Internal Revenue Service

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Person To Contact:
, ID No.
Telephone Number:

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Section 263-- Capital Expenditures
(Deductible v. Not Deductible)

263.00-00-- Capital Expenditures
(Deductible v. Not Deductible)

Section 9100--Extension of Time for Making Certain Elections

9100.00-00-- Extensions of Time for Making Certain Elections

LEGEND:

Taxpayer =

X =

Taxable Year =

Y =

Corporation P =

Corporation Q =

Date 1 =

Target =

$a =

Financial Advisor =

$b =

$c =

Date 2 =

Tax Return Preparer =

Date 3 =

Dear

This responds to a letter ruling request dated August 20, 2014, submitted on behalf of Taxpayer. Taxpayer requests an extension of time under §§ 301.9100-1 and 301.9100- 3 of the Procedure and Administration Regulations to make a late election concerning the treatment of success-based fees in accordance with Rev. Proc. 2011-29, 2011-1 C.B. 746, which requires that a statement be attached to Taxpayer's original federal income tax return for Taxable Year.

FACTS

Taxpayer was formed by X, a partnership for U.S. federal tax purposes. Taxpayer is the common parent of a consolidated group engaged in the business of Y. Taxpayer uses the accrual method of accounting and has a calendar year end. Taxpayer formed Corporation P. Corporation P, in turn, formed Corporation Q. On Date 1, Corporation Q merged into unrelated Target with Target surviving the acquisition. Pursuant to the acquisition, 100 percent of the stock of Target was acquired by Corporation P for approximately $a. For federal income tax purposes, the formation of Corporation Q and its merger into Target was disregarded and instead treated as a direct purchase of stock of Target by Corporation P. See, e.g., Rev. Rul. 73-427, 1973-1 C.B. 294; Rev. Rul. 78-250, 1978-1 C.B. 83; Rev. Rul. 79-273, 1979-2 C.B. 125; and Rev. Rul. 90-95, 1990-2 C.B. 67.

The merger was treated as a stock acquisition and is a covered transaction in accordance with § 1.263(a)-5(e) of the Income Tax Regulations. In connection with the acquisition, Financial Advisor provided services to Target. As compensation for the services, Target agreed to pay Financial Advisor $b. Of this amount, $c was a success based fee for services performed in the process of investigating or otherwise pursuing the acquisition. Upon execution of the acquisition, Target paid Financial Advisor the success- based fee of $c.

Taxpayer prepared its federal income tax return for Taxable Year, which included the merger transaction. The Taxpayer decided to take advantage of the safe harbor election provided in Rev. Proc. 2011-29 and prepared its return accordingly. The federal income tax return as filed included a deduction of 70 percent of the success-based fee while the remaining 30 percent was capitalized, consistent with the requirements of the safe harbor election. The return did not include the statement required by section 4.01(3) of Rev. Proc. 2011-29 by which the taxpayer states it is electing the safe harbor election, identifies the transaction, and sets forth the success-based fees that are capitalized and those that are deducted. Before filing its return, Taxpayer had asked Tax Advisor to review the return for completeness and accuracy.

On Date 2, Tax Advisor and Taxpayer reviewed Taxpayer's federal income tax return as filed and determined that the required election statement had been omitted. This oversight was uncovered prior to any discovery by the Internal Revenue Service. Consequently, it was determined to request relief to late file the election under Rev. Rul. 2011-29, as the filing of a late election is within the discretion of the Commissioner under §§ 301.9100-1 and 301.9100-3.

Taxpayer is requesting permission with this ruling request to supersede its originally filed federal income tax return for Taxable Year with a return with the mandatory election statement completed and attached. The statute of limitations has not run for Taxable Year and thus, Taxable Year is still open to tax assessment.

LAW

Section 263(a)(1) of the Internal Revenue Code and § 1.263(a)-2(a) of the Income Tax Regulations provide that no deduction shall be allowed for any amount paid out 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. *INDOPCO, Inc. v. Commissioner*, 503 U.S. 79, 89-90, 112 S. Ct. 1039, 117 L. Ed. 2d 226 (1992); *Woodward v. Commissioner*, 397 U.S. 572, 575-576, 90 S. Ct. 1302, 25 L. Ed. 2d 577 (1970).

Under § 1.263(a)-5, a taxpayer must capitalize an amount paid to facilitate the business acquisition or reorganization transactions described in § 1.263(a)-5(a). In general, an

amount is paid to facilitate a transaction described in § 1.263(a)-5(a) if the amount is paid in the process of investigating or otherwise pursuing the transaction. Whether an amount is paid in the process of investigating or otherwise pursuing the transaction is determined based on all of the facts and circumstances. § 1.263(a)-5(b)(1).

Section 1.263(a)-5(f) provides that an amount that is contingent on the successful closing of a transaction described in § 1.263(a)-5(a) (i.e., a success-based fee) 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.

Section 4.01 of Rev. Proc. 2011-29 provides a safe harbor election for taxpayers that pay or incur success-based fees for services performed in the process of investigating or otherwise pursuing a covered transaction described in § 1.263(a)-5(e)(3). In lieu of maintaining the documentation required by § 1.263(a)-5(f), a taxpayer may elect to allocate a success-based fee between activities that facilitate the transaction and activities that do not facilitate the transaction by treating 70 percent of the amount of the success-based fee as an amount that does not facilitate the transaction and by capitalizing the remaining 30 percent as an amount that does facilitate the transaction. In addition, the taxpayer must attach a statement to its original federal income tax return for the taxable 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.

Section 301.9100-1(c) provides that the Commissioner has discretion to grant a reasonable extension of time under the rules set forth in §§ 301.9100-2 and 301.9100-3 to make certain regulatory elections. Section 301.9100-1(b) defines a "regulatory election" as an election whose due date is prescribed by a regulation published in the Federal Register, or a revenue ruling, revenue procedure, notice or announcement published in the Internal Revenue Bulletin.

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 an election. Section 301.9100-2 provides automatic extensions of time for making certain elections. Section 301.9100-3 provides extensions of time for making elections that do not meet the requirements of § 301.9100-2.

Section 301.9100-3(a) provides that requests for extensions of time for regulatory elections (other than automatic changes covered under section 301.9100-2) 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 that granting relief will not prejudice the interests of the Government.

Section 301.9100-3(b)(1) provides 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.

Section 301.9100-3(b)(3) provides that a taxpayer will not be considered to have acted reasonably and in good faith if the taxpayer —

(i) seeks to alter a return position for which an accuracy-related penalty could be imposed under § 6662 at the time the taxpayer requests relief 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.

Section 301.9100-3(c)(1) provides that the Commissioner will grant a reasonable extension of time 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 a 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. 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 § 6501(a) before the taxpayer's receipt of a ruling granting relief under this section.

ANALYSIS

Taxpayer's election is a regulatory election, as defined under § 301.9100-1(b), because

the due date of the election is prescribed in the Income Tax Regulations under § 1.263(a)-5(f). The Commissioner has the authority under §§ 301.9100-1 and 301.9100-3 to grant an extension of time to file a late regulatory election.

The information and representations made by Taxpayer establish that Taxpayer acted reasonably and in good faith. One fact illustrating this is that the Taxpayer discovered that the required statement was not filed with the return prior to any such discovery by the Service. Taxpayer is not seeking to alter a return position for which an accuracy related penalty has been or could be imposed under § 6662 of the Code at the time relief is requested. Taxpayer did not affirmatively choose not to make the election after having been informed in all material respects of the required election and related tax consequences. Rather, Taxpayer intended to take advantage of the safe harbor provisions in Rev. Proc. 2011-29 and filed its return for Taxable Year reflecting those provisions but failed to include the required election statement. Taxpayer is not using hindsight in requesting relief.

Further, based on the facts of the case provided, granting an extension will not prejudice the interests of the Government. Taxpayer will not have a lower tax liability in the aggregate for all taxable years affected by the election if given permission to make the election at this time than Taxpayer would have had if the election had been timely made. In addition, 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 will not be closed by the period of limitations on assessment under § 6501(a) before Taxpayer's receipt of the ruling granting an extension of time to make a late election.

RULING

Based upon our analysis of the facts as represented, 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 §§ 301.9100-1 and 301.9100-3 have been met.

Taxpayer is granted an extension of 45 days from the date of this ruling to file the statement required by section 4.01(3) of Rev. Proc. 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 its success-based fees subject to the election, or whether Taxpayer's transaction was within the

scope of Rev. Proc. 2011-29. Moreover, this ruling does not express or imply any opinion concerning whether Target appropriately reported on Taxpayer's consolidated return for Taxable Year the success-based fees that Target incurred, as opposed to Target reporting those success-based fees on its return for the short taxable year ending at the close of Date 3.

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 ruling should be attached to Taxpayer's federal income tax return for the tax years affected. Alternatively, if taxpayer files its return electronically, it may satisfy this requirement by attaching a statement providing the date and control number of this ruling to its return.

In accordance with the power of attorney on file with this office, a copy of this letter is being sent to your authorized representatives. We are also sending a copy of this letter to the appropriate operating division director. Enclosed is a copy of the letter ruling showing the deletions proposed to be made in the letter when it is disclosed under § 6110 of the Code.

Sincerely,

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

Enclosure (1)

cc: