Internal Revenue Service

Number: **201927006**
Release Date: 7/5/2019

Index Number: 9100.00-00, 263.00-00

Department of the Treasury
Washington, DC 20224

Third Party Communication:
Date of Communication:

Person To Contact:

ID No.

Telephone Number:

Refer Reply To:
CC:ITA:B01
PLR-126710-18

Date:
April 09, 2019

Legend

Taxpayer =
Taxable Year =
A =
B =
C =
D =
Director =
Date 1 =
Date 2 =
Date 3 =
$a =

Dear :

This letter responds to your correspondence dated August 16, 2018, requesting an extension of time to make the safe harbor election for success-based fees described in Rev. Proc. 2011-29, 2011-18 I.R.B. 746. Taxpayer failed to attach the required election statement to its previously filed return in order to make the safe harbor election to allocate success-based fees between facilitative and non-facilitative amounts. Therefore, Taxpayer requests an extension of time under §§ 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations to attach the required election statement to its return.

FACTS

Taxpayer is a domestic corporation incorporated under the laws of State A on Date 1, and a member of an affiliated group that files a consolidated federal income tax return.

Taxpayer has a fiscal tax year and uses an accrual method as its overall method of accounting. On Date 2, Taxpayer acquired B in a reorganization under § 368(a)(1)(B) of the Internal Revenue Code (the Transaction). Taxpayer engaged C to perform services in the process of investigating or otherwise pursuing the Transaction as part of its acquisition of B. Taxpayer incurred $a in success-based fees for the services performed by C. Taxpayer paid the $a in success-based fees to C upon the successful closing of the Transaction.

Taxpayer engaged D, a third-party tax professional, to perform an analysis of the success-based fees incurred and paid in connection with Taxpayer's acquisition of B and to prepare any documentation to establish that portion of the success-based fees allocable to activities that did not facilitate the Transaction. Taxpayer and D discussed and documented the necessity of making an election to allocate the success-based fees pursuant to Rev. Proc. 2011-29. Taxpayer self-prepared its original return for its Taxable Year (Return) reflecting a deduction of seventy percent of its success-based fees as allocable to activities that do not facilitate the Transaction and reflecting capitalization of thirty percent as allocable to activities that facilitate the Transaction. However, Taxpayer and Director, who oversees tax compliance for Taxpayer, inadvertently failed to attach the statement required by section 4.01(3), or notice the absence of the statement, when Taxpayer filed its Return electronically with the Internal Revenue Service (Service). Taxpayer also engaged D to review and sign the Return as preparer; nonetheless, D failed to include, or notice the absence of, the statement before Taxpayer timely filed its Return electronically on Date 3.

In the second tax year immediately following the Taxable Year, Taxpayer made another acquisition involving success-based fees. Taxpayer engaged D to perform a review of the transaction costs incurred in the acquisition. Director and D discussed making the election for success-based fees incurred in the acquisition pursuant to Rev. Proc. 2011-29, as Taxpayer did for Taxable Year. In the course of this discussion, Director inquired with D about the election statement for Taxable Year, and D discovered that the election statement had not been included with the Return. D then advised Director of the procedures under §§ 301.9100-1 and 301.9100-3 to obtain an extension of time to attach the required statement to the Return. Shortly after, Taxpayer filed this private letter ruling requesting an extension of time to add the required statement under section 4.01(3) of Rev. Proc. 2011-29 to its Return.

LAW & ANALYSIS

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 (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). 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) ("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.

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

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), this safe harbor permits electing taxpayers to treat seventy percent of the success-based fee as an amount that does not facilitate the transaction, and may be deducted, and the remaining portion of the fee must be capitalized as an amount that facilitates the transaction.

Section 4.01 of Rev. Proc. 2011-29 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 satisfies three requirements. First, the taxpayer must treat seventy 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 must : (a) state that the taxpayer is electing the safe harbor; (b) identify the transaction; and (c) state the success-based fee amounts deducted and capitalized. It is the third requirement that Taxpayer requests permission to accomplish with this ruling request. Taxpayer requests permission to amend its Return by attaching to it the completed statement required by § 4.01(3) of Rev. Proc. 2011-29.

Sections 301.9100-1 through 301.9100-3 of the Procedure and Administration Regulations provide the standards the Commissioner will use to determine whether to grant an extension of time to make an election. 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 301.9100-2 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.

The election Taxpayer wants to make 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 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, Taxpayer has met the requirements of §§ 301.9100-1 and 301.9100-3.

Taxpayer is granted an extension of sixty days from the date of this ruling to amend its Return to attach the statement required under section 4.01(3) of Rev. Proc. 2011-29. The statement must set forth that Taxpayer is electing the safe harbor treatment for success-based fees, identify the transaction, and set forth the amount of the success-based fees that are deducted and capitalized for Taxable Year.

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. Although this office has not verified any of the material submitted in support of the request for the ruling, it is subject to verification on examination.

Except as expressly set forth 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 Transaction was within the scope of Rev. Proc. 2011-29.

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 returns that provides the date and control number of the letter ruling.

Enclosed is a copy of the letter ruling showing the deletions proposed to be made in the letter when it is disclosed under § 6110 of the Code.

This ruling is directed only to Taxpayer that is requesting it. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.

In accordance with the provisions of the power of attorney currently on file with this office, we are sending a copy of this letter ruling to your two authorized representatives, . We are also sending a copy of this letter to the appropriate operating division director.

Sincerely,

Norma C. Rotunno
Chief, Branch 1
Office of Associate Chief Counsel
Income Tax & Accounting Division

Enclosure:
Copy for § 6110 purposes

cc: