

Internal Revenue Service

Department of the Treasury

Number: **200306023**
Release Date: 02/07/2003
Index Number: 382.02-05
9100.00-00

Washington, DC 20224

Person to Contact:

Telephone Number:

Refer Reply To:

CC:CORP:B03-PLR-151025-02

Date:

October 31, 2002

LEGEND

Parent =

Acquiror =

Company A =

Company B =

Company C =

Company D =

Company E =

Company Official =

Business F =

Tax Preparer =

State W =

State X =

State Y =

Country Z =

Date 1 =

Date 2 =

Date 3 =

Date 4 =

Year 5 =

g% =

\$h =

\$i =

\$j =

\$k =

\$l =

\$m =

Dear _____ :

This responds to a letter dated September 16, 2002 submitted on behalf of Parent consolidated group requesting an extension of time under §§ 301.9100-1 through 301.9100-3 of the Procedure and Administration Regulations to file an election. Parent, as the common parent of an affiliated group of corporations that file a consolidated Federal income tax return, (the "Group" or "Taxpayer") is requesting an extension to file a "closing-of-the-books election" pursuant to § 1.382-6(b) of the Income Tax Regulations (the "Election"), with respect to a transaction that occurred on Date 1. Additional information was received in a letter dated October 14, 2002. The material information is summarized below.

Parent, a State W corporation, and the other members of the Group are engaged in Business F. The Parent consolidated group was composed of Parent; Company C, a State X corporation; Company D, a State X corporation; and Company E, a State Y corporation. The Group computed its consolidated Federal income tax liability using an accrual method of accounting and filed its consolidated Federal income tax returns on a calendar year basis.

On Date 1, Acquiror, a Country Z corporation, acquired g% of the stock of Company A and thus, indirectly, its subsidiaries, including Company B, a Country Z corporation. At the time of acquisition (the "change date transaction"), Company B owned all the stock of Parent. As a result of the change date transaction, the Group had an ownership change as defined in § 382(g) of the Internal Revenue Code.

For the entire tax year ending on Date 2, the consolidated net operating loss for the Group was \$h. Under the pro-rata allocation method, \$i would be allocable to the pre-change period and \$j would be allocable to the post-change period. Under the closing-of-the-books method, \$k would be allocable to the pre-change period and \$l would be allocable to the post-change period. The consolidated § 382 limitation is \$m.

The Election was due on Date 3, but for various reasons it was not filed. In the early part of Year 5, Tax Preparer discovered and informed Parent that the Election was not filed. Subsequently this request was submitted, under § 301.9100-1, for an extension of time to file the Election. The period of limitations on assessment under § 6501(a) expired on Date 4 for the taxable year for which the Group's Election should have been filed.

The following representations have been made in connection with this request:

(1) Parent's failure to make the Election under § 1.382-6(b) on its timely filed tax return has not been discovered by the IRS.

(2) The Group has not carried back and will not carry back, under § 172, or any applicable section of the consolidated return regulations, any portion of the consolidated net operating loss it incurred in the tax year ended on Date 2 to a prior tax year. The Group incurred consolidated net operating losses in the tax years that would otherwise have qualified under § 172 and any applicable section of the consolidated return regulations as carry back years for the consolidated net operating loss it incurred in the tax year ended on Date 2.

(3) The Group is a “loss group” within the meaning of § 1.1502-91T(c)(1) (as in effect for the change date transaction tax year) with respect to certain net operating loss carryovers.

(4) As a result of the change date transaction on Date 1, Parent underwent an ownership change as defined in § 382(g)(1).

(5) The Group has not accelerated income into the pre-change period or deferred loss to the post-change period for the purpose of avoiding the application of § 382(b).

(6) Parent is not under the jurisdiction of a court in a Title 11 or similar case.

(7) Since Date 1, Parent has continued the operation of its historic trade or business within the meaning of § 1.1502-93T(d)(1) (as in effect for the change date tax year).

(8) All necessary amended returns will be filed to reflect the Election if relief is granted by this ruling request.

(9) The Group will determine its alternative minimum taxable income and adjusted current earnings for the pre-change and post-change periods based on a closing-of-the-books election as of the ownership change date, and will elect out of ratable allocation.

(10) An election under § 338 was not made in connection with the Date 1 acquisition.

Section 1.382-6(a) provides that, except as provided in paragraphs (b) and (d) of the section, a loss corporation must allocate its net operating loss or taxable income and its net capital loss or modified capital gain net income for the change year between the pre-change period and the post-change period by ratably allocating an equal portion to each day in the year.

Section 1.382-6(b)(1) provides that a loss corporation may elect to allocate its net operating loss or taxable income and its net capital loss or modified capital gain net

income for the change year between the pre-change period and the post-change period as if the loss corporation's books were closed on the change date.

Section 1.382-6(b)(2) provides that a loss corporation makes the closing-of-the-books election by including the following statement on the information statement required by § 1.382-2T(a)(2)(ii) for the change year: "THE CLOSING-OF-THE-BOOKS ELECTION UNDER § 1.382-6(b) IS HEREBY MADE WITH RESPECT TO THE OWNERSHIP CHANGE OCCURRING ON [INSERT DATE]." The election must be made on or before the due date (including extensions) of the loss corporation's income tax return for the change year.

Section 1.1502-91T(c)(1) (as in effect for the change date transaction year) defines a loss group as a consolidated group that: (i) is entitled to use a net operating loss carryover to the taxable year that did not arise (and is not treated under § 1.1502-21T(c) as arising) in a SRLY; (ii) has a consolidated net operating loss for the taxable year in which a testing date of the common parent occurs (determined by treating the common parent as a loss corporation); or (iii) has a net unrealized built-in loss.

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.

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., § 1.382-6(b)(2)). Therefore, the Commissioner has discretionary authority under § 301.9100-1 to grant an extension of time for Parent to file the Election, 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 Parent, Company Official, and Tax Preparer explain the circumstances that resulted in the failure to timely file a valid Election. The information establishes that the request for relief was filed before the failure to make the Election was discovered by the Internal Revenue Service and that the interests of the government will not be prejudiced if relief is granted. See § 301.9100-3(b)(1)(i).

Based on the facts and information submitted, including the representations made, we conclude that Parent has shown 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. Accordingly, an extension of time is granted under § 301.9100-1, UNTIL 45 DAYS FROM THE DATE OF THIS LETTER, for Parent to file the Election.

WITHIN 120 DAYS OF THE DATE ON THIS LETTER, Parent must file or amend, as applicable, the Group's consolidated income tax returns for all open taxable years affected by the Election and to attach to the returns a copy of the Election, a copy of the information statement (if one has not already been attached), and a copy of this letter.

The above extension of time is conditioned on: (1) the Taxpayer'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); (2) all members of the Group closing their books as of the ownership change date pursuant to § 1.382-6(b)(3)(i); and (3) income or loss allocated to the pre-change period not exceeding the taxable income or loss for the taxable year that includes the change date.

No opinion is expressed as to the taxpayers' tax liability for the years involved. A determination thereof will be made by the applicable 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' tax liability is lower. Section 301.9100-3(c).

We express no opinion as to: (1) whether the Group is a "loss group", as defined in § 1.1502-91T(c)(1), or (2) whether an ownership change, as defined in § 382(g) and § 1.382-2T(a)(1) and § 1.1502-92T(b)(1)(i), occurred on Date 1; or (3) any other tax consequences arising from the Election.

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 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 ruling is directed only to the taxpayer(s) requesting it. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.

In accordance with the Power of Attorney on file with this office, a copy of this letter is being sent to your authorized representative.

Sincerely,

Ken Cohen

Ken Cohen
Senior Technician Reviewer, Branch 3
Office of Associate Chief Counsel
(Corporate)