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Internal Revenue Service

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Department of the Treasury

Washington, DC 20224

Person to Contact:

Telephone Number:

Refer Reply To:

CC:DOM:CORP:5 PLR-119393-98

Date:
February, 22, 1999

Parent =

Sub =

Purchaser =

Sellers =

Target =

Corp =

Company Official =

Business A =

Authorized Representatives =

Date A =

Date B =

Date C =

X % =

Dear

This letter responds to your Authorized Representatives' letter, dated October 13, 1998, requesting an extension of time under §§ 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations to file an election. The extension is being requested for Purchaser (as the common parent of the consolidated group of which the purchasing corporation is a member, and as the United States shareholder of the controlled foreign purchasing corporation) to file an election under § 338(g) of the Internal Revenue Code and §§ 1.338-1(d) and 1.338-1(g) of the Income Tax Regulations with respect to the Purchaser's acquisition of the stock of Target (sometimes hereinafter referred to as the "Election"), on Date A. Additional information was received in letters dated December 14, 1998, and February 22, 1999. The material information submitted for consideration is summarized below.

Parent is the common parent of a consolidated group that has a calendar taxable year and uses the accrual method of accounting. Purchaser is a wholly owned subsidiary of Sub, which in turn is a wholly owned subsidiary of Parent. Target was wholly owned by Sellers (Sellers are foreign individuals and/or entities whose exact identity, and country of citizenship and residency, is recorded in the above redacted legend -- they are not United States shareholders, as defined in § 951(b)). Target's only asset was a X % interest (i.e., a minority interest that is less than 50%) in Corp. Sub, Purchaser, Target and Corp are foreign corporations (the exact country is recorded in the above redacted legend -- they are not United States shareholders, as defined in § 951(b)). Sub and Purchaser were newly formed by Parent for purposes of acquiring Target and its interest in Corp, and Parent and Target are engaged in Business A through their subsidiaries.

Prior to the below described acquisition, Sellers and Target did not file U.S. income tax returns, and they were not subject to U.S. income taxation. Further, Target was not: (1) a controlled foreign corporation within the meaning of § 957(a); (2) a

passive foreign investment company for which an election under § 1295 was in effect; (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. It is represented that Corp was not a "target affiliate," within the meaning of § 1.338-1(c)(14) and § 338(h)(6).

On Date A, Purchaser acquired from Sellers, for cash in fully taxable acquisitions, 100% of the stock of Target. It is represented that the acquisition of Target constituted a qualified stock purchase within the meaning of § 338(d)(3), and that Purchaser was not related to Sellers within the meaning of § 338(h)(3). The period of limitations on assessments under § 6501(a) has not expired for Purchaser's or Target's taxable year(s) 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.

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

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 transaction 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.

Sections 1.338-1(g)(1)(i) and (v) provide that for purposes of § 1.338-1(g)(1) (i.e., qualifying for the special rule when a foreign purchasing corporation or deemed purchasing corporation must file an election, which is a later filing date than the "ordinary" filing date required by § 338(g)), a foreign corporation is considered subject to United States tax (i.e., not eligible for the special rule) if it is a CFC. 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.

Section 1.338-1(g)(3) provides that the United States shareholders (as defined in § 951(b)) of a foreign purchasing corporation that is a controlled foreign corporation (as defined in § 957, taking into account § 953(c)) may file a statement of "section 338 election" on behalf of the purchasing corporation if the purchasing corporation is 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. 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 corporation) filed with respect to the purchasing corporation by each United States shareholder for the purchasing corporation.

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 301.9100-1(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 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 Purchaser to file the Election, provided Purchaser 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 Company Official and Authorized Representatives explain the circumstances that resulted in the failure to file a valid Election. The information establishes that tax professionals were responsible for the Election, that Purchaser relied on the tax professionals to timely make the Election, and that the government will not be prejudiced if relief is granted. See § 301.9100-3(b)(v).

Based on the facts and information submitted, including the representations that have been made, we conclude that Purchaser 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 Purchaser (as the common parent of the consolidated group of which the purchasing corporation is a member, and as the United States shareholder of the controlled foreign purchasing corporation) 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' (Purchaser's, Target'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 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).

Purchaser should file the Elections in accordance with § 1.338-1(d). That is, a new election 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 copy of this letter should be attached to the election form. Purchaser 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 (see §§ 1.338-1(g) and 1.338-5). That is, the "old" target must file a separate final return (if and as applicable) and the "new" target must be included in Purchaser's return (by being listed on Form 5471, information return with respect to a foreign corporation) for the first year following the acquisition. See: Announcement 98-2, 1998-2 I.R.B. 38, and § 1.338-1(g), with regard to which election form to use.

No opinion is expressed as to (1) whether Purchaser'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 recognized (if any) by Target on the deemed asset sales.

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.

A copy of this letter is being sent to the authorized representative you so designated on your power of attorney.

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
Counsel to the Assistant
Chief Counsel (Corporate)