Internal Revenue Service

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Department of the Treasury
Washington, DC 20224

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Person To Contact:
, ID No.

Telephone Number:

Refer Reply To:
CC:ITA:B02
PLR-138278-16

Date:
May 10, 2017

EIN:

Dear

TY:

Taxpayer=
A=
B=
C=
D=
State=
Acquisition Advisor=
Financial Advisor=
Tax Advisor=
Date1=
Date2=
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This is in response to a letter dated Date1, requesting an extension of time to file the required election statement to make a safe-harbor election under Rev. Proc. 2011-29, 2011-1 C.B. 746, to allocate success-based fees between facilitative and non-facilitative amounts for Taxpayer's transaction during TY. This request is made in accordance with §§ 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations.

FACTS AND REPRESENTATIONS

Taxpayer represents the following:

Taxpayer was organized on Date6, under the laws of State. During TY, Taxpayer was the common parent of an affiliated group of corporations (Taxpayer Group) that joined in filing consolidated U.S. federal income tax returns. Taxpayer had a calendar year end and used the accrual method of accounting.

Description of Taxpayer's Business Operations

During TY, Taxpayer operated as a holding company. Taxpayer, through its operating subsidiaries, including A, owned and operated short-stay ambulatory facilities across the United States. Immediately prior to the Acquisition (discussed below), Taxpayer was owned by B.

Facts Relating to the Acquisition

On Date2, C, an unrelated corporation, Taxpayer, and B entered into an agreement to undertake a business combination of Taxpayer and certain subsidiaries of C (the "C Contributed Entities"). This business combination was to be effected through an acquisition of Taxpayer and the C Contributed Entities by D (i.e., the Acquisition). On Date3, the following steps were consummated to effect the Acquisition:

Taxpayer Contribution. B transferred w% of their equity interests in Taxpayer to D in exchange for x% of the sole issued and outstanding class of D stock (the "Taxpayer Contribution");

C Contribution. C transferred all of the outstanding equity interests in the C Contributed Entities to D in exchange for y% of the sole issued and outstanding class of D stock (the "C Contribution"); and

D Share Transfer. B collectively sold z% of D stock to C in exchange for cash.

Upon completion of the Acquisition, ww% of D stock was held by C and xx% of D stock was held by B. Due to the Acquisition, Taxpayer Group terminated on Date 3, and the Taxpayer Group's tax return for TY represents Taxpayer Group's final return. Thereafter, Taxpayer operated as a subsidiary of D.

The Success-Based Fees Paid by Taxpayer

With respect to the Acquisition, Taxpayer paid Acquisition Advisor and Financial Advisor success-based fees of $a and $b, respectively, (the "success-based fees") for financial advisory services performed in the process of investigating or otherwise pursuing the Acquisition. Thus, Taxpayer paid amounts for success-based fees totaling $c during TY (and this amount was properly accruable for TY).

The Missed Election and Discovery of the Missed Election

Tax Advisor advised Taxpayer as to the proper U.S. federal income tax treatment of the success-based fees and prepared Taxpayer's consolidated U.S. federal income tax return for TY (i.e., the Election Return). In preparing such return, Tax Advisor complied with the substantive requirements of Rev. Proc. 2011-29 (described in detail below) by deducting 70% of the success-based fees under section 162 and capitalizing 30% of the success-based fees based upon a transaction cost study performed by Tax Advisor. For TY, the Taxpayer deducted $d (i.e., 70% of $c) of success-based fees on the Election Return filed Date4. However, Taxpayer inadvertently failed to attach the required election statement (the "Rev. Proc. 2011-29 Election Statement").

On Date5, while discussing with Tax Advisor its report concerning the success-based fees, Taxpayer inquired as to whether the Rev. Proc. 2011-29 Election Statement had been included with the Election Return. It was determined upon a review of the Election Return that the Rev. Proc. 2011-29 Election Statement had not been filed therewith. Tax Advisor immediately discussed with Taxpayer the ability of Taxpayer to request an extension of time pursuant to Treas. Reg. §§ 301.9100-1 and 301.9100-3 to file the Rev. Proc. 2011-29 Election Statement.

LAW

Section 263(a)(1) of the Internal Revenue Code and § 1.263(a)-2(a) of the Income Tax Regulations generally 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 (1992); Woodward v. Commissioner, 397 U.S. 572, 575-576 (1970).

Under § 1.263(a)-5, a taxpayer must capitalize an amount paid to facilitate a business acquisition or reorganization transaction described in § 1.263(a)-5(a). 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. See § 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) (success-based fee) is presumed to facilitate the transaction, and thus must be capitalized. A taxpayer may rebut the presumption by maintaining sufficient documentation to establish that a portion of the fee is allocable to activities that do not facilitate the transaction, and thus may be deductible.

A taxpayer's method for determining the portion of a success-based fee that facilitates a transaction and the portion that does not facilitate the transaction is a method of accounting under § 446. See section 2.04 of Rev. Proc. 2011-29.

Because the treatment of success-based fees was a continuing subject of controversy between taxpayers and the Service, the Service published Rev. Proc. 2011-29. Rev. Proc. 2011-29 provides a safe harbor method of accounting 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), this safe harbor permits electing taxpayers to treat 70 percent of the success-based fee as an amount that does not facilitate the transaction, i.e., an amount that can be deducted. The remaining portion of the fee must be capitalized as an amount that facilitates the transaction.

Section 4.01 of Rev. Proc. 2011-29 allows a taxpayer to make a safe harbor election with respect to success-based fees. Section 4.01 provides that the Service will not challenge a taxpayer's allocation of success-based fees between activities that facilitate a transaction described in § 1.263(a)-5(e)(3) and activities that do not facilitate the transaction if the taxpayer does three things. First, the taxpayer must treat 70 percent of the amount of the success-based fee as an amount that does not facilitate the transaction. Second, the taxpayer must capitalize the remaining amount of the success-based fee as an amount which does facilitate the transaction. Third, 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. This statement should: state that the taxpayer is electing the safe harbor; identify the transaction; and state the success-based fee amounts that are deducted and capitalized. It is this third requirement that Taxpayer requests permission to accomplish with this ruling request. Taxpayer requests permission to attach the election statement required by section 4.01(3) of Rev. Proc. 2011-29 to its return by amending its original filed return for TY and attaching a completed election statement to it.

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 301.9100-1(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.

Section 301.9100-3(a) provides that requests for extensions of time for regulatory elections under § 301.9100-3 will be granted when the taxpayer provides evidence 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, in general, a taxpayer is 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) failed to make the election because of intervening events beyond the taxpayer's control; (iii) failed to make the election because, after exercising reasonable 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 is deemed to have not acted reasonably and 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 section 6662 at the time the taxpayer requests relief 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 and related tax consequences but chose not to file the election; or (iii) uses hindsight in requesting relief.

Section 301.9100-3(c)(1) provides that the interests of the Government are prejudiced if granting relief would result in the 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.

Section 301.9100-3(c)(2) provides special rules for accounting method regulatory elections. Section 301.9100-3(c)(2) provides that the interests of the Government are deemed prejudiced, except in unusual or compelling circumstances, if the accounting method regulatory election for which relief is requested is subject to the advance consent procedures for method changes, requires a § 481(a) adjustment, would permit a change from an impermissible method of accounting that is an issue under consideration by examination or any other setting, or provides a more favorable method of accounting if the election is made by a certain date or taxable year.

Taxpayer's election is a regulatory election as defined in § 301.9100-1(b) because the due date of the election is prescribed in § 1.263(a)-5(f) of the Income Tax Regulations. 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.

CONCLUSION:

Based upon our analysis of the facts and representations provided, Taxpayer acted reasonably and in good faith, and granting relief will not prejudice the interests of the Government. Therefore, the requirements of §§ 301.9100-1 and 301.9100-3 have been met.

Taxpayer is granted an extension of 60 days from the date of this ruling to file the statement required under section 4.01(3) of Rev. Proc. 2011-29 stating that it is electing the safe harbor treatment for success-based fees, identifying the transaction, and stating the success-based fee amounts that are deducted and capitalized for TY.

CAVEATS:

The rulings contained in this letter are based on 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. In particular, no opinion is expressed as to whether Taxpayer properly included the correct costs as its success-based fees subject to the retroactive election, or whether the Acquisition is within the scope of Rev. Proc. 2011-29.

A copy of this letter must be attached to any income tax return to which it is relevant. Alternatively, a taxpayer filing its return electronically may satisfy this

requirement by attaching a statement to its return that provides the date and control number of the letter ruling.

In accordance with the provisions of the power of attorney currently 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.

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.

Sincerely yours,

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BRIDGET TOMBUL
Chief, Branch 2
Office of Associate Chief Counsel
(Income Tax & Accounting)

Enclosure:

Copy for § 6110 purposes