Internal Revenue Service

Number: **201746020**
Release Date: 11/17/2017

Index Number: 263.00-00, 9100.00-00

Department of the Treasury
Washington, DC 20224

Third Party Communication: None
Date of Communication: Not Applicable

Person To Contact:

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Refer Reply To:
CC:ITA:B01
PLR-109876-17

EIN:

Date:
August 18, 2017

LEGEND

Taxpayer =
Date 1 =
Date 2 =
Date 3 =
Q Sub =
Buyer =
Parent =
Merger Sub =
CPA =

Dear :

This responds to a letter ruling request dated March 09, 2017, submitted on behalf of Taxpayer. Taxpayer requests an extension of time pursuant to sections 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations to make an election for the treatment of a success-based fee in accordance with Rev. Proc. 2011-29, 2011-18 I.R.B. 746, which requires that a statement be attached to Taxpayer's original federal income tax return for the taxable year the success-based fee is paid or incurred. Taxpayer's request is with respect to the short taxable year beginning Date 1, and ending Date 2.

FACTS

Taxpayer is an S corporation with a qualified subchapter S subsidiary, Q Sub. On Date 2, in accordance with the terms of the Merger Agreement and Exchange Agreement, Buyer acquired all issued and outstanding shares of Taxpayer. As part of the transaction, certain shareholders of Taxpayer sold a portion of their common stock for cash, as well as contributed a portion of their common stock, to Parent. Parent is the sole shareholder of Buyer. In return, the shareholders became partial owners of Parent. In accordance with the Merger Agreement, Merger Sub, a subsidiary of Buyer, merged with and into Taxpayer, with Merger Sub ceasing to exist and Taxpayer becoming a wholly-owned subsidiary of Buyer. Taxpayer represents that the transaction qualified as a covered transaction pursuant to section 1.263(a)-5(e)(3) of the Income Tax Regulations.

On or around Date 3, Taxpayer hired CPA to prepare and timely file its U.S. Form 1120S for the short tax year beginning Date 1, and ending Date 2. Consistent with the safe harbor election provided in Rev. Proc. 2011-29, 2011-18 I.R.B. at 746-47, Taxpayer capitalized 30% of the success-based fees and deducted the remaining 70% on its tax return for the taxable year. CPA prepared and timely filed the Short Year Form 1120S on behalf of Taxpayer. CPA, on behalf of Taxpayer, failed to include the statement required by section 4.01(3) of Rev. Proc. 2011-29, 2011-18 I.R.B. at 747, to elect to use the safe harbor method of allocating success-based fees to Taxpayer's original federal tax return for the taxable year.

Promptly upon the discovery of the inadvertent and unintentional omission of the Safe Harbor Election Statement, Taxpayer sought relief based on its reasonable reliance on CPA. Taxpayer and CPA have each prepared and submitted an affidavit regarding CPA's failure to attach the required election statement to Taxpayer's return.

LAW

Section 263(a)(1) of the Internal Revenue Code provides generally that no deduction shall be allowed for any amount paid in exchange for property having a useful life extending beyond the end of the taxable year. See also section 1.263(a)-2(a). No deduction is allowed for an amount paid to acquire or create an intangible, which includes an ownership interest in a corporation or other entity. Section 1.263(a)-1(d)(3); see also sections 1.263(a)-4(c)(1)(i); 1.263(a)-4(d)(2)(i)(A). Costs incurred in the process of acquisition or reorganization of a business entity that produce significant long-term benefits must be capitalized. Indopco v. Commissioner, 503 U.S. 79, 89-90 (1992); section 1.263(a)-5(a) (providing that taxpayers must capitalize amounts paid to facilitate certain transactions set forth in that section).

Section 1.263(a)-5(b)(1) provides that an amount is paid to facilitate a transaction if the amount is paid in 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.

Section 1.263(a)-5(f) sets forth the rule governing success-based fees. It provides that an amount paid that is contingent on the successful closing of a transaction described in section 1.263(a)-5(a) is treated as 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.

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 section 446.

Section 4.01 of Rev. Proc. 2011-29, 2011-18 I.R.B. 746, provides a safe harbor election for allocating success-based fees paid in business acquisitions or reorganizations described in section 1.263(a)-5(e)(3). Pursuant to section 4.01 of Rev. Proc. 2011-29, 2011-18 I.R.B. at 747, the Service will 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% of the amount of the success-based fee as an amount that does not facilitate the transaction; 2) capitalizes the remaining 30% 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.

Section 301.9100-1 sets forth the standards the Commissioner will use to determine whether to grant an extension of time to make a regulatory election. Section 301.9100-1(b) provides that a regulatory election is 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. Pursuant to section 301.9100-1(c), the Commissioner has discretion to grant a reasonable extension of time under the rules set forth in sections 301.9100-2 and 301.9100-3 to make a regulatory election.

Section 301.9100-2 provides automatic extensions of time for making certain elections. Section 301.9100-3 sets forth the rules applicable to requests for extensions of time for regulatory elections that do not meet the requirements of section 301.9100-2. Requests for relief pursuant to section 301.9100-3 will be granted when the taxpayer provides evidence (including affidavits described in section 301.9100-3(e)) that

establishes that the taxpayer acted reasonably and in good faith, and that the granting of relief will not prejudice the interests of the government.

Section 301.9100-3(b)(1) provides that 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 (taking into account the taxpayer's experience and the complexity of the return or issue), 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.

Section 301.9100-3(b)(3) provides that a taxpayer will not be deemed 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, 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 an extension of time to make a regulatory election will be granted only when the interests of the government are not prejudiced by the granting of relief. The interests of the government are prejudiced if granting relief would result in a 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)(i).

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 under section 6501(a) before the taxpayer's receipt of a ruling granting relief under this section. Section 301.9100-3(c)(1)(ii).

Section 301.9100-3(c)(2) provides special rules for accounting method regulatory elections. The interests of the government are deemed to be prejudiced except in unusual and compelling circumstances if the accounting method regulatory election for which relief is requested:

(i) is subject to the procedure set forth in section 1.446-1(e)(3)(i) of this chapter (requiring advance written consent of the Commissioner);
(ii) requires an adjustment under section 481(a) (or would require an adjustment under section 481(a) if the taxpayer changed to the method of accounting for which relief is requested in a taxable year subsequent to the taxable year in which the election should have been made);
(iii) would permit a change from an impermissible method of accounting that is an issue under consideration by examination, an appeals office, or a federal court and the change would provide a more favorable method or more favorable terms and conditions than if the change were made as part of an examination; or
(iv) provides a more favorable method of accounting or more favorable terms and conditions if the election is made by a certain date or taxable year.

ANALYSIS

Taxpayer's election is a regulatory election, as defined in section 301.9100-1(b), because the due date of the election is prescribed in the Income Tax Regulations under section 1.263(a)-5(f). The Commissioner has the authority under sections 301.9100-1 and 301.9100-3 to grant an extension of time to file a late regulatory election.

The information provided and representations made by Taxpayer establish that Taxpayer acted reasonably and in good faith. Taxpayer requested relief before the failure to make the regulatory election was discovered by the Service. Taxpayer is not seeking to alter a return position for which an accuracy-related penalty has been or could be imposed under section 6662 at the time relief is requested. Taxpayer did not affirmatively choose not to make the election after having been informed in all material respects of the required election and related tax consequences. Rather, Taxpayer inadvertently failed to attach the mandatory election statement. Immediately upon realizing the omission, Taxpayer filed for relief. Taxpayer is not using hindsight in requesting relief.

Further, based on the information provided 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 all taxable years to which the election applies at this time than Taxpayer would have had if the election had been timely made. In addition, the taxable year in which the regulatory elections should have been made 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

section 6501(a) before Taxpayer's receipt of the ruling granting an extension of time to make a late election.

CONCLUSION

Based solely on the information provided and representations made, we conclude that Taxpayer acted reasonably and in good faith, and granting relief will not prejudice the interests of the government. Therefore, the requirements of sections 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 its mandatory statement as required by section 4.01 of Rev. Proc. 2011-29, 2011-18 I.R.B. at 747, stating that it is electing the safe harbor for allocating success-based fees, identifying the transaction, and stating the success-based fee amounts that are deducted and capitalized.

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 Taxpayer's transactions were within the scope of Rev. Proc. 2011-29, 2011-18 I.R.B. 746.

This ruling is directed only to the taxpayer requesting it. Pursuant to section 6110(k)(3), this ruling may not be used or cited as precedent.

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.

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 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.

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

Sincerely,

TaJuana E. Nelson Hyde
Senior Technician Reviewer, Branch 1
(Income Tax & Accounting)

cc: