

## Internal Revenue Service

Department of the Treasury  
Washington, DC 20224

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Refer Reply To:  
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PLR-132471-09  
Date:  
November 19, 2009

Parent =

Purchaser =

Target =

Successor =

Tax Professional =

Company Official =

State X =

Country Y =

Date A =

Date B =

Year =

Dear :

This letter responds to a letter dated June 30, 2009, submitted on behalf of Purchaser, requesting an extension of time under §301.9100-3 of the Procedure and Administration Regulations to file an election. Additional information was submitted in letters dated September 17, September 28, November 9, and November 13, 2009. Purchaser is requesting an extension to file a "§338 election" under §338(g) of the Internal Revenue Code with respect to its acquisition of the stock of Target (sometimes hereinafter referred to as the AElection<sup>®</sup>) on Date A. Citations in this letter to regulations under §338 are to regulations in effect on Date A. The material information is summarized below.

Purchaser, a Country Y corporation, was newly organized by Parent, a State X corporation, to effectuate the proposed transaction. On Date A, Purchaser acquired all of the stock of Target from the Target shareholders solely for cash in a taxable exchange. In Year, Target was merged into Purchaser and Purchaser changed its name to Successor. It is represented that Purchaser's acquisition of the stock of Target qualified as a "qualified stock purchase," as defined in §338(d)(3).

Prior to the acquisition, Target was not a controlled foreign corporation, a passive foreign investment company, or a foreign personal holding company.

The Election was required to be filed on or before Date B, but for various reasons the Election was not filed. After Date B, it was discovered that the filing of the Election had not been timely accomplished. Subsequently, this request was submitted, under §301.9100-3, for an extension of time for filing of the Election.

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 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.*, §1.338-1(d)). Therefore, the Commissioner has discretionary authority under §301.9100-3 to grant an extension of time for Purchaser to file the Election, provided Purchaser 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, Company Official and Tax Professional 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. See §301.9100-3(b)(1)(v).

Based on the facts and information submitted, including the representations made, we conclude that Purchaser 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 Purchaser 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 must file the Election on Form 8023 in accordance with §1.338-1(d).

WITHIN 120 DAYS OF THE DATE ON THIS LETTER, all relevant parties must file or amend, as applicable, all returns and amended returns 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 8023 (or Form 8883, if appropriate) 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 of the letter ruling.

The above extension of time is conditioned on all relevant parties' tax liability (Parent, Purchaser, Target and Successor) 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 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 tax liability is lower. Section 301.9100-3(c).

We express no opinion as to: (1) whether the acquisition of the Target stock qualifies as a "qualified stock purchase" under § 338(d)(3); or (2) any other tax consequences arising from the Election. In addition, no opinion was requested and no opinion is expressed concerning the merger of Purchaser and Target, discussed above. Finally, 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.

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 Purchaser's authorized representative.

Sincerely,

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

cc: