

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.

Telephone Number:

Refer Reply To:

CC:CORP:03

PLR-146819-04

Date:

December 23, 2004

Legend

Purchaser =

Target =

Sellers =

State Y =
State Z =
Date A =
Date B =
Date C =
Date D =
Date E =
Year 1 =
Company Officials =

Dear :

This letter responds to a letter dated August 31, 2004, requesting an extension of time under §301.9100-3 of the Procedure and Administration Regulations for Purchaser and Sellers 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.) Additional information was received in and with letters dated October 26 and December 14, 2004. The material information is summarized below.

Purchaser was a State Z corporation. Target is a State Y corporation which on Date A was an S corporation all of whose outstanding stock 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 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). Purchaser and Target filed a consolidated return for Year 1.

On Date C, Purchaser was sold to a new buyer. Immediately thereafter, Purchaser merged into Target with Target as the surviving corporation.

The Election was due on Date B, and all parties have filed Federal income tax returns consistently with a valid election having been made. However, after the due date for the Election, Purchaser and Sellers have been unable to establish that a valid Election was filed. Accordingly, 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) will not expire for Purchaser's or Target's taxable years ending Date D or later until at least Date E.

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 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 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)). 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, Sellers, and Company Officials explain the circumstances surrounding the intended filing of the Election before Date B. 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.

WITHIN 45 DAYS OF THE DATE ON THIS LETTER, Purchaser and Sellers must file the Election on Form 8023. A copy of this letter must be attached to Form 8023. Also, a copy of this letter and Form 8023 (or Form 8883, if applicable), must be attached to Purchaser's and Target's tax returns for all relevant years ending on or after Date D.

The above extension of time is conditioned on the taxpayers' (Purchaser's, its 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; (3) whether Target qualified as an S corporation on Date A; or (4) 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 for 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 interests that would otherwise be applicable, if any, continues to apply.

Purchaser must provide 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.

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

Sincerely,

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