

Internal Revenue Service

Department of the Treasury

Number: **200402010**
Release Date: 1/9/2004
Index Number: 9100.22-00

Washington, DC 20224

Person to Contact:

Telephone Number:

Refer Reply To:
CC:CORP:B02-PLR-168939-02
Date:
September 30, 2003

LEGEND:

Acquiring

Acquiring Group

Acquiring Foreign Parent

Holdco

Holdco Group

Selling U.S. Group

Seller 1

Selling Foreign Parent

PLR-168939-02

Seller 2

Seller 2 Group

Target 1

Target 2

Target 3

Target 4

Target 5

Target 6

Target 7

Target 8

Target 9

Date 1

Date 2

Date 3

Date 4

Date 5

Date 6

PLR-168939-02

Company Official

Country Y

Country Z

Dear _____ :

This letter responds to a letter dated December 16, 2002, requesting, on behalf of Acquiring, an extension of time under § 301.9100-3 of the Procedure and Administration Regulations to file an election. The extension is being requested for Acquiring to file an election under § 1.1502-21(b)(3)(ii)(B) of the Income Tax Regulations to relinquish, with respect to all consolidated net operating losses (“CNOLs”) attributable to Targets 1 through 9, the portion of the carryback period for which Targets 1 through 9 were members of another group (sometimes hereinafter referred to as the “Election”). Additional information was submitted in letters dated April 9, April 23, May 7, and August 4, 2003. The material information submitted for consideration is summarized below.

Prior to Date 6, Acquiring was the common parent of Acquiring Group, an affiliated group of corporations filing a consolidated federal income tax return. At all relevant times, Acquiring has been controlled, directly or indirectly, by Acquiring Foreign Parent, a corporation organized under the laws of Country Y.

Since Date 6, all of the stock of Acquiring has been owned by Holdco. Acquiring is a member of the Holdco Group of which Holdco is the common parent and which has filed consolidated federal income tax returns.

On Date 2, Acquiring purchased 100% of the outstanding stock of Targets 1 through 9 from members of Selling U.S. Group, an affiliated group of corporations filing a consolidated federal income tax return. For all relevant periods, Seller 1 was the common parent of such group. Immediately prior to Date 2, Selling U.S. Group was controlled, directly or indirectly, by Selling Foreign Parent, a corporation organized under the laws of Country Z.

Seller 2 joined the Selling U.S. Group on Date 1. Prior to Date 1, Seller 2 was the common parent of Seller 2 Group, an affiliated group of corporations filing a consolidated federal income tax return. Seller 2 Group was controlled, directly or indirectly, by Selling Foreign Parent.

The Date 2 acquisitions were made pursuant to (i) a master agreement between Acquiring Foreign Parent and Selling Foreign Parent (the “Master Agreement”), (ii) a tax deed between Acquiring Foreign Parent and Selling Foreign Parent (the “Tax Deed”), and (iii) agreements between certain subsidiaries of Acquiring Foreign Parent and

PLR-168939-02

certain subsidiaries of Selling Foreign Parent. The Master Agreement and the Tax Deed are each governed by the law of Country Z. Neither the Master Deed nor the Tax Deed contain provisions dealing with the carryback of portions of Acquiring Group's CNOLs attributable to the Target corporations. There exist no other agreements dealing with such carrybacks.

For the taxable year ending Date 3, Acquiring Group timely filed a consolidated federal income tax return. Targets 1 through 9, and various other subsidiaries that are not relevant here, were included in Acquiring Group's consolidated return for the portion of the taxable year that they were members of the consolidated group.

The Election was due on Date 4, but for various reasons a valid election was not filed. On Date 5, after the due date for the Election, it was discovered that an Election had not been filed. Subsequently, this request was submitted, under § 301.9100-3, for an extension of time to file the Election. The period of limitations on assessment under § 6501(a) has not expired for Acquiring Group's or Selling U.S. Group's taxable years in which the Election should have been filed or any subsequent taxable years.

Selling U.S. Group and Seller 2 Group have represented that no member of the Selling U.S. Group or the Seller 2 Group has taken into account as a carryback on a federal income tax return (whether an original return or an amended return) any portion of a net operating loss of a Target company that arose in a taxable year of the Target company beginning after Date 2. Selling U.S. Group and Seller 2 Group have also represented that if the ruling is granted no member of Selling U.S. Group or Seller 2 Group will take into account as a carryback on a federal income tax return (whether an original return or an amended return) any portion of a net operating loss of a Target company that has arisen, or will arise, in a taxable year of the Target company beginning after Date 2.

Section 1.1502-21(b)(3)(ii)(B) provides that if one or more members of a consolidated group become members of another consolidated group, the acquiring consolidated group may elect to relinquish, with respect to all CNOLs attributable to the member, the portion of the carryback period for which the corporation was a member of another group. This election is available provided that any other corporation joining the acquiring group that was affiliated with the member immediately before it joined the acquiring group is also included in the waiver. This election is not a yearly election and applies to all losses that would otherwise be subject to a carryback to a former group under § 172.

The election is made in a separate statement entitled "THIS IS AN ELECTION UNDER SECTION 1.1502-21(b)(3)(ii)(B) TO WAIVE THE PRE-[insert first taxable year for which the member (or members) was not a member of another group] CARRYBACK PERIOD FOR THE CNOLs attributable to [insert names and employer identification number of members]." Section 1.1502-21(b)(3)(ii)(B) provides that the statement must be filed with the acquiring consolidated group's original income tax return for the year the corporation (or corporations) became a member, and it must be signed by the common parent and each of the members to which it applies.

PLR-168939-02

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. Section 301.9100-3 provides extension of time for making certain 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 time for filing the Election is fixed by the regulations (*i.e.*, § 1.1502-21(b)(3)(ii)(B)). Therefore, the Commissioner has discretionary authority under § 301.9100-3 to grant an extension of time for Acquiring (and Targets 1 through 9) to file the Election, provided Acquiring (and Targets 1 through 9) 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 Acquiring and Company Official explain the circumstances that resulted in the failure to timely file a valid Election. The information establishes that Acquiring reasonably relied upon a qualified tax professional who failed to make, or advise Acquiring to make, the Election, the request for relief was filed before the failure to make the Election was discovered by the Internal Revenue Service, and that the government will not be prejudiced if relief is granted. See §§ 301.9100-3(b)(1)(i) and (v).

Based on the facts and information submitted, including the representations made, we conclude that Acquiring has shown it 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 § 301.9100-3, until 45 days from the date on this letter, for Acquiring to file the Election regarding the relinquishment, with respect to all CNOLs attributable to the Target members, of the portion of the carryback period for which the Target corporations were members of another group, as described above.

Acquiring should file the Election by filing the statement described in § 1.1502-21(b)(3)(ii)(B). A copy of this letter should be attached to the Election statement.

The above extension of time is conditioned on Acquiring Group's, Holdco Group's, Selling U.S. Group's, and Seller 2 Group'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

PLR-168939-02

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).

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 § 301.9100-3, 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 § 301.9100-3 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 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 the taxpayer.

Sincerely,

Ken Cohen

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