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Department of the Treasury

Washington, DC 20224

Person to Contact:

Telephone Number:

Refer Reply To:
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Date:
October 23, 2000

Parent =

Purchaser =

Seller =

Target =

Date A =

Date B =

Date C =

Date D =

state X =

state Y =

state Z =

Purchaser's Company Official =

Parent's Outside Tax Professional =

This letter responds to a letter dated June 15, 2000, requesting, on behalf Parent and Seller, 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 Purchaser is a member) and Seller are requesting an extension to file a "§ 338(h)(10) election" under §§ 338(g) and 338(h)(10) of the Internal Revenue Code and § 1.338(h)(10)-1(d) of the Income Tax Regulations,

with respect to Purchaser's acquisition of the stock of Target (sometimes hereinafter referred to as the "Election"), effective on Date A. All citations in this letter to regulations under § 338 are to the regulations as in effect on Date A. Additional information was submitted in letters dated August 1, and October 16, 2000. The material information is summarized below.

Parent, a state X corporation, is the common parent of a consolidated group that has a fiscal year. Parent owns all of the outstanding stock of Purchaser, a state Y corporation. Prior to Date A, Purchaser was included in Parent's consolidated federal income tax return.

Target was an S corporation incorporated in state Z. Prior to Date A, Seller owned all of the stock of Target. Target's tax year was the calendar year.

Purchaser acquired all of the outstanding stock of Target from Seller for cash pursuant to a stock purchase agreement dated Date B (effective Date A) in a fully taxable transaction. It is represented that (1) Parent and Purchaser are not (and were not at all times relevant) related to Seller within the meaning of § 338(h)(3), and (2) Purchaser's acquisition of all of the outstanding stock of Target qualified as a "qualified stock purchase" as defined in § 338(d)(3). Following the acquisition, "new" Target was included in Parent's consolidated return.

Purchaser and Seller intended to file the Election. The Election was due on Date C, but for various reasons it was not filed. On Date D (which is after the due date for the Election), Purchaser's Company Official was advised by Parent's Outside Tax Professional that the date for filing the Election had passed. Subsequently, this request was submitted, under § 301.9100-1, for an extension of time to file the Election. The period of limitations on assessment under § 6501(a) has not expired for Parent's, Purchaser's, Seller's, or Target's taxable year in which the acquisition/sale was consummated, the taxable year in which the Election should have been filed, or for any taxable year(s) that would have been affected by the Election had it been timely filed.

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 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 338(h)(10) permits the purchasing and selling corporations to elect jointly to treat the target corporation as deemed to sell all of its assets and distribute the proceeds in complete liquidation. The sale of stock included in the qualified stock purchase generally is ignored. A § 338(h)(10) election may be made for target only if it is a member of a selling consolidated group, a member of a selling affiliated group filing separate returns, or an S corporation. Section 1.338(h)(10)-1(a). Gain or loss on the deemed sale is included in the consolidated return of the selling group (unless the target corporation is a member of a selling affiliated group filing separate returns or an S corporation). Section 1.338(h)(10)-1(d) provides that a § 338(h)(10) election may be made for the target corporation if the purchasing corporation makes a "qualified stock purchase" of the target corporation stock. Section 1.338(h)(10)-1(d)(3) provides that if a § 338(h)(10) election is made for the target corporation, it is irrevocable and a § 338 election is deemed made for the target corporation.

More specifically, old target is treated as if, while a member of the selling group (or owned by the selling affiliate or S corporation shareholders), it distributed all of its assets in complete liquidation. If target is an S corporation immediately before the acquisition date, nothing in the § 338 provisions prevents a holder of target stock from taking deemed sale gain into account under §§ 1366 and 1367. See § 331 or § 332 for gain or loss recognized by the old target shareholders as a result of the deemed liquidation. Section 1.338(h)(10)-1(e)(2)(ii). No gain or loss is recognized on the sale or exchange by the selling consolidated group (or the selling affiliate or an S corporation shareholder) of target stock included in the qualified stock purchase. If target is an S corporation immediately before target's acquisition date, the sale or exchange of old target stock does not result in a termination of the § 1362(a) election for the S corporation. Section 1.338(h)(10)-1(e)(2)(iv).

Section 1.338(h)(10)-1(d)(2) provides that a § 338(h)(10) election is jointly made by a purchaser and the selling consolidated group (or the selling affiliate or the S corporation shareholders) on Form 8023 in accordance with the instructions to the form. The regulations further provide that the election must be made not later than the 15th day of the ninth month beginning after the month in which the acquisition date occurs. The instructions to Form 8023 provide that a § 338(h)(10) election must be made jointly by the purchasing corporation and the common parent of the selling consolidated group (or selling affiliate or S corporation shareholders). The instructions provide that the form must be signed by a person authorized to act on behalf of each corporation, and if made for an S corporation it must be signed by each S corporation shareholder who sells target stock in the qualified stock purchase. The instructions

further provide that the signatures, dates and titles (if applicable) of those persons must be provided in a "signature attachment," and they provide specific details as to the preparation of the "signature attachment" and its attachment to Form 8023.

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(h)(10)-1(d)). Therefore, the Commissioner has discretionary authority under § 301.9100-1 to grant an extension of time for Parent and Seller to file the Election, provided Parent and Seller 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 Parent, Seller, and Purchaser's Company Official explain the circumstances that resulted in the failure to timely file the valid Election. The information also establishes that Seller was responsible for the Election, that Parent relied on Seller to make the Election timely, that the request for relief was initiated before the failure to make the Election was discovered by the 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 Seller 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 § 301.9100-1, until 30 days from the date of issuance of this letter, for Parent (as the common parent of the consolidated group of which Purchaser is a member) and Seller to file the Election with respect to the acquisition 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, all returns and amended returns (if any) necessary to report the transaction in accordance with the Election; and (2) the taxpayers' (Seller's, Parent's, Purchaser'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 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 agent for Purchaser) and Seller must file the Election in accordance with § 1.338(h)(10)-1(d). That is, a new election on Form 8023 must be executed on or after the date of this letter, which grants an extension, and filed in accordance with the instructions to the form. A copy of this letter should be attached to the election form. Parent and Seller must file or amend their returns, as applicable, for the year in which the transaction was consummated to report the transaction as a § 338(h)(10) transaction, and to attach thereto a copy of this letter and a copy of the Election (along with the information required with the election form). If they already reported the transaction as a § 338(h)(10) transaction they must amend their returns to attach a copy of the Election, the information requested therewith, and a copy of this letter. Pursuant to § 1.338(h)(10)-1(e)(2)(iv), Target's S election is not terminated. Accordingly, Target is not required to file an S short year return (i.e., a year that ended the day before the acquisition) nor a one day short return as a non-affiliated C corporation.

We express no opinion as to (1) whether the acquisition/sale of Target's stock qualifies as a "qualified stock purchase" under § 338(d)(3); (2) whether the acquisition/sale of Target's stock qualifies for § 338(h)(10) treatment; or (3) if § 338(h)(10) is applicable, as to the amount and character of gain or loss, if any, recognized by Target (and, thus, by Seller) on Target's deemed asset sale.

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 § 301.9100-1, we relied on certain statements and representations made by the taxpayers. However, the District Director(s) 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 the taxpayer, pursuant to the power of attorney on file in this office.

Sincerely yours,
Associate Chief Counsel (Corporate)
by: Ken Cohen, Acting Chief, Branch 3