



July 2016

GT's Quick Guide to Section 338(h)(10) Elections

Section 338(h)(10) of the Internal Revenue Code can provide significant tax benefits to a buyer of 80% or more of a target corporation. A 338(h)(10) election allows a buyer of *stock* of an S corporation or a corporation within a consolidated group to treat the transaction as an acquisition of 100% of the *assets* of the target for tax purposes. The deemed asset sale for tax purposes increases the tax basis of the target's assets which can significantly reduce the buyer's future taxable income.

GT's Quick Guide to Section 338(h)(10) Elections provides you with a quick reference to understanding the 338(h)(10) election, when and how it can be made and its impact on buyers and sellers.

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GT's Quick Guide to Section 338(h)(10) Elections

When can a 338(h)(10) election be made?	Who makes the 338(h)(10) election and how is the 338(h)(10) election made?	How does the 338(h)(10) election impact the tax treatment of the stock purchase?	How does the 338(h)(10) election impact the purchase agreement?
<p>The target company must be an S-Corp or a member of an affiliated or consolidated group of corporations</p> <p>Buyer must be a corporation making a "qualified stock purchase" of at least 80% of the target company's stock</p>	<p>The Buyer and all stockholders of the target company must agree to make the 338(h)(10) election, and join in the execution and delivery of Form 8023 to the IRS by the 15th day of the 9th month after the Closing Date</p>	<p>The transaction is treated as a taxable acquisition of 100% of the target company's assets for tax purposes</p> <p>Step up in the tax basis of the target company's assets to fair market value may result in additional depreciation and/or amortization deductions; to the extent allocated to goodwill, the purchase price can generally be amortized ratably over 15 years</p>	<p>Tax Reps: If buying an S-Corp, Buyer needs confidence that target company is in fact an S-Corp, otherwise the 338(h)(10) election cannot be made</p> <p>Purchase Price Allocation: S-Corp Sellers will want to avoid ordinary income from gain on assets such as inventory, accounts receivable, and depreciation recapture and may seek a gross-up for incremental tax liability</p> <p>Buyer should obtain an executed Form 8023 from Sellers at or prior to Closing</p>

Additional Considerations

<p>Seller cannot achieve a tax-deferred rollover when a 338(h)(10) election is made</p> <ul style="list-style-type: none"> > Rollovers or reinvestments into LLCs above the acquiring corporation can bust the qualified stock purchase 	<p>Seller could incur increased tax liability as a result of the 338(h)(10) election attributable to:</p> <ul style="list-style-type: none"> > the recognition of gain on ordinary income type assets and "1374 gain" from prior years as a C-Corp; > tax basis of stock exceeding tax basis of assets; or > additional state income taxes due to asset location 	<p>In certain circumstances, a Section 336(e) election may accomplish the same result as a Section 338(h)(10) election with different requirements from those mentioned above</p>
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