Internal Revenue Service

Department of the Treasury

Washington, DC 20224

Index Numbers: 0338.00-00
9100.07-00

Number: **199947014**
Release Date: 11/26/1999

Person to Contact:

Telephone Number:

Refer Reply To:
CC:DOM:CORP:5 - PLR-107099-99
Date:
August 26, 1999

Purchaser =

Parent =

Target =

Sellers =

Purchaser's Attorneys =

Purchaser's Outside Tax Professional =

Authorized representatives =

Date A =

Date B =

Date C =

This responds to your letter dated October 25, 1998, requesting an extension of time under § 301.9100-3 of the Procedure and Administration Regulations to file an election. Purchaser and Sellers are requesting the extension to file a "section 338(h)(10) election" under §§ 338(g) and 338 (h)(10) of the Internal Revenue Code and § 1.338(h)(10)-1(d) of the Income Tax Regulations (the "Election"), with respect to Purchaser's acquisition of Target on Date B. Additional information was received in letters dated February 24, 1999, June 18, 1999 and July 16, 1999. The material information is summarized below.

Parent is the common parent of a consolidated group that has a taxable year ending September 30 and uses the accrual method of accounting. Parent owns all of the outstanding stock of Purchaser. Target, prior to the transaction, was an S corporation.

On Date A, Purchaser, Parent, Target and Sellers entered into a stock purchase agreement (the "Stock Purchase Agreement" or the "Agreement") for Purchaser to acquire all of Sellers' Target stock. On Date B, Purchaser acquired all of the Sellers' Target stock, pursuant to the Stock Purchase Agreement, for cash and a certain number of shares of Common Stock representing 10 percent of the fully diluted common equity of Parent, in a fully taxable transaction. Purchaser was not related to Sellers within the meaning of § 338(h)(3), as the Sellers are individuals. It is represented that Purchaser's acquisition of Target stock qualified as a "qualified stock purchase," as defined in § 338(d)(3). Following the acquisition, "new" Target was included in Parent's consolidated return.

Purchaser and Sellers intended to file the Election. Pursuant to the Stock Purchase Agreement entered into on Date A, the parties contracted to make the Election. The Agreement also provided that each Seller must sign at or prior to closing all federal and state forms used to make the election. Pursuant to that provision, each Seller signed Form 8023-A at the closing on Date B. The Agreement also provided an allocation among the parties of the responsibility for the taxes resulting from the making of the election. All parties to the Agreement were obligated to file their returns in accordance with the making of the section 338 (h)(10) election and the purchase price allocation provided for in the agreement.

The Election was due on Date C, but was not filed. Sometime after Date C, (the due date of the election), Purchaser received a request from the representative of one of the Sellers to furnish a copy of the Election so that the seller could file a copy of the Election. Purchaser was unable to locate a copy of a filed Form 8023-A. The Purchaser believed that Purchaser's Outside Tax Professional had been instructed to file the Election and that the Election had been filed. Purchaser's Attorneys thought that Purchaser had informed Purchaser's Outside Tax Professional of the necessity of filing the Election and that the Election had been made. Purchaser has now ascertained that the section 338(h)(10) Election was never filed. Purchaser and Sellers

have proceeded in a manner consistent with the Election having been filed. Subsequently, Purchaser filed this request, in which the Sellers now join, under §301.9100-1, for an extension of time to file the Election. The period of limitations on assessment under § 6501(a) has not expired for Purchaser's, Target's or Sellers' taxable year in which the acquisition/sale was consummated, the taxable year in which the Election should have been filed, or for any taxable year(s) 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 "section 338 election" under § 338(g); and (2) the acquisition is a "qualified stock purchase" (QSP). 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) provides that the term "purchase" means any acquisition of stock, but only if: (i) the basis of the stock in the hands of the purchasing corporation is not determined (I) in whole or in part by reference to the adjusted basis of such stock in the hands of the person from whom acquired, or (II) under § 1014(a) (relating to property acquired from a decedent); (ii) 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 (iii) the stock is not acquired from a person the ownership of whose stock would, under § 318(a) (other than paragraph (4) thereof), be attributed to the person acquiring such stock.

Section 338(h)(10) permits the purchasing and selling corporations to elect jointly to treat the target corporation as deemed to sell all of its assets and distribute the proceeds in complete liquidation. The sale of stock included in the qualified stock purchase generally is ignored. A §338(h)(10) election may be made for target only if it is a member of a selling consolidated group, a member of a selling affiliated group filing separate returns, or an S corporation. Section 1.338(h)(10)-1(a). Gain or loss on the deemed sale is included in the consolidated return of the selling group (unless the target corporation is a member of a selling affiliated group filing separate returns or an S corporation). Section 1.338(h)(10)-1(d) provides that a § 338(h)(10) election may be made for a target corporation if the purchasing corporation makes a "qualified stock purchase" of the target corporation stock. Sections 1.338(h)(10)-1(d)(2) and (3) provide that if a § 338(h)(10) election is made for the target corporation, it is irrevocable and a § 338 election is deemed made for the target corporation.

Section 1.338(h)(10)-1(d)(2) provides that a §338(h)(10) election is jointly made by a purchaser and the selling consolidated group (or the selling affiliate or the S corporation shareholders) on Form 8023-A or Form 8023 in accordance with the instructions to the form. The regulations further provide that the election must be made

not later than the 15th day of the ninth month beginning after the month in which the acquisition date occurs. The instructions to Form 8023-A or Form 8023 provide that if a § 338(h)(10) election must be made jointly by the purchasing corporation and the common parent of the selling consolidated group (or selling affiliate or S corporation shareholders), then the form must be signed by each person authorized to act on behalf of each corporation, and if made for an S corporation, it must be signed by each S corporation shareholder who sells target stock in the QSP. The instructions further provide that the signatures, dates and titles (if applicable) of those persons must be provided in a "signature attachment," and they provide the details as to the preparation of the "signature attachment" and its attachment to Form 8023-A or Form 8023.

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 1.338(h)(10)-1(e)(2)(ii) provides that old target is treated as if, while owned by the selling S corporation shareholders, it distributed all of its assets in complete liquidation.

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 or Form 8023 and the instructions thereto.

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.

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 elections that do not meet the requirements of section 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 time for filing the election is fixed by regulations promulgated under § 338(g)(1), i.e., no later than the 15th day of the 9th month, beginning after the

month in which the acquisition date occurs. See § 1.338-1(d). The Commissioner has discretionary authority under § 301.9100-1 to grant an extension of time for Purchaser and Sellers to file the election, provided Purchaser and Sellers show 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 Purchaser, Sellers and the Authorized Representative explain the circumstances that resulted in the failure to timely file a valid election. The information also establishes that tax professionals were responsible for the election, that Seller and Purchaser relied on them to timely make the election, and that the government will not be prejudiced if relief is granted. See § 301.9100-3(b)(1)(v).

Based on the facts and information submitted, including the representations made, we conclude that Purchaser and Seller have shown 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. Accordingly, an extension of time is granted under § 301.9100-1, until 30 days from the date of issuance of this letter, for Purchaser and Sellers to file the Election with respect to the acquisition of Target, as described above.

The above extension of time is conditioned on the taxpayers' (Sellers', Purchaser's and Target's) 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 the taxpayers' tax liability for the years involved. A determination thereof will be made by the District Directors' offices 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). The above extension is also conditioned on: (i) Purchaser and the Sellers signing the election, and (ii) Purchaser and Sellers treating the acquisition/sale of Target stock as a § 338(h)(10) transaction.

Purchaser and Sellers must file the Election in accordance with § 1.338(h)(10)-1(d). That is, new elections on Form 8023A 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 to the form. A copy of this letter should be attached to the election form. Purchaser and Sellers must file or amend, as applicable, their returns to report the transactions as § 338(h)(10) transactions, and attach a copy of the "new" Election, the information required therewith, and a copy of this letter. See also, Announcement 98-2, 1998-2 I.R.B. 38.

We express no opinion regarding: (1) whether the acquisition/sale of Target stock qualifies as a "qualified stock purchase" under § 338(d)(3); (2) whether the acquisition/sale of Target stock qualifies for § 338(h)(10) treatment; or (3), if

§338(h)(10) is applicable, as to the amount and character of gain or loss, if any, recognized by Target and Sellers on Target's deemed asset sale and deemed liquidation.

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 § 301.9100-1, we relied on certain statements and representations made by the taxpayers. However, the District Director(s) 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.

This letter is directed only to the taxpayer(s) who requested it. Section 6110(k)(3) provides that it may not be used or cited as precedent.

A copy of this letter is being sent to Purchaser, to each of the Sellers, and pursuant to the power of attorney on file in this office, to the specified authorized representative.

Sincerely yours,

Assistant Chief Counsel (Corporate)

By: Bernita L. Thigpen

Bernita L. Thigpen
Deputy Assistant Chief Counsel
(Corporate)