

**Internal Revenue Service**

Number: **201951003**

Release Date: 12/20/2019

Index Number: 338.01-02, 9100.06-00

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:3

PLR-107004-19

Date:

September 27, 2019

Legend

Parent =

US SubY =

Foreign SubY =

Target =

Country A =

Date 1 =

Date 2 =

Date 3 =

Company Official =

Tax Professional =

Dear \_\_\_\_\_ :

This letter responds to a letter dated April 1, 2019, submitted on behalf of Parent, the common parent of the consolidated group that includes US SubY, requesting an extension of time under §301.9100-3 of the Procedure and Administration Regulations to file an election. Additional information was received subsequently.

Parent is requesting an extension to file a “section 338 election” under section 338(g) of the Internal Revenue Code (the “Code”) with respect to the acquisition, on Date 2, by a wholly owned subsidiary of US SubY, Foreign SubY, of the stock of Target (sometimes hereinafter referred to as the “Election”). The material information is summarized below.

Parent is a domestic corporation and the common parent of an affiliated group of corporations that join in the filing of a consolidated Federal income tax return (the “Parent Group”). Parent wholly owns US SubY, a domestic corporation and a member of the Parent Group. Pursuant to a Share Purchase Agreement dated Date 1, on Date 2, a wholly owned subsidiary of US SubY, Foreign SubY (a Country A corporation), acquired all of the stock of Target (a Country A corporation) in exchange for cash.

Parent has represented that the acquisition of the shares of Target stock by Foreign SubY constituted a “qualified stock purchase,” as defined in section 338(d)(3). Parent has also represented that Target was not a controlled foreign corporation, a passive foreign investment corporation, or a foreign personal holding company at any time during the portion of its taxable year that ended on the acquisition date (as defined in section 338(h)(2)). Parent has further represented that Foreign SubY was a controlled foreign corporation as defined in section 957 and was 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.

The section 338 election was required to be filed not later than Date 3, 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 section 6501(a) has not expired for the taxable year in which the acquisition occurred, the taxable year in which the Election should have been filed, or any taxable year that would have been affected by the Election had it been timely filed.

Parent has represented that it is not seeking to alter a return position for which an accuracy-related penalty has been or could be imposed under section 6662. Parent has further represented that to the extent any tax returns were filed inconsistently with

an Election being in place for the purchase of Target, the inconsistencies did not result in the Parent Group (or any other taxpayer affected by the Election) having a lower U.S. Federal tax liability in the aggregate for all years to which the Election applies than if the Election had been timely made (taking into account the time value of money).

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 “section 338 election” or a “section 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 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 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).

In this case, the time for filing the Election is fixed by 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, and Tax Professional explain the circumstances that resulted in the failure to timely file a valid Election. The information establishes that Parent reasonably relied on a qualified tax professional who failed to make, or to 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 of this letter, for Parent to file the Election with respect to the acquisition of the stock of Target.

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 (e)(3) and the instructions to the form. A copy of this letter must be attached to the Form 8023.

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 section 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 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 (PLR-107004-19) of this letter ruling.

The above extension of time is conditioned on all relevant parties' 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). See §301.9100-3(c)(1)(i). No opinion is expressed as to the taxpayers' tax liability 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.

We express no opinion as to: (1) whether the acquisition of the Target stock by Foreign SubY qualifies as a "qualified stock purchase" under section 338(d)(3); or (2) any other tax consequence 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 the Parent, Company Official, and Tax Professional. However, 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 who requested it. Section 6110(k)(3) 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 representatives.

Sincerely,

*T. Ian Russell*

---

T. Ian Russell  
Chief, Branch 1  
Office of Associate Chief Counsel (Corporate)

cc: