Internal Revenue Service

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Department of the Treasury
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Person To Contact:
, ID No.
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PLR-103720-19
Date:
August 08, 2019

TY:

LEGEND:

Taxpayer	=
Owner	=
Acquired Entity	=
Adviser 1	=
Adviser 2	=
Accounting Firm	=
Date 1	=
Date 2	=
Date 3	=
Date 4	=
Date 5	=
Taxable Year	=
$a	=
$b	=
$c	=

Dear :

This letter responds to a letter dated Date1, 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 file a safe

harbor election under Rev. Proc. 2011-29, 2011-18 I.R.B. 746, which requires that a statement be attached to Taxpayer's original federal income tax return for Taxable Year.

FACTS

Taxpayer is a biopharmaceutical company focused on developing and delivering therapeutics and conducting clinical research. Taxpayer's currently marketed products support the health of patients in areas of

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On Date 2, Taxpayer, Seller, and Acquired Entity entered into a stock purchase agreement, which provided that Taxpayer would acquire all of the issued and outstanding stock of Acquired Entity from Seller for $a cash consideration. As part of the acquisition, Taxpayer paid $b and $c of success-based fees to Adviser 1 and Adviser 2, respectively, for services performed in the process of investigating or otherwise pursuing the transaction.

On Date 3, Taxpayer acquired all of Acquired Entity's outstanding stock and Acquired Entity became a wholly-owned subsidiary of Taxpayer. As a result, Taxpayer and Acquired Entity became related entities within the meaning of section 267(b) of the Internal Revenue Code.

Taxpayer engaged Accounting Firm to analyze the proper treatment of costs incurred in connection with the transaction for U.S. federal income tax purposes and also to prepare the pertinent U.S. federal income tax return for the tax year ending on Date 4. Accounting Firm determined that Taxpayer was eligible to apply the safe harbor under Rev. Proc. 2011-29 to the success-based fees.

Accounting Firm prepared the tax return, in accordance with the requirements of Rev. Proc. 2011-29, deducting 70% of the success-based fees and capitalizing the remaining 30%. Accounting Firm, however, failed to attach the election statement for the success-based fees to the tax return, as required by Rev. Proc. 2011-29. Although Taxpayer reviewed the tax return and was aware that the election statement was required to be attached thereto, it did not detect the missing election statement.

In Date 5, Taxpayer was in negotiations with a potential buyer interested in acquiring Acquired Entity. In preparation for discussions with the potential buyer, Taxpayer reviewed information related to the acquisition, including the tax return, and determined that the election statement for the success-based fees should have been attached to the tax return.

Taxpayer requested assistance from Accounting Firm regarding the missing election statement. After Accounting Firm informed Taxpayer that it must seek relief under Treas. Reg. §§ 301.9100-1 and 301.9100-3 for an extension of time to properly file the election, Taxpayer engaged Accounting Firm to prepare such request.

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 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. See INDOPCO, Inc. v. Commissioner, 503 U.S. 79 (1992); Woodward v. Commissioner, 397 U.S. 572 (1970).

Under section 1.263(a)-5, a taxpayer must capitalize an amount paid to facilitate the business acquisition or reorganization transactions 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) provides that an amount that is contingent on the successful closing of a transaction described in section 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.

To reduce controversy between the IRS and taxpayers over the documentation required to allocate success-based fees, the Department of Treasury and IRS issued Rev. Proc. 2011-29. The revenue procedure provides that the IRS will 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) 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) 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 § 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.

Taxpayer represents that for federal income tax purposes, the transaction was a direct taxable purchase of stock of Taxpayer by Acquirer. Thus, immediately after the transaction, Taxpayer and Acquirer were related within the meaning of sections 267(b) or 707(b). The transaction thus qualifies as a covered transaction described in section 1.263(a)-5(e)(3)(ii).

Taxpayer in this case has represented that it requested relief before the failure to make the regulatory election was discovered by the Service and that it reasonably relied on a qualified tax professional, and the tax professional failed to make, or advise Taxpayer to make, the election. Thus, under sections 301.9100-3(b)(1)(i) and (v), 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 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.

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 the statement required by section 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 specifically provided herein, no opinion is expressed or implied concerning the federal tax consequences of the facts described above under any other provision of the Code. In particular, no opinion is expressed or implied as to whether the 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.

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 § 6110 of the Code.

Sincerely,

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

Enclosure: Copy of the letter for 6110 purposes

cc: