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:B03
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Date:
March 27, 2018

TY:

LEGEND:

Taxpayer =
Acquirer =
Adviser =
Accounting Firm =
Company A =

Company B =

Date 1=
Date 2=
Date 3=
Date 4 =
Date 5 =
Year 1 =
Year 2 =
Month 1 =
$A =

Dear :

This is in response to a letter sent on your behalf by your representatives dated February 7, 2018. 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 3. The request is based on sections 301.9100-1 and 301.9100-3 of the Procedure and

Administrative Regulations.

FACTS

Taxpayer is a Company A. Acquirer is a Company B.

On Date 3, Acquirer acquired all of the outstanding stock of the parent company of Taxpayer in a taxable reverse subsidiary merger transaction. More specifically, a wholly owned merger subsidiary of Acquirer merged with and into the common parent company of Taxpayer's former consolidated return group, with Taxpayer surviving as a subsidiary of Acquirer. For federal income tax purposes, the formation of Acquirer's merger subsidiary and its merger into Taxpayer's former parent company was disregarded. Instead, the transaction was treated for federal tax purposes as a direct taxable purchase of stock of Taxpayer by Acquirer. As a result of the acquisition transaction, Taxpayer's former consolidated return group terminated, and Taxpayer joined Acquirer's consolidated return group as of the end of the day on Date 3. Accordingly, Taxpayer was required to file a final short-period consolidated Form 1120 for the taxable year ended Date 3, the closing date of the acquisition transaction.

In connection with the acquisition transaction, Taxpayer engaged Adviser to act as exclusive financial advisor to Taxpayer regarding the proposed sale of Taxpayer to Acquirer. Adviser's services included transaction advisory services related to general sale strategy, assessment of offers received, financial and structural advice related to the form of the transaction, and various related financial analyses. Pursuant to the terms of Adviser's engagement letter, Adviser was entitled to receive a contingent fee payable on the successful closing of a transaction which was to be calculated as a percentage of transaction value. As a result of the successful closing of this transaction, Adviser became entitled to receive a contingent fee of $A million.

During the period in question, Taxpayer's accounting and finance departments were inundated with various matters related to the acquisition. For financial accounting purposes, Taxpayer prepared short period financial statements as a result of the transaction for the short periods of Date 1 through Date 2 and Date 3 through Date 4. The Date 3 closing date activity, including the contingent fee paid to Adviser as a result of the successful closing of a transaction, was not included in the first short period.

In preparing its short period tax return ending on Date 3, Taxpayer provided the Date 1 to Date 2 financial information to its predecessor accounting firm, which excluded the success-based fee paid to Adviser on Date 3. As a result, no portion of the $A million success-based fee was included in Taxpayer's final tax return, and Taxpayer failed to attach the election statement under Rev. Proc. 2011-29 for the short period tax return ending on Date 3 with its originally filed tax return. Taxpayer represented that it relied upon its predecessor accounting firm for the correct preparation of its final tax return,

including the proper tax treatment of transaction costs. Taxpayer's former accounting firm mentioned neither the incorrect taxable year end date nor the treatment of transaction costs incurred on the Date 1 closing date to Taxpayer.

This missing election was discovered in connection with the preparation of the consolidated federal tax return for Acquirer and its subsidiaries for tax the year ending Date 4. During the preparation of Acquirer's consolidated federal tax return, Accounting Firm requested additional information relating to the tax treatment of transaction costs on Taxpayer's final tax return in order to confirm proper treatment of these costs. In response to this request, Accounting Firm received, among other things, a copy of Adviser's invoice dated Date 3 showing a $A million contingent transaction fee incurred by Taxpayer. Although this information was requested in connection with the preparation of Acquirer's originally filed Year 2 consolidated tax return, Accounting Firm did not receive this information until Month 1. When Accounting Firm reviewed the information it received, it discovered that the contingent fee was inadvertently excluded from Taxpayer's final tax return and that the safe harbor election for success-based fees under Rev. Proc. 2011-29 was inadvertently missed as a result. Upon discovery of the missed election, Accounting Firm advised that Taxpayer request relief under Treas. Reg. §§301.9100-1 and 301.9100-3 to make a late election. Taxpayer represented that the extended due date of Taxpayer's short-period tax return ending on Date 3 was Date 5, and thus the period of assessment was still open when Taxpayer requested relief.

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 between the activities that facilitate the transaction and activities that do not facilitate the transaction, 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 Taxpayer by Acquirer. Thus, immediately after the transaction, Taxpayer and Acquirer 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 requested relief before the failure to make the regulatory election was discovered by the Service and that it failed to make the election because, after exercising due diligence, Taxpayer was unaware of the necessity for the election. Taxpayer has also 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 sections 301.9100-3(b)(1)(i), (iii), and (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, Taxpayer has represented that 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 until 60 days following the date of this letter to file an amended return for the tax year ending Date 1 electing safe harbor treatment of its success-based fees under Rev. Proc. 2011-29.

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,

Robert Casey
Acting Branch Chief
(Income Tax & Accounting)

cc: