sellers', 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).

We express no opinion as to: (1) whether the "acquisition/sale" of the Target stock qualifies as a "qualified stock purchase" under § 338(d)(3); (2) whether the "acquisition/sale" of Target stock qualifies for § 338(h)(10) treatment; or (3) 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 effects resulting from, filing the Election late that are not specifically set forth in the above ruling. For purposes of granting relief under § 301.9100-3, 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 § 301.9100-3 for the filing of the Election, penalties and interest that would otherwise be applicable, if any, continue to apply.

Purchaser must provide each of the Sellers with a copy of this letter.

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,

Ken Cohen

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