Internal Revenue Service

Department of the Treasury

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Person to Contact:

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April 12, 2000

LEGEND

Parent =

Sub #1 =

Sub #2 =

Sub #3 =

Acquiring #1 =

Acquiring #2 =

Parent's Official =

Acquiring #1's
Official =

Tax Professional =

Authorized
Representative =

X =
Y =
Z =
W =
Date A =
Date B =
Date C =
Date D =
Date E =
$A =
$B =
$C =
$D =
$E =

Dear :

This responds to your Authorized Representative's August 30, 1999 letter requesting, on behalf of the above taxpayers, an extension of time under §§ 301.9100-1 through 301.9100-3 of the Procedure and Administration Regulations to make an election. Parent (as the corporation to which the losses of Sub #2 will be reattributed, and as the common parent of the consolidated group of which Sub #2 was a member) and Acquiring #1 (as the common parent of the consolidated group of which Sub #2 is now a member) are requesting the extension to file an election under § 1.1502-20(g)(4)[(5)] (as in effect before being renumbered as § 1.1502-20(g)(4) by T. D. 8824, 64 F. R. 36116) of the Income Tax Regulations (sometimes hereinafter referred to as the "Election"), for Parent's taxable year ending on W. The Election is required for the reattribution of certain losses of Sub #2 to Parent. Parent's income tax returns for its Z taxable years, which includes its taxable year ending on W and is the taxable year in which the Election should have been made, is under examination by the District Director. This request has been coordinated with the District Director's office,

pursuant to section 5.02 of Rev. Proc. 2000-1, and section 5.01 of Rev. Proc. 2000-2, 2000-1 I.R.B. at 15-16 and 79, respectively. Additional information was received in letters dated October 7, 1999, and February 10 and 23, and March 14, 2000. The material information 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. Sub #1 was a wholly owned subsidiary of Parent, and Sub #2 and Sub #3 were wholly owned subsidiaries of Sub #1. Sub #2 has net operating losses, some of which are treated a separate return limitation year losses, which it can not currently use. Acquiring #1 and Acquiring #2 are each the common parent of a consolidated group that has a calendar taxable year and uses the accrual method of accounting, and that are not related to each other or to Parent.

On Date A (which is in Parent's taxable year ending on W, and is after February 1, 1991, the effective date of § 1.1502-20), Parent sold all of the stock of Sub #2 to Acquiring #1 for cash and an "earn out" (i.e., a cash "earn out" -- no additional consideration was received thereunder), and recognized a loss. On its return for its taxable year ending on W, Parent claimed a $A loss on the sale (which represents the amount of the loss recognized, reduced by $B of extraordinary gain dispositions, positive investment adjustments, and/or duplicated losses that are disallowed under §1.1502-20(c)(1)). On Date B (which is after Date A, but also in Parent's taxable year ending on W), Parent sold all of the stock of Sub #1 (including Sub #3) to Acquiring #2 for cash, and recognized a loss. Also, on its return for its taxable year ending on W, Parent claimed a $C loss on the sale (which represents the amount of the loss, reduced by certain extraordinary gain dispositions, positive investment adjustments, and/or duplicated losses that are disallowed under §1.1502-20(c)(1)).

It is represented that an election under § 338(h)(10) has not been made with respect to the sale of Sub #2 or Sub #1 stocks, and that fair market value was paid by Acquiring #1 for Sub #2 and by Acquiring #2 for Sub #1. It is also represented that at the time of the sale of Sub #2: (1) Sub #2 had current and prior year losses which qualified as allowable under § 1.1502-20(c); and (2) Sub #2 was not insolvent within the meaning of §1.1502-20(g)(2).

The Election was due on Date C (i.e., the date Parent filed its consolidated federal income tax return for its taxable year ending on W). However, the Election was not made. On Date D (which is after the due date for the Election), as part of the examination of Parent's return for its Z taxable years, the District Director proposed to reduce the deduction Parent claimed for the capital loss recognized on the sale Sub #2 stock by $D (which represents additional amounts of extraordinary gains and duplicated losses disallowed under § 1.1502-20(c)(1)). Parent then attempted to amend its return (for its taxable year ending on W) to reattribute $E of Sub #2's net operating losses to itself, and to deduct same on its return (for its taxable year ending on W). However, the District Director denied the reattribution of $E of Sub #2's net operating losses to Parent under § 1.1502-20(g), because the Election had not been timely filed. Subsequently,

this request was submitted to the Service, 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 Parent's or Acquiring #1's (or Sub #1's, Sub #2's, or Sub #3's) taxable year in which the sales occurred, the taxable year in which the Election should have been filed, or any taxable years that would have been affected by the Election had it been timely filed.

In order to reattribute any portion of Sub #2's losses to Parent, Parent (as the corporation to which the losses of Sub #2 will be reattributed, and as the common parent of the consolidated group of which Sub #2 was a member) and Acquiring #1 (as the common parent of the consolidated group of which Sub #2 is now a member) were required to make the Election and attach it to Parent's timely filed return for the year of disposition, and to attach a copy of the Election to Acquiring #1's income tax return for the first taxable year ending after the due date (including extensions) of the return in which the Election had to be filed. See § 1.1502-20(g)(5)[(4)].

Section 1.1502-20(a)(1) provides that, as a general rule, no deduction is allowed for any loss recognized by a member of a consolidated group with respect to the disposition of stock of a subsidiary. Section 1.1502-20(a)(2) provides that a disposition means any event in which gain or loss is recognized, in whole or in part. Section 1.1502-20(h) provides that, as a general rule, § 1.1502-20 applies with respect to dispositions on or after February 1, 1991.

Section 1.1502-20(g)(1) provides that, as a general rule, a common parent may reattribute to itself any portion of the net operating loss carryovers and net capital loss carryovers attributable to the subsidiary when a member disposes of stock of the subsidiary and the member's loss would be disallowed under § 1.1502-20(a)(1). The amount reattributed may not exceed the amount of loss that would be disallowed if no election is made under this paragraph (g). For this purpose, the amount of loss that would be disallowed is determined by applying paragraph (c)(1) of this section (without taking into account the requirement in paragraph (c)(3) of this section that a statement be filed) and by not taking reattribution into account. Section 1.1502-20(g)(2) limits reattribution of losses from insolvent members. Section 1.1502-20(g)(5)[(4)] provides that the election to reattribute losses under § 1.1502-20(g)(1) must be made in a separate statement, signed by the common parent and each subsidiary whose losses are being reattributed, and filed with the group's return for the taxable year of disposition. Also, § 1.1502-20(g)(5)[(4)](iii) requires that the subsidiary whose losses are reattributed (or the common parent of any consolidated group that acquires the subsidiary or lower tier subsidiary) must attach a copy of the election to its income tax return for the first tax year ending after the due date, including extensions, of the return in which the election is to be filed.

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.

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.

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. 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 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 was fixed by the regulations (i.e., § 1.1502-20(g)(5)[(4)]). Therefore, the Commissioner has discretionary authority under § 301.9100-1 to grant an extension of time for Parent and Acquiring #1 (for Sub #2) to file the Election, provided Parent and Acquiring #1 (for Sub #2) 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, Acquiring #1, Parent's Official, Tax Professional, Acquiring #1's Official and Authorized Representative explain the circumstances that resulted in the failure to file the Election. The information establishes that tax professionals were responsible for the Election, that Parent, Sub #2 and Acquiring #1 relied on the tax professionals to timely make the Election, and that the government will not be prejudiced if relief is granted. See § 301.9100-3(b)(1)(v).

Based on the facts and information submitted, including the representations that have been made, we conclude that Parent, Sub #2 and Acquiring #1 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, subject to the below conditions, we grant an extension of time under § 301.9100-1, until 60 days from the date of issuance of this letter, for Parent (as the corporation to which the losses of Sub #2 will be reattributed, and as the common parent of the consolidated group of which Sub #2 was a member) and Acquiring #1 (as the common parent of the consolidated group of which Sub #2 is now a member) to file the Election with respect to the disposition of Sub #2 on Date A, as described above. However, the Election will not allow the reattribution of any of Sub #2's losses from its X

taxable year, as those losses would not otherwise be available to Sub #2 as a carryover to its taxable years beginning after Date A.

The above extension of time is conditioned on: (i) the sale of Sub #2 constituting a disposition, within the meaning of §1.1502-20; (ii) Sub #2 and Sub #1 not being insolvent within the meaning of §1.1502-20(g)(2); (iii) Parent filing the Election within the extended period of time granted herein (which will require Parent and the District Director to reach an agreement as to the losses (if any) that may be reattributed from Sub #2 to Parent); and (iv) the taxpayers' (Parent's, Sub #1's, Sub #2's and Acquiring #1's) tax liability 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 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).

We express no opinion regarding: (1) whether a loss was, in fact, recognized on the sale of Sub #2 and Sub #1 stocks, or as to the amount of such losses (if any); (2) whether the sale of Sub #2 constituted a disposition, within the meaning of § 1.1502-20(a)(2); (3) whether Sub #2 has any losses that may be reattributed to Parent under § 1.1502-20(g), or as to the amount of such losses (if any); (4) whether the insolvency limitation of § 1.1502-20(g) is applicable; or (5), any matter arising in, or concerning, the examination of Parent’s Z taxable years (or any taxable years affected thereby) that is not specifically ruled on it this letter.

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.

Parent and Acquiring #1 (for Sub #2) should file the Election in accordance with § 1.1502-20(g)(5)[(4)]. That is, Parent and Acquiring #1, as applicable, should amend their returns for the year of the disposition and the first year following the disposition (and for any years affected by the Election) to attach thereto the Election, or a copy of the Election, and a copy of this letter. Moreover, Parent must amend its return (as the taxpayer and District Director mutually agree) to: (1) claim a deduction for the correct amount of capital loss recognized on the sale of Sub #2 stock that is not disallowed (i.e., excluding items and amounts which represent extraordinary gain dispositions, positive investment adjustments, and/or duplicated losses that are disallowed under §1.1502-

20(c)(1)); and (2) reflect the effect of the reattribution on the sale of the Sub #2 stock and subsequent sale of Sub #1 stock (e.g., Sub #1's basis in its Sub #2 stock, and, in turn, Parent's basis in its Sub #1 stock, is reduced by the amount reattributed, effective immediately before the disposition of Sub #2, which will reduce the amount of the loss on the sale of the Sub #2 stock, and, in turn, will reduce the amount of loss on the sale of the Sub #1 stock). See §§ 1.1502-20(g)(3), Examples 1 and 2, and 1.1502-32(b)(3)(iii). Further, Parent's use of the reattributed losses is limited as required by other provisions of the Code and regulations. See, e.g., § 381(c)(1)(B) and § 1.381(c)(1)-(1)(d). Parent must furnish a copy of this letter, the Election, and the amended return to the Revenue Agent examining Parent's return.

This letter is directed only to the taxpayer(s) who requested it. Section 6110(k)(3) provides that it may not be used or cited as precedent.

Pursuant to powers of attorney on file in this office, we are sending a copy of this letter to your Authorized Representative and to Acquiring #1's Official.

Sincerely yours,

Philip J. Levine
Assistant Chief Counsel (Corporate)