

Internal Revenue Service

Department of the Treasury

Number: **200220016**
Release Date: 5/17/2002
Index Numbers: 9100.00-00, 382.02-05

Washington, DC 20224

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Refer Reply To:
CC:CORP:B05-PLR-165588-01
Date:
February 14, 2002

LEGEND

Parent =

Acquirer =

Merger Sub =

Investment Firm =

Company Official 1 =

Company Official 2 =

Tax Advisor =

Authorized
Representatives =

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A =

B =

State X =

State Y =

Date 1 =

Date 2 =

Date 3 =

Date 4 =

Date 5 =

Date 6 =

y =

z =

Dear

This responds to a letter dated November 30, 2001 submitted on behalf of the 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")) 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 3. Additional information was received in a letter dated January 10, 2002. The material information is summarized below.

Parent, a State X corporation, and the other members of the Group are engaged in the business of providing A and B services. The Group computes its consolidated federal income tax liability using an accrual method of accounting and files its consolidated federal income tax returns on a calendar year basis. The Group is a "loss group" within the meaning of § 1.1502-91(c)(1).

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On Date 1, Acquirer, a State Y limited liability company taxable as a partnership for Federal tax purposes and organized by Investment Firm, formed Merger Sub, a State Y corporation. On Date 2, Parent and Merger Sub entered into an agreement and plan of merger ("Agreement"), and Parent subsequently obtained the approval of its shareholders to proceed under the Agreement.

On Date 3, in accordance with the Agreement, Merger Sub merged with and into Parent (the "Merger"). Parent survived the Merger and pursuant to the Agreement, Acquirer acquired ownership of approximately y % (at least x %) of Parent's outstanding common stock in exchange for cash. The remaining z % of Parent shares were retained by management and other prior shareholders. The Merger resulted in an ownership change as defined in § 382(g) of the Internal Revenue Code and §§ 1.382-2T(a)(1) and 1.1502-92(b)(1)(i) on Date 3 for Parent and all of the other members of the Group. On Date 5, Parent filed a consolidated Federal income tax return for the taxable year ending on Date 4.

The Election was due on Date 5, but for various reasons it was not filed. On or about Date 6, Tax Advisor or Tax Advisor's firm 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) has not expired for the taxable year for which the Group's Election should have been filed, or for any taxable year(s) that would have been affected by the Election had it been timely filed.

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

- (1) 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);
- (2) The Group will determine its alternative minimum taxable income and adjust current earnings for the pre-change and post-change periods based on a closing of the books as of Date 3, and will elect out of ratable allocation;
- (3) The Group has not carried back, and does not intend to carry back, to a prior taxable year any portion of the consolidated net operating loss it incurred in its taxable year ended Date 4.
- (4) The Internal Revenue Service has not discovered Parent's failure to make the Election;
- (5) The Group is not currently under the jurisdiction of a court in a Title 11 or similar case; and
- (6) At all times since Date 3, the Group has continued the operations of its

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historic trade or business.

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 1.1502-91(c)(1) defines a loss group as a consolidated group that either: (i) is entitled to use a net operating loss carryover that did not arise (and is not treated 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; 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. See § 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. See § 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 that 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.

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Information, affidavits and representations submitted by Parent, Company Official 1, Company Official 2, Tax Advisor, and Parent's Authorized Representatives 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 that 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 on this letter, for Parent to file the Election, as described above.

The above extension of time is conditioned on (1) the filing by Parent, within 120 days of the date on this letter, of all returns and amended returns (if any) necessary to report the transaction in accordance with the Election, and (2) the taxpayers' (the 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 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. See § 301.9100-3(c).

Parent must file the Election in accordance with § 1.382-6(b)(2). That is, Parent must file or amend, as applicable, the Group's consolidated income tax returns for the taxable year in which the transaction was consummated (and for any other affected taxable year), 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.

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

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A copy of this letter must be attached to any income tax return to which it is relevant.

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 a power of attorney on file in this office, a copy of this letter is being sent to the first and second representatives listed on that power of attorney.

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

cc: