Internal Revenue Service

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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:B06
PLR-138065-13

Date:
January 09, 2014

Legend:

Parent =

Sub 1 =

Sub 2 =

Sub 3 =

DRE 1 =

Asset 1 =

Year 1 =

Date 1 =

Date 2 =

State A =

Company Official =

Tax Professional Firm =

Tax Professional =

Dear :

This letter responds to a letter dated August 29, 2013, requesting an extension of time under § 301.9100-3 of the Procedure and Administration Regulations to file certain elections. The extension is being requested in order to allow Parent to file elections under § 362(e)(2)(C) with respect to the Transaction (as defined below) (the "Elections"). The material information is summarized below.

Parent was the common parent of a consolidated group including subsidiaries Sub 1, Sub 2, and Sub 3 for Year 1. In Year 1, Parent owned all of the stock of Sub 1; Sub 1 owned all of the stock of Sub 2; and Sub 2 owned all of the stock of Sub 3. In addition to owning the stock of Sub 1, Parent owned Asset 1.

On Date 1, as part of a plan to contribute Asset 1 to an entity owned by Sub 3, Sub 3 formed DRE 1, a State A limited liability company that is disregarded as an entity separate from Sub 3, its owner, for U.S. Federal income tax purposes. On Date 2, a date after September 16, 2008, Parent contributed Asset 1 to Sub 1 in a transaction intended to qualify as a non-taxable transfer under § 351 ("Contribution 1"); then Sub 1 contributed Asset 1 to Sub 2 in a transaction intended to qualify as a non-taxable transfer under § 351 ("Contribution 2"); then Sub 2 contributed Asset 1 to Sub 3 in a transaction intended to qualify as a non-taxable transfer under § 351 ("Contribution 3") (Contribution 1, Contribution 2, and Contribution 3 are collectively referred to as the "Contributions"); then Sub 3 contributed Asset 1 to DRE 1 in an exchange intended to be disregarded for U.S. Federal income tax purposes ("Disregarded Transfer"). (The Contributions and the Disregarded Transfer, collectively, are referred to as the "Transaction"). Immediately before the Transaction, Parent's basis in Asset 1 exceeded Asset 1's fair market value.

Parent and Tax Professional Firm were aware that for U.S. Federal income tax purposes that: (1) if Parent, Sub 1, Sub 2, and Sub 3 filed separate returns, § 362(e)(2)(A) generally would have required a step down in the basis of Asset 1 to its

fair market value in Contribution 1; (2) if Parent, Sub 1, Sub 2, and Sub 3 filed separate returns, § 362(e)(2)(C) provides that each transferor and transferee could make a joint election to reduce the transferor's basis in the stock received to its fair market value, and no reduction of the transferee's basis in the property received would be required under § 362(e)(2)(A); and (3) if Parent, Sub 1, Sub 2, and Sub 3 filed separate returns, a § 362(e)(2)(C) election would be necessary for each Contribution in order to preserve the basis in Asset 1 in the hands of Sub 3. Parent and Tax Professional Firm were also aware that because Contributions 1, 2, and 3 were all between members of a consolidated group, the general rule of § 362(e)(2) requiring a step down in the basis of Asset 1 to its fair market value was inapplicable pursuant to § 1.1502-80(h)(1).

Additionally, Parent and Tax Professional Firm were aware that the general rule of § 362(e)(2) requiring a step down in the basis of Asset 1 to its fair market value was inapplicable with respect to the Disregarded Transfer because the Disregarded Transfer would be treated as a transaction solely within Sub 3 for U.S. Federal income tax purposes.

Certain states do not permit consolidated filing, but otherwise follow U.S. Federal income tax law. Accordingly, and notwithstanding that the Contributions were made between members of the same consolidated group and therefore not subject to § 362(e)(2), Parent and Tax Professional Firm intended to have Parent make the Elections under § 362(e)(2)(C) with respect to the Contributions in order to preserve the basis in Asset 1 following the Contributions under state law.

Furthermore, although DRE 1 is disregarded as an entity separate from its owner for U.S. Federal income tax purposes, certain states treat DRE 1 as a separate entity for purposes of computing its income tax liability. In these states, the Election with respect to the Disregarded Transfer would ensure the basis in Asset 1 would be preserved following the Disregarded Transfer.

Elections under § 362(e)(2)(C) by corporate transferors other than Controlled Foreign Corporations are required to be filed on the transferor's timely filed U.S. Federal income tax return for the year of the transfer. For various reasons, however, the Elections were not filed. Parent represents that it is not seeking to alter a return position for which an accuracy-related penalty could be imposed under § 6662.

Section 362(e)(2)(A) generally provides that if property is transferred to a transferee as a capital contribution or in an exchange to which § 351 applies and the aggregate basis of the transferred property, would, if not for this provision, exceed its aggregate value immediately after the transaction, then the transferee's basis in such property shall not exceed the fair market value of such property.

Under § 362(e)(2)(C), however, the transferor and transferee may make a joint election to reduce the transferor's basis in the stock received to its fair market value, and no

reduction of the transferee's basis in the property received will be required. Section 362(e)(2)(C) provides that the Elections shall be made at such time and in such form and manner as the Secretary may prescribe and, once made, shall be irrevocable.

Section 1.1502-80(h)(1) provides that § 362(e)(2) does not apply to any intercompany transaction occurring on or after September 17, 2008.

In effect on Date 2, Notice 2005-70, 2005-2 C.B. 694, provided guidance on how to make elections under § 362(e)(2)(C). Notice 2005-70 generally provided that the transferor made a valid election on or with its tax return filed by the due date (including extensions) for filing its original return for the taxable year in which the transaction occurred. Notice 2005-70 provided that the common parent of a consolidated group of corporations could make the election on behalf of its members.

For transactions after September 3, 2013, rules for making elections under § 362(e)(2)(C) are in § 1.362-4(d)(3)(ii). However, taxpayers may apply § 1.362-4 to transactions occurring after October 22, 2004.

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 Section 301.9100-2. 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. Section 301.9100-3(a).

The time for filing an election under § 362(e)(2)(C) is fixed by Notice 2005-70 or, if applicable, § 1.362-4(d)(3)(ii). Therefore, the Commissioner has discretionary authority under § 301.9100-3 to grant an extension of time to file the Elections, provided Parent 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 government.

Information, affidavits, and representations submitted by Parent, Company Official, and Tax Professional explain the circumstances that resulted in the failure to timely file the Elections. The information establishes that Parent reasonably relied on a qualified tax

professional who failed to make, or advise Parent to make, the Elections, and that the request for relief was filed before the IRS discovered the failure to make the Elections. See § 301.9100-3(b)(1)(i) and (v).

Based on the facts and information submitted, including the affidavits submitted and the representations made, we conclude that Parent 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 60 days from the date on this letter, for Parent, or Parent and the other transferors, if appropriate, to file the Elections, in the manner described in Notice 2005-70 or § 1.362-4(d)(3), if applicable.

This extension of time is conditioned on the U.S. Federal income tax liability (if any) of Parent, the Parent consolidated group, Sub 1, Sub 2, Sub 3, and DRE 1 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 tax liability for the years involved. A determination thereof will be made by the Director's office upon audit of the federal income tax returns involved.

Except as expressly provided herein, no opinion is expressed or implied concerning the tax consequences of any aspect of any transaction discussed in this letter. Specifically, no opinion is expressed as to: (1) whether the Contributions are described in § 351; (2) whether DRE 1 is disregarded as an entity separate from its owner for U.S. Federal income tax purposes; nor (3) the basis or fair market value of any asset. In addition, we express no opinion as to the tax effects or consequences of filing the Elections late under the provisions of any other section of the Code or regulations, or as to the tax treatment of any conditions existing at the time of, or effects resulting from, filing the Elections late that are not specifically set forth in the above ruling.

For purposes of granting relief under § 301.9100-3, we have relied on certain statements and representations that Parent, Company Official, and Tax Professional made under penalties of perjury. However, the Director should verify all essential facts. Moreover, notwithstanding that the extension is granted under § 301.9100-3 to file the Elections, any penalties and interest that would otherwise be applicable still apply.

The letter ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.

A copy of this letter must be attached to any income tax return to which it is relevant. Alternatively, taxpayers filing their returns electronically may satisfy this requirement by attaching a statement to the return that provides the date and control number of the letter ruling.

In accordance with the Power of Attorney on file with this office, a copy of this letter is being sent to your authorized representative.

Sincerely,

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Ken Cohen
Senior Technician Reviewer, Branch 3
Office of Associate Chief Counsel (Corporate)

cc: