199951045

Internal Revenue Service

Department of the Treasury

Index Number: 0338.01-02
9100.07-00

Washington, DC 20224

Person to Contact:

Telephone Number:

Refer Reply To:
CC:DOM:CORP:5 PLR-110335-99
Date:
September 28, 1999

LEGEND

Purchaser =

Sub =

Target =

Sellers =

Date A =

Date B =

Date C =

311

PLR-110335-99

199951045

X% =
Y% =

Business L =

Business M =

Company Official =

Outside Tax
Professional =

Authorized
Representative =

Dear :

This responds to your Authorized Representatives' letter dated June 1, 1999, requesting an extension of time under § 301.9100-1 through 301.9100-3 of the Procedure and Administration Regulations to file an election. Purchaser and Seller are requesting an 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 the Target stock on Date D. Additional information was received in letters dated July 30 and September 3, 1999. The material information is summarized below.

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Purchaser, a publicly traded corporation engaged in Business L, is the common parent of a consolidated group. Sub was a wholly owned subsidiary of Purchaser that was newly formed as a special acquisition corporation. Target was an S corporation, within the meaning of § 1361, engaged in Business M, and was wholly owned by Sellers (i.e., grantor trusts for three individuals). Target does not have any subsidiaries or disregarded entities.)

On Date A, Purchaser, Sub, Sellers and Target entered into a stock acquisition agreement and plan of merger, pursuant to which Sub would merge with and into Target in an acquisition structured as a reverse triangular merger, with the Sellers receiving Purchaser stock and dissenters receiving some cash provided by Target. Also on Date A, pursuant to the plan, Sub merged into Target with the exchanging shareholders (however, the exchanging Sellers) receiving Purchaser voting stock for approximately X% of the Target stock and with the dissenting shareholders (i.e., the dissenting Sellers) receiving cash supplied by Purchaser for approximately Y% of the Target stock (i.e., cash supplied by Purchaser constituted more than 20% of the total consideration for the stock of Target -- See § 368(a)(2)(E)(ii)). It is represented that the transaction was a fully taxable transaction, and that it did not qualify as a reorganization under § 368(a)(2)(E) because of the amount of cash received by the dissenting Sellers that was supplied by Purchaser. It is also represented that (1) Purchaser was not related to Sellers 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). Following the acquisition, "new" Target was included in Purchaser's consolidated group as a Subchapter C corporation.

Purchaser and Sellers intended to file the Election. The Election was due on Date B (which is after Date A). However, for various reasons a valid Election was not filed. On Date C (which is after Date B), Company Official, Outside Tax Professional 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.

The period of limitations on assessments under § 6501(a) has not expired for Purchaser's, Sellers' or Target's taxable year(s) in which the acquisition occurred, the taxable year(s) in which the Election should have been filed, or any taxable year(s) that would have been affected by the Election had it been timely filed. Further, the Service has not discovered that the Election has not been filed, and none of the taxpayers (or related entities or individuals) have filed a return (or otherwise taken a reporting position) that is not consistent with making the Election.

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 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 QSP 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 jointly elect 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 QSP is generally 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 QSP 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.

More specifically, Target is treated as if, while a member of the selling group (or owned by the selling affiliate or S corporation shareholders), it distributed all of its assets in complete liquidation. If target is an S corporation immediately before the acquisition date, nothing in the § 338 provisions prevents a holder of target stock from taking deemed sale gain into account under §§ 1366 and 1367. See § 331 or 332 for gain or loss recognized by the old target shareholders as a result of the deemed liquidation. Section 1.338(h)(10)-1(e)(2)(ii). No gain or loss is recognized on the sale or exchange by the selling consolidated group (or the selling affiliate or an S corporation shareholder) of target stock included in the QSP. If target is an S corporation immediately before target's acquisition date, the sale or exchange of old

target does not result in a termination of the § 1362(a) election for the S corporation. Section 1.338(h)(10)-1(e)(2)(iv).

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 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 provide that a § 338(h)(10) election must be made jointly by the purchasing corporation (or the common parent of the consolidated group of which the purchasing corporation is a member, or the selling affiliate or S corporation shareholders) and the selling corporation (or the common parent of the consolidated group of which the selling corporation is a member, or the selling affiliate or S corporation shareholders). The instructions provide that 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 "qualified stock purchase." 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.

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. Section 301.9100-1(a). Section 301.9100-2 provides automatic extensions of time for making certain elections. 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 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 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, Company Official, Outside Tax Professional and Authorized Representatives explain the circumstances that resulted in the failure to timely file a valid Election. The information establishes that the Service has not discovered that the election has not been filed, and that none of the taxpayers (or related entities or individuals) have filed a return (or otherwise taken a reporting position) that is not consistent with making the Election. The information also establishes that the government will not be prejudiced if relief is granted. See §§ 301.9100-3(a) and 301.9100-3(b)(1)(i).

Based on the facts and information submitted, including the representations made, we conclude that Purchaser and Sellers 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: (i) Purchaser and each and every one of the Sellers signing the Election, (ii) Purchaser and each and every one of the Sellers treating the acquisition/sale of the Target stock as a § 338(h)(10) transaction, and (iii) the taxpayers' (i.e., Purchaser's and Sellers') tax liability (if any) being not lower, in the aggregate, for all years to which the Election apply, 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 and Sellers must file the Election in accordance with § 1.338(h)(10)-1(d). That is, a new Election 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 to the form. See Announcement 98 -2, 1998 -2 I.R.B. 38. A copy of this letter should be attached to the election form.

Purchaser and Sellers must file their returns to report the transaction as a § 338(h)(10) transaction for the year in with the transaction was consummated, and attach to the return a copy of this letter and a copy of the Election.

We express no opinion: (1) as to whether the acquisition/sale of Target's stock qualifies as a QSP under § 338(d)(3); (2) as to whether the acquisition/sale of Target's 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 Sellers) 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 who requested it. Section 6110(k)(3) provides that it may not be used or cited as precedent.

Pursuant to the powers of attorney on file in this office, copies of this letter are being sent to designated authorized representatives for delivery to Purchaser and Seller.

Sincerely yours,
Assistant Chief Counsel (Corporate)

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