

Internal Revenue Service

Number: **202137001**

Release Date: 9/17/2021

Index Number: 9100.00-00, 9100.07-00,
338.00-00, 338.01-00,
338.01-02

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-100185-21

Date:
June 17, 2021

Legend

Purchaser =

Target =

Sellers =

Date 1 =

Company Official =

Tax Professional =

Dear :

This letter responds to a letter dated December 22, 2020, submitted on behalf of Purchaser and Sellers, requesting an extension of time under §301.9100-3 of the Procedure and Administration Regulations to file an election. Purchaser and Sellers are requesting an extension to file a “section 338(h)(10) election” under section 338(h)(10) of the Internal Revenue Code (the “Code”) and §1.338(h)(10)-1(c) of the Income Tax Regulations (the “regulations”) with respect to Purchaser’s acquisition of the stock of Target, an S corporation, on Date 1 (the “Election”). The material information submitted is summarized below.

On Date 1, Purchaser acquired all the stock of Target from Sellers. Purchaser and Sellers have represented that the acquisition of Target qualified as a “qualified stock purchase” within the meaning of section 338(d)(3). Purchaser and Sellers have also represented that all relevant returns were filed consistent with making the Election.

Purchaser and Sellers intended to file the Election, but for various reasons, a valid Election may not have been made. After the due date for the Election, it was discovered that a valid Election may not have been made. Subsequently, this request was submitted, under §301.9100-3, for an extension of time to file the Election.

Purchaser and Sellers have represented that they are not seeking to alter a return position for which an accuracy-related penalty has been or could be imposed under section 6662.

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 338(h)(10) permits the purchasing corporation and sellers to elect jointly to treat the target corporation as deemed to sell all of its assets and distribute the proceeds in complete liquidation. A section 338(h)(10) election may be made for target only if purchaser acquires stock meeting the requirements of section 1504(a)(2) from a selling consolidated group, a selling affiliate, or the S corporation shareholders in a qualified stock purchase. Section 1.338(h)(10)-1(c)(1).

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. See §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. See §301.9100-3(a).

In this case, the time for filing the Election is fixed by regulations (i.e., §1.338(h)(10)-1(c)(3)). Therefore, the Commissioner has discretionary authority under §301.9100-3 to grant an extension of time for Purchaser and Sellers to file the Election, provided Purchaser and Sellers show they 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, Sellers, Company Official, and Tax Professional explain the circumstances that resulted in the possible failure to timely file a valid Election. The information establishes that the request for relief was filed before the possible 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 Purchaser and Sellers have shown they 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 75 days from the date on this letter, for Purchaser and Sellers to file the Election with respect to the acquisition of the stock of Target.

WITHIN 75 DAYS OF THE DATE ON THIS LETTER, Purchaser and Sellers 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 Form 8023.

WITHIN 150 DAYS OF THE DATE ON THIS LETTER, all relevant parties, having originally filed or amended their returns for all open years to be consistent with a valid Election having been made, must amend their returns to attach to the returns a copy of this letter. In lieu of attaching a copy of this letter to their returns, 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-100185-21) of, the letter ruling.

The above extension of time is conditioned on the relevant 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). We express no opinion 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 Target stock qualifies as a "qualified stock purchase" under section 338(d)(3); (2) whether the acquisition/sale of

Target stock qualifies for section 338(h)(10) treatment; or (3) any other tax consequences 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 ruling. For purposes of granting relief under §301.9100-3, we relied on certain statements and representations made by Purchaser, Sellers, Company Official, and Tax Professional. 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 taxpayers 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 representative.

Sincerely,

Thomas J. Russell

Thomas I. Russell
Chief, Branch 1
Office of Associate Chief Counsel (Corporate)

cc: