

## Internal Revenue Service

Number: **200546020**

Release Date: 11/18/2005

Index Number: 338.01-02, 9100.06-00

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:B03

PLR-124588-05

Date:

August 08, 2005

Parent =

Sub 1 =

Sub 2 =

Purchaser =

Target =

Target Sub 1 =

U.S. Seller =

Date A =

Date B =

Date C =

Date D =

Country E =

State F =

Company Official =

Tax Professional =

Dear :

This letter responds to a letter dated April 28, 2005, submitted on behalf of Parent, requesting an extension of time under §301.9100-3 of the Procedure and Administration Regulations to file an election. Parent is requesting an extension of time to file a “§338 election” under §338(g) with respect to Purchaser’s acquisition of the stock of Target and the deemed acquisition of the stock of Target Sub 1 (sometimes hereinafter referred to as the “Election”) on Date C. Additional information was received in a letter dated July 6, 2005. The material information is summarized below.

Parent, a State F corporation, is the common parent of a consolidated group of corporations. Parent owns all the stock of Sub 1. Sub 1 owns all the stock of Sub 2. Sub 2 owns all the stock of Purchaser. Purchaser, a State F limited liability company, is disregarded as an entity separate from its owner for Federal tax purposes.

U.S. Seller owned all the stock of Target, a Country E corporation. Target owned all the stock of Target Sub 1, a Country E corporation.

On Date A, Purchaser and U.S. Seller entered into a purchase agreement for Purchaser to acquire all of the stock of Target (which included Target Sub 1) from Seller. This agreement was subsequently amended and restated as of Date B. On Date C, Purchaser acquired all of the stock of Target from Seller in a fully taxable transaction. Parent represented that this acquisition was a “qualified stock purchase,” as defined in §338(d)(3).

Prior to their acquisition, Target and Target Sub 1 were each controlled foreign corporations within the meaning of §957. Neither Target nor Target Sub 1 was a passive foreign investment company or a foreign personal holding company at any time

during the portion of its taxable year that ended on the acquisition date (as defined in §338(h)(2)).

Parent intended to file the Election. The Election was due on Date D, but for various reasons a valid Election was not filed. After the due date of 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) has not expired for Parent's consolidated group's, Target's, or Target Sub 1's 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."

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., §1.338-2(d)). Therefore, the Commissioner has discretionary authority under §301.9100-3 to grant an extension of time for Parent to file the Election, provided Parent 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 Parent, Company Official, and Tax Professional explain the circumstances that resulted in the failure to timely file a valid Election. The information establishes that Parent reasonably relied on a qualified tax professional who failed to make, or advise Parent to make, the Election and that the interests of the government will not be prejudiced if relief is granted. See §301.9100-3(b)(1)(v).

Based on the facts and information submitted, including the representations made, we conclude that Parent 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 §301.9100-3, until 45 days from the date on this letter, for Parent to file the Election with respect to the acquisition of stock of Target and the deemed acquisition of Target Sub 1, as described above.

WITHIN 45 DAYS OF THE DATE ON THIS LETTER, Parent must file the Election on Form 8023 in accordance with §1.338-2(d) and the instructions to the Form. A copy of this letter must be attached to Form 8023. Notice of the Election must also be provided to U.S. Seller and any other U.S. person described in §1.338-2(e)(4).

WITHIN 120 DAYS OF THE DATE ON THIS LETTER, all relevant parties (including U.S. Seller) must file or amend, as applicable, all returns and amended returns (if any) necessary to report the transaction as a §338 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 8883 must be attached to the returns.

The above extension of time is conditioned on the taxpayers' (Parent's consolidated group's, Target's, and Target Sub 1'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 acquisitions of the Target and the deemed acquisition of Target Sub 1 stock qualify as "qualified stock purchases" under §338(d)(3); or (2) any other tax consequences arising from the Election. Also, no opinion is expressed concerning the application of §1248, §951, and §338(h)(16) to U.S. Seller because of the deemed sale of the Target's and Target Sub 1's assets pursuant to the §338(g) election. See §1.338-9.

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. Also, except as expressly provided herein, no opinion is expressed or implied concerning the tax consequences of any transaction or item discussed or referenced in this letter.

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.

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, the original of this letter is being sent to Parent with copies to Parent's authorized representatives.

Sincerely,

*Ken Cohen*

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