Internal Revenue Service

Number: **201935007**
Release Date: 8/30/2019

Index Number: 9100.00-00

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:B03
PLR-132234-18

Date:
May 29, 2019

In Re:

TY:

Legend:

Taxpayer	=
Purchaser	=
Advisor 1	=
Advisor 2	=
Preparer	=
Services	=
Date 1	=
Date 2	=
Date 3	=
Date 4	=
Date 5	=
Date 6	=
$A	=
$B	=
C%	=
$E	=

Dear :

This letter responds to a letter dated Date 1, submitted on behalf of Taxpayer, requesting a ruling that Taxpayer be granted an extension of time under §§ 301.9100-1(c) and 301.9100-3 of the Procedure and Administration Regulations to make a safe harbor election under Rev. Proc. 2011-29, 2011-1 C.B. 746, which requires that a

statement be attached to Taxpayer's original federal income tax return for the short tax year ending on Date 2.

FACTS

In the tax year at issue, Taxpayer provided Services. Before the transaction described below, Taxpayer had several owners. On Date 2, Purchaser acquired all outstanding interests in Taxpayer.

On Date 3, Taxpayer engaged Advisor 1 to provide financial advisory services in conjunction with its potential sale. The engagement letter provided for a fee of $A if the consideration paid for taxpayer was less than or equal to $B, or $A plus C% of the excess over $B. No amount would be due if the sale did not occur, other than reimbursement of reasonable out of pocket expenses. In addition, Taxpayer engaged Advisor 2 on Date 4 to provide additional advisory services in conjunction with the sale, with the same arrangement for success-based fees. The transaction closed on Date 2. Both advisors received $A.

Taxpayer engaged Preparer to prepare and file its tax return for the short year ending on Date 2. Preparer deducted 70% of the amounts paid pursuant to the success based fee arrangements to Advisor 1 and Advisor 2, a total of $E, in accordance with the safe harbor election provided in Rev. Proc. 2011-29. Due to an administrative error, Preparer failed to attach a statement to Taxpayer's Form 1065 for that year, as required in order to make the election. Preparer discovered when its Tax Partner reviewed the file. Preparer then advised Taxpayer that it could request relieve under Treas. Reg. §§ 301.9100-1 and 301.9100-3, and Taxpayer agreed to do so.

LAW

Section 263(a) of the Internal Revenue Code provides generally that no deduction is allowed for any amount paid out for new buildings or for permanent improvements or betterments made to increase the value of any property or estate or any amount expended in restoring property or in making good the exhaustion thereof for which an allowance is or has been made.

Section 1.263(a)-1(d)(3) of the Income Tax Regulations provides that no deduction is allowed for an amount paid to acquire or create an intangible, which under §§ 1.263(a)-4(c)(1)(i) and 1.263(a)-4(d)(2)(i)(A) includes an ownership interest in a corporation or other entity. See also § 1.263(a)-4(a).

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. See INDOPCO, Inc. v. Commissioner, 503 U.S. 79 (1992);

Woodward v. Commissioner, 397 U.S. 572 (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. Section 1.263(a)-5(b)(1).

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) (i.e., a success-based fee) is 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.

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.

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).

Section 301.9100-1(c) 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 extensions of time for regulatory elections (other than automatic changes covered under section 301.9100-2) 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 that granting relief will not prejudice the interests of the Government.

Section 301.9100-3(b)(1) provides 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) inadvertently 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, 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 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 could be imposed under § 6662 at the time the taxpayer requests relief and the new position requires 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.

Section 301.9100-3(c)(1) provides that the Commissioner will grant a reasonable extension of time only when the interests of the Government will not be 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). 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.

ANALYSIS

Taxpayer's election is a regulatory election, as defined under § 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 and representations made by Taxpayer establish that Taxpayer acted reasonably and in good faith. Taxpayer has represented that it requested relief before the failure to make the regulatory election was discovered by the Service. Taxpayer has also represented that it reasonably relied upon the advice of Preparer, a qualified tax professional, to prepare its federal income tax return for the taxable year ending on Date 2.

Moreover, Taxpayer has represented that none of the circumstances listed in section 301.9100-3(b)(3) apply. It is not the case that Taxpayer was informed of the need to file the election but chose not to do so. 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. Taxpayer did not affirmatively choose not to file the election after having been informed in all material respects of the required election and related tax consequences. Taxpayer has also represented that it is not using hindsight in making its request for relief and that no specific facts have changed since the due date for filing the election that make the election advantageous.

Further, based on the facts of the case provided, granting an extension will not prejudice the interests of the Government. Taxpayer has 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 at this time than Taxpayer would have had if the election had been timely made (taking into account the time value of money). Taxpayer has also represented that the tax year at issue is not closed by the period of limitations on assessment at the time relief would be granted. In addition, granting relief in this instance will not affect any closed years.

RULING

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 60 days from the date of this ruling to file an amended return for the tax year ending Date 3 including the statement required by § 4.01(3) of Rev. Proc. 2011-29, stating that it is electing the safe harbor for success-based fees, properly identifying the party making the election, identifying the transaction, and stating the success-based fee amounts that are deducted and capitalized.

The rulings contained in this letter are based upon information and representations submitted by Taxpayer and accompanied by a penalty of perjury statement executed by appropriate parties. 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 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) provides that it may not be used or cited as precedent.

A copy of this ruling should be attached to Taxpayer's federal income tax returns for the tax years affected. Alternatively, taxpayers filing returns electronically may satisfy this requirement by attaching a statement to their return that provides the date and control

number of this ruling. We are also sending a copy of the ruling 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.

Sincerely,

Brinton Warren
Branch Chief, Branch 3
(Income Tax & Accounting)

Enclosure: Copy of the letter for § 6110 purposes