Internal Revenue Service

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Department of the Treasury
Washington, DC 20224

Third Party Communication: None
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Person To Contact:
, ID No.

Telephone Number:

Refer Reply To:
CC:ITA:B03
PLR-139678-16

Date:
April 21, 2017

Legend:

Taxpayer	=
Target	=
Bank1	=
Bank2	=
AccountingFirm	=
Date1	=
Date2	=
Date3	=
Date4	=
Date5	=
Year1	=
Year2	=
$a	=
$b	=
$c	=
$d	=
$e	=
$f	=
$g	=

Dear :

This letter responds to a letter dated Date1, submitted on behalf of Taxpayer, requesting a ruling that Taxpayer be granted an extension of time under §§ 301.9100-1 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

Taxpayer is a corporation that designs, develops, manufactures, distributes, and sells a variety of . On Date2, Taxpayer submitted an indication of interest in acquiring Target. In Year1, Taxpayer entered into engagement letters with two investment banking firms, Bank1 and Bank2, to serve as financial advisors in a potential acquisition of Target. Both engagement letters called for a $a fee contingent upon closing the transactions. The agreement with Bank2 also included a non-refundable monthly $b retainer fee that would reduce its $a contingent fee. Both firms ultimately reduced their fees to $c, and Bank2 reduced the monthly retainer to $d. On Date3, Taxpayer submitted a revised indication of interest. On Date4, Taxpayer and Target entered into an exclusivity agreement. The transaction closed on Date5. As a result of this transaction, Taxpayer and Target became related entities within the meaning of § 267(b) of the Internal Revenue Code.

The fees ultimately paid to Bank1 and Bank2 totaled $e, consisting of $f in retainer fees incurred prior to Date4 and $g in success-based fees. On its Year1 Form 1120, Taxpayer deducted the $f in retainer fees as expenses which did not facilitate the transaction. Further, Taxpayer deducted % of the success-based fees as amounts that did not facilitate the transaction, and capitalized the remaining % under the safe harbor election of Rev. Proc. 2011-29. However, Taxpayer inadvertently did not include the election statement required by Rev. Proc. 2011-29 with its Year1 income tax return. This omission was not discovered until Taxpayer's Year1 return was reviewed by a new employee of Taxpayer in Year2. Upon discovery, Taxpayer engaged the services of AccountingFirm to assist with its request to obtain relief under § 301.9100-3. Taxpayer asserts that no return that would be affected by this ruling is under examination, before appeals, or before a Federal Court.

LAW

Section 263(a) 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. § 1.263(a)-5(b)(1).

Section 1.263(a)-5(f) provides that an amount paid that is contingent on the successful closing of a covered transaction described in § 1.263(a)-5(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 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). In lieu of maintaining the documentation required by § 1.263(a)-5(f), a taxpayer 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 capitalizes the remaining amount of the success-based fees as an amount which does facilitate the transaction. The taxpayer must also 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 (treated as not facilitating the transaction) and capitalized (treated as facilitating the transaction).

It is this last requirement that Taxpayer requests permission to accomplish with this ruling request. Taxpayer requests permission with this ruling request to attach the statement required by section 4.01 of Rev. Proc. 2011-29 to its return, by amending its original filed return and superseding it with a return with the proper election statement completed and attached.

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 301.9100-2 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 301.9100-1(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 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.

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. § 301.9100-3(a).

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 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 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 reasonably or 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 § 6662 and the new position requires or permits a regulatory election for which relief is requested;

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

(iii) 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 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 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. 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.

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 Rev. Proc. 2011-29. 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. Taxpayer requested relief before its failure to make the election was discovered by the Service. Taxpayer did not affirmatively choose not to make the election after it was informed of the need to file the election. Rather, Taxpayer intended to take advantage of the safe harbor provisions in Rev. Proc. 2011-29 and filed its return for Year1 reflecting those provisions but failed to include the required election statement. Taxpayer is not seeking to alter a return position for which an accuracy-related penalty had been or could be imposed under § 6662 at the time relief was requested. Taxpayer is not using hindsight in requesting relief, and no specific facts have changed since the due date for filing the election that make the election advantageous.

Further, based on the information and representations made by Taxpayer, granting an extension will not prejudice the interests of the Government. Taxpayer will not have a lower tax liability in the aggregate for Year1 and all taxable years affected by the election had it been timely made if relief is granted to make the election at this time than Taxpayer would have had if the election had been timely filed. In addition, Year1 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 receives the ruling granting an extension of time to make a late election.

RULING

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 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.

A copy of this ruling should be attached to Taxpayer'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 provisions of a power of attorney currently on file, we are sending a copy of the ruling letter 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.

Sincerely,

Jamie J. Kim
Assistant to the Branch Chief, Branch 3
(Income Tax & Accounting)

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

cc: