

Internal Revenue Service

Department of the Treasury

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Person to Contact:

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Refer Reply To:
CC:CORP:B03 - PLR-117480-00
Date:
January 4, 2001

Parent =

Purchaser =

Target 1 =

Target 2 =

Sellers =

Authorized
Representatives =

State Z =

Country C =

Date 1 =

Date 2 =

Date 3 =

Date 4 =

This letter responds to a letter dated August 31, 2000, requesting, on behalf of Parent, an extension of time under §301.9100-1 through 301.9100-3 of the Procedure and Administration Regulations to file an election. Additional information was submitted

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in a letter dated January 3, 2001. The extension is being requested for Parent to file an election under §338(g) of the Internal Revenue Code and §1.338-1(d) of the Income Tax Regulations with respect to the acquisition of the Target 2 stock (hereinafter referred to as the "Election"), on Date 2. All citations in this letter to regulations under §338 are to the regulations in effect on Date 2. The material information submitted for consideration is summarized below.

Parent, a State Z corporation, is the common parent of a consolidated group that has a calendar tax year and uses the accrual method of accounting. Purchaser, a Country C corporation, was formed on Date 1 by Parent to engage in the transaction. Purchaser did not perform any other function besides borrow money and receive capital from Parent specifically for the transaction. It is represented that for federal tax purposes, Parent was the true purchaser of Target 1.

On Date 2, Purchaser acquired all of the stock of Target 1 from Sellers in a fully taxable transaction. Target 2 was a wholly owned subsidiary of Target 1. (Together, Target 1 and Target 2 may be referred to as "the Targets."). The Targets are Country C corporations. Upon acquisition of Target 1, Purchaser was amalgamated into Target 1 with Target 1 being the surviving corporation in a transaction represented to qualify as a reorganization under §368(a)(1)(D). It is represented that the acquisition of the Targets constituted a qualified stock purchase within the meaning of §338(d)(3), and that Parent was not related to Sellers within the meaning of §338(h)(3). Parent made a §338(g) election with respect to the acquisition of the stock of Target 1.

Prior to Date 1, the Targets were not: (1) controlled foreign corporations within the meaning of §957(a), (2) passive foreign investment companies for which an election under §1295 was in effect, (3) foreign investment companies or foreign corporations 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 or subject to United States income taxation.

Parent intended to file the Election. The Election was due on Date 3, but for various reasons it was not filed for Target 2. However, an election under §338(g) was filed for Target 1. On Date 4 (which is after the due date for the Election), one of Authorized Representatives discovered that the Election was not filed. 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 or Target 2's taxable years 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

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“§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 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 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 1.338-2(b)(1) provides that an individual cannot make a qualified stock purchase of target. Section 338(d)(3) requires, as a condition of a qualified stock purchase, that a corporation purchase the stock of target. If an individual forms a corporation (new P) to acquire target stock, new P can make a qualified stock purchase of target if new P is considered for tax purposes to purchase the target stock. Facts that may indicate that new P does not purchase the target stock include that new P merges downstream into target, liquidates, or otherwise disposes of the target stock following the purported qualified stock purchase.

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 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 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

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shareholder for the purchasing corporation. A foreign purchasing corporation that does not file a United States income tax return must file Form 8023 with the Office of the Assistant Commissioner (International).

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).

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 to file the Election, provided Parent establishes it acted reasonably and in good faith, granting relief will not prejudice the interests of the government, and the requirements of §§301.9100-1 and 301.9100-3 are satisfied.

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Information, affidavits, and representations submitted by Parent and Authorized Representatives explain the circumstances that resulted in the failure to timely file the valid Election. The information establishes that a tax professional was responsible for the Election, that Parent relied on the tax professional to timely make the Election, and that the government will not be prejudiced if relief is granted. See §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 it acted reasonably and in good faith in failing to timely file the Election, 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 on this letter, for Parent to file the Election with respect to the acquisition of the stock of Target 2 on Date 2, as described above.

The above extension of time is conditioned on (1) the §338(g) election made with respect to the acquisition of the stock of Target 1 being a valid election, (2) 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 Election, and (3) the taxpayers' (Parent's, Purchaser's, Target 2's, and Sellers') United States tax liability, if any, not being lower, in the aggregate for all years to which the Election applies, than it would have been if the Election had been made timely (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 should file the Election and provide "notice" in accordance with §§1.338-1(d) and 1.338-1(g)(4). This 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 on the election form (together with the information that is required to be attached to the election form). Parent's returns must be amended, if and as applicable, to report the acquisition as a "section 338 transaction." A copy of this letter should be attached to the election form and a copy of this letter and the election form should be attached to the returns.

No opinion is expressed as to (1) the validity of the §338(g) election with respect to the acquisition of Target 1 stock, (2) whether the acquisition of Target 2 stock qualifies as a "qualified stock purchase", (3) whether the acquisition of Target 2 stock qualifies for §338(a) treatment, or (4) if the acquisition of Target 2 stock qualifies for §338(a) treatment, as to the amount of gain or loss recognized (if any) by Target 2 on the deemed asset sales. Also, no opinion is expressed as to whether Parent or Purchaser was the real purchaser of Target 1 for federal income tax purposes.

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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 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 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 your authorized representatives, pursuant to a power of attorney on file in this office.

Sincerely yours,
Associate Chief Counsel (Corporate)
By *Filiz Serbes*
Chief, Branch 3