Internal Revenue Service

Number: **201624008**
Release Date: 6/10/2016

Index Number: 9100.00-00

Department of the Treasury
Washington, DC 20224

Third Party Communication: None
Date of Communication: Not Applicable

Person To Contact:
, ID No.
Telephone Number:

Refer Reply To:
CC:ITA:B03
PLR-129787-15

Date:
March 08, 2016

TY:

LEGEND:

Parent =

Disregarded Entity =

Taxpayer =

Target =

Merger Sub =

Date 1 =

Date 2 =

Date 3 =

Date 4 =

Date 5 =

Taxable Year =

$a =

Financial Advisor =

Tax Return Preparer =

CPA Firm =

Dear :

This responds to a letter ruling request dated Date 1, submitted on behalf of Parent. Parent 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.

FACTS

On Date 2, Disregarded Entity, a wholly-owned subsidiary of Taxpayer, which itself is a wholly-owned subsidiary of Parent, acquired 100% of the outstanding stock of Target, an unrelated corporation. The acquisition was structured a reverse subsidiary merger, whereby Merger Sub, a wholly-owned subsidiary of Disregarded Entity, merged with and into Target, with Target surviving. For U.S. federal income tax purposes, the formation of Merger Sub and its merger into Target was disregarded and instead treated as a direct taxable purchase of stock of Target by Corporation. Since Disregarded Entity is treated as a disregarded entity, Corporation is treated as having directly acquired the stock of Target for U.S. federal income tax purposes.

In connection with the acquisition, Parent engaged Financial Advisor to provide various advisory services. As compensation for the services, Parent agreed to pay Financial Advisor a fee of *$a*, which was contingent upon the consummation of the acquisition and was a success-based fee for services performed in the process of investigating or otherwise pursuing the acquisition.

Parent's tax department prepared, and Tax Return Preparer reviewed and signed, Parent's consolidated U.S. federal income tax return for the tax year ended Date 3. On the return, Parent's tax department, in accordance with Rev. Proc. 2011-29, deducted 70% of the success-based fee and capitalized the remaining 30% of the success-based fee. Parent's tax department complied with the ministerial requirement of filing an election statement pursuant to Rev. Proc. 2011-29 with the return. However, the incorrect taxpayer, Target, was inadvertently listed on the election statement as the party making the election.

On Date 4, CPA Firm provided preliminary findings from its review of the transaction cost analysis pertaining to an acquisition separate from, and unrelated to, the above described acquisition. During its review, CPA Firm observed that the wrong taxpayer had been listed on the election statement with respect to the unrelated acquisition.

On Date 5, Parent and CPA Firm determined that the unrelated acquisition's election statement was invalid and that Parent should seek relief under Rev. Proc. 2015-1 and Treas. Reg. §§ 301.9100-1 and 301.9100-3. After receiving this advice, Parent examined the election statement for the above described acquisition and discovered an identical error had been made. Parent engaged Tax Return Preparer to prepare a request for relief.

LAW

Section 263(a) of the Internal Revenue Code provides generally that no deduction is allowed for any amount paid out for new buildings or for permanent improvements or betterments made to increase the value of any property or estate or any amount expended in restoring property or in making good the exhaustion thereof for which an allowance is or has been made.

Section 1.263(a)-1(d)(3) of the Income Tax Regulations provides that no deduction is allowed for an amount paid to acquire or create an intangible, which under §§ 1.263(a)-4(c)(1)(i) and 1.263(a)-4(d)(2)(i)(A) includes an ownership interest in a corporation or other entity. See also § 1.263(a)-4(a).

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 INDOPCO, Inc. v. Commissioner, 503 U.S. 79 (1992); Woodward v. Commissioner, 397 U.S. 572 (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. Section 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

The election provided for in Rev. Proc. 2011-29 is a regulatory election, as defined under § 301.9100-1(b). 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 Parent establish that Parent acted reasonably and in good faith. Parent reasonably relied on Tax Return Preparer, a qualified tax professional, to prepare its federal income tax return for Taxable Year. Parent is not seeking to alter a return position for which an accuracy related penalty has been or could be imposed under § 6662 at the time relief is requested. Parent 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, Parent 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 properly identify the correct party making the election on the required statement. Parent 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. Parent 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 Parent 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 Parent'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 Parent 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.

Parent is granted an extension of 60 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, properly identifying the entity making the election, identifying the transaction, and stating the success-based fee amounts that are deducted and capitalized.

The rulings contained in this letter are based upon information and representations submitted by Parent 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 the correct costs were properly included as success-based fees subject to the election, or whether the transaction was within the scope of Rev. Proc. 2011-29.

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

A copy of this ruling should be attached to Parent's federal income tax returns for the tax years affected. Alternatively, taxpayers filing returns electronically may satisfy this requirement by attaching a statement to their return that provides the date and control number of this ruling.

In accordance with the power of attorney on file with this office, a copy of this letter is being sent to your authorized representative. 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.

Sincerely,

Christopher F. Kane
Branch Chief, Branch 3
(Income Tax and Accounting)

cc: