

Internal Revenue Service

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Department of the Treasury

Washington, DC 20224

Person to Contact:

Telephone Number:

Refer Reply To:

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Date:

July 28, 1999

Legend:

Purchaser =

Disregarded
Sub =

Parent =

Sellers =

Target #1 =

Target #2 =

Target #3 =

Country X =

Date A =

Date B =

Date C =

Date D =

Date Y =

X Taxable
Year =

Officials =

Outside Tax

Professional =

Authorized
Representatives =

Business A =

Business B =

This responds to your Authorized Representatives' March 15, 1999, letter requesting an extension of time, under § 301.9100-1 through 301.9100-3 of the Procedure and Administration Regulations, to make late elections. Purchaser (for itself and Parent, and as the deemed purchasing corporation) is requesting an extension of time to make late "section 338 elections" under § 338(g) of the Internal Revenue Code and § 1.338-1(d), with respect to the acquisitions of the stock of Target #1, Target #2 and Target #3 (sometimes hereinafter such elections are collectively referred to as the "Election" or "Elections") on Date A. Parent has joined this request for an extension to make the Elections. Additional information was received in letters dated May 18, June 4, and July 22, 1999. The material information is summarized below.

Parent is a publically traded corporation that is the common parent of a consolidated group, has a calendar taxable year and uses the accrual method of accounting. Purchaser was a wholly-owned subsidiary of Parent and included in its consolidated return (see the below discussion regarding the spin-off of Purchaser after the acquisitions but before the Elections were made). Disregarded Sub is a Country X corporation (the specific country of incorporation is set forth above in the redacted legend) that (prior to the subject acquisition and on or before Date Y), was newly formed by Purchaser as a wholly owned subsidiary to acquire the stock of Target #1, Target #2 and Target #3. Target #1, Target #2 and Target #3 are Country X corporations that were entirely owned by Sellers (individuals and trusts who are citizens and residents of Country X, except as described in the above redacted legend). Purchaser and Target #1 are engaged in Business A, and Target #2 and Target #3 are engaged in Business B.

Prior to the below described acquisition, Sellers, Target #1, Target #2 and Target #3 did not file U.S. income tax returns and were not subject to U.S. income taxation. Further, neither Target #1, Target #2 nor Target #3 was: (1) a controlled foreign corporation within the meaning of § 957(a); (2) a passive foreign investment company as defined in Section 1297(a); (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. In addition, prior to the acquisition, neither Sellers, Target #1, Target # 2, nor Target #3 owned U.S. real property interests, as defined in Section 897(c).

Purchaser further represents that: (1) Disregarded Sub is a separate unit (within the meaning of Sections 1.1503-2(c)(3) and (4)) treated as a dual resident corporation (withing the meaning of Section 1.1503-2(c)(2)). As a result, the limitations under § 1.1503-2(b) on the use of a dual consolidated loss to offset the income of any domestic affiliate, including Purchaser, will be followed; and (2) there have not been, nor are there currently, any loans, royalties or management fees between Disregarded Sub and Target # 1, Target #2 or Target #3, other than certain minor intercompany activity between these entities (e.g. miscellaneous small payments related to one entity paid by another for convenience purposes and charged to an intercompany account).

On Date A, Sellers, Purchaser, Disregarded Sub, Target #1, Target #2 and Target #3 entered into a Stock Purchase Agreement for Disregarded Sub to acquire all of Sellers' stock of Target #1, Target #2 and Target #3. Also on Date A, Disregarded Sub acquired all of the Sellers' stock of Target #1, Target #2 and Target #3, pursuant to the Stock Purchase Agreement, solely for cash and the assumption of Target #1's, Target #2's and Target #3's liabilities, in fully taxable transactions. After the acquisitions, "new" Target #1, Target #2 and Target #3 were included in Purchaser's return by being listed on Form 5471 (Information Return With Respect To Certain Foreign Corporations). It is represented that (1) Purchaser was not related to Sellers within the meaning of § 338(h)(3), and (2) Purchaser's deemed acquisition of the stock of Target #1, Target #2 and Target #3 each 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 Purchaser's, Target #1's, Target #2's or Target #3's taxable year(s) in which the acquisitions occurred, the taxable year(s) in which the Elections should have been filed, or any taxable year(s) that would have been affected by the Elections had they been timely filed.

On Date Y Disregarded Sub filed an election under § 301.7701-3 (i.e., by filing Form 8832, Entity Classification Election) to be treated as a disregarded entity effective on Date A. On Date B (which is after the acquisition, on Date A, but before the due date of the Elections, on Date C) Parent distributed all of the stock of Purchaser, its wholly owned subsidiary, to its shareholders in a distribution that is represented to qualify as a tax-free distribution under § 355 of the Code (see PLR 9833003, dated May 8, 1998). Sellers did not receive any stock of Purchaser in the spin-off.

The Elections were due on Date C. However, for various reasons the Elections were not filed. On Date D (which is after the due date for the Elections), Purchaser's Company Official, Outside Tax Professional and Authorized Representatives discovered that the Elections had not been filed. Subsequently, this request was submitted, under § 301.9100-1, for an extension of time to file the Elections.

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.

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. Form 8023-A and Form 8023, as applicable, must be filed as described in the form and its instructions. 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 1.1502-77(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, Form 8023 and the instructions thereto. 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 purchasing corporation of the target stock. The acquiring corporation in the section 381(a) transaction may make an election under section 338 for target.

Section 301.7701-3(a) provides that a business entity that is not classified as a corporation under 301.7701-2(b)(1), (3), (4), (5), (6), (7), or (8) (an eligible entity) may elect its classification for federal tax purposes. An eligible entity with a single owner can elect to be disregarded as an entity separate from its owner. Elections are necessary only when an eligible entity chooses to be classified initially as other than the default classification or when an eligible entity chooses to change its classification.

Section 301.7701-3(c)(1)(i) provides that an eligible entity may elect to be classified other than as provided under § 301.7701-3(b), or to change its classification, by filing Form 8832, Entity Classification Election, with the appropriate service center. Under § 301.7701-3(c)(1)(iii), this election will be effective on the date specified by the entity on Form 8832. The date specified on Form 8832 cannot be more than 75 days prior to the date on which the election is filed.

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 times for filing the Elections were 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 and Purchaser to file the Elections, provided Parent and Purchaser show that they 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 Company Officials, Outside Tax Professional and Authorized Representatives explain the circumstances that resulted in the failure to file valid Elections. The information establishes that tax

professionals were responsible for the Elections, that Purchaser and Parent relied on the tax professionals to timely make the Elections and requested this relief before the omission was discovered by the Service, and that the government will not be prejudiced if relief is granted. See § 301.9100-3(b)(i) and (v).

Based on the facts and information submitted, including the representations that have been made, we conclude that Purchaser and Parent acted reasonably and in good faith in failing to timely file the Elections, 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 Purchaser (for itself and Parent, and as the deemed purchasing corporation) to file the Elections with respect to the acquisition of the stock of Target #1, Target #2 and Target #3, as described above.

The above extension of time is conditioned on the taxpayers' (Purchaser's, Parent's, Disregarded Sub's, Target #1's, Target #2's, Target #3 's, and Sellers' (to the extent they have any US tax liability)) tax liability being not lower, in the aggregate for all years to which the Elections apply, than it would have been if the Elections 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).

Purchaser and Parent should file the Elections in accordance with § 1.338-1(d). That is, new elections on Form 8023-A or 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). A separate election form is needed for each target. A copy of this letter should be attached to the election form. Parent (and Purchaser for its short taxable year) must file or amend its return to report the acquisitions as "section 338 transactions," with a copy of this letter and a copy of the election forms and the information required therewith; the "old" targets must file final separate returns (if and as applicable); and the "new" targets must be included in Parent's and Purchaser's returns (by being listed on Form 5471, or as otherwise applicable) for the first year following the acquisition. See: Announcement 98-2, 1998-2 I.R.B. 38 with regard to which election form to use.

No opinion is expressed as to: (1) whether the acquisition of the stock of each of the target corporations qualifies as a "qualified stock purchase"; (2) whether the acquisition of the stock of each of the target corporations qualifies for § 338(a) treatment; (3) if the acquisition of the stock of each of the target corporations qualifies for § 338(a) treatment, the amount of gain or loss recognized (if any) by the target corporations on the deemed asset sales; or (4) whether Disregarded Sub is in fact a disregarded entity for purposes of the Federal Income Tax Code.

In addition, no opinion is expressed as to the tax effects or consequences of filing the Elections 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 Elections 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.

A copy of this letter is being sent to the authorized representatives you so designated, pursuant to the power of attorney on file in this office.

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.

Sincerely yours,

Assistant Chief Counsel (Corporate)

by Richard Todd

Richard Todd
Counsel to the Assistant
Chief Counsel (Corporate)