

Internal Revenue Service

Department of the Treasury

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Person to Contact:

Telephone Number:

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Date:
November 30, 1999

Parent =

Sub =

Company Official =
Tax Professional =

Authorized
Representative =

Year 1 =

Year 2 =

Year 3 =

Date 1 =

Date 2 =

This letter responds to your Authorized Representative's letter, dated August 16, 1999, on behalf of Parent and Sub, requesting an extension of time under §§ 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations to file elections. The extension is being requested for Parent and Sub to file an election under § 1.1502-75 of the Income Tax Regulations. Additional information was received in letters dated September 22, 1999, and October 7, 1999. Parent's and Sub's returns for Year 1, Year 2, and Year 3 are under examination with the applicable District Director and this request has been coordinated with the District Director's office pursuant to Rev. Proc. 99-1, 1999-1 C.B. 6, and Rev. Proc. 99-2, 1999-1 C.B. 73. The material information submitted for consideration is summarized below.

Parent owns all of the stock of Sub. Both corporations have calendar taxable years and use the accrual method of accounting. Company Official, who is not versed in tax matters, engaged Tax Professional to advise on tax matters and to prepare the corporations tax returns. For Year 1 and Year 2, taxpayers intended to have the losses of Sub offset the gains of Parent. However, for various reasons Tax Professional did not properly have Parent and Sub make the election to file consolidated returns in accordance with § 1.1502-75. The election to file consolidated returns for Year 1 and Year 2 were due on Date 1 and Date 2, respectively.

It was discovered that the losses of Sub could not offset the gains of Parent under the way the returns were filed for Parent and Sub. Taxpayers attempted to make the election to file consolidated returns (with Parent as the common parent) consistent with § 1.1502-75 (the "Election"). However, the Election was rejected because it was not filed within the time prescribed by § 1.1502-75.

Subsequently, this request was submitted, under § 301.9100-1, for an extension of time to file the Election so that Parent and Sub can file a consolidated return for Year 1, Year 2, and for subsequent years. It is represented that the period of limitations on assessments under § 6501(a) has not expired for Parent's or Sub's, Year 1 or Year 2 tax return or any taxable years that would be affected by the Election had it been timely filed. It has been represented that for Year 3, Parent and Sub properly filed consolidated returns in accordance with § 1.1502-75.

Section 1501 provides "An affiliated group of corporations shall . . . have the privilege of making a consolidated return . . . for the taxable year in lieu of separate returns. The making of a consolidated return shall be upon the condition that all corporations which at any time during the taxable year have been members of the affiliated group consent to all the consolidated return regulations prescribed under section 1502 prior to the last day prescribed by law for the filing of such return. The making of a consolidated return shall be considered as such consent."

Section 1502 provides: "The Secretary shall prescribe such regulations as he may deem necessary in order that the tax liability of any affiliated group of corporations making a consolidated return and of each corporation in the group, both during and after the period of affiliation, may be returned, determined, computed, assessed, collected, and adjusted, in such

manner as clearly to reflect the income-tax liability and the various factors necessary for the determination of such liability, and in order to prevent avoidance of such tax liability."

Section 1.1502-75(a)(1) provides: "A group which did not file a consolidated return for the immediately preceding taxable year may file a consolidated return in lieu of separate returns for the taxable year, provided that each corporation which has been a member during any part of the taxable year for which the consolidated return is to be filed consents (in the manner provided in paragraph (b) of this section) to the regulations under section 1502. If a group wishes to exercise its privilege of filing a consolidated return, such consolidated return must be filed not later than the last day prescribed by law (including extensions of time) for the filing of the common parent's return."

Section 1.1502-75(b) provides: "The consent of a corporation referred to in paragraph (a)(1) of this section shall be made by such corporation joining in the making of the consolidated return for such year. A corporation shall be deemed to have joined in the making of such return for such year if it files a Form 1122 in the manner specified in paragraph (h)(2) of this section.

Section 1.1502-75(h)(1) provides: "The consolidated return shall be made on Form 1120 for the group by the common parent corporation. The consolidated return, with Form 851 (affiliations schedule) attached, shall be filed with the district director with whom the common parent would have filed a separate return."

Section 1.1502-75(h)(2) provides: "If, under the provisions of paragraph (a)(1) of this section, a group wishes to exercise its privilege of filing a consolidated return, then a Form 1122 must be executed by each subsidiary and must be attached to the consolidated return for such year. Form 1122 shall not be required for a taxable year if a consolidated return was filed (or was required to be filed) by the group for the immediately preceding taxable 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. See § 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. See 301.9100-3(a). Except as provided in paragraphs 301.9100-3(b)(3)(i) through

(iii), a taxpayer is deemed to have acted reasonably and in good faith if the taxpayer reasonably relied on a qualified tax professional and the tax professional failed to make, or advise the taxpayer to make, the election. Section 301.9100-3(b)(1)(V). A taxpayer will not be considered to have reasonably relied on a qualified tax professional if the taxpayer knew or should have known that the professional was not (i) Competent to render advice on the regulatory election; or (ii) Aware of all relevant facts. Section 301.9100-3(b)(2).

In this case, the time for filing the Elections was fixed by the regulations (*i.e.*, § 1.1502-75). Therefore, the Commissioner has discretionary authority under § 301.9100-1 to grant an extension of time for Parent and Sub to file the Election, provided Parent and Sub show that 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 Company Official, Tax Professional and Authorized Representative explain the circumstances that resulted in the failure to file the Election. The information establishes that tax professionals were responsible for advising and making the Election, that Parent and Sub relied on the tax professionals to make appropriate elections, and that the government will not be prejudiced if relief is granted. See § 301.9100-3(f) Example 2.

Based on the facts and information submitted, including the representations that have been made, we conclude that Parent and Sub 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 30 days from the date of issuance of this letter, for Parent and Sub to file the Election and returns consistent with § 1.1502-75.

The above extension of time to file the Election is conditioned on: (1) the taxpayers' (Parent's and Sub'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) and (2) Parent and Sub otherwise meet all the other requirements of filing a consolidated return. 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).

Parent and Sub should file the Election in accordance with § 1.1502-75. That is, consolidated returns should be filed for Year 1 and Year 2 with all appropriate forms and consents on or after the date of this letter, which grants an extension. A copy of this letter should be attached to the tax returns.

No opinion is expressed as to whether Parent and Sub otherwise qualify to file consolidated returns. In addition, no opinion is expressed about the tax treatment of any conditions existing at the time of, or effects resulting from, the filing of consolidated returns not specifically covered by the above rulings.

In addition, no opinion is expressed as to the tax effects or 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, its Company Official, Tax Professional and Authorized Representative. However, the District 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.

A copy of this letter is being sent to the Authorized Representative designated on your power of attorney.

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

Sincerely yours,

Assistant Chief Counsel (Corporate)

By: Richard Todd

Richard Todd
Counsel to the Assistant
Chief Counsel (Corporate)