Internal Revenue Service

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Department of the Treasury
199951036
Washington, DC 20224

Person to Contact:

Telephone Number:

Refer Reply To:
CC:DOM:CORP:1 PLR-122305-98

Date:
September 28, 1999

re:

Legend
Parent =

Sub #1 =

Sub #2 =

Sub #3 =

Sub #4 =

Sub #5 =

Sub #6 =

Purchaser =

Sellers =

Target =

Target Affiliates =

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Company Officials
& Tax Professionals =

Authorized
Representatives =

Business A =
Business B =
Date #A =

Date #B =

Date #BB =

Date #C =

Date #D =
Date #E =

Date #F =
Date #G =
X Taxable Year =
F Country =
A% =
B% =
c =
d =
P =
Z =
Article X =

Dear :

This letter responds to your letter, dated December 11, 1998, on behalf of the above taxpayers, requesting an extension of time under §§ 301.9100-1 and 301.9100-3

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of the Procedure and Administration Regulations to file elections. The extension is being requested for Parent (as the common parent of the consolidated group of which the United States shareholder of the controlled foreign purchasing corporation and deemed controlled foreign purchasing corporations is a member) to file elections 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 Purchaser's acquisition of the stock of Target and the deemed acquisition of the stocks of the Target Affiliates (sometimes hereinafter referred to collectively as the "Elections" or the "Election") on Date #D. Additional information was received in letters dated March 4, April 22, April 26, May 7 and 17, July 21 and 22, and August 26 and 27, 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. All of the shares of Sub #6 are owned by Purchaser (and because Sub #6 is a disregarded entity it is treated as a branch of Purchaser); all of the shares of Purchaser are owned by Sub #5; all of the shares of Sub #5 are owned by Sub #4, and all of the shares of Sub #4 are owned by Sub #3 (and because Sub #5 and Sub #4 are disregarded entities they are treated as branches of Sub #3); A% of the shares of Sub #3 are owned by Parent and B% by Sub #2; all of the shares of Sub #2 are owned by Sub #1 (except for c shares of preferred stock that are owned by the public); and all of the shares of Sub #1 are owed by Parent (except for d shares of preferred stock that are owned by Parent's indirect subsidiaries). Sub #1, Sub #2 and Sub #3 are domestic corporations; Sub #4, Sub #5, Purchaser and Sub #6 are F Country corporations; and all of said corporations are included in Parent's consolidated return (along with other subsidiaries that are not relevant for purposes of this letter) (i.e., Sub #1, Sub #2 and Sub #3 by being directly included; Sub #4 and Sub #5 by being disregarded entities and, thus, branches of Sub #3; Purchaser by being listed on Form 5471, Information Return With Respect to a Foreign Corporation; and Sub #6 by being a disregarded entity and, thus, a branch of Purchaser, an entity that is listed on Form 5471). All of the shares of Target Affiliate # 1, Target Affiliate #2, Target Affiliate #3, Target Affiliate #4 and Target Affiliate #5 are owned by Target; and all of the shares of Target are owned by Sellers. Target is an F Country corporation. Target Affiliate #1, Target Affiliate #2, Target Affiliate #3, Target Affiliate #4, and Target Affiliate #5 are F Country corporations, and they are sometimes hereinafter referred to collectively as the "Target Affiliates" or the "Target Affiliate" (as also indicated in the above redacted legend). Sellers are not United States shareholders, as defined in § 951(b), and their identity, country of citizenship and residency is fully recorded in the above redacted legend. Parent and its subsidiaries are engaged in Business A, and Target and its subsidiaries are engaged in Business B.

Prior to the below described acquisition, Sellers, Target and the Target Affiliates did not file United States income tax returns, and they were not subject to United States

income taxation. Further, neither Target nor any of the Target Affiliates was: (1) a controlled foreign corporation within the meaning of § 957(a) ("CFC"); (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.

On Date #B, Sub #4 and Sub #5 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 (which is before Date #B). Also, it is represented that Sub #6 timely 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 #BB (which is after Date #B, but before Date #C).

On Date #D (which is after Date #C), Purchaser acquired from Sellers, solely for cash in fully taxable acquisitions, 100% of the stock of Target (including the Target Affiliates). It is represented that the acquisition of Target, and the deemed acquisition of the Target Affiliates, each 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). Approximately two months after Purchaser's acquisition of Target (including Target Affiliates), Purchaser contributed the stock of Target (including Target Affiliates) to Sub #6. Purchaser had acquired the stock of Sub #6 in P , which is in a taxable year prior to the taxable year that contains Date #D. Again, remember that Sub #6 became a disregarded entity effective on Date #BB, which is before Date #D.

On Date #E (which is after Date #D), Target and each of the Target Affiliates 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 #C (i.e., which is after Date #B). The prior owners of Target and Target Affiliates (i.e., Sellers) did not consent to the change in classification. Sub #4, Sub #5, Target and Target Affiliates were foreign eligible entities treated as associations under the default provisions of § 301.7701-3(b)(2)(B).

Related to or subsequent to Purchaser's acquisition of the stock of Target (including Target Affiliates), there have been two loans directly or indirectly involving the Purchaser. To acquire Target (including Target Affiliates), Purchaser borrowed funds ("Loan # 1") from a domestic member of the Parent affiliated group. As of the end of Z (which is in the year of the acquisition), Purchaser has not repaid Loan # 1. Interest paid by the Purchaser to the Parent affiliated group member will be deductible by Purchaser for F Country tax purposes and for calculating U.S. earnings and profits. In addition, interest paid by Purchaser on Loan # 1 will be exempt from the F Country withholding tax under Article X of the United States - F Country income tax treaty.

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Sub #6, a F Country corporation, has borrowed money ("Loan # 2") from Sub #5, another corporation. Interest paid by Sub #6 on Loan # 2 will be deductible for F Country tax purposes and for calculating the U.S. earnings and profits of Purchaser. The interest that Sub #5 receives from Loan # 2 will be treated as income for F Country tax purposes, and also will be treated as foreign source income to Sub #3 for U.S. income tax purposes and included in the Parent consolidated return. The Loan # 2 interest income will enter into the calculation of whether Sub #5, as a separate unit of Sub #3, will have a dual consolidated loss under § 1503(d). Parent has represented that for purposes of § 1503(d), Sub #4 and Sub #5 are separate branches of Sub #3 that will be treated as one separate unit of Sub #3.

Parent has made the following representations related to its request for relief under § 301.9100 to file late § 338(g) elections for Target and Target Affiliates:

1. Purchaser is a controlled foreign corporation ("CFC") within the meaning of § 957(a).

2. Prior to Purchaser's purchase of the stock of Target stock and Target Affiliates, neither Target nor any of the Target Affiliates was: (a) a CFC within the meaning of § 957(a), (b) a passive foreign investment company for which an election under § 1295 was in effect, or (c) a foreign investment company or a foreign corporation the stock ownership of which is described in § 552(a)(2).

3. Under §§ 1.1503-2(b)(1), (c)(2), and (c)(3), Sub #4 and Sub #5 are disregarded entities and separate branches of Sub #3 and are treated as one separate unit of one dual resident corporation.

4. Because Sub #4 and Sub #5 were treated as one separate unit in calculating the dual consolidated income and loss for the 1998 Parent consolidated federal income tax return, Sub #5's income and loss were treated as attributable to Sub #4. Parent is reconsidering the correctness of the legal position and is researching the matter further under § 1.1503-2.

5. To the extent that Sub #4 and Sub #5 have net losses in the F Country, the net losses can be surrendered to other members entitled to group relief in the F Country.

6. Net losses of Sub #4 and Sub #5 will be dual consolidated losses in the United States and cannot offset income from other domestic Parent affiliates.

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7. No election has been filed for either Sub #4 or Sub #5 that would permit unrestricted use of their net losses, expenses, or deductions in the United States.

8. The interest paid by Sub #6 on Loan # 2 will be deductible by Sub #6 for F Country income tax purposes.

9. The interest income from Loan # 2 will be treated as foreign source income to Sub #3 for U.S. income tax purposes and will be includible in the Parent consolidated return.

10. Sub #5 will include interest income from Loan # 2 in the calculation of whether Sub #5 will have a dual consolidated loss under § 1503(d), as a separate unit of Sub #3.

11. Any interest paid by Sub #6 on Loan # 2 will be deductible by Purchaser for purposes of U.S. earnings and profits calculations.

12. Because Sub #5 will be treated as a branch of a dual resident corporation, Sub #5 will not treat interest income from Loan # 2 as subpart F income.

13. For purposes of § 1.1503-2(d)(1)(ii), Sub #4 and Sub #5 will use the U.S. dollar as their functional currency.

14. For purposes of § 1.1503-2(f), Sub #4 and Sub #5 will treat domestic interest allocated under § 1.861-8 as an unrelated item that is taken into account in the current year rather than as a separate unit item that is not taken into account until absorbed.

15. For purposes of calculating dual consolidated losses, the § 78 amount of any dividend paid by a CFC to Sub #4 or Sub #5 will be treated as an item of income.

16. Parent has no present intention to change the stock ownership of Sub #4 or Sub #5.

The Elections were due on Date #F (which is after Date #E). However, for various reasons the Elections were not filed. On Date #G (which is shortly after Date #F), Company Officials & Tax Professionals 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. It is

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represented that the period of limitations on assessments under § 6501(a) has not expired for Parent's, Purchaser's, Target's, or Target Affiliates' taxable year(s) in which the acquisition(s) occurred, the taxable year(s) in which the Elections should have been filed, or any taxable years that would have been affected by the Elections had they been timely filed. Moreover, no return has been filed that is not consistent with the Elections, and the Service has not discovered that the Elections have not been 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 "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.

Sections 1.338-1(g)(1)(i) and (v) provide, inter alia, that a foreign purchasing corporation or deemed foreign purchasing corporation is not eligible for the special rule under § 1.338-1(g)(1) (i.e., which specifies a filing date for the election that is later than the filing date required by § 338(g) and § 1.338-1(d)) if such foreign corporation is considered subject to United States tax (e.g., is a CFC or is required to file a United States income tax return). 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 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 must be filed in accordance with the instructions to the form, and a copy of the form must be attached to Form 5471 (Information Return With Respect to Foreign Corporation) and filed with respect to the purchasing corporation by each United States shareholder for the purchasing corporation.

Section 1.338-1(c)(14) provides that the term "target affiliate" has the same meaning as in § 338(h)(6), applied without § 338(h)(6)(B)(i), and that if a target affiliate is acquired in a qualified stock purchase, it is also a target. 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. Under § 338(h)(3)(B), new target's deemed purchase of stock of another corporation is a purchase for purposes of § 338(d)(3) on the acquisition date of target. If new target's deemed purchase causes a qualified stock purchase of the other corporation and if a § 338 election is made for the other corporation, the acquisition date for the other corporation is the same as the acquisition date of target. However, the deemed sale and purchase of the other corporation's assets is considered to take place after the deemed sale and purchase of target's 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 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. See § 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

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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. See 301.9100-3(a).

In this case, the time for filing the Elections was fixed by the regulations (i.e., §§ 1.338-1(d) and 1.338-1(g)). Therefore, the Commissioner has discretionary authority under § 301.9100-1 to grant an extension of time for Parent to file the Elections, provided Parent 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 Officials & Tax Professionals and Authorized Representatives explain the circumstances that resulted in the failure to file the Elections. The information establishes that tax professionals were responsible for the Elections, that Parent relied on the tax professionals to timely make the Elections, and that the government will not be prejudiced if relief is granted. The information also establishes that the failure to make the Elections was discovered by the tax professionals only days after the due date, that no returns have been filed that are not consistent with the Elections, and that relief was requested before the failure to make the Elections was discovered by the Service. See §§ 301.9100-3(b)(1)(i) and (v).

Under § 301.7701-3(b)(2), Target and Target Affiliates are treated as associations taxed as corporations unless a different treatment is elected. Section 301.7701-3(a) indicates that an eligible entity with a single owner can elect to be classified as an association or to be disregarded as an entity separate from its owner. As of Date #D, Target and Target Affiliates would be considered to each have a single owner and would have been entitled to elect disregarded treatment.

Section 301.7701-3(c)(1)(i) provides the general requirements for a classification election. Under § 301.7701-3(c)(1)(iii), the effective date specified on the Form 8823 can be up to 75 days prior to the date on which the election is filed. If an election is to have a retroactive effective date, each person who was an owner between the date the election is to be effective and the date the election is filed, and who is not an owner at the time the election is filed, must also sign the election. See § 301.7701-3(c)(2)(ii).

In the present situation, the elections to be treated as a disregarded entity were filed on Date #E, with a retroactive effective date of Date #C. However, the Target group (i.e., Target and Target Affiliates) was purchased on Date #D. Therefore, for the entity classification elections to have been valid, the signatures of the prior owners of the Target group (i.e., Target and Target Affiliates) were required. There is no authority under the regulations to treat an election that fails to comply with § 301.7701-3(c)(2)(ii)

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as valid. Accordingly, we hold that because such elections did not contain the necessary signatures, they were invalid, and Target and Target Affiliates retained their default classification as associations.[1]

In addition, based on the facts and information submitted, including the representations that have been made, we conclude that 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, subject to the below conditions, we grant an extension of time under § 301.9100-1, until 30 days from the date of issuance of this letter, for Parent (as the common parent of the consolidated group of which the United States shareholder of the controlled foreign purchasing corporation and deemed controlled foreign purchasing corporations is a member) to file the Elections with respect to the acquisition of the stock of Target and deemed acquisition of the stocks of the Target Affiliates, as described above.

The above extension of time to file the Elections is conditioned on: (1) Target and Target Affiliates having retained their default classification as associations on the acquisition date (i.e., being associations on Date #D, and not having valid "disregarded entity" elections with an effective date of Date #D); and (2) the taxpayers' (Parent's and its subsidiaries' (including Sub #1's, Sub #2's, Sub #3's, Sub #4's, Sub #5's, Sub #6's and Purchaser's), Target's and its subsidiaries' (including Target Affiliates') 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).

Parent should file the Elections in accordance with §§ 1.338-1(d) and 1.338-1(g). That is, new elections on 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 (a single Form 8023 may be used, with the Target Affiliates listed on signature and information attachments -- see the instructions to the form). A copy of this letter should be attached to the election form. Parent must amend any returns in which Target and Target Affiliates were treated as disregarded entities on Date #D, to instead treat Target and Target Affiliates as corporations. Parent must file amend its return (and Target

[1]Parent disagrees with this conclusion. Parent contends that there are valid "check-the-box" elections for Target and Target Affiliates.

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and Target Affiliates must file final returns, if and as applicable) to report the actual and deemed stock acquisitions/sales as "section 338 transactions," and attach thereto a copy of this letter and a copy of the election form (also see §§ 1.338-1(g) and 1.338-5). That is, the "old" Target and Target Affiliates must file separate final returns (if and as applicable) and the "new" Target and Target Affiliates must be included in Parent's return (by being listed on Form 5471, information return with respect to a foreign corporation) for the first year following the acquisition. See §§ 1.338-1(e) and1.338-1(g), and Announcement 98-2, 1998-2 I.R.B. 38. In addition, Target and Target Affiliates may request an extension of time under § 301.9100-1and-3 to make late disregarded entity elections; but the effective date of such disregarded entity elections will have to be a date other than the acquisition date (i.e., Date #D), because the conflict between the disregarded entity regulations and the § 338 regulations prevents § 338 from applying if the effective date of the two is the same.

No opinion is expressed as to: (1) whether the acquisition of Target stock, and deemed acquisition of Target Affiliates' stock, qualify as "qualified stock purchases"; (2) whether the acquisition of Target stock, and deemed acquisition of Target Affiliates' stock, qualify for § 338(a) treatment; (3) if the acquisition of Target stock, and deemed acquisition of Target Affiliates' stock, qualify for § 338(a) treatment, as to the amount of gain or loss recognized (if any) by the applicable Target and Target Affiliates on the deemed asset sales; or (4) whether Sub #4 and Sub #5 are in fact disregarded entities for purposes of the Federal Income Tax Code.

No opinion is expressed about the tax treatment or the accuracy of the tax treatment related to any of the above provided representations. In addition, no opinion is expressed about the tax treatment of any conditions existing at the time of, or effects resulting from, the purchase of the stock of Target and Target Affiliates not specifically covered by the above rulings.

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 company official designated on your power of attorney.

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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)

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