

Internal Revenue Service

Number: **200119038**
Release Date: 5/11/2001
Index Number: 0338.01-02
9100.06-00

Department of the Treasury

Washington, DC 20224

Person to Contact:

Telephone Number:

Refer Reply To:

CC:CORP:1 PLR-118492-00

Date:

February 8, 2000

LEGEND

Parent =

Sub 1 =

Purchaser =

Seller =

Target =

Target Sub =

Country X =

Country Y =

Country Z =

Date A =

Date B =

Date C =

Business T =

Business W =

Company Official =

Tax Professionals =

Authorized
Representatives =

Dear:

This letter responds to your authorized representative's letter dated September 21, 2000, requesting an extension of time under §§ 301.9100-1 through 301.9100-3 of the Procedure and Administration Regulations to file elections. Parent, the common parent of the consolidated group that includes Sub 1, the United States shareholder of Purchaser, the foreign purchasing company, and of "new" Target, the deemed foreign purchasing company, is requesting the extension to file elections under § 338(g) of the Internal Revenue Code and §§ 1.338-1(d) and 1.338-1(g) of the Income Tax Regulations, with respect to the acquisition of the stock of Target and deemed acquisition of the stock of Target Sub (sometimes hereinafter referred to as the "Elections"). All citations in this letter to regulations under § 338 are to the regulations in effect on Date A. Additional information was submitted in a letter dated October 31, 2000. The information submitted for consideration is summarized below.

Parent is the common parent of an affiliated group that files a consolidated federal income tax return. Sub 1 is a member of the group. Purchaser is a wholly owned Country X subsidiary of Sub 1. Parent and the members of its affiliated group are involved in Business T.

Prior to the acquisition described below, Target was wholly owned by a foreign corporation ("Seller"), a Country Z corporation. Target Sub is a wholly owned subsidiary of Target. Target is a Country X holding company and Target Sub is a Country Y corporation. Target Sub is engaged in Business W. Prior to the acquisition, Target and Target Sub did not file U.S. income tax returns and they were not subject to U.S. income taxation.

On Date A, Purchaser acquired all of the stock of Target from Seller in a fully taxable transaction. Parent intended to file the Elections. The Elections were due on Date B. However, for various reasons the Elections were not filed. On Date C (which is after the due date for the Elections), Company Official discovered that the Elections had not been filed and engaged Authorized Representatives for assistance.

It is represented that (1) Purchaser was not related to Seller within the meaning of § 338(h)(3), (2) the acquisition of the stock of Target qualified as a "qualified stock purchase," as defined in § 338(d)(3), and (3) the period of limitations on assessments under § 6501(a) has not expired for Parent's, Purchaser's, Target's, or Target Sub's taxable year(s) in which the acquisition occurred, the taxable year(s) in which the Elections should have been filed, or any taxable year(s) that would have been affected by the Elections had they been timely filed. It is further represented that Target and Target Sub were not (1) controlled foreign corporations within the meaning of § 957(a), (2) passive foreign investment companies for which an election was made under §1295,

(3) foreign investment companies or foreign corporations the stock ownership of which is described in § 552(a), or (4) required under § 1.6012-2(g) to file a United States income tax return.

Section 338(a) permits certain stock purchases to be treated as asset purchases if the purchasing corporation makes or is treated as having made a "section 338 election" under § 338(g) and the acquisition is a "qualified stock purchase." Section 338(d)(3) defines a "qualified stock purchase" as any transaction or series of transactions in which stock (meeting the requirements of § 1504(a)(2)) of one corporation is acquired by another corporation by purchase during the 12-month acquisition period.

Section 338(h)(3)(A) provides that the term "purchase" means any acquisition of stock, but only if (i) the basis of the stock in the hands of the purchasing corporation is not determined in whole or in part by reference to the adjusted basis of such stock in the hands of the person from whom acquired, or under § 1014(a) (relating to property acquired from a decedent); (ii) the stock is not acquired in an exchange to which §§ 351, 354, 355, or 356 applies and is not acquired in any other transaction described in the regulations in which the transferor does not recognize the entire amount of the gain or loss realized on the transaction; and (iii) the stock is not acquired from a person the ownership of whose stock would, under § 318(a), be attributed to the person acquiring such stock.

Section 1.338-1(d) provides that a purchasing corporation makes a "section 338 election" for target by filing a statement of "section 338 election" on Form 8023 in accordance with the instructions on the form. The "section 338 election" must be filed not later than the 15th day of the ninth month beginning after the month in which the acquisition date occurs. A "section 338 election" is irrevocable.

Section 1.338-1(g)(3) provides that the United States shareholders (as defined in § 951(b)) of a foreign purchasing corporation that is a CFC (as defined in § 957, taking into account § 953(c)) may file a statement of "section 338 election" on behalf of the purchasing corporation if the purchasing corporation is 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. Form 8023 must be filed in accordance with the instructions to the form and a copy of the form must be attached to Form 5471 (Information Return of U.S. Persons with Respect to Certain Foreign Corporations) filed with respect to the purchasing corporation by each United States shareholder for the purchasing corporation.

The term target affiliate has the same meaning as in § 338(h)(6) (applied without § 338(h)(6)(B)(i)). Thus, a corporation described in § 338(h)(6)(B)(i) is considered a target affiliate for all purposes of § 338. If a target affiliate is acquired in a qualified stock purchase, it is also a target. See § 1.338-1(c)(14). If an election under § 338 is made for target, old target is deemed to sell target's assets and new target is deemed to acquire those assets. Section 1.338-2(b)(4). Under § 338(h)(3)(B), new target's

deemed purchase of stock of another corporation is a purchase for purposes of § 338(d)(3) on the acquisition date of target. If new target's deemed purchase causes a qualified stock purchase of the other corporation and if a § 338 election is made for the other corporation, the acquisition date for the other corporation is the same as the acquisition date of target. However, the deemed sale and purchase of the other corporation's assets is considered to take place after the deemed sale and purchase of target's assets. See § 1.338-2(b)(4).

Section 1.1502-77(a) provides that the common parent, for all purposes (other than for several purposes not relevant here), shall be the sole agent for each subsidiary in the group, duly authorized to act in its own name in all matters relating to the tax liability for the consolidated return year. See also Form 8023 and the instructions thereto.

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 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 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 Elections is fixed by the regulations (i.e., §§ 1.338-1(d) and 1.338-1(g)). Therefore, the Commissioner has discretionary authority under § 301.9100-1 to grant an extension of time for Parent to file the Elections, provided Parent shows 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.

Information, affidavits, and representations submitted by Tax Professionals and Authorized Representatives explain the circumstances that resulted in the failure to file valid Elections. The information establishes that a tax professional was responsible for the Elections, that Parent relied on the tax professional to timely make the Elections, and that the government will not be prejudiced if relief is granted. Section 301.9100-3(b)(1)(v).

Based on the facts and information submitted, including the representations that have been made, we conclude that Parent has established that it acted reasonably and in good faith in failing to timely file the Elections, the requirements of §§ 301.9100-1 and 301.9100-3 are satisfied, and granting relief will not prejudice the interests of the government. Accordingly, we grant an extension of time under § 301.9100-1, until 30 days from the date of issuance of this letter, for Parent to file the Election with respect to the acquisition of the stock of Target, as described above.

The above extension of time is conditioned on (1) the filing, within 120 days of the issuance of this letter, of all returns and amended returns (if any) necessary to report the transaction in accordance with the Elections, and (2) the taxpayers' (Parent's consolidated group's, Purchaser's, Target's, and Target Sub's) tax liability (if any) being not lower, in the aggregate, for all years to which the Elections apply, 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 the taxpayers' tax liability for the years involved. A determination thereof will be made by the director 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 taxpayers' tax liability is lower. Section 301.9100-3(c).

Parent should file the Elections in accordance with §§ 1.338-1(d) and 1.338-1(g). That is, new elections on Forms 8023 must be executed on or after the date of this letter, which grants an extension, and filed in accordance with the instructions on the election form. A copy of this letter should be attached to the election forms. Parent, Purchaser, Target, and Target Sub must file or amend (if and as applicable) its applicable returns to report the acquisition as a "section 338 transaction," and to attach a copy of the Form 8023 and a copy of this letter.

No opinion is expressed as to: (1) whether the acquisition or deemed acquisition of Target's or Target Sub's stock qualifies as a "qualified stock purchase," (2) whether the acquisition of the stock qualifies for § 338(a) treatment, and (3) if the acquisition of the stock qualifies for § 338(a) treatment, as to the amount of gain or loss recognized (if any) by such target corporation on its deemed asset sale.

In addition, no opinion is expressed as to the tax effects or 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 ruling. For purposes of granting relief under § 301.9100-1, we relied on certain statements and representations made by the taxpayer, its employees and representatives. However, the director should verify all essential facts upon audit of the federal income tax returns involved. In addition, notwithstanding that an extension is granted under § 301.9100-1 to file the Elections, 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 powers of attorney on file in this office, copies of this letter are being sent to Authorized Representatives.

Sincerely yours,
Associate Chief Counsel (Corporate)
By: Mark S. Jennings
Chief, Branch 1