Internal Revenue Service

Number: **201930024**
Release Date: 7/26/2019

Index Number: 263.14-00

Department of the Treasury
Washington, DC 20224

Third Party Communication: None
Date of Communication: Not Applicable

Person To Contact:
, ID No.

Telephone Number:

Refer Reply To:
CC:ITA:B01
PLR-127617-18

Date:
April 16, 2019

LEGEND

Taxpayer	=
State A	=
Business Holding Company	=
Principal Business Activity	=
Transaction 1	=
Transaction 2	=
Transaction 3	=
Year 1	=
Year 2	=
Date *a*	=
Date *b*	=
Date *c*	=
Date *d*	=
Date *e*	=

Dear :

This is in response to a letter sent on behalf of Taxpayer dated Date *a*, requesting permission to attach an election statement to Taxpayer's originally filed

federal tax return for Year 1 and Year 2. The election statement was not included with Taxpayer's originally filed tax return for Year 1 nor Year 2 although it was required in order for Taxpayer to elect the safe harbor under section 4.01 of Rev. Proc. 2011-29. The request is made under §§ 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations.

FACTS

The Taxpayer represents the following facts:

The Taxpayer is a State A registered corporation that was formed on Date *b* and is a Business Holding Company. The Taxpayer is the common parent of a U.S. consolidated return group and it is engaged in the Principal Business Activity.

Taxpayer incurred transaction costs, including success-based fees paid upon the consummation of Transaction 1 on Date *c*. Taxpayer incurred transaction costs, including success-based fees paid upon the consummation of Transaction 2 on Date *d.* Taxpayer incurred transaction costs, including success-based fees paid upon the consummation of Transaction 3 on Date *e*. The Taxpayer capitalized the transaction costs in accordance with § 263 of the Internal Revenue Code and § 1.263(a)-2(a) and § 1.263(a)-5 of the Income Tax Regulations. Taxpayer capitalized 30 percent of the success-based fees, and deducted the remaining 70 percent, on its timely filed Year 1 and Year 2 federal income tax returns consistent with the safe harbor election provided in Rev. Proc. 2011-29. However, Taxpayer failed to attach the statement required by Rev. Proc. 2011-29 to elect to use the safe harbor method of allocating success-based fees. This oversight was uncovered by the Internal Revenue Service (Service) and the disallowance of certain transaction costs related to Transaction 1 was raised as an issue for Year 1.

LAW AND ANALYSIS

Section 263(a)(1) and § 1.263(a)-2(a) 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). 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.

Section 1.263(a)-5(f) provides that an amount 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, and thus must be capitalized. 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, and thus may be deductible.

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 § 446.

Because the treatment of success-based fees was a continuing subject of controversy between taxpayers and the Service, the Service published Revenue Procedure 2011- 29. Revenue Procedure 2011-29 provides a safe harbor method of accounting for allocating success-based fees paid in business acquisitions or reorganizations described in regulations § 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 70 percent of the success-based fee as an amount that does not facilitate the transaction (i.e., amounts that can be deducted). The remaining portion of the fee must be capitalized as an amount that facilitates the transaction.

Section 4.01 of Revenue Procedure 2011-29 allows the taxpayer to make a safe harbor election with respect to success-based fees. Section 4.01 provides that the Service will not challenge the taxpayer's allocation of success-based fees between activities that facilitate a transaction described in § 1.263(a)-5(e)(3) (costs that must be capitalized) and activities that do not facilitate the transaction (costs that may be deductible) if the taxpayer does three things. First, the taxpayer must treat 70 percent of the amount of the success-based fee as an amount that does not facilitate the transaction and thus may be deductible. Second, the taxpayer must capitalize the remaining amount of the success-based fee as an amount which does facilitate the transaction. Finally, 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 (treated as *not* facilitating the transaction) and capitalized (treated as facilitating the transaction).

It is this last requirement that Taxpayer requests permission to accomplish with this ruling request. Taxpayer requests permission with this ruling request to attach the statement required by Section 4.01 of Revenue Procedure 2011-29 to its Year 1 and Years returns, by amending its original filed returns and superseding it with returns with the proper election statement completed and attached.

Section 301.9100-1(c) provides that the Commissioner of Internal Revenue, in exercising his discretion, may grant a reasonable extension of time under the rules set

forth in § 301.9100-3 to make a regulatory election under all subtitles of the Internal Revenue Code except subtitles E, G, H, and I. The term "regulatory election" is defined in § 301.9100-1(b) as an election whose due date is prescribed by a regulation published in the Federal Register, or a revenue ruling, revenue procedure, or announcement published in the Internal Revenue Bulletin.

Section 301.9100-3(a) provides that requests for relief subject to this section will be granted when the taxpayer provides the evidence to establish to the satisfaction of the Commissioner that the taxpayer acted reasonably and in good faith, and the grant of relief will not prejudice the interests of the Government.

Under § 301.9100-3(b)(1), except as provided in § 301.9100-3(b)(3) (i) through (iii), a taxpayer is deemed to have acted reasonably and in good faith if the taxpayer:

(i) requested relief under this section before the failure to make the regulatory election was discovered by the Internal Revenue 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 Internal Revenue 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.

Paragraphs (b)(3)(i) through (iii) of § 301.9100-3 provide that a taxpayer is deemed not to have acted reasonably and in good faith if the taxpayer:

(i) seeks to alter a return position for which an accuracy-related penalty 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. If specific facts have changed since the due date for making the election that make the election advantageous to a taxpayer, the Service will not ordinarily grant relief. In such a case, the Service

will grant relief only when the taxpayer provides strong proof that the taxpayer's decision to seek relief did not involve hindsight.

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

Section 301.9100-3(c)(2) provides special rules for accounting method regulatory elections. Section 301.9100-3(c)(2) provides that the interests of the government are deemed prejudiced, except in unusual or compelling circumstances, if the accounting method regulatory election for which relief is requested is subject to the advance consent procedures for method changes, requires a 481(a) adjustment, would permit a change from an impermissible method of accounting that is an issue under consideration by examination or in any other setting, or provides a more favorable method of accounting if the election is made by a certain date or taxable year.

Taxpayer's election is a regulatory election, as defined under § 301.9100-1(b), because the due date of the election is prescribed by Rev. Proc. 2011-29. In the present situation, the requirements of §§ 301.9100-1 and 301.9100-3 of the regulations have been satisfied. The information and representations made by Taxpayer and the attached affidavits establish that the Taxpayer acted reasonably and in good faith. The Taxpayer reasonably relied on qualified tax professionals for the filing of Taxpayer's return. The tax professionals prepared the return consistent with an election under Rev. Proc. 2011-29, but failed to attach the statement required by the safe harbor election.

The information and representations presented establish that Taxpayer is not seeking to alter a return position for which an accuracy-related penalty had been or could be imposed under § 6662 at the time relief was requested. Taxpayer was not informed in all material respects of the required election, and its related tax consequences. Furthermore, Taxpayer is not using hindsight in requesting relief, and no facts have changed since the time of the original filing deadline.

Finally, granting an extension will not prejudice the interests of the Government. It is represented that Taxpayer 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 in the appropriate amount at this time than Taxpayer would have had if the election were made in the appropriate amount by the original deadline for making the election. Moreover, 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, are not closed by the period of limitations on assessment.

CONCLUSION

Based solely on the facts submitted and the representations made, we conclude that Taxpayer acted reasonably and in good faith, and that granting the request will not prejudice the interests of the government. Accordingly, the requirements of §§ 301.9100-1 and 301.9100-3 have been satisfied.

Taxpayer is granted an extension of 45 days from the date of this ruling to file its mandatory statement as required by Section 4.01 of Rev. Proc. 2011-29, stating that it is electing the safe harbor for 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 regarding Taxpayer's classification of success-based fees.

In accordance with the provisions of the power of attorney currently on file with this office, a copy of this letter is being sent to your authorized representatives. We are also sending a copy of this letter to the appropriate operating division director. Enclosed is a copy of the letter ruling showing the deletions proposed to be made in the letter when it is disclosed under § 6110.

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

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,

Sean M. Dwyer
Senior Technical Reviewer, Branch 1
Associate Office of Chief Counsel
(Income Tax & Accounting)