Internal Revenue Service

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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-104056-17

Date:
February 21, 2017

In Re: A request for relief under § 301.9100-1 of the Federal Income Tax Regulations

Taxpayer Identification Number:

Legend:

X	=
Date1	=
P	=
Date2	=
Acquirer	=
Bank1	=
$a	=
Accountant	=
Date3	=

Dear :

This letter responds to a letter dated Date1, submitted on behalf of X ("Taxpayer"), requesting a ruling that Taxpayer be granted an extension of time under sections 301.9100-1(c) and 301.9100-3 of the Procedure and Administration Regulations to file a safe harbor election under Revenue Procedure 2011-29, 2011-18 I.R.B. 746.

Facts

According to the information submitted, Taxpayer is a group of corporations that produces P. On Date2, Taxpayer was acquired by Acquirer, becoming its wholly owned subsidiary and a related party within the meaning of § 267 of the Internal Revenue Code. Taxpayer engaged Bank1 to advise it on the transaction, and agreed to pay $a for its services which was due only on the completion of the transaction.

The short-year return for the period ending Date2 was prepared on behalf of Taxpayer by Accountant and timely filed on Date3. Although Taxpayer provided Accountant with a copy of the agreement and plan of merger, Accountant never informed Taxpayer of the opportunity to the make the election under Rev. Proc. 2011-29. The success-based fees paid to Bank1 were not included in the return, in whole or in part, and the required statement under Rev. Proc. 2011-29 was not included. This error was discovered by Taxpayer's new owners, and Taxpayer and its advisors determined to request relief under § 301.9100-3 to late file the election under Rev. Proc. 2011-29.

Taxpayer asserts that no return that would be affected by this ruling is under examination, before appeals, or before a Federal Court.

Law and Analysis

Treasury Regulations § 1.263(a)-5(a) requires taxpayers to capitalize amounts paid or incurred to facilitate certain transactions. Section 1.263(a)-5(a)(2) includes an acquisition of an ownership interest in a business entity as one such transaction.

Treasury Regulations § 1.263(a)-5(e)(1) provides that an amount paid by the taxpayer in the process of investigating or otherwise pursuing a covered transaction facilitates that transaction only if the amount relates to activities performed on or after the earlier of (i) the date a letter of intent, exclusivity agreement, or similar written communication is executed, or (ii) the date on which the material terms of the transaction are approved by the taxpayer's board of directors. Section 1.263(a)-5(e)(3) defines a covered transaction as (i) a taxable acquisition by the taxpayer of assets that constitute a trade or business, (ii) a taxable acquisition of an ownership interest in a business entity (whether the taxpayer is the acquirer or the target) if immediately after the acquisition the acquirer and the target are related within the meaning of §§ 267(b) or 707(b), or (iii) a reorganization described in §§ 368(a)(1)(A), (B), or (C), or a reorganization described in § 368(a)(1)(D) in which the stock or securities of the corporation to which the assets are transferred are distributed in a transaction that qualifies under §§ 354 or 356.

Section 1.263(a)-5(f) provides that an amount paid that is contingent on the successful closing of a covered transaction 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.

Section 4 of Revenue Procedure 2011-29 provides a safe harbor election for allocating success based fees paid in business acquisitions or reorganizations described in § 1.263(a)-5(e)(3). Under the safe harbor, taxpayers may elect to treat 70% of such success based fees as amounts which do not facilitate the transaction and therefore are not required to be capitalized, provided that the taxpayer (i) capitalizes the remaining 30%, and (ii) attaches a statement to its timely filed return electing to use the safe harbor treatment.

Under § 301.9100-1(c), the Commissioner may grant a reasonable extension of time to make a regulatory election, or a statutory election (but no more than six months except in the case of a taxpayer who is abroad), under all subtitles of the Internal Revenue Code, except subtitles E, G, H, and I. Section 301.9100-1(b) defines the term "regulatory election" as including an election whose deadline is prescribed by a regulation published in the Federal Register or a Revenue Procedure published in the Internal Revenue Bulletin.

Sections 301.9100-1 through 301.9100-3 provide the standards that the Commissioner will use to determine whether to grant an extension of time to make an election. Section 301.9100-1(a).

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.

Requests for relief under § 301.9100-3 will be granted when the taxpayer provides evidence to establish 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(a).

Section 301.9100-3(b)(1) provides that a taxpayer will be deemed to have acted in good faith if the taxpayer requests relief before the failure to make the election is discovered by the Service, or if the taxpayer reasonably relied on a qualified tax professional who failed to make the election or to advise the taxpayer to make the election.

Section 301.9100-3(b)(3) provides that a taxpayer will not be deemed to have acted in good faith if the taxpayer: (1) seeks to alter a return position for which an accuracy-related penalty has been or could be imposed under § 6662 and the new position requires or permits a regulatory election for which relief is requested; (2) was informed in all material respects of the required election but chose not to file the election; or (3) uses hindsight in requesting relief, when specific facts have changed since the due date for making the election that make the election advantageous to the taxpayer.

Section 301.9100-3(c) provides that interests of the government will be prejudiced if granting relief would result in a lower tax liability in the aggregate for all tax years affected by the election than the taxpayer would have had if the election had been timely filed, or if the taxable year in which the election should have been made is closed at the time the relief would be granted.

In this case, Taxpayer represents that the issue is not under examination. It is not the case that Taxpayer was informed of the need to file the election but chose not to do so. Taxpayer represents that it is not altering a return position for which an accuracy-related penalty could be imposed, because the error actually reduces its tax liability. Taxpayer

also represents that no specific facts have changed since the due date for filing the election that make the election advantageous. Finally, Taxpayer represents that its tax liability for the year at issue will not be lower if relief is granted than it would have been had the election been timely filed. Although its tax liability will be lowered, it will be lowered only to the extent it would have been had the election been timely filed, and, taking into account the time value of money, the interests of the government will not be prejudiced. The tax year at issue is not a closed year at the time relief would be granted.

Conclusion

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

Taxpayer is granted an extension of 60 days from the date of this ruling to file an amended return with the statement required by § 4.01(3) of Rev. Proc. 2011-29, stating that it is electing the safe harbor for success-based fees, properly identifying the party 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 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 specifically provided herein, no opinion is expressed or implied concerning the federal tax consequences of the facts described above under any other provision of the Code. In particular, no opinion is expressed or implied as to whether the 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.

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.

In accordance with the provisions of a power of attorney currently on file, we are sending a copy of the ruling 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 & Accounting)

Enclosures (2):
Copy of this letter
Copy for section 6110 purposes