Internal Revenue Service

Number: **201942003**
Release Date: 10/18/2019

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.
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Refer Reply To:
CC:ITA:B03
PLR-101872-19

Date:
July 17, 2019

TY:

LEGEND:

Taxpayer =
Acquirer =
Financial Advisor =
Tax Return Preparer =
Corporation X =
Corporation Y =
Hold Co. =
Taxable Year =
Date 1 =
Date 2 =
Date 3 =
Date 4 =
Date 5 =
Date 6 =
Date 7 =
Date 8 =
$a =

Dear :

This responds to a letter ruling request dated Date 1, submitted on behalf of Taxpayer. Taxpayer requests an extension of time under sections 301.9100-1 and 301.9100- 3 of the Procedure and Administration Regulations to make a late election concerning the treatment of success-based fees in accordance with 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 taxable year ending on Date 2.

FACTS

On Date 3, Taxpayer engaged Financial Advisor to provide assistance with a potential transaction. Financial Advisor identified potential purchasers, performed financial analysis, assisted in soliciting interest in the potential acquisition, and assisted in negotiating the financial aspects of the transaction.

On Date 4, Acquirer purchased all outstanding common and Series A units of Taxpayer, other than those held by Corporation X and Corporation Y, in exchange for cash consideration. On the same day, Acquirer purchased all shares of Corporation X and all shares of Corporation Y in exchange for cash consideration. Acquirer did not make a section 338 election for Corporation X and Corporation Y.

On Date 5, Acquirer formed Hold Co. as a wholly-owned U.S. subsidiary. Pursuant to two merger agreements dated Date 2, Corporation X and Corporation Y merged with and into Hold Co. on Date 2 with Hold Co. surviving the merger. On Date 2, simultaneous with the merger, Acquirer contributed all of its Taxpayer units to Hold Co.. As a result of the merger and the capital contribution, Hold Co. became the owner of all outstanding common and preferred units of Taxpayer and Taxpayer's partnership status terminated on Date 2.

Upon closing of the transaction, Taxpayer incurred and paid Financial Advisor a contingent fee of *$a.*

In an agreement dated Date 6, Acquirer and Taxpayer agreed that Acquirer would be responsible for the preparation and filling of all federal, state and local income tax returns of Taxpayer for taxable periods ending on or before the closing that are required to be filed after the closing. The agreement also stated that each final partnership income tax return shall contain a safe harbor election pursuant to Rev. Proc. 2011-29.

Acquirer engaged Tax Return Preparer to prepare and provide tax advice with respect to Taxpayer's Form 1065, U.S. Return of Partnership Income, for Taxable Year. Tax Return Preparer advised Taxpayer to make the safe harbor election for allocating success-based fees set forth in Rev. Proc. 2011-29 and prepared a high-level calculation summarizing the income tax treatment of various transaction costs. Acquirer reviewed and concurred with Tax Return Preparer's calculation.

Taxpayer timely filed its final partnership tax return on Date 7. Taxpayer complied with the substantive requirements for the safe harbor election for allocating success-based fees by deducting 70 percent of the success-based fee and capitalizing 30 percent of the success-based fee on Taxpayer's final partnership tax return. However, Taxpayer failed to attach the election statement required by section 4.01(3) of Rev. Proc. 2011-29 to the Taxpayer's final partnership tax return when it inadvertently omitted the statement from Tax Return's e-file package.

The omission of the election statement to use the safe harbor method for allocating success-based fees was discovered on Date 8, when Acquirer requested Tax Return Preparer confirm that the election statement was included in the Taxpayer's Final Partnership Tax Return e-file package. Upon review of the e-file package, Tax Return Preparer discovered the election statement was omitted from the e-file submitted to the IRS.

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) provides that no deduction is allowed for an amount paid to acquire or create an intangible, which under sections 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 section 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. 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). In general, 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. 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) 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. 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.

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(a) 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.

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. 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.

ANALYSIS

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 the Income Tax Regulations under section 1.263(a)-5(f). The Commissioner has the authority under sections 301.9100-1 and 301.9100-3 to grant an extension of time to file a late regulatory election.

Taxpayer in this case has represented that it requested relief before the failure to make the regulatory election was discovered by the Service. Thus, under section 301.9100-3(b)(1)(i), 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.

Based on the facts of the case Taxpayer provided, granting an extension of time to file the election will not prejudice the interests of the government under section 301.9100-3(c)(1). 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

In the present situation, the requirements of sections 301.9100-1 and 301.9100-3(b)(1) 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 under section 301.9100-3(c)(1). 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 Taxable Year 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 ruling to file an amended return for the tax year ending Date 2 electing safe harbor treatment of its success-based fees under section 4.01(3) of Rev. Proc. 2011-29. The amended return must include an election statement stating that Taxpayer is electing the safe harbor for success-based fees, 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 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.

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.

A copy of this ruling 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.

In accordance with the Power of Attorney on file with this office, a copy of this letter is being sent to your authorized representative. 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 section 6110 of the Code.

Sincerely,

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