

Internal Revenue Service

Number: **200504019**

Release Date: 1/28/05

Index Numbers: 338.01-02, 9100.07-00

Department of the Treasury

Washington, DC 20224

Third Party Communication: None

Date of Communication: Not Applicable

Person To Contact:

, ID No.

Telephone Number:

Refer Reply To:

CC:CORP:B06

PLR-142201-04

Date:

October 15, 2004

Legend

Purchaser =

Target =

Seller =

Date A =

Date B =

Date C =

Tax Professionals =

Company Official =

Dear

This letter responds to a letter dated July 30, 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) 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 A. (All citations in this letter to regulations under § 338 are to regulations in effect on Date A.) The material information is summarized below.

Purchaser is a corporation that is the common parent of an affiliated group of corporations filing a consolidated Federal income tax return. Prior to Purchaser's acquisition of all of the stock of Target, Target was an "S" corporation, and Seller owned all of the stock of Target.

On Date A, Purchaser acquired all of the stock of Target from Seller pursuant to a Stock Purchase Agreement signed on that day. It is represented that Purchaser's acquisition of the stock of Target qualified as a "qualified stock purchase," as defined in § 338(d)(3).

The Election was due on Date B, 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 § 301.9100-3, for an extension of time to file the Election. The period of limitations on assessment under § 6501(a) for Purchaser's consolidated group's taxable year in which the acquisition occurred and subsequent years will not expire until at least Date C. Although the taxable year (for the year of the sale) for Seller has expired, the gain resulting from treating the sale of the Target stock under § 338(h)(10) has been taken into account by Seller and Target.

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 purchasing corporation and the selling shareholders of the target corporation 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)-1(d).

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

Based on the facts and information submitted, including the representations made, we conclude that Purchaser and Seller 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 Seller to file the Election with respect to the acquisition of the stock of Target, as described above.

WITHIN 45 DAYS OF THE DATE ON THIS LETTER, Purchaser and Seller must file the Election on Form 8023. 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 Form 8023.

ALSO WITHIN 45 DAYS OF THE DATE ON THIS LETTER, Purchaser 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 Form 8023 (or Form 8883, if applicable) must be attached to the returns.

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 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 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 to file the Election, penalties and interest that would otherwise be applicable, if any, continue to apply.

Purchaser must provide Seller with a copy of this letter.

This ruling is directed only to the taxpayers requesting it. Section 6110(k)(3) of the Code 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: