Internal Revenue Service

Department of the Treasury
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Person To Contact:
, ID No.

Telephone Number:

Refer Reply To:
CC:IT&A:01
PLR-101929-19

Attn:

Date:
August 12, 2019

In re:

Legend

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

Dear

This letter responds to your correspondence dated January 31, 2019, 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 consolidated Federal income tax return for Year 1 (Year 1 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 Year 1 return.

FACTS

Taxpayer is a C corporation incorporated on Date 1 under the laws of State A. Taxpayer is the parent of an affiliated group that files a consolidated Federal income tax return. Taxpayer formed A, and though A, purchased all the stock of B from B's shareholders in exchange for cash. On Date 2, B merged into A with B surviving (the Transaction). Taxpayer represents the Transaction qualifies as a reorganization described in § 368(a)(1)(B) of the Internal Revenue Code and hence, a covered transaction described in § 1.263(a)-5(e) of the Income Tax Regulations.

Taxpayer engaged C to perform advisory services in the process of investigating or otherwise pursuing the Transaction as part of Taxpayer's acquisition of B. Taxpayer represents it incurred a liability of $a in success-based fees for C's services. Taxpayer paid the entire amount of $a to C upon the closing of the Transaction.

Taxpayer engaged D, a third-party tax professional, in the preparation of Taxpayer's state tax return and its consolidated Federal income tax return for Year 1. Taxpayer intended to make the safe harbor election to allocate the success-based fees pursuant to Rev. Proc. 2011-29. Taxpayer's Year 1 return reflects a deduction of seventy percent of $a, and capitalization of the remaining thirty percent as allocable to activities that facilitated the Transaction. Due to an administrative error, D failed to attach the statement required by section 4.01(3) of Rev. Proc. 2011-29 to the Year 1 return filed with the Internal Revenue Service (Service).

On Date 3, several new employees of D commenced working on the tax matters of Taxpayer. D instructed these employees to review Taxpayer's prior tax filings to familiarize themselves with Taxpayer. These employees were unable to locate the election statement with D's copy of Taxpayer's Year 1 return.

Initially, D's further investigation suggested that there was a technical problem with the software used to prepare the Year 1 return. D's employees believed the election statement was attached to the Year 1 return when it was filed. To confirm whether the election statement was attached to the return, D asked Taxpayer to review its copy of the Year 1 return. However, Taxpayer could not locate the election statement.

Although Taxpayer's Year 1 return reflected a deduction of success-based fees as provided in Rev. Proc. 2011-29; the Taxpayer failed to attach the required election statement to its return. D advised Taxpayer that relief to file a late election might be obtained under § 301.9100-3. Taxpayer immediately authorized D to prepare all the necessary documents to request the relief on behalf of Taxpayer.

LAW & ANALYSIS

Section 263(a)(1) and § 1.263(a)-2(a) provide that no deduction shall be allowed for any amount paid 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.

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).

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 Year 1 return by attaching the statement required by section 4.01(3) of Rev. Proc. 2011-29.

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

Taxpayer's election is a regulatory election as defined in § 301.9100-1(b) because the due date of the election is prescribed in section 4.01(3) of Rev. Proc. 2011-29. 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.

Section 2.04 of Rev. Proc. 2011-29 provides that 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. Elections relating to methods of accounting are subject to special rules. Section 301.9100-3(c)(2). However, Taxpayer is not seeking to change its method of accounting for the success-based fees, only to file the statement required by section 4.01(3) of Rev. Proc. 2011-29.

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 60 days from the date of this letter ruling to amend its Year 1 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 Year 1.

CAVEATS

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. Taxpayer similarly represented that C acquired no proprietary interest in Taxpayer or B immediately before, during, or immediately after the Transaction. 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: (1) Taxpayer incurred a liability for the entire $a as success-based fees; (2) Taxpayer paid the entire amount of $a; (3) Taxpayer properly included the correct costs as success-based fees subject to the retroactive election; or (4) the 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) 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 authorized representative. We are also sending a copy of this letter ruling to the appropriate operating division director.

Sincerely,

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

Enclosure:
Copy for § 6110 purposes

cc: