Internal Revenue Service

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Person To Contact:
, ID No.

Telephone Number:

Refer Reply To:
CC:ITA:B03
PLR-105934-17

Date:
March 28, 2017

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

Taxpayer Identification Number:

Legend:

Date1	=
X	=
Date2	=
Y	=
Bank	=
$a	=
$b	=
$c	=
LawFirm	=
CPAFirm	=
Date3	=
Date4	=
Date5	=

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 the common parent of an affiliated group of corporations that provide financial services. On Date2, Y acquired the stock of Taxpayer in a tax free reorganization in which Taxpayer ultimately merged with and into a wholly owned limited liability company of Y that is a disregarded entity for federal income tax purposes. Taxpayer engaged the services of Bank in anticipation of a transaction to provide advisory services, in exchange for a total fee of $a, including success-based fee in the amount of $b. Taxpayer also engaged LawFirm to provide legal advisory services in connection with the proposed transaction, in exchange for a success-based fee of $c.

Taxpayer engaged CPAFirm to prepare the short-year tax return for Taxpayer for the tax period Date3 to Date2. The return was timely filed on Date4. CPAFirm discussed the proper treatment of the fees with Taxpayer, and agreed to make use of the safe harbor in Rev. Proc. 2011-29 for the fee paid to Bank. However, Taxpayer did not have enough information at the time for CPAFirm to determine whether the fee paid to LawFirm was success-based. Accordingly, CPAFirm prepared the return deducting 70% of the $b fee as an amount which does not facilitate the transaction, capitalizing the remaining 30%, and capitalizing the entire $c fee paid to LawFirm. However, CPAFirm inadvertently omitted the election statement required by Rev. Proc. 2011-29. This mistake was discovered by CPAFirm in Date 5. In addition, Taxpayer has since determined that the fee paid to LawFirm was success-based. Taxpayer then applied for relief under Treas. Reg. § 301.9100-3, requesting an extension of time to make the safe harbor election with respect to both fees.

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 original federal income tax 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, and that it reasonably relied upon the advice of a tax professional. 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. 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. 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 make the safe harbor election for allocating success based fees and file 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, a copy of this letter is being sent to your authorized representatives. We are also 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