Internal Revenue Service

Department of the Treasury
Washington, DC 20224

Number: **201442021**
Release Date: 10/17/2014

Index Number: 263.08-04, 9100.00-00

Third Party Communication: None
Date of Communication: Not Applicable

Person To Contact:
, ID No.

Telephone Number:

Refer Reply To:
CC:ITA:B01
PLR-120853-14

In re: Letter Ruling Request Regarding
Success-Based Fees

Date:
July 09, 2014

LEGEND

Representative	=
State	=
Taxpayer	=
Taxable Year	=
Date1	=
Date2	=
Date3	=
Date4	=
Date5	=
Date6	=
Target	=
Firm	=
Advisor	=
$X	=

Dear :

This letter responds to the Date1 letter submitted by your representative, Representative, on behalf of Taxpayer requesting an extension of time under sections 301.9100-1 through 301.9100-3 of the Procedure and Administration Regulations to make the election described in Section 4 of Rev. Proc. 2011-29, 2011-18 I.R.C. 746. The letter notes that Taxpayer failed to attach the statement described in Section 4.01(3) of Rev. Proc. 2011-29 to its original federal income tax return for the taxable year ending Date2.

FACTS

Taxpayer is a State corporation, organized on Date3, that is the operating parent of a consolidated group. On Date4, Taxpayer acquired 100 percent of the stock of Target. Taxpayer engaged Firm to provide advisory services. Taxpayer paid Firm a success-based fee in the amount of $X.

For the taxable year ending Date2, Taxpayer's full-time tax department prepared the consolidated return. Taxpayer engaged Advisor to review the return before it was filed. Taxpayer filed the return timely on Date5. On the return, Taxpayer deducted 70 percent of the success-based fee and capitalized the remaining 30 percent of the success-based fee under I.R.C. § 263(a), as if making the election under Rev. Proc. 2011-29. Taxpayer, however, omitted the election statement, and Advisor, did not notice the omission in its review.

Taxpayer learned of the omission in Date6, before the Internal Revenue Service could learn of the omission. Taxpayer now asks for additional time to make the election, and argues that it reasonably relied on Advisor, and that Advisor failed to identify the omission in its review.

LAW AND ANALYSIS

Section 263(a)(1) of the Internal Revenue Code provides generally that no deduction shall be allowed for any amount paid for property having a useful life substantially beyond the taxable year. In the case of an acquisition or reorganization of a business entity, costs that are incurred in the process of acquisition and that produce significant long-term benefits must be capitalized. See Treas. Reg. §1.263(a)-5; *INDOPCO, Inc. v. Commissioner*, 503 U.S. 79 (1992); *Woodward v. Commissioner*, 397 U.S. 572 (1970).

Section 1.263(a)-5(f) provides that "an amount paid that is contingent on the successful closing of a transaction described in paragraph (a) of this section is an amount paid to facilitate the transaction except to the extent the taxpayer maintains sufficient documentation to establish that a portion of the fee is allocable to activities that do not facilitate the transaction. This documentation must be completed on or before the due date of the taxpayer's timely filed original Federal income tax return (including extensions) for the taxable year during which the transaction closes." In lieu of maintaining the documentation required in section 1.263(a)-5(f), Revenue Procedure 2011-29 offers a safe harbor election for allocating success-based fees. It states that the Service will not challenge a taxpayer's allocation of a success-based fee between activities that facilitate a transaction described in section 1.263(a)-5(e)(3) and activities that do not facilitate the transaction, if the taxpayer:

1. Treats 70% of the amount of the success-based fee as an amount that does not facilitate the transaction;

2. Capitalizes the remaining 30% as an amount that does facilitate the transaction, and

3. Attaches a statement to its original Federal income tax return for the tax year the success-based fee is paid or incurred, stating that the taxpayer is electing the safe harbor, identifying the transaction, and stating the success-based fee amounts that are deducted and capitalized.

Taxpayer satisfied the first two requirements of Rev. Proc. 2011-29 by deducting 70% and capitalizing 30% of the success-based fee, but it failed to attach the statement to the original Federal income tax return, as required in item three.

Section 301.9100-1(a) gives the Service discretionary authority to grant a reasonable extension of time to make a regulatory election, provided that the time for making such election is not expressly prescribed by statute. 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 Service will use to determine whether to grant an extension of time to make a regulatory election. 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 section 301.9100-2.

Section 301.9100-3 provides that requests for extensions of time for regulatory elections will be granted when the taxpayer provides evidence (including affidavits described in the regulations) to establish to the satisfaction of the Commissioner that the taxpayer acted reasonably and in good faith, and granting relief will not prejudice the interests of the government.

Section 301.9100-3(b)(1) states that a taxpayer will be deemed to have acted reasonably and in good faith if the taxpayer:

(i) requests relief before the failure to make the regulatory election is discovered by the Service;

(ii) inadvertently failed to make the election because of intervening events beyond the taxpayer's control;

(iii) failed to make the election because, after exercising due diligence, the taxpayer was unaware of the necessity for the election;

(iv) reasonably relied on the written advice of the Service; or

(v) reasonably relied on a qualified tax professional, and the tax professional failed to make, or advise the taxpayer to make, the election.

A taxpayer will not be deemed to have reasonably relied on a qualified tax professional if the taxpayer knew or should have known that professional was not competent to render advice on the election or was not aware of all of the relevant facts. Treas. Reg. §301.9100-3(b)(2).

In this case, the affidavits presented show that Taxpayer acted reasonably and in good faith, having reasonably relied on Advisor to ensure that the statement required by Rev. Proc. 2011-29 would be attached to the Taxable Year consolidated return. Taxpayer completed the return as if it intended to make the election, but merely failed to attach the required statement. Additionally, Taxpayer has requested relief before the omission has been discovered by the Service.

Under section 301.9100-3(b)(3), a taxpayer will be deemed to have not acted reasonably and in good faith if the taxpayer--

(i) seeks to alter a return position for which an accuracy-related penalty has been or could be imposed under section 6662 at the time the taxpayer requests relief (taking into account section 1.6664-2(c)(3) of the Income Tax Regulations) and the new position requires a regulatory election for which relief is requested;

(ii) was informed in all material respects of the required election and related tax consequences, but chose not to file the election; or

(iii) uses hindsight in requesting relief. If specific facts have changed since the original deadline that make the election advantageous to a taxpayer, the Service will not ordinarily grant relief.

Taxpayer is not seeking to alter a return position for which an accuracy-related penalty has been or could be imposed under section 6662 at the time relief is requested. The affidavits show that Taxpayer was informed of the election and intended to make it, but was not informed in all material respects of the required election. Furthermore, Taxpayer is not using hindsight in requesting relief because Taxpayer completed its original return as if it intended to make the election. And Taxpayer has represented that no facts have changed since the original deadline of the Taxable Year consolidated return.

Section 301.9100-3(c)(1)(i) provides, in part, that the Commissioner will grant an extension to make a regulatory election only when the interests of the government will not be prejudiced by the granting of relief. The interests of the government are prejudiced if granting relief would result in the taxpayer having a lower tax liability in the

aggregate for all taxable years affected by the election than the taxpayer would have had if the election had been timely made (taking into account the time value of money). Section 301.9100-3(c)(1)(ii) provides, in part, that the interests of the government are ordinarily prejudiced if the taxable year in which the regulatory election should have been made, or any taxable years that would have been affected by the election had it been timely made, are closed by the period of limitations on assessment.

Under these criteria, the interests of the government are not prejudiced in this case. Taxpayer has represented that granting relief would not result in Taxpayer having a lower tax liability in the aggregate for all taxable years affected by the election than if the election had been timely made (taking into account the time value of money). Furthermore, the taxable year in which the regulatory election should have been made and any taxable years that would have been affected by the election had it been timely made, are not closed by the period on assessment.

Section 301.9100-3(c)(2) provides special rules for accounting method regulatory elections. Section 301.9100-3(c)(2) provides that the interests of the government are deemed prejudiced, except in unusual or compelling circumstances, if the accounting method regulatory election for which relief is requested is subject to the advance consent procedures for method changes, requires a section 481(a) adjustment, would permit a change from an impermissible method of accounting that is an issue under consideration by examination or in any other setting, or provides a more favorable method of accounting if the election is made by a certain date or taxable year.

Granting relief will not prejudice the interests of the government associated with the special rules for accounting method regulatory elections. The election provided by Rev. Proc. 2011-29 for allocating success-based fees is granted on an automatic basis (if all proper procedures including the attaching the mandatory statement are followed), does not require a section 481(a) adjustment, is not an issue under consideration, and does not provide a more favorable method of accounting if the election is made by a certain date or taxable year.

CONCLUSION

Based solely on the facts and representations submitted, we conclude that Taxpayer acted reasonably and in good faith, and granting relief will not prejudice the interests of the government. Accordingly, the requirements of sections 301.9100-1 and 301.9100-3 have been met.

Therefore, Taxpayer is granted an extension of 45 days from the date of this ruling to file its mandatory statement as required by Section 4.01 of Revenue Procedure 2011-29, stating that it is electing the safe harbor for success-based fees, identifying the transaction, and stating the success-based fee amounts that are deducted and capitalized.

The ruling contained in this letter is based upon information and representations submitted by Taxpayer and accompanied by a penalty of perjury statement executed by appropriate parties. While this office has not verified any of the material submitted in support of the request for rulings, it is subject to verification on examination.

Except as expressly provided herein, no opinion is expressed or implied concerning the tax consequences of any aspect of any transaction or item discussed or referenced in this letter, including whether Taxpayer properly included the correct costs as success-based fees subject to the retroactive election, or whether Taxpayer's transactions were within the scope of Rev. Proc. 2011-29. Moreover, this ruling does not express or imply any opinion whether Taxpayer's acquisition is within the scope of Rev. Rul. 90-95.

This ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.

A copy of this letter must be attached to any income tax return to which it is relevant. Alternatively, taxpayers filing their returns electronically may satisfy this requirement by attaching a statement to their return that provides the date and control number of the letter ruling.

In accordance with the power of attorney, we are sending copies of this letter to Taxpayer's authorized representative. We are also sending a copy of this letter to the appropriate operating area director.

Sincerely,

Lewis K Brickates
Branch Chief, Branch 1
(Income Tax & Accounting)

cc: