

## Internal Revenue Service

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Department of the Treasury

Washington, DC 20224

Third Party Communication: None

Date of Communication: Not Applicable

Person To Contact:

, ID No.

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Refer Reply To:

CC:CORP:B05

PLR-130376-04

Date:

October 4, 2004

### Legend

Purchaser =

Acquisition Sub =

Seller =

Trust 1 =

Trust 2 =

Target =

Year 1 =

Date 1 =

Date 2 =

Date 3 =

Date 4 =

Date 5 =

z =

State X =

State Y =

Business A =

Tax Advisors =

Dear :

This letter responds to a letter dated June 2, 2004, submitted on behalf of Purchaser and Seller, requesting an extension of time under § 301.9100-3 of the Procedure and Administration Regulations to file an election. Purchaser 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)(2) of the Income Tax Regulations (hereinafter referred to as “the Election”), with respect to Purchaser’s acquisition of the stock of Target on Date 2. (All citations in this letter to regulations under § 338 are to regulations in effect on Date 2.) The material information submitted for consideration is summarized below.

Seller is an individual who held all the stock in Target through Trust 1 and Trust 2, both grantor trusts. Target is a State Y corporation which on Date 2 was an S corporation. Target was engaged in Business A.

Purchaser is a closely-held C corporation formed in State X in Year 1 for the purpose of acquiring Target.

Acquisition Sub was a transitory C corporation incorporated under the laws of State Y in Year 1 solely for the purpose of merging into Target in a transaction in which Purchaser would acquire the stock of Target. All the stock in Acquisition Sub was held by Purchaser.

On Date 1, Purchaser, Acquisition Sub, Target, and Seller (through Trusts 1 and 2) entered into an agreement (“Merger Agreement”) under which Purchaser would acquire 80% or more of Target’s stock. On Date 2, pursuant to the Merger Agreement,

Acquisition Sub was merged into Target in a transaction (the "Acquisition") in which: (i) Purchaser acquired over 80% of the outstanding Target stock; and (ii) Seller received solely cash (approximately \$z). It is represented that Purchaser's acquisition of the stock of Target constituted a "qualified stock purchase," as defined in § 338(d)(3). Purchaser and Target file a consolidated Federal income tax return.

Purchaser, Target, and Seller intended to, and had agreed to, make an election to treat Purchaser's acquisition of Target stock as a deemed asset sale under § 338(h)(10). The Election was due on Date 3, but for various reasons, a valid Election was not filed. Subsequently, this request was submitted, under § 301.9100-3, for an extension of time to file the Election. As to the matter specified, the period of limitations on assessment under § 6501(a) for the taxable year ending Date 4 and all subsequent years of the Purchaser consolidated group will not expire until at least Date 5.

For Year 1 and all subsequent years, each and every tax return and other form filed with the Internal Revenue Service by Purchaser, Target, and Seller has been filed on a basis consistent with a valid § 338(h)(10) election having been made with regard to the Acquisition.

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."

Section 338(h)(10) permits the purchaser and seller 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 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).

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)-1(d)(2)). Therefore, the Commissioner has discretionary authority under

§ 301.9100-3 to grant an extension of time for Purchaser and Seller to file the Election, provided Purchaser 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 Purchaser, Seller, and Tax Advisors explain the circumstances that resulted in the failure to timely file the Election. The information establishes that Purchaser and Seller reasonably relied on one or more qualified tax advisors who failed to make, or advise them of the procedures necessary to make, the Election, that the request for relief was submitted before the failure to make the Election was discovered by the 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 that have been made, we conclude that Purchaser and Seller have shown that 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 Seller to file the Election with respect to the acquisition of the stock of Target.

WITHIN 45 DAYS OF THE DATE ON THIS LETTER, Purchaser and Seller must file the Election on Form 8023, executed on or after the date on this letter. The election must comply with the simultaneous joint election requirement of § 1.338(h)(10)-1(d)(2). A copy of this letter must be attached to the Form 8023. Also, a copy of this letter and the Form 8023 (or Form 8883, if applicable) must be attached to Purchaser's tax return for all relevant years ending on or after Date 4.

The above extension of time is conditioned on the taxpayers' (Purchaser's consolidated group's, Seller'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 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).

No opinion is expressed as to: (1) whether the acquisition of Target stock qualifies as a "qualified stock purchase;" (2) whether the acquisition of Target stock qualifies for § 338(h)(10) treatment; or (3) any other tax consequences arising from the Election.

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 or 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 Purchaser, Seller, and Tax Advisors. However, the Director should verify all essential facts. Moreover, notwithstanding that the extension is granted under § 301.9100-3 to file the Election, any penalties and interest that would otherwise be applicable still apply.

Purchaser must provide Seller with a copy of this letter.

This ruling is directed only to the taxpayer(s) requesting it. Section 6110(k)(3) provides that it may not be used or cited as precedent.

In accordance with the Power of Attorney on file with this office, a copy of this letter is being sent to your authorized representative.

Sincerely,

*Ken Cohen*

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

cc: