

## Internal Revenue Service

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Department of the Treasury

Washington, DC 20224

Third Party Communication: None

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PLR-145851-08

Date:

April 06, 2009

### LEGEND

Parent =

Purchaser =

Target =

Foreign Target =

Seller =

CountryA =

a =

DateA =

DateB =

DateC =

Parent Official =

Dear :

This letter responds to a letter dated October 20, 2008, requesting on behalf of Parent an extension of time under §§ 301.9100-1 through 301.9100-3 of the Procedure and Administration Regulations to file an election. The extension is being requested for Parent to file a “§ 338 election” under § 338(g) of the Internal Revenue Code (sometimes hereinafter referred to as the “Election”) with respect to Purchaser’s acquisition of the stock of Foreign Target on DateA. Additional information was received in subsequent correspondence. The material information submitted is summarized below.

Parent is a domestic corporation and the common parent of an affiliated group that filed a consolidated Federal income tax return that included Purchaser for the taxable year that included DateA. Purchaser is wholly owned by Parent.

Seller is a subchapter S corporation. Seller owned all the stock of Target, a qualified subchapter S subsidiary (QSub).

Foreign Target, a CountryA corporation, was wholly owned by Target. Foreign Target was a controlled foreign corporation during the taxable year that included the acquisition date.

On DateA, Purchaser acquired all the stock in Target in exchange for \$a cash (subject to adjustments). Because Target was a QSub, Purchaser’s acquisition of the stock of Target is treated, for Federal income tax purposes, as an acquisition of Target’s assets, which included the stock of Foreign Target.

It is represented that Purchaser’s acquisition of the stock of Foreign Target qualified as a “qualified stock purchase,” as defined in § 338(d)(3).

Parent intended to treat the acquisition of Foreign Target as an asset acquisition. The Election for Foreign Target was due on DateB, but for various reasons a valid Election was not filed. Subsequent to DateB, it was discovered that a valid Election had not been filed. Thereafter, this request was submitted, under § 301.9100-3, for an extension of time to file a valid Election.

The period of limitations on assessment under § 6501(a) of the Code has not expired for Parent’s consolidated group’s taxable year in which the acquisition occurred, the taxable year for which the Election should have been filed, or for any taxable years that would have been affected by the Election had it been timely filed. The period of limitations on assessment for Parent’s consolidated group’s taxable year that included DateA will expire no earlier than DateC.

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,” 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.

Section 301.9100-1(a) describes the Commissioner's authority to grant an extension of time to make a regulatory election. Section 301.9100-1(b) defines the term "regulatory election". Section 301.9100-2 provides automatic extensions of time for making certain elections. Section 301.9100-3 provides extensions of time for making regulatory elections that do not meet the requirements of § 301.9100-2. 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 shows that 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.

Information, affidavits, and representations submitted by Parent and Parent Official explain the circumstances that resulted in the failure to timely file the 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. See § 301.9100-3(b)(1)(i).

Based on the facts and information submitted, including the representations made, we conclude that Parent has shown that it acted reasonably and in good faith in failing to timely file the Election, the requirements of §§ 301.9100-1 and 301.9100-3 are satisfied, and granting relief will not prejudice the interests of the Government. Accordingly, we grant an extension of time 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 the stock of Foreign Target.

WITHIN 45 DAYS FROM THE DATE ON THIS LETTER, Parent must file the Election on Form 8023, in accord with § 1.338-2(d) and the instructions to the form. A copy of this letter must be attached to the 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 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 8883) must be attached to any tax return to which it is relevant. Alternatively, taxpayers filing their returns electronically may satisfy the requirement of attaching a copy of this letter by attaching a statement to their return that provides the date and control number (PLR-145851-08) of this ruling letter.

The above extension of time is conditioned on the tax liability (if any) of Parent's consolidated group 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 amount of tax liability for the years involved. A determination thereof will be made 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 amount of tax liability is lower. Section 301.9100-3(c).

#### CAVEAT

We express no opinion as to: (1) whether the acquisition of Foreign Target stock qualifies as a "qualified stock purchase" under § 338(d)(3); (2) any tax consequences arising from the Election; or (3) any other tax consequences of the transaction.

In addition, we express no opinion as to the tax effects or any other 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. 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.

The rulings contained in this letter are based upon information, representations, and affidavits submitted by Parent and Parent Official, with all submissions accompanied by a penalties of perjury statement executed by an appropriate party. While this office has not verified any of the material submitted in support of the request for rulings, all of this material is subject to verification on examination.

#### PROCEDURAL STATEMENTS

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

Pursuant to a power of attorney on file in this matter, a copy of this letter is being sent to your authorized representatives.

Sincerely,

*Ken Cohen*

Ken Cohen  
Acting Chief, Branch 3  
Office of Associate Chief Counsel (Corporate)