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**From:**

**Sent:** Thursday, February 18, 2010 12:57:12 PM

**To:**

**Cc:**

**Subject:** 9100 relief

I have looked over the material you have sent to this office concerning whether the taxpayer has complied with the requirements of Rev. Proc. 2003-33 to obtain an automatic extension of time under §301.9100-3 of the regulations to make a §338(h)(10) election. Any conclusions reached herein are based on the facts presented. If the facts are incorrect, then this analysis may not apply.

In order to obtain an automatic extension of time to file an election under §338, a taxpayer must attach a statement to its Form 8023, including the information provided in sections 5.01 through 5.15 of Rev. Proc. 2003-33. From the information submitted, I do not see a lack of compliance with the requirements set forth therein.

Section 5.04 of the revenue procedure requires that the Form 8023 be filed no later than 12 months after the discovery of the failure to timely file the election. The information submitted indicates that the taxpayer submitted its Form 8023 exactly one year after discovery of its failure to timely file Form 8023. There is no requirement that the taxpayer file the form any earlier than that. Accordingly, assuming that the taxpayer did in fact file the Form 8023 exactly 12 months after discovery of the failure to timely file the election, this provision has been satisfied.

Section 5.05 concerns inconsistent filing of returns. The taxpayer has indicated that returns have been filed inconsistent with a §338(h)(10) election having been made. However, the taxpayer has also indicated that all inconsistent returns will be amended to be consistent with a §338(h)(10) election. Further, the taxpayer has provided information to demonstrate that the inconsistent filing of returns is not indicative of the use of hindsight. According to the information submitted, the stock purchase agreement mandates the filing of a §338(h)(10) election AND the tax professional relied upon in this case has provided an affidavit that he was responsible for the preparation of Form 8023 and the presentation of such form to the required filers for timely filing but that he failed to do so. Additionally, no other facts appear to have changed since the due date of the election that indicate that the making of the election became more advantageous after the due date for the election. (See section 5.11 of the revenue procedure). Thus, the taxpayer has demonstrated that the inconsistent filing is not an indication of hindsight.

Section 5.07 of the revenue procedure requires that an assessment for deficiency is not prevented, in the case of inconsistent filings, for at least 18 months after the filing of Form 8023. You have informed this office indicates that all required filers have executed a Form 872 to extend the statute of limitations beyond this 18 month threshold. Thus, section 5.07 has been satisfied.

Section 5.08 provides grounds pursuant to which a taxpayer can demonstrate that it acted reasonably and in good faith. A taxpayer need satisfy only one of the listed provisions. The taxpayer's statement, as supported by the affidavit from its tax professional, satisfies section 5.08(1).

All of the other provisions of the revenue procedure not discussed here also appear to have been satisfied.

Accordingly, if the facts relied upon above are accurate, the taxpayer has complied with the requirements of the revenue procedure and thus should be treated as timely filing its election.