

Internal Revenue Service

Department of the Treasury
Washington, DC 20224

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April 19, 2011

RE: Request for Extension of Time to Make a Section 197(f)(9)(B) Election.

LEGEND:

Taxpayer =

Date 1 =

Date 2 =

Date 3 =

Taxpayer Official 1 =

Taxpayer Official 2 =

Tax Professional =

S =

I =

P =

B =

Dear :

This letter responds to a letter dated Date 1, and subsequent correspondence, submitted on behalf of Taxpayer, requesting an extension of time pursuant to § 301.9100-3 of the Procedure and Administrative Regulations to make the election under § 197(f)(9)(B) of the Internal Revenue Code and § 1.197-2(h)(9) of the Income Tax Regulations for certain section 197 intangibles acquired in the taxable year ended Date 2.

FACTS

Taxpayer represents that the facts are as follows:

For the taxable year ended Date 2, Taxpayer owned S, which in turn owned I. Pursuant to a stock purchase agreement entered into on Date 3, S sold the stock of I to B in exchange for cash and 40 percent of the stock of P, the parent of B.

The stock purchase agreement provided that at B's option, S and B would make a § 338(h)(10) election. If the parties made this election, the agreement also provided that the parties would make a gain recognition election under § 197(f)(9)(B). Taxpayer, as the common parent of S, and B made a timely election under § 338(h)(10). However, Taxpayer did not make an election under § 197(f)(9)(B) and § 1.197-2(h)(9) for its taxable year ending on Date 2. The period of limitations on assessment under § 6501(a) has not expired for the taxable year for which the election should have been filed or for any subsequent taxable year.

Information, affidavits, and representations submitted by Taxpayer, Taxpayer Official 1, Taxpayer Official 2, and Tax Professional explain the circumstances that resulted in the failure to timely file a valid election under § 197(f)(9)(B). The information establishes that Taxpayer reasonably relied on a qualified tax professional who failed to make, or advise Taxpayer to make, the election.

RULING REQUESTED

Taxpayer requests an extension of time pursuant to § 301.9100-3 to make the election under § 197(f)(9)(B) and § 1.197-2(h)(9) to recognize gain on the disposition of the section 197 intangibles in the transaction at issue on its Federal income tax return for the taxable year ended Date 2.

LAW AND ANALYSIS

Section 197(a) provides that a taxpayer shall be entitled to an amortization deduction with respect to any amortizable section 197 intangible. Section 197(c) provides that, in general, the term “amortizable section 197 intangible” means any section 197 intangible which is acquired after August 10, 1993, and which is held in connection with the conduct of a trade or business. Section 197(d)(1) provides, in part, that the term “section 197 intangible” means goodwill, going concern value, and other identified intangible assets.

Section 197(f)(9)(A) provides, in part, that the term “amortizable section 197 intangible” shall not include any section 197 intangible which is goodwill, going concern value, or for which depreciation or amortization would not have been allowable but for § 197, and which is acquired after August 10, 1993, if the intangible was held or used at any time on or after July 25, 1991, and on or before August 10, 1993, by the taxpayer or a related person. Section 197(f)(9)(C)(i) provides, in part, that a person is related to any person if the related person bears a relationship to such person specified in § 267(b) or § 707(b)(1). In applying § 267(b) or § 707(b)(1), “20 percent” shall be substituted for “50 percent.” However, § 197(f)(9)(B) provides that § 197(f)(9)(A) would not apply to an intangible acquired by the taxpayer but for the 20 percent substitution rule of § 197(f)(9)(C)(i), and the person from whom the taxpayer acquired the intangible elects to recognize gain on the disposition of the intangible and pay a tax on such gain which, when added to any other income tax on such gain equals such gain multiplied by the highest rate of income tax applicable to such person.

Section 1.197-2(h)(9)(i) provides that a section 197(f)(9) intangible qualifies for the gain-recognition exception if: (A) the taxpayer acquires the intangible from a person that would not be related to the taxpayer but for the substitution of 20 percent for 50 percent under § 1.197-2(h)(6)(i)(A); and (B) that person (whether or not otherwise subject to Federal income tax) elects to recognize gain on the disposition of the intangible and agrees, notwithstanding any other provision of law or treaty, to pay for the taxable year in which the disposition occurs an amount of tax on the gain that, when added to any other Federal income tax on such gain, equals the gain on the disposition multiplied by the highest marginal rate of tax for that taxable year.

Section 1.197-2(h)(9)(ii) provides that the anti-churning rules of § 1.197-2(h) apply to a section 197(f)(9) intangible that qualifies for the gain-recognition exception only to the extent the acquiring taxpayer's basis in the intangible exceeds the gain recognized by the transferor.

Section 1.197-2(h)(9)(iii) provides that the election described in § 1.197-2(h)(9) must be made by the due date (including extensions of time) of the electing taxpayer's Federal income tax return for the taxable year in which the disposition occurs. The election is made by attaching an election statement satisfying the requirements of § 1.197-2(h)(9)(viii) to the electing taxpayer's original or amended income tax return for that taxable year (or by filing the statement as a return for the taxable year under §

1.197-2(h)(9)(xi)). In addition, the taxpayer must satisfy the notification requirements of § 1.197-2(h)(9)(vi). The election is binding on the taxpayer and all parties whose Federal tax liability is affected by the election.

Section 1.197-2(h)(9)(vi) provides that a taxpayer making an election under § 1.197-2(h)(9) with respect to the disposition of a section 197(h)(9) intangible must provide written notification of the election on or before the due date of the return on which the election is made to the person acquiring the section 197 intangible. In addition, a partnership or S corporation making an election under § 1.197-2(h)(9) must attach to the Schedule K-1 furnished to each partner or shareholder a written statement containing all information necessary to determine the recipient's additional tax liability under § 1.197-2(h)(9).

Section 1.197-2(h)(9)(viii) provides that an election statement satisfies the requirements of § 1.197-2(h)(9)(viii) if it is in writing and contains the information listed below. The required information should be arranged and identified in accordance with the following order and numbering system:

- (A) The name and address of the electing taxpayer.
- (B) Except in the case of a taxpayer that is not otherwise subject to Federal income tax, the taxpayer identification number (TIN) of the electing taxpayer.
- (C) A statement that the taxpayer is making the election under § 197(f)(9)(B).
- (D) Identification of the transaction and each person that is a party to the transaction or whose tax return is affected by the election (including, except in the case of persons not otherwise subject to Federal income tax, the TIN of each such person).
- (E) The calculation of the gain realized, the applicable rate of tax, and the amount of the taxpayer's additional tax liability under § 1.197-2(h)(9).
- (F) The signature of the taxpayer or an individual authorized to sign the taxpayer's Federal income tax return.

Under § 301.9100-1, the Commissioner has discretion, upon a showing of good cause, to grant a reasonable extension of time for making the election under the rules set forth in §§ 301.9100-2 and 301.9100-3 to make a regulatory election.

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 an election. Section 301.9100-2 provides automatic extensions of time for making certain elections. Section 301.9100-3 provides extensions of time for making elections that do not meet the requirements of § 301.9100-2.

Section 301.9100-3(a) provides that 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 the grant of relief will not prejudice the interests of the government.

CONCLUSIONS

Based solely on the facts and circumstances submitted, we conclude that the requirements of §§ 301.9100-1 and 301.9100-3 have been satisfied. Accordingly, Taxpayer is granted 60 calendar days from the date of this letter to make the election under § 197(f)(9)(B) for its taxable year ended Date 2, and to provide written notification of the election to the person that acquired the section 197 intangibles, as required by § 1.197-2(h)(9)(vi). This election must be made by: (1) Taxpayer filing an amended Federal income tax return for its taxable year ending on Date 2, with the election statement satisfying the requirements of § 1.197-2(h)(9)(viii) and with the payment of tax required by § 1.197-2(h)(9)(i)(B); and (2) Taxpayer providing written notification of the election to the person who acquired the section 197 intangibles. See § 1.197-2(h)(9)(iii) and (vi).

Except as specifically set forth above, we express no opinion concerning the federal income tax consequences of the facts described above under any other provisions of the Code. Specifically, no opinion is expressed or implied on whether Taxpayer qualifies to make an election under § 197(f)(9)(B) and § 1.197-2(h)(9), or whether Taxpayer and B made a valid § 338(h)(10) election.

In accordance with the Power of Attorney on file with this office, a copy of this letter is being sent to Taxpayer's authorized representatives. We are also sending a copy of this letter to the appropriate operating division director.

This 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.

Sincerely,

Kathleen Reed

Kathleen Reed
Chief, Branch 7
Office of Associate Chief Counsel
(Income Tax & Accounting)

Enclosures (2):

copy of this letter
copy for section 6110 purposes