



SC REVENUE RULING #89-10

- SUBJECT:** Return Due Date - IRC Section 338(h)(10) Election  
(Income Tax)
- EFFECTIVE DATE:** Applies to all periods open under statute.
- SUPERSEDES:** All previous documents and any oral directives  
in conflict herewith.
- REFERENCE:** S.C. Code Ann. Section 12-7-1410 (Law. Co-Op. Supp. 1988)  
S.C. Code Ann. Section 12-54-70 (Law. Co-Op. Supp. 1988)
- AUTHORITY:** S.C. Code Ann. Section 12-3-170 (1976)  
SC Revenue Procedure #87-3
- SCOPE:** A Revenue Ruling is the Commission's official interpretation of how  
tax law is to be applied to a specific set of facts. A Revenue Ruling is  
public information and remains a permanent document until  
superseded by a Regulation or is rescinded by a subsequent Revenue  
Ruling.

Questions:

1. If the IRC Section 338(h)(10) election is not made, will Y's South Carolina corporate tax return be due November 15, 1988 or March 15, 1989? If the IRC Section 338(h)(10) election is made will the South Carolina return be due November 15, 1988?
2. If the IRC Section 338(h)(10) election changes the due date of the return to November 15, 1988, can an extension be granted? Also, how and when should the extension be requested since the Section 338(h)(10) election will not be made until March 15, 1989?
3. If the IRC Section 338(h)(10) election changes the due date of the return, will penalties and interest be assessed if the return is filed or extended by March 15, 1989?
4. Will the tax attributable to the deemed sale that results from the IRC Section 338(h)(10) election be disregarded for purposes of the estimated tax penalty?

Facts:

Parent corporation X and its subsidiary Y file as part of a consolidated group with a calendar year end for federal tax purposes. Subsidiary Y is the only member of the group doing business in South Carolina. Therefore, Y files a separate South Carolina return on a calendar year basis.

On August 31, 1988 X sold 100 percent of the stock of Y. On March 15, 1989 an election will be made under IRC Section 338(h)(10) to treat the stock purchase as an asset purchase.

Discussion:

In general, IRC Section 338 allows a corporation that has purchased a controlling interest (80% or more) in another corporation (the "target") to elect to have the acquisition of the target's stock treated as a purchase of the assets of the target and to have the target corporation treated as if it had repurchased its assets. In this way, the purchasing corporation receives a stepped up basis in the assets acquired from the target and the target recognizes a gain or loss on the sale.

Generally, for Federal purposes, the due date of the final return of the target corporation is 2 1/2 months after the month in which the acquisition date occurs. However, the purchasing corporation has until the 15th day of 9th month after the month in which the acquisition date occurs to decide whether to make the Section 338 election.

When the target corporation is a member of a consolidated group, however, the target is generally not treated as a member of that group with respect to the sale. As a result, the tax liability of the target is separate from the group and is not taken into account on the group's consolidated income tax return in the absence of an IRC Section 338(h)(10) election. The target corporation must file a final return that is a separate return referred to as a "deemed sale return". A Section 338(h)(10) election allows the transaction to be treated as if the target had sold all of its assets in a single, fully taxable transaction and distributed the proceeds of the sale to the seller (the consolidated group) in liquidation. Gain or loss on the deemed sale of assets is recognized by the seller on its consolidated return.

IRS Temp. Reg. Section 1.338-IT(h)(1) waive certain penalties due to circumstances that would not exist but for an election under Section 338. Interest on any underpayment of tax runs from the due date of the return and is not subject to the waiver rule. Further, the deemed sale is not taken into account for estimated tax purposes.

South Carolina has adopted IRC Section 338 and related regulations. S.C. Section 12-7-1410 provides that a taxpayer's taxable year must be the same as the taxpayer's taxable year for federal purposes. Y corporation will have a Federal taxable year that ends on the date of the sale. Without the 338(h)(10) election, the "deemed sale" final Federal return would be a separate return due 2 1/2 months after the end of the month in which the sale takes place. With the 338(h)(10) election, Y would file this final return as part of the consolidated group. For South Carolina purposes, Y must file a return that includes operating income or loss and gain or loss on the deemed sale 2 1/2 months after the month in which the sale takes place. A request for an extension should have been filed on or before November 15, 1988. South Carolina will allow an

extension for the same period allowed for Federal purposes. As the adoption of the Federal taxable year has changed the requirements for filing a South Carolina short period return, the failure to file and failure to pay penalties will be waived if the return is filed or an extension requested on or before March 15, 1989. S.C. Code Section 12-54-160 will prohibit the waiver of interest, thus interest must be paid from November 15, 1988. South Carolina will waive penalties attributable to the 338 election as provided in IRS Temp. Reg. 1.338-IT(h)1. The tax attributable to the deemed sale will be disregarded for purposes of computing the estimated tax penalty pursuant to IRS Temp. Reg. 1.338-IT(h)(1).

Conclusion:

1. Y's S.C. corporate tax return will be due November 15, 1988 whether or not the IRC Section 338(h)(10) election is made.
2. An extension can be granted through the period ending with the due date of Y's Federal return (including Federal extensions). The extension should be requested by filing a tentative South Carolina return on or before November 15, 1988.
3. Failure to file and failure to pay penalties will be waived through the period ending March 15, 1989 if the return is filed or an extension is requested on or before March 15, 1989. Interest will be assessed on the balance due from November 15, 1988 until the date of payment.
4. The tax attributable to the deemed sale that results from the IRC Section 338(h)(10) election will be disregarded for purposes of the estimated tax penalty.

SOUTH CAROLINA TAX COMMISSION

s/S. Hunter Howard, Jr.

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S. Hunter Howard, Jr., Chairman

s/A. Crawford Clarkson, Jr.

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A. Crawford Clarkson, Jr., Commissioner

s/T. R. McConnell

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T. R. McConnell, Commissioner

Columbia, South Carolina  
April 19 1989