

Internal Revenue Service

Number: **202131009**
Release Date: 8/6/2021

Index Number: 338.00-00, 338.01-00,
1361.00-00, 1361.05-00,
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:B04
PLR-126961-20

Date:
May 13, 2021

LEGEND

Purchaser =

Target =

Seller =

State =

Date 1 =

Date 2 =

Date 3 =

Date 4 =

Company Official =

Tax Professional =

Dear :

This letter responds to a letter dated November 23, 2020, submitted on behalf of Purchaser, requesting extensions of time under §301.9100-3 of the Procedure and Administration Regulations to file two elections. Specifically, Purchaser is requesting extensions of time to: (i) file a “section 338 election” under section 338(g) with respect to Purchaser’s acquisition of the stock of Target on Date 3 (sometimes hereinafter referred to as “the Section 338(g) Election”), and (ii) make a late election on behalf of Target to be a qualified subchapter S subsidiary (“QSub”) under section 1361(b)(3)(B)(ii) of the Internal Revenue Code (“Code”) and §1.1361-3 of the Income Tax Regulations (the foregoing two elections are collectively referred to as “the Elections”). The material information submitted is summarized below.

FACTS

Purchaser is a State limited liability company organized on Date 1 that elected to be treated as an S corporation effective Date 2.

On Date 3, Purchaser acquired all the stock of Target from Seller. Purchaser represents that the acquisition of the stock of Target qualified as a “qualified stock purchase” as defined in section 338(d)(3). At all times after the qualified stock purchase, Purchaser has owned all the stock of Target.

Purchaser intended to timely file the Section 338(g) Election. Purchaser also intended to timely elect to treat Target as a QSub effective Date 4. For various reasons, however, the Elections were not timely filed. Purchaser has represented that it has filed consistently with being an S corporation and has treated Target as a QSub since Date 4. Further, Purchaser has represented that the returns for all relevant taxable years have been filed consistently with its having made a valid election under section 338(g).

After the respective due dates for the Elections, it was discovered that the Elections had not been filed. Subsequently, this request was submitted, under §301.9100-3, for extensions of time to file the Elections.

Purchaser 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.

LAW AND ANALYSIS

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 “section 338 election” or a “section 338(h)(10) election”; and (2) the acquisition is a “qualified stock purchase.”

Section 1.338-2(d) provides, in part, that the purchasing corporation makes a section 338 election on Form 8023, Elections Under Section 338 for Corporations Making Qualified Stock Purchases, in accordance with the instructions to the form. The section

338 election must be made not later than the 15th day of the 9th month beginning after the month in which the acquisition date occurs.

Section 1361(b)(3)(A) generally provides that a QSub shall not be treated as a separate corporation and all assets, liabilities, and items of income, deduction, and credit of a QSub shall be treated as assets, liabilities, and such items (as the case may be) of the S corporation.

Section 1361(b)(3)(B) defines a QSub as a domestic corporation which is not an ineligible corporation, if 100 percent of the stock of the corporation is owned by the S corporation, and the S corporation elects to treat the corporation as a QSub.

Section 1.1361-3(a) prescribes the time and manner for making an election to be classified as a QSub. Section 1.1362-3(a)(2) provides that an S corporation may elect to treat an eligible subsidiary as a QSub by filing a Form 8869 with the appropriate service center. Section 1.1361-3(a)(4) provides that an election may be effective up to two months and 15 days prior to the date the election is filed or not more than 12 months after the election is filed.

Section 1.1361-3(a)(6) provides that an extension of time to make a QSub election may be available under procedures applicable under §§301.9100-1 and 301.9100-3.

Section 1.1361-4(b)(4) provides that an S corporation that makes a qualified stock purchase of a target may make an election under section 338 with respect to the acquisition if it meets the requirements for the election, and may make a QSub election with respect to the target. If an S corporation makes an election under section 338 with respect to a subsidiary acquired in a qualified stock purchase, a QSub election made with respect to that subsidiary is not effective before the day after the acquisition date (within the meaning of section 338(h)(2)). If the QSub election is effective on the day after the acquisition date, the liquidation under §1.1361-3(a)(2) occurs immediately after the deemed asset purchase by the new target corporation under section 338. If an S corporation makes an election under section 338 (without a section 338(h)(10) election) with respect to a target, the target must file a final return as a C corporation reflecting the deemed sale. See §1.338-10(a). If the target was an S corporation on the day before the acquisition date, the final return as a C corporation must reflect the activities of the target for the acquisition date, including the deemed sale. See §1.338-10(a)(3).

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) provides that the term "regulatory election" includes an election whose due date is prescribed by a regulation published in the Federal Register.

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. Section 301.9100-3(a) provides that requests for relief under §301.9100-3 will be granted when the taxpayer provides evidence (including affidavits described in §301.9100-3(e)) 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.

In this case, the times for filing the respective elections are fixed by the regulations (i.e., §§1.338-2(d) and 1.1361-3(a)(4)). Therefore, the Commissioner has discretionary authority under §301.9100-3 to grant an extension of time for Purchaser to make the Elections, 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 the Elections. The information establishes that the request for relief was filed before the failure to make the Elections was discovered by the Internal Revenue Service. See §301.9100-3(b)(1)(i).

CONCLUSION

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, the following extensions of time are granted under §301.9100-3 for Purchaser to file the Elections:

- (i) Purchaser is granted an extension of time of 75 days from the date on this letter to file the Section 338(g) Election; and
- (ii) Purchaser is granted an extension of time of 120 days from the date on this letter to elect to treat Target as a QSub, effective Date 4. The election should be made by filing Form 8869, Qualified Subchapter S Subsidiary Election, with the appropriate service center, and a copy of this letter should be attached to the election.

WITHIN 75 DAYS OF THE DATE ON THIS LETTER, Purchaser must file the section 338(g) 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.

WITHIN 150 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 section 338 transaction for the taxable year in which the transaction was consummated (and for any other affected taxable year). Note, however, that the relief granted by this ruling letter is limited to the above extensions of time to file the Elections; no opinion is expressed with respect to any other relief or permission (e.g., permission to change a method of accounting) that any relevant parties would otherwise be required to receive or obtain from the Internal Revenue Service in order to report the transaction consistently with the making of the Section 338(g) Election had the Section 338(g) Election been timely made.

A copy of this letter and a copy of 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 on, and control number (PLR-126961-20) of, this letter ruling.

The above extensions of time are conditioned on no taxpayer's tax liability (if any) being lower, in the aggregate, for all taxable years affected by the Elections, than it would have been if the Elections had been timely made (taking into account the time value of money). No opinion is expressed as to such 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.

Except as expressly provided herein, no opinion is expressed or implied concerning the tax consequences of any aspect of any transaction or item discussed or referenced in this letter. For example, we express no opinion as to: (1) whether the acquisition of the stock of Target qualifies as a "qualified stock purchase" under section 338(d)(3), (2) whether Purchaser is a valid S corporation, (3) whether Target is eligible to be a QSub, or (4) any other tax consequences arising from the Elections.

In addition, we express no opinion as to the tax consequences of filing the Elections 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 Elections 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 Purchaser, Company Official, and Tax Professional. However, the Director should verify all essential facts. In addition, notwithstanding that extensions are granted under §301.9100-3 to file the Elections, penalties and interest that would otherwise be applicable, if any, continue to apply.

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

In accordance with the Power of Attorney on file with this office, copies of this letter are being sent to your authorized representatives.

Sincerely,

Thomas I. Russell

Thomas I. Russell

Chief, Branch 1

Office of Associate Chief Counsel (Corporate)

Enclosures (2)

Copy of this letter

Copy for section 6110 purposes

cc: