Internal Revenue Service

Number: **201736009**
Release Date: 9/8/2017

Index Number: 9100.00-00

Department of the Treasury
Washington, DC 20224

[Third Party Communication:
Date of Communication: Month DD, YYYY]

Person To Contact:
, ID No.

Telephone Number:

Refer Reply To:
CC:ITA:B03
PLR-112449-17

Date:
June 05, 2017

TY:

LEGEND:

Taxpayer =
Company =
Merger Sub =
Target =
Adviser A =
Adviser B =
Adviser C =
Tax Preparer =
Date 1 =
Date 2 =
Date 3 =
Date 4 =
Date 5 =
Date 6 =
Date 7 =
Date 8 =
Date 9 =
Date 10 =
Year 1 =
$D =
$E =
$F =

Dear :

This is in response to a letter sent on your behalf by your representatives dated . In the letter, your representatives requested on your behalf an extension of time

to file the forms necessary to make a safe harbor election under Rev. Proc. 2011-29 to allocate success-based fees between facilitative and non-facilitative amounts incurred for a covered transaction for Taxpayer's tax year ending Date 1. The request is based on sections 301.9100-1 and 301.9100-3 of the Procedure and Administrative Regulations.

FACTS

Taxpayer is a Company. On Date 2, Taxpayer, Target, and Merger Sub, a wholly-owned subsidiary of Taxpayer entered into a merger agreement. On Date 3, pursuant to the merger agreement, Merger Sub commenced a tender offer to purchase all of the outstanding shares of common stock of Target. On Date 4, Taxpayer announced that it had successfully completed the tender offer for all outstanding shares of common stock of Target and had accepted for payment all shares validly tendered and not withdrawn as of the expiration time of the tender offer and would promptly pay for such shares. On Date 5, pursuant to the terms of the merger agreement, Merger Sub merged with and into Target, the separate corporate existence of Merger Sub ceased, and Target continued as the surviving corporation. As a result of the completion of the merger, Target became a wholly-owned subsidiary of Taxpayer. Taxpayer represents that for federal income tax purposes, the Transaction was a direct taxable purchase of stock of Target by Taxpayer. As part of the transaction, Taxpayer paid Adviser A, Adviser B, and Adviser C success-based fees of $D, $E and $F, respectively, that were contingent upon the successful closing of the merger transaction.

Tax Preparer prepared Taxpayer's consolidated U.S. federal income tax return for the tax year ending on Year 1. Tax Preparer worked closely with Taxpayer in the preparation of the Year 1 tax return, with Taxpayer's tax department providing, among other items, its Year 1 workpapers reflecting the calculation of the Rev. Proc. 2011-29 safe harbor amount. Taxpayer performed its own technical analysis of the Year 1 transaction costs, relying on the methodology of the Year 1 transaction costs analysis which Tax Preparer performed for the merger transaction. Tax Preparer's team reviewed and approved Taxpayer's Year 1 transaction costs methodology. Taxpayer represents that Tax Preparer's team complied with the substantive requirements of Rev. Proc. 2011-29 by deducting 70 percent of the success-based fees and capitalizing 30 percent of the success-based fees on the Year 1 tax return, but the team was not aware of the ministerial requirement of filing the election statement required by Rev. Proc. 2011-29 and thus it was not filed with the Year 1 return.

On or around Date 6, a member of Tax Preparer's team learned through an internal communication that an election statement is a requirement for making a valid election. Realizing that Tax Preparer had inadvertently failed to include the election statement in the Year 1 return filing, Tax Preparer alerted Taxpayer's tax department. On or around the same time, the Internal Revenue Service, which was examining the Year 1 return, inquired as to whether the election statement was included with the Year 1 return. On

Date 7, Taxpayer responded that it had erroneously omitted the election statement from the Year 1 return.

In the period following this communication to the Internal Revenue Service's examination team, employee turnover occurred in both Taxpayer's tax department and on Tax Preparer's team, resulting in none of the persons most familiar with the missed election statement remaining on hand to address this unresolved issue. On or around Date 8, during the Internal Revenue Service's audit of the Year 1 return, the examining agent issued a draft Form 5701, Notice of Proposed Adjustment, proposing the disallowance of the safe harbor treatment. Taxpayer immediately started discussions with the agent and scheduled a formal meeting with the examination team on Date 9. During the meeting, Taxpayer represents that it reiterated the substantive correctness of its Year 1 return position (i.e., the deduction of 70% of the success-based fees and capitalization of the remaining 30%) as permitted by Rev. Proc. 2011-29 and specifically addressed the potential relief under sections 301.9100-1 through 301.9100-3 of the Procedure and Administration Regulations for the missing election statement. Taxpayer represents that the examining agent agreed to reconsider and discuss the election with the team manager. However, Taxpayer represents that it did not receive any further communication from the Internal Revenue Service until Date 10, when the Internal Revenue Service issued the final Form 5701 disallowing the safe harbor treatment. Taxpayer represents that the examining agent advised Taxpayer to request relief under sections 301.9100-1 through 301.9100-3 of the Procedure and Administration Regulations.

LAW AND ANALYSIS

Section 263(a)(1) of the Internal Revenue Code and section 1.263(a)-2(a) of the Income Tax Regulations 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 section 1.263(a)-5, a taxpayer must capitalize an amount paid to facilitate a business acquisition or reorganization transaction described in section 1.263(a)-5(a). An amount is paid to facilitate a transaction described in section 1.263(a)-5(a) if the amount is paid in the process of investigating or otherwise pursuing the transaction.

Section 1.263(a)-5(f) of the Regulations provides that an amount that is contingent on the successful closing of a transaction described in section 1.263(a)-5(a), or success-based fee, is presumed to facilitate the transaction. 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.

To reduce controversy between the IRS and taxpayers over the documentation required to allocate success-based fees alternatively to the regulatory presumption, the IRS issued Rev. Proc. 2011-29, 2011-1 C.B. 746. The revenue procedure states that the IRS would not challenge a taxpayer's allocation of a success-based fee between activities that facilitate a transaction described in section 1.263(a)-5(e)(3) and activities that do not facilitate the transaction if the taxpayer --

(1) treats 70 percent of the amount of the success-based fee as an amount that does not facilitate the transaction;

(2) capitalizes the remaining 30 percent as an amount that does facilitate the transaction; and

(3) attaches 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.

The revenue procedure applies to covered transactions described in section 1.263(a)-5(e)(3), which include --

(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 in the acquisition or the target of the acquisition) if, immediately after the acquisition, the acquirer and the target are related within the meaning of section 267(b) or section 707(b); or

(iii) A reorganization described in section 368(a)(1)(A), (B), or (C) or a reorganization described in section 368(a)(1)(D) in which stock or securities of the corporation to which the assets are transferred are distributed in a transaction which qualifies under section 354 or 356 (whether the taxpayer is the acquirer or the target in the reorganization).

Sections 301.9100-1 through 301.9100-3 of the Procedure and Administration Regulations provide the standards the Commissioner uses to determine whether to grant an extension of time to make a regulatory 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 section 301.9100-2.

Section 301.9100-1(b) defines the term "regulatory election" as an election whose due date is prescribed by a regulation published in the Federal Register, or a revenue ruling, procedure, notice or announcement published in the Internal Revenue Bulletin.

Section 301.9100-1(c) provides that 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 301.9100-3 provides extensions of time to make a regulatory election under Code sections other than those for which section 301.9100-2 expressly permits automatic extensions. Requests for extensions of time for regulatory elections 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 granting relief will not prejudice the interests of the government.

Section 301.9100-3(b)(1) states 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) 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, including a tax professional employed by the taxpayer, and the tax professional failed to make, or advise the taxpayer to make the election.

Under section 301.9100-3(b)(3), 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 has been or could be imposed under section 6662 at the time the taxpayer requests relief (taking into account section 1.6664-2(c)(3)) 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.

If specific facts have changed since the original deadline that make the election advantageous to a taxpayer, the Service will not ordinarily grant relief.

Taxpayer represents that for federal income tax purposes, the transaction was a direct taxable purchase of stock of Target by Taxpayer. Thus, immediately after the transaction, Taxpayer and Target were related within the meaning of sections 267(b) or 707(b). The transaction thus qualifies as a "covered transaction" described in section 1.263(a)-5(e)(3)(ii).

Taxpayer in this case has represented that it reasonably relied on a qualified tax professional, and the tax professional failed to make, or advise Taxpayer to make, the election. Thus, under section 301.9100-3(b)(1)(v), Taxpayer will be deemed to have acted reasonably and in good faith. Taxpayer has also represented that none of the circumstances listed in section 301.9100-3(b)(3) apply.

Section 301.9100-3(c)(1)(i) provides, in part, 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 (taking into account the time value of money). Section 301.9100-3(c)(1)(ii) provides, in part, that 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 section 6501(a) before the taxpayer's receipt of a ruling granting relief.

Under these criteria, the interests of the government are not prejudiced in this case. Taxpayer has represented that granting relief would not result in a lower tax liability in the aggregate for all taxable years affected by the election than Taxpayer would have had if the election had been timely made (taking into account the time value of money). Furthermore, the taxable year in which the regulatory election should have been made and any taxable years that would have been affected had it been timely made, are not closed by the period of assessment.

CONCLUSION

Taxpayer's election is a regulatory election, as defined under section 301.9100-1(b), because the due date of the election is prescribed in Rev. Proc. 2011-29. In the present situation, the requirements of sections 301.9100-1 and 301.9100-3(b)(1)(v) of the regulations have been satisfied. The information and representations made by Taxpayer establish that Taxpayer acted reasonably and in good faith. Furthermore, granting an extension will not prejudice the interests of the Government. Taxpayer represented that it 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 than Taxpayer would

have if the election were made by the original deadline for making the election. Taxpayer also represented that the period of assessment for Year 1 will not be closed before receipt of a ruling. Accordingly, Taxpayer is granted an extension of time to file the statement required by section 4.01(3) of Rev. Proc. 2011-29 until 60 days following the date of this letter.

Except as expressly provided herein, no opinion is expressed or implied concerning the federal income tax consequences of any aspect of any transaction or item discussed or referenced in this ruling including whether 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) of the Code provides that it may not be used or cited as precedent.

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

A copy of this letter must be attached to any income tax return to which it is relevant. Alternatively, taxpayers filing their returns electronically may satisfy this requirement by attaching a statement to their return that provides the date and control number of the letter ruling.

The rulings contained in this letter are based upon information and representations submitted by the taxpayer and accompanied by a penalty of perjury statement executed by an appropriate party. 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.

Sincerely,

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

cc: Internal Revenue Service