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Department of the Treasury
Washington, DC 20224

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February 28, 2018

Taxpayer =
A =
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Dear

This letter responds to your letter dated September 12, 2017, requesting an extension of time under §§ 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations to make the safe harbor election for success-based fees set forth in Section 4 of Rev. Proc. 2011-29, 2011-18 I.R.B. 746. Section 4 requires a taxpayer, on its original federal income tax return for the year of the election, to: (1) allocate 70 percent of its success-based fees to activities that do not facilitate the transaction at issue and 30 percent to activities that do facilitate the transaction and (2) attach a statement setting forth, among other items, that the taxpayer is making the election.

FACTS

Taxpayer is a corporation and a member of an affiliated group that files a consolidated federal income tax return. Taxpayer files its federal income tax return on a calendar year basis and uses an accrual method as its overall method of accounting.

Taxpayer is wholly owned by A, formed under the laws of B and C. A is owned by D, also formed under the laws of B and C. D is owned by E, the Taxpayer's parent, formed under the laws of F.

G was formed under the laws of H and was wholly owned by J. On Date 1, pursuant to a plan of merger, E arranged for Taxpayer to acquire 100 percent of the stock of G (the Transaction). In the course of investigating and pursuing the Transaction, Taxpayer incurred certain transaction costs. Some of these costs included Taxpayer obtaining the services of K, a financial advisor, for a cost of L, the payment of which was contingent upon the successful closing of the Transaction. Taxpayer paid L to K upon that closing.

Taxpayer hired M to prepare Taxpayer's federal income tax return for the period ended Date 2 and to advise the Taxpayer as to all elections with respect to that return. Taxpayer was unaware of the success-based fee; therefore, the information it provided to prepare its return made no mention of it. Moreover, M did not inquire specifically of the Taxpayer whether it had incurred any success based fees. As a result, the Taxpayer timely filed its original federal income tax return for its taxable year ending Date 2 without reflecting the 70/30 split of the success-based fees on the return and without attaching the required statement to that return.

On Date 3, Taxpayer engaged N to prepare Taxpayer's federal income tax return for the period ended Date 4. Shortly after that, Taxpayer was advised that it had incurred a success-based fee in its taxable year ending on Date 2. N advised Taxpayer that the success-based fee qualified under Rev. Proc. 2011-29 and advised the Taxpayer to file this request for a private letter ruling granting an extension of time under §§ 301.9100-1 and -3 to make the election.

LAW

Section 263(a)(1) of the Internal Revenue Code and § 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, 112 S. Ct. 1039, 117 L. Ed. 2d 226 (1992); *Woodward v. Commissioner*, 397 U.S. 572, 575-576, 90 S. Ct. 1302, 25 L. Ed. 2d 577 (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. *See* § 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 transaction described in § 1.263(a)-(5)(a) (i.e., a success-based fee) is presumed to facilitate the transaction. A taxpayer may rebut this presumption by maintaining sufficient documentation to establish that a portion of the fee is allocable to activities that do not facilitate the transaction.

Section 4.01 of Rev. Proc. 2011-29 provides a safe harbor election for taxpayers that pay or incur success-based fees for services performed in the process of investigating or otherwise pursuing a covered transaction 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 allocate a success-based fee between activities that facilitate the transaction and activities that do not facilitate the transaction by treating 70 percent of the amount of the success-based fee as an amount that does not facilitate the transaction and by capitalizing the remaining 30 percent as an amount that does facilitate the transaction. In addition, 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, 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(c) of the Procedural Regulations 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.

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 301.9100-3(a) provides that requests for relief 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 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 at 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 § 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 § 1.446-1(e)(3)(i) of this chapter (requiring advance written consent of the Commissioner);
(ii) requires an adjustment under § 481(a) (or would require an adjustment under § 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

The Taxpayer's election is a regulatory election, as defined in § 301.9100-1(b), because the due date of the election is prescribed in the Income Tax Regulations under § 1.263(a)-5(f). 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 provided and representations made by the Taxpayer establish that the Taxpayer acted reasonably and in good faith. The Taxpayer reasonably relied on M, a qualified tax professional, to prepare its federal income tax return for the period ended Date 2. The Taxpayer is not seeking to alter a return position for which an accuracy related penalty has been or could be imposed under § 6662 at the time relief is requested. The 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, the Taxpayer relied on M to advise it as to any relevant elections, which M failed to do with respect to this election. The Taxpayer is not using hindsight in requesting relief.

Further, based on the information provided and representations made by the Taxpayer, granting an extension will not prejudice the interests of the government. The Taxpayer will not have a lower tax liability in the aggregate for all taxable years to which the election applies at this time than the Taxpayer would have had if the election had been timely made. In addition, the taxable year in which the regulatory election 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 § 6501(a) before the 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. Accordingly, the requirements of §§ 301.9100-1 and 301.9100-3 have been met.

Taxpayer is granted an extension of 45 days from the date of this ruling to file an amended return for its taxable year reflecting 70 percent of the amount of the success-based fee as an amount that does not facilitate the transaction and capitalizing the remaining 30 percent of the success-based fee as an amount that does facilitate the transaction. The Taxpayer must also attach the mandatory statement, as required by Section 4.01 of Revenue Procedure 2011-29. The mandatory statement must state that Taxpayer is electing the safe harbor for success-based fees, identify the transaction, and state the success-based fee amounts that are deducted and capitalized.

The ruling contained in this letter is based upon 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.

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, including whether Taxpayer properly included the correct costs as success-based fees subject to the retroactive election, or whether Taxpayer's transactions were 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.

A copy of this ruling should be attached to Taxpayer's federal tax returns for the tax years affected. 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.

In accordance with the provisions of the power of attorney currently on file with this office, a copy of this letter ruling is being sent to your two authorized representatives.

Sincerely,

/s/ Ronald J. Goldstein

Ronald J. Goldstein
Assistant to the Branch Chief, Branch 1
Office of Associate Chief Counsel
(Income Tax & Accounting