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Internal Revenue Service

Department of the Treasury

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Washington, DC 20224

Person to Contact:

Telephone Number:

Refer Reply To:
CC:DOM:CORP: 5 - PLR-117228-98
Date:
February 16, 1999

Parent =

Bank =

Purchaser =

Holding =

Seller =

Target =

Parent's Company
Official =

Holding's Tax Professional =

Holding's Company Official =

Parent's Tax Professional =

Authorized Representatives =

Date A =

Date B =

Date C =

Dear

This responds to your Authorized Representatives' letter dated September 1, 1998, requesting an extension of time under § 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations to file an election. Parent and Holding (as the common parents of the respective consolidated groups that include Purchaser and Seller) are requesting the extension to file a joint "section 338(h)(10) election" under § 338(h)(10) of the Internal Revenue Code and § 1.338-1(c)(10) and 1.338(h)(10)-1(d) of the Income Tax Regulations (the "Election"), with respect to Purchaser's acquisition of Target on Date A. Parent's return for the taxable year in which the acquisition was consummated is presently being examined by the applicable District Director's office, and this request has been coordinated therewith, pursuant to Rev. Procs. 98-1 and 98-2, 1998-1 I.R.B. 7 and 74, respectively, and the corresponding provisions in Rev.

Procs. 99-1 and 99-2, 1991-1 I.R.B. Additional information was received in a letter dated February 8, 1999. The material information is summarized below.

Parent is the common parent of a consolidated group that has a taxable calendar year and uses the accrual method of accounting. Purchaser is a wholly-owned subsidiary of Bank, which is a wholly-owned subsidiary of Parent. Purchaser and Bank are included in Parent's Consolidated United States Corporate Income Tax Return.

Holding is the common parent of a consolidated group that has a taxable calendar year and uses the accrual method of accounting. Target was a wholly-owned subsidiary of Seller, which is a wholly-owned subsidiary of Holding. Target and Seller were included in Holding's Consolidated United States Corporate Income Tax Return for the year in which the below described transaction was consummated.

On Date A, Purchaser and Seller entered into a Stock Purchase Agreement for Purchaser to acquire all of the outstanding shares of Target from Seller. Also on Date A, pursuant to the Stock Purchase Agreement, Purchaser acquired all of the stock of Target from Seller for cash in a fully taxable transaction. It is represented that (1) Purchaser was not related to Seller within the meaning of § 338(h)(3), and (2) Purchaser's acquisition of Target stock qualified as a "qualified stock purchase", as defined in § 338(d)(3).

Parent and Holding intended to file the Election. The Election was due on Date B, but for various reasons it was not filed. On Date C (which is after the due date for the Election), Parent's Company Official, Parent's Tax Professional, Holding's Company Official, Holding's Tax Professional and Authorized Representatives discovered that the Election was not timely filed. The statute of limitations under § 6501(a) has not expired for Parent's, Bank's, Purchaser's, Holding's, Seller's or Target's taxable year in which the acquisition/sale was consummated, the taxable year the Election was due, or for any 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." Section 1.338-1(c)(10) provides that a "section 338" election is an election to apply section 338(a) to target. Section 338(g) specifies the requirements for making a "section 338 election." Section 1.338(h)(10)-1(d)(3) provides that if a § 338(h)(10) election is made for T, a "section 338 election" is deemed made for T. 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 1 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 the 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 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 provide that if a § 338(h)(10) election must be made jointly by the purchasing corporation and the selling corporation (or by the common parent of the consolidated group(s), or the selling affiliate, or the S corporation shareholders, as applicable). The instructions provide that the form must be signed by each person authorized to act on behalf of each corporation, and if it 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 specific details as to the preparation of the "signature attachment" and its attachment to Form 8023-A.

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 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 301.9100-1(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 section 301.9100-2. Requests for relief under section 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 the regulations (i.e., § 1.338(h)(10)-1(d)). Therefore, the Commissioner has discretionary authority under § 301.9100-1 to grant an extension of time for Parent and Holding to file the Election, provided Parent and Holding 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 Parent, Holding, Parent's Company Official, Parent's Tax Professional, Holding's Company Official, Holding's Tax Professional and Authorized Representatives 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 Parent and

Holding 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 Parent and Holding 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 Parent and Holding (as the common parents of the respective consolidated groups that include Purchaser and Seller) to file the Election with respect to the acquisition of Target, as described above.

The above extension of time is conditioned on the taxpayers' (Parent's, Bank's, Purchaser's, Holding's, Seller'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 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). The above extension is also conditioned on (i) Parent and Holding both signing the Election, and (ii) Parent and Holding both treating the acquisition/sale of Target stock as a § 338(h)(10) transaction.

Parent and Holding must file the Election in accordance with § 338(h)(10)-1(d) (i.e., a new election on Form 8023-A 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. Parent and Holding must amend their applicable returns to report the transaction as a "section 338(h)(10)" transaction and to attach a copy of the "new" election form (and the information required therewith) and a copy of this letter to the return. 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, thus, by Holding) on Target's deemed asset sale.

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.

Pursuant to powers of attorney on file in this office, we are sending copies of this letter to the designated authorized representative and to Holding's Company Official.

Sincerely yours,
Assistant Chief Counsel (Corporate)

by _____
Richard Todd
Counsel to the Assistant Chief
Counsel (Corporate)