Internal Revenue Service

Number: **201948004**
Release Date: 11/29/2019

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:B01
PLR-103739-19

Date:
August 29, 2019

In re: Request for an Extension to File Election Statement

LEGEND

Taxpayer =

Business =

Transaction =

A =

Year 1 =

Date a =
Date b =
Date c =
Date d =
State A =

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 consolidated Federal income tax return for Year 1. The election statement was not

included with Taxpayer's originally filed tax return for Year 1 although it was required in order for Taxpayer to use the safe harbor under section 4.01 of Rev. Proc. 2011-29, 2011-1 C.B. 746. The request is made under §§ 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations.

FACTS

Taxpayer represents the following facts:

Taxpayer is a State A registered corporation that was organized on Date b and is engaged in the Business. Taxpayer is the common parent of a U.S. consolidated return group.

Taxpayer incurred transaction costs, including success-based fees paid upon the consummation of Transaction on Date c. Taxpayer represents that Transaction was a covered transaction for purposes of § 1.263(a)-5(e)(3)(ii) 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 Federal income tax return consistent with the safe harbor election provided in Rev. Proc. 2011-29. However, Taxpayer failed to attach the statement required by section 4.01(3) of Rev. Proc. 2011-29 to elect to use the safe harbor method of allocating success-based fees. This oversight was uncovered on Date d by A, a tax professional employed by Taxpayer who was responsible for filing all tax elections for Taxpayer. A intended to complete and attach the statement required by Rev. Proc. 2011-29 to Taxpayer's return for Year 1, but inadvertently failed to do so.

To date, Taxpayer has not received any notification from the Internal Revenue Service (IRS) that its Federal income tax return for Year 1 is under examination, nor has it received notification that the failure to include the election statement was discovered by the IRS. Accordingly, Taxpayer requests permission to file an amended consolidated return for Year 1 which will include the mandatory election statement required to use the safe harbor method of accounting for success-based fees under section 4.01(3) of Rev. Proc. 2011-29.

LAW AND ANALYSIS

Section 263(a)(1) of the Internal Revenue Code 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. 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 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.

Rev. Proc. 2011-29 provides a safe harbor method of accounting for allocating success-based fees paid in business acquisitions or reorganizations described in § 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 Rev. Proc. 2011-29 allows the taxpayer to make the 70/30 safe harbor election with respect to success-based fees. Section 4.01(3) of Rev. Proc. 2011-29 provides that 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).

Taxpayer requests permission with this ruling request to attach the statement required by Section 4.01(3) of Rev. Proc. 2011-29 to its Year 1 return, by amending its original filed return and superseding it with a return with the proper election statement completed and attached.

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 301.9100-1(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.

Section 301.9100-3(b)(1) provides that, in general, 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 IRS; (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, the taxpayer was unaware of the necessity for the election; (iv) reasonably relied on the written advice of the IRS; 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 is deemed to have not 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 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 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.

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.

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 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 attach the statement required by section 4.01(3) of Rev. Proc. 2011-29 to its return by amending its original filed return for Year 1, and superseding it with a return attaching a completed election statement with respect to the Transaction.

The rulings contained in this letter are based on information and representations submitted by 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 tax consequences of any aspect of any transaction or item discussed or referenced in this letter. In particular, no opinion is expressed as to whether Taxpayer properly included the correct costs as its success-based fees subject to the retroactive election or whether Taxpayer's Transaction is within the scope of Rev. Proc. 2011-29.

A copy of this letter must be attached to any income tax return to which it is relevant. Alternatively, a taxpayer filing its return electronically may satisfy this requirement by attaching a statement to its return that provides the date and control number of the letter ruling.

A copy of this letter is being sent 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.

Sincerely,

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

Enclosure(1):
Copy for § 6110 purposes