

Internal Revenue Service

Department of the Treasury

Washington, DC 20224

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Person to Contact:

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Refer Reply To:

CC:DOM:CORP:5-PLR-113920-99

Date:

January 13, 2000

Re:

Legend:

Purchaser =

Sellers =

Target =

Parent =

Corp X =

Company Official
and Tax Professional =

New Tax
Advisor =

Authorized
Representatives =

Country A =

Country B =

Date A =

Date B =

Date C =

Date D =

Condition X =

This responds to your Authorized Representatives' letter, dated July 26, 1999,

requesting an extension of time under §§ 301.9100-1 through 301.9100-3 of the Procedure and Administration Regulations to file an election. The extension is being requested by Parent (as the common parent of the consolidated group that includes the foreign successor to the foreign purchasing corporation, and as the U.S. shareholder of the foreign purchasing corporation and the foreign successor thereto) to file a "section 338 election" under section 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 Purchaser's acquisition of Target stock (hereinafter referred to as the "Election"), on Date A. Additional information was received in a letter dated October 8, 1999. The material information submitted for consideration is summarized below.

Parent is a publicly traded corporation that is the common parent of a consolidated group that prior to the subject acquisition included Purchaser and Corp X (in addition to other subsidiaries that are not relevant for purposes of the Election), and after the subject acquisition included "new" Target. Prior to Date A: (1) Purchaser and Corp X were wholly owned subsidiaries of Parent, and (2) Target was wholly owned by Sellers (individuals and trusts, the specifics of which are set forth above in the redacted legend). Target does not have (and did not have at the time of the acquisition) any subsidiaries. Parent has a calendar taxable year and uses the accrual method of accounting. Target and Corp X are (were) Country A corporations and Purchaser was a Country B corporation (the specific countries of formation are set forth above in the redacted legend). It is represented that Corp X is the successor to Purchaser, by reason of the below described "reorganization," which occurred after the acquisition of Target.

Prior to the below described acquisition, Target did not file U.S. income tax returns and was not subject to U.S. income taxation. Further, Target was not : (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 U.S. income tax return.

On Date A, Purchaser acquired all of the Sellers' Target stock solely for cash in fully taxable transactions. After the acquisition, "new" Target was included in Parent's return by being listed on Form 5471 (information return filed with respect to a foreign corporation). 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 stock qualified as a "qualified stock purchase," as defined in § 338(d)(3). The period of limitations on assessments under § 6501(a) has not expired for Parent's, Purchaser's, Target's or Corp X's taxable year(s) in which the acquisition occurred, the taxable year(s) in which the Election should have been filed, or any taxable year(s) that would have been affected by the Election had it been timely filed.

The Election was due on Date B. Parent (as the common parent of the consolidated group that then included the foreign purchasing corporation, and as the United States shareholder thereof) intended to file the Election. However, for various

reasons the Election was not filed. On Date C (which is several years after the due date for the Election), Company Official and Tax Professional, New Tax Advisor and Authorized Representatives discovered that the Election had not been filed. On Date D, (which is in a tax year subsequent to the tax year that Date C is in) Purchaser transferred all of its assets to Corp X in a transaction that is represented to qualify under §§ 368(a)(1)(D) and 381(a). As part of such "reorganization" Target was, or will be, liquidated into Corp X in a transaction that is represented to qualify under §§ 332 and 381(a). 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 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.

Sections 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 when a foreign purchasing corporation or deemed purchasing corporation must file an election, which is a later filing date than the "ordinary" filing date required by § 338(g)), a foreign corporation is considered subject to United States tax (i.e., not eligible for the special rule) if it is a controlled foreign corporation ("CFC"). Section 338(h)(3)(A)(iii) provides that the term "purchase" means any acquisition of stock, but only if (1) 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); (2) 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 (3) 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-A or Form 8023, as applicable, 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 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-A

and Form 8023, as applicable, must be filed as described in the form and its instructions, and also must be attached to Form 5471 (information return with respect to foreign corporation) 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 section 381(a), provided that the purchasing corporation is considered for tax purposes as the purchaser of the target stock. The acquiring corporation in the section 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.

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 of the consolidated return year. See also Form 8023-A 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, provided the taxpayer demonstrates to the satisfaction of the Commissioner that:

- (1) The taxpayer acted reasonably and in good faith, and,
- (2) Granting relief will not prejudice the interests of the government.

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 was 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 the foreign successor to the foreign purchasing corporation, and as the U.S. shareholder of the foreign purchasing corporation and the foreign successor thereto) to file the Election, 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 Parent, Company Official and Tax Professional, New Tax Advisor and Authorized Representatives explain the circumstances that resulted in the failure to file the 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)(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 of this letter, for Parent to file the Election with respect to Purchaser's acquisition of the stock of Target, as described above.

The above extension of time to make the Election is conditioned on: **(1)** Purchaser's transfer of its assets (*i.e.*, including the Target stock) on Date D to Corp X and the "liquidation and/or dissolution" of Purchaser, in fact, qualifying as a reorganization under §§ 368(a)(1)(D) and 381(a) (*i.e.*, the actual liquidation and/or dissolution of Purchaser has to have occurred in the same taxable year in which Date D is included); **(2)** Target's liquidation into Corp X (if and when consummated), in fact, qualifying as a liquidation under §§ 332 and 381(a) (*i.e.*, Corp X must retain all of Target's assets and all of Target's "earnings and profits (or deficit of earnings and profits)" or if not liquidated then Target must retain same as a directly owned subsidiary of Corp X); **(3)** the fulfillment of Condition X (which is fully described in the above redacted legend to prevent the disclosure of taxpayer identifying information); and **(4)** the taxpayers' (Parent's, Purchaser's Target's, and Corp X's) tax liability 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 the common parent of the group should file the Election in accordance with § 1.338-1(d). That is, a new election on Form 8023-A (not 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). Purchaser and "old" Target must file or amend their returns, 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 return(s). See, Announcement 98-2, 1998-2 I.R.B. 38, and § 1.338-1(g).Dissolution

No opinion is expressed as to whether: (1) Purchaser's transfer of assets (*i.e.*, including the Target stock) on Date D to Corp X and the "liquidation and/or dissolution" of Purchaser qualifies as a reorganization under §§ 368(a)(1)(D) and 381(a)(1); (2) Target's liquidation into Corp X, qualifies as a liquidation under §§ 332 and 381(a); (3) Purchaser's acquisition of Target stock qualifies as a "qualified stock purchase"; (4) the acquisition of Target stock qualifies for § 338(a) treatment; and (5) if the acquisition of Target stock qualifies for §338(a) treatment, as to the amount of gain or loss recognized (if any) by Target on the deemed asset sale.

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 representative first listed on your power of attorney on file in this office.

Sincerely yours,
Assistant Chief Counsel (Corporate)

By: Richard Todd

Counsel to the Assistant Chief Counsel
(Corporate)