

Internal Revenue Service

Department of the Treasury
Washington, DC 20224

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Telephone Number:

Refer Reply To:
CC:CORP:B06
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Date:
August 13, 2009

TY:

Legend

Parent =

Seller =

Purchaser =

Target 1 =

Target 2 =

Business A =

Business B =

Company Official 1 =

Company Official 2 =

Tax Professional 1 =

Tax Professional 2 =

Tax Professional 3 =

Date A =

Date B =

Date C =

Dear _____ :

This letter responds to a letter dated March 25, 2009, submitted by Parent, as common parent of the consolidated group of which Purchaser is a member, requesting an extension of time under § 301.9100-3 of the Procedure and Administration regulations to file an election. Parent is requesting an extension to file a "§ 338 election" under § 338(g) with respect to Purchaser's acquisition of the stock of Target 1 and Target 2 (the "Election") on Date B. Additional information was received in letters dated July 8, 2009 and July 30, 2009. The material information is summarized below.

On Date A, Purchaser and Seller entered into a purchase agreement for Purchaser to acquire substantially all of the assets of Business A and Business B and all of the stock of Target 1 and Target 2, which were controlled foreign corporations within the meaning of § 957, from Seller. Target 1 and Target 2 were Purchaser's only stock purchases under the purchase agreement.

On Date B, Purchaser acquired all of the stock of Target 1 and Target 2 from Seller pursuant to the purchase agreement. It is represented that Purchaser's acquisition of the stock of Target 1 and Target 2 qualifies as a "qualified stock purchase," as defined in § 338(d)(3).

Neither Target 1 nor Target 2 was a passive foreign investment company or a foreign personal holding company at any time during the portion of its taxable year that ends on the acquisition date (as defined in § 338(h)(2)).

The Election was due on Date C, but for various reasons a valid Election was not filed. After the due date for the Election, it was discovered that the Election had not been filed. Subsequently, this request was submitted under § 301.9100-3 for an extension of time to file the Election. The period of limitations on assessment under § 6501(a) has

not expired for Parent's consolidated group's or Targets' taxable years in which the acquisition occurred, the taxable years in which the Election should have been filed, or any taxable years 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" or a "§ 338(h)(10) election", and (2) the acquisition is a "qualified stock purchase."

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.

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. 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., § 1.338-2(d)). Therefore, the Commissioner has discretionary authority under § 301.9100-3 to grant an extension of time for Parent to file the Election, 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 interests of the government.

Information, affidavits, and representations submitted by Parent, Company Official 1, Company Official 2, Tax Professional 1, Tax Professional 2 and Tax Professional 3 explain the circumstances that resulted in the failure to timely file the Election. The information establishes that the Parent reasonably relied on a qualified tax professional who failed to make, or advise Parent to make, the Election, and that the request for relief was filed before the failure to make the Election was discovered by the Internal Revenue Service. See §§ 301.9100-3(b)(1)(i) and (v).

Based on the facts and information submitted, including the representations made, we conclude that Parent has shown 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. Accordingly, an extension of time is granted under § 301.9100-3, until 45 days from the date on this letter, for Parent to file the Election with respect to the acquisition of the stock of Target 1 and Target 2, as described above.

WITHIN 45 DAYS OF THE DATE ON THIS LETTER, Parent must file the Election on Form 8023, in accordance with § 1.338-2(d) and the instructions to the form. A copy of this letter must be attached to Form 8023 and to any tax return to which it is relevant. Alternatively, taxpayers filing their returns electronically may satisfy the requirement of attaching a copy of this letter by attaching a statement to their return that provides the date and control number of the letter ruling.

WITHIN 120 DAYS OF THE DATE ON THIS LETTER, all relevant parties must file or amend, as applicable, all returns and amended returns (if any) necessary to report the transaction as a § 338 transaction for the taxable year in which the transaction was consummated (and for any other affected taxable year). A copy of this letter and a copy of Form 8883 must be attached to any tax return to which it is relevant. Alternatively, taxpayers filing their returns electronically may satisfy the requirement of attaching a copy of this letter by attaching a statement to their return that provides the date and control number of the letter ruling.

Because Target 1 and Target 2 were controlled foreign corporations, Parent must also deliver written notice of the election (and a copy of Forms 8023 and 8883, their attachments and instructions) to U.S. persons selling or holding stock in Target 1 or Target 2. See § 1.338-2(e)(4).

The above extension of time is conditioned on Parent's consolidated group's and Targets' 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 Parent's consolidated group's and Targets' tax liability, if any, for the years involved. A determination thereof will be made by the applicable 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 Parent's consolidated group's tax liability is lower. Section 301.9100-3(c).

We express no opinion as to: (1) whether the acquisitions of the stock of Target 1 and Target 2 qualify as "qualified stock purchases" under § 338(d)(3); or (2) any other tax consequences arising from the Election.

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 § 301.9100-3, we relied on certain statements and representations made by Parent and accompanied by a penalty of perjury statement executed by an appropriate party. While this office has not verified any of the material submitted in support of the request for rulings, it is subject to verification on examination. The Director should verify all essential facts. In addition, notwithstanding that an extension is granted under

§ 301.9100-3 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) of the Code provides that it may not be used or cited as precedent. Pursuant to the power of attorney on file in this office, a copy of this letter is being sent to your authorized representative.

Sincerely,

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

cc: