

Internal Revenue Service

Department of the Treasury
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Refer Reply To:
CC:CORP:B05
PLR-129922-11
Date:
November 07, 2011

TY:

Legend
Parent =

Holding =

Purchaser =

Old Parent =

Target =

Country A =

Date 1 =

Date 2 =

Date 3 =

Date 4 =

Date 5 =

Date 6 =

Company Official =

Dear :

This letter responds to a letter dated July 18, 2011, submitted on behalf of Parent (successor in interest of Old Parent, the common parent of the consolidated group that included Holding, the United States shareholder of Purchaser, the foreign purchasing corporation) requesting an extension of time under § 301.9100-3 of the Procedure and Administration Regulations to file an election. Parent is requesting an extension to file a “§ 338 election” under § 338(g) of the Internal Revenue Code (the “Code”) with respect to Purchaser’s acquisition of the stock of Target (sometimes hereinafter referred to as the “Election”) on Date 1. (Citations in this letter are to the regulations in effect on Date 1.) Additional information was received in letters dated August 25, 2011, October 5, 2011, and November 3, 2011. The material information is summarized below.

Old Parent was the common parent of an affiliated group of corporations filing consolidated returns, which included Holding, a wholly owned subsidiary. Purchaser, a Country A corporation, was a wholly owned subsidiary of Holding. Purchaser acquired all the stock of Target, a Country A corporation, for cash through a series of transactions ending on Date 1 (the “Transactions”). On Date 2, Target and Purchaser amalgamated under Country A law with Purchaser continuing as the amalgamated company. On Date 4, Parent purchased all of the stock of Old Parent. On Date 5, Old Parent merged into Parent, with Parent surviving and becoming the direct parent of Holding. On Date 6, Holding and Purchaser adopted a plan of liquidation to begin the process of liquidating Purchaser under Country A law.

Parent has represented that Purchaser’s acquisition of the stock of Target qualified as a “qualified stock purchase,” as defined in § 338(d)(3). Parent has also represented that no person filed a United States tax return treating the transactions constituting the qualified stock purchase in a manner that is inconsistent with the tax consequences that would have resulted from the Election for which extension is sought.

Target was not a controlled foreign corporation, a passive foreign investment corporation, 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)).

Purchaser was a controlled foreign corporation as defined in § 957 and was not required under § 1.6012-2(g) (other than § 1.6012-2(g)(2)(i)(b)(2)) to file a United States income tax return for its taxable year that includes the acquisition date.

The § 338 election was due on Date 3, but for various reasons a valid election was not filed. After the due date for 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. Parent has represented that it is not seeking to alter a return position for which an accuracy-related penalty has been or could be imposed under section 6662 of the Code.

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 to the satisfaction of the Commissioner 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 regulations (*i.e.*, § 1.338-1(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 interest of the government.

Information, affidavits, and representations submitted by Parent and Company Official 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 to advise Parent to make, the Election, and 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) and (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 of this letter, for Parent to file an election with respect to the acquisition of the stock of Target.

WITHIN 45 DAYS OF THE DATE ON THIS LETTER, Parent must file the Election on Form 8023, in accordance with § 1.338-1(d) and (g) and the instructions to the Form. A copy of this letter must be attached to Form 8023.

WITHIN 120 DAYS OF THE DATE ON THIS LETTER, all relevant parties, having filed their returns consistent with the Election having been made, must amend any tax return to which it is relevant by attaching a copy of this letter and a copy of Form 8023 (or Form 8883, if appropriate). 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-129922-11) of the letter ruling.

The above extension of time is conditioned on Parent's consolidated group's 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.

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 consequence 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 forth in the above rulings. For purposes of granting relief under § 301.9100-3, we relied on certain statements and representations made by the Parent and Company Official. 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 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 representatives.

Sincerely,

Ken Cohen

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

cc: