

Internal Revenue Service

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Department of the Treasury
Washington, DC 20224

Third Party Communication: None
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Refer Reply To:
CC:CORP:B05
PLR-104829-10

Date:
May 28, 2010

LEGEND

ShareholderA =

Purchaser =

PurchaserAffiliate =

Target =

Target Affiliates =

LocationA =

b =

c =

DateA =

DateB =

DateC =

DateD =

Company Official =

Tax Professional =

Dear

This letter responds to a letter dated January 25, 2010, submitted on behalf of Purchaser and PurchaserAffiliate, requesting the Internal Revenue Service (“Service”) to grant 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 Purchaser and PurchaserAffiliate 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 and PurchaserAffiliate’s acquisition of the stock of Target and the deemed acquisitions of the stock of Target Affiliates on DateA and DateB, respectively. Additional information was received in a letter dated May 19, 2010. The material information submitted is summarized below.

Purchaser, a corporation organized in LocationA, and PurchaserAffiliate, a corporation organized in LocationB, are holding companies and members of an affiliated group within the meaning of § 338(h)(5). More than 10% of the stock in Purchaser is and has been held, directly or indirectly, by ShareholderA, a U.S. corporation. The ShareholderA group has provided advice to Purchaser with regard to certain U.S. tax matters.

Target directly and/or indirectly holds all the outstanding stock in the b Target Affiliates. Prior to the acquisition described herein, Target was a publicly held company. Neither Target nor any of the Target Affiliates is a U.S. person.

During the 12-month period that ended on DateB, Purchaser and PurchaserAffiliate acquired for c cash all the outstanding stock in Target and, thus, indirectly, all the outstanding stock in Target Affiliates. After DateA but prior to DateB, PurchaserAffiliate was deemed to liquidate into Purchaser pursuant to a series of “check-the-box” elections in which PurchaserAffiliate became disregarded as an entity separate from its owner.

Purchaser and PurchaserAffiliate intended to file the Election. The Election was due on DateC but for various reasons a valid Election was not filed. Subsequent to DateC, 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.

REPRESENTATIONS

(a) Purchaser and PurchaserAffiliate were members of an affiliated group within the meaning of § 338(h)(5) and Purchaser’s and PurchaserAffiliate’s acquisition of the stock of Target and the deemed acquisition of the stock of the Target Affiliates constituted a “qualified stock purchase,” as defined in § 338(d)(3).

(b) As of the date the request for this ruling letter was submitted, the Service had not contacted Purchaser, PurchaserAffiliate, Target, or any of the Target Affiliates concerning Purchaser’s and PurchaserAffiliate’s failure to timely make the Election.

(c) The period of limitations on assessments under § 6501(a) of the Code has not expired for any affected taxpayer: (i) for the taxable year in which the acquisition occurred; (ii) for the taxable year for which the Election should have been filed; or (iii) for any taxable years that would have been affected by the Election had it been timely filed. The period of limitations on assessment for any taxpayer’s taxable year that would be affected by the Election will expire no earlier than DateD.

APPLICABLE LAW

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(b) defines the term “regulatory election” as including an election whose due date is prescribed by a regulation, revenue ruling, revenue procedure, notice or announcement. 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 an election.

Section 301.9100-1(a) describes the Commissioner’s authority to grant an extension of time to make a 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 § 301.9100-1 to grant an extension of time for Purchaser and PurchaserAffiliate to file the Election, provided Purchaser and PurchaserAffiliate show that they acted reasonably and in good faith, that the requirements of §§ 301.9100-1 and 301.9100-3 are satisfied, and that granting relief will not prejudice the interests of the Government.

Information, affidavits, and representations submitted by Purchaser, PurchaserAffiliate, Company Official, and Tax Professional explain the circumstances that resulted in the failure to timely file the Election. The information establishes that Purchaser and PurchaserAffiliate reasonably relied on a qualified tax professional who failed to make, or advise Purchaser and PurchaserAffiliate to make, the Election. In addition, the information, representations, and affidavits submitted indicate that the present request for relief was submitted to this office prior to the Service discovering that the Election had not been timely made. See § 301.9100-3(b)(1)(i) and (v).

CONCLUSION AND GRANT OF EXTENSION

Based solely on the facts, information, representations, and affidavits submitted, we conclude that Purchaser and PurchaserAffiliate have shown that they 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.

Provided the stock acquisition qualifies substantively as a § 338(d)(3) “qualified stock purchase,” we grant an extension of time under § 301.9100-3, until forty-five (45) days from the date on this letter, for Purchaser and PurchaserAffiliate to file the Election with respect to the acquisition of the stock of Target and the deemed acquisition of the stock of the Target Affiliates.

WITHIN 45 DAYS FROM THE DATE ON THIS LETTER, Purchaser and PurchaserAffiliate 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 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-104829-10) of this ruling letter.

The above extension of time is conditioned on the taxpayers' 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 upon audit of the relevant Federal income tax returns. 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: (1) as to whether the Acquisition qualifies substantively as a “qualified stock purchase” under § 338(d)(3); or (2) as to any tax consequences arising from the Election. Furthermore, except as expressly provided herein, no opinion is expressed or implied concerning the tax consequences of any aspect of any matter or item discussed or referenced in this ruling letter.

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

For purposes of granting this relief we relied upon certain information, representations, and/or affidavits submitted by Purchaser, PurchaserAffiliate, Company Official, and Tax Professional, 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 person(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
Senior Technician Reviewer, Branch 3
Office of Associate Chief Counsel
(Corporate)