Internal Revenue Service

Department of the Treasury

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Person to Contact:

Telephone Number:

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Date:
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Number: **200025010**
Release Date: 6/23/2000

Parent =

Sub =

Purchaser =

Target #1 =

Target #2 =

Sellers =

Target Sub 1 =

Target Sub 2 =

Target Sub 3 =

Target Sub 4 =

Target Sub 5 =

Target Sub 6 =

Target Sub 7 =

Target Sub 8 =

Target Sub 9 =

Date A =

Date B =

Date D =

Date E =

Date G =

Date H =

Date J =

Country X =

A% =

B% =

C% =

Parent Official =

Parent Tax Counsel =

Outside Tax Professional =

This responds to your letter dated November 19, 1999, submitted on behalf of the above named taxpayers, requesting an extension of time under §§ 301.9100-1 through 301.9100-3 of the Procedure and Administration Regulations to file an election. Parent (as common parent of the consolidated group of which Sub, the United States shareholder of Purchaser, the foreign purchasing company, and the deemed foreign purchasing companies (hereinafter referred to as the "foreign purchasing company") is a member) is requesting an extension to file an election under § 338(g) of the Internal Revenue Code with respect to Purchaser's deemed acquisition of the stock of Target Subs 1 - 9 (sometimes hereinafter referred to as the "Election"), on Date B. Additional information was submitted in letters dated February 11 and March 7, 2000. A previous request for an extension pursuant to the same acquisition was granted to the taxpayers in a letter dated September 2, 1999, Control Number PLR-102053-99, LTR 199948012 (the "Prior Letter"). The material information is summarized below.

Parent is a publicly traded corporation that is the common parent of a consolidated group. On Date G. Sub became a member of the Parent consolidated group. Prior to its acquisition by Parent, Sub was the common parent of its own consolidated group. Purchaser, a Country X corporation, was a wholly owned subsidiary of Sub.

Target #1 was a Country X corporation whose stock was 100% directly owned by Sellers. Sellers are foreign individuals who are not United States shareholders within the meaning of § 951(b). Target #2 was a Country X corporation that was directly owned B% by Sellers and C% by Target #1. The remaining A% (less than 20%) was publicly traded on the stock exchange in Country X. Target #2 owned all of the stock of Target Subs 1 - 9, directly or indirectly through other of Target Subs 1 - 9,

Prior to the transaction described below, Purchaser, Sellers, Target #1, Target #2 and Target Subs 1 - 9 did not file United States income tax returns and were not subject to United States income taxation. Further, neither Target #1, Target #2, nor any of Target Subs 1 - 9 were: (1) a controlled foreign corporation within the meaning of § 957(a); (2) a passive foreign investment company for which an election under § 1295 was in effect; (3) a foreign investment company or a foreign corporation the stock ownership of which is described in § 552(a)(2); or (4) required, under § 1.6012-2(g), to file a United States income tax return.

On Date A, Sellers and Sub entered into a Share Purchase Agreement for Sub to acquire all of Sellers' Target #1 and Target #2 stock. The Share Purchase Agreement was subsequently assigned by Sub to Purchaser. On Date B, Purchaser acquired all of Sellers' Target #1 and Target #2 stock for cash in a fully taxable transaction. On Date D, Target #1 was merged into Purchaser. Between Date J (which was after Date B and before Date D), and Date D, pursuant to a tender offer and a "freeze-out" under Country X stock exchange regulations and Country X law, the remaining A% of the Target #2 stock was acquired from shareholders other than Purchaser and Target #1. Accordingly, after the merger of Target #1 into Purchaser, all of the Target #2 stock was owned by Purchaser.

After the transactions described above, Target #2 and Target Sub 7 were included in Sub's return by being listed on Form 5471 (Information Return Filed with Respect to a Foreign Corporation). None of Target Subs 1 - 7 nor Target Sub 9 were so listed.

It is represented that (1) Purchaser was not related to Sellers within the meaning of § 338(h)(3), and (2) Purchaser's acquisition of Target #1, and the deemed acquisitions of Target #2 and Target Subs 1 - 9 were "qualified stock purchases" within the meaning of § 338(d)(3). The period of limitations on assessment under § 6501(a) has not expired for Parent's, Sub's, Purchaser's, Target #1's, Target #2's, or for any of Target Subs 1 - 9's taxable years in which the acquisitions occurred, the taxable years in which the Election should have been filed, or for any taxable years that would have been affected by the Election had it been timely filed.

The Election was due on Date E. However, for various reasons, the Election was not made. On Date H (which is after the due date of the Election), Parent, Parent Official, Parent Tax Counsel, and Outside Tax Professional discovered the need for the Election for Target Subs 1 - 9. Subsequently, this request was submitted, under § 301.9100-1, for an extension of time to file the Election.

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" under § 338(g); and (2) the acquisition is a "qualified stock purchase." Section 1.338-1(c)(10) provides that a "§ 338 election" is an election to apply § 338(g) to target. Section 338(g) specifies the requirements for making a "§ 338 election." 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 1 corporation is acquired by another corporation by purchase during the 12-month acquisition period.

Section 1.338-1(g)(1)(i) and (v) provide that for purposes of § 1.338-1(g)(1) (i.e., qualifying for the special rule which provides a later filing date for an election under § 338(g) than ordinarily required), a foreign corporation is considered subject to United

States tax (i.e., is not eligible for the special rule) if it is a controlled foreign corporation.

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 (I) in whole or in part by reference to the adjusted basis of such stock in the hands of the person from whom acquired, or (II) 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 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) (other than paragraph (4) thereof), be attributed to the person acquiring such stock.

Section 1.338-1(d) provides that a purchasing corporation makes a "§ 338 election" for target by filing a statement of "§ 338 election" on Form 8023 or Form 8023-A, as applicable, in accordance with the instructions on the form. The "§ 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 "§ 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 controlled foreign corporation (as defined in § 957, taking into account § 953(c)) may file a statement of "§ 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 or Form 8023-A, as applicable, must be filed as described in the form and its instructions, and also must be attached to Form 5471 filed with respect to the purchasing corporation by each United States shareholder for the purchasing corporation.

Section 1.338-2(b)(4) provides that 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(c)(1) provides that the purchasing corporation may make an election under § 338 for target even though target is liquidated on or after the acquisition date. Section 1.338-2(c)(2) provides that an election may be made for target after the acquisition of assets of the purchasing corporation by another corporation in a transaction described in § 381(a), provided that the purchasing corporation is considered for tax purposes as the purchaser of the target stock. The acquiring corporation in the § 381(a) transaction may make an election under § 338 for target. Section 1.338-2(b)(4)(ii), Example 1, illustrates how the purchase of a corporation holding target stock (provided a § 338(g) election is made therefor) and the direct purchase of the remaining target stock can be combined to make a qualified stock purchase.

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. 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 Election is fixed by the regulations (i.e., § 1.338-1(d)). Therefore, the Commissioner has discretionary authority under § 301.9100-1 to grant an extension of time for Parent (as the common parent of the consolidated group that includes Sub, the United States shareholder of the foreign purchasing corporation) to file the Election, provided Parent shows that Sub (as the United States shareholder of the foreign purchasing corporation) 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 Parent, Parent Official, Parent Tax Counsel and Outside Tax Professional explain the circumstances that resulted in the failure to timely file the valid Election. The information also establishes that the request for relief was initiated before the failure to make the regulatory election was discovered by the Internal Revenue Service and that the interests of the government will not be prejudiced if relief is granted. *See* § 301.9100-3(b)(1)(i).

Based on the facts and information submitted, including the representations made, we conclude that Parent and Sub 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 § 301.9100-1, until 30 days from the date of issuance of this letter, for Parent (as the common parent of the consolidated group that includes Sub, the United States shareholder of the foreign purchasing company) to file the Election with respect to the acquisition of Target Subs 1 - 9, as described above. Further, the fact that an Election is hereby being made for Target Subs 1 - 9, contrary to a statement made in the Prior Letter, will have no effect on the extension granted in the Prior Letter. That is, the extension granted in the Prior Letter remains in full force and effect.

The above extension of time is conditioned on the taxpayers' (Parent's, Sub's, Purchaser's, Target #1's, Target #2's, and each of Target Subs 1 - 9'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 (talking 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 District Director's office 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' liability is lower. Section 301.9100-3(c).

Parent (as common parent of the consolidated group which contains Sub) should file the Election in accordance with § 1.338-1(d). That is, a new election on Form 8023 or Form 8023-A, as applicable, 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 (together with any information that is required to be attached to the election form). A copy of this letter should be attached to the election form. Parent must amend Sub's return for Sub's first taxable year following the acquisitions to attach a copy of this letter and the election form (and any information required therewith) and to show that the acquisitions were reported as § 338 transactions (i.e., the "new" Target Subs 1 - 9, as applicable, must be included in Sub's return by being listed on Form 5471 for the first year following the acquisitions). Also, Parent must file "final returns" for Target Subs 1 - 9 (if and as applicable) reporting the acquisitions as § 338 transactions and

attach thereto a copy of this letter and the election form. See §§ 1.338-1(e) and (g) and Announcement 98-2, 1998-1 C.B. 282.

No opinion is expressed as to: (1) whether the acquisition of the stock of Target Subs 1 - 9 qualifies as a "qualified stock purchase"; (2) whether the acquisition of the stock of Target Subs 1 - 9 qualifies for § 338(a) treatment; or (3), if the acquisition of the stock of Target Subs 1 - 9 qualifies for § 338(a) treatment, as to the amount of gain or loss recognized (if any) by any of Target Subs 1 - 9 on the deemed asset sales.

In addition, no opinion is expressed as to the tax effects or 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 tax effects or consequences resulting from, filing the Election 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 District Director should verify all essential facts. In addition, notwithstanding that an extension is granted under § 301.9100-1 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(s) who requested it. Section 6110(k)(3) provides that it may not be used or cited as precedent.

A copy of this letter is being sent to Parent, pursuant to the power of attorney on file in this office.

Sincerely yours,

Philip J. Levine

Philip J. Levine
Assistant Chief Counsel (Corporate)