

**Internal Revenue Service**

Department of the Treasury

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Person to Contact:

Telephone Number:

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Date:

May 5, 1999

Acquiring =

Target =

State X =

Business A =

Business B =

Country Y =

Acquiring's Company  
Official =

Date 1 =

Date 2 =

Authorized Representatives =

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

This responds to your letter dated December 15, 1998, in which you requested an extension of time under § 301.9100-1 and § 301.9100-3 of the Procedure and Administration Regulations to file an election. The election is requested for Acquiring (as the common parent of the consolidated group) to file an election under § 338(g) and § 1.338-1(d), with respect to Acquiring's purchase of all of Target's stock. Additional information was received in letters dated March 2 and March 12, 1999. The material information submitted for our review is summarized below.

Acquiring is a State X multinational publicly-traded company. Acquiring files a consolidated return with its subsidiaries and is engaged in Business A. Target is a Country Y corporation and is engaged in Business B. On Date 1, Acquiring acquired for cash all of the stock of Target. Prior to the purchase, under Country Y law, Target had been converted from an entity similar to a U.S. limited liability company to a U.S. joint stock company. Following the acquisition, Acquiring intended to convert Target to an entity similar to a U.S. pass-thru entity.

Acquiring also intended to make a § 338(g) election to treat the purchase of stock as a sale of assets by Target to a newly-formed Target prior to the sale of stock. The election was due on Date 2. However, Acquiring failed to make a timely election because it was not clear to Acquiring whether an election was appropriate. Acquiring was unclear on the impact of Target's status changes to its § 338(g) election. In addition, Acquiring was undergoing a rapid period of growth and its tax department was overwhelmed with work. Finally, Acquiring has submitted an affidavit from Acquiring's Company Official indicating that the official was responsible to make the election and, for the above reasons, failed to make the election.

It has been represented that the acquisition of Target constituted a qualified stock purchase within the meaning of § 338(d)(3), and that Acquiring was not related to Target within the meaning of § 338(h)(3). The period of limitations on assessments under § 6501 has not expired for Acquiring's or Target's taxable year in which the acquisition occurred, the taxable years in which the election should have been filed, or any taxable years 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 purchases if the purchasing corporation makes or is treated as having made a "§ 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 (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 in 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 § 338 election for a target corporation 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 15<sup>th</sup> 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, and also must be attached to Form 5471 (information return with respect to foreign corporations) filed with respect to the purchasing corporation by each United States shareholder for the purchasing corporation. 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 1.338-2(c)(1) provides that the purchasing corporation may make an election under § 338 for target even though target is liquidated on or after the acquisition date. 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 § 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 § 381(a) transaction may make an election under § 338 for target. Section 1.338-2(b)(4)(ii), example 2, illustrates how the purchase of a corporation holding target stock (provided a § 338(g) election is made therefor) and the direct purchase of the remaining target stock can be combined to make a qualified stock purchase.

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.

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 301.9100-2 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.

In this case, the time for making the election was 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 Acquiring to file the election, provided Acquiring shows 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.

Information, affidavits, and representations submitted by Acquiring’s Company Official and Authorized Representatives explain the circumstances that resulted in the failure to make a valid election. The information established that Acquiring’s Company Official was responsible for making the election, that Acquiring relied on the Official to timely make the election, and that the government will not be prejudiced if relief is granted.

Based on the facts and information submitted, including the representations that have been made, we conclude that Acquiring acted reasonably and in good faith in failing to timely file the election, 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 Acquiring to file the election with respect to the acquisition of the stock of Target as described above.

The above extension of time is conditioned on the taxpayers’ (Acquiring’s and Target’s) tax liability 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 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 taxpayer’s liability is lower.

Acquiring should file the elections in accordance with § 1.338-1(d). A copy of this letter should be attached to the election form. Acquiring must file or amend its return (along with the target corporation, if and as applicable), to report the acquisition as a “section 338 transaction” and to attach a copy of this letter, the election form and the information required therewith.

No opinion is expressed as to (1) whether Acquiring's acquisition of Target stock qualifies as a qualified stock purchase, (2) whether the acquisition of Target stock qualifies for § 338(a) treatment, and (3) if the acquisition of Target stock qualifies for § 338(a) treatment, as to the amount of gain or loss, if any, recognized by Target on Target's deemed assets sale.

In addition, no opinion is expressed as to the tax effects or 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 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.

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.

Pursuant to power of attorney on file with this office, a copy of this letter is being sent to your Authorized Representatives.

Sincerely yours,

Assistant Chief Counsel (Corporate)

By: Bernita L. Thigpen  
Deputy Assistant Chief Counsel  
(Corporate)