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Department of the Treasury
Washington, DC 20224

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, ID No.

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CC:ITA:2
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Date:
January 08, 2020

Taxpayer	=
Buyer	=
Tax Professional	=
Year 1	=
Date 1	=
Date 2	=

Dear :

This is in response to a letter dated September 13, 2019, requesting that Taxpayer be granted an extension of time under §§ 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations to make an election to use the safe harbor method of accounting under § 4.01 of Rev. Proc. 2011-29, 2011-18 I.R.B. 746, to allocate success-based fees in connection with the acquisition of ownership interests in Taxpayer by Buyer.

FACTS AND REPRESENTATIONS

On Date 1, ownership interests in Taxpayer were sold to Buyer. In the course of this acquisition, Taxpayer incurred fees Taxpayer represents qualify as success-based fees. Taxpayer retained Tax Professional to prepare Taxpayer's federal income tax return for Year 1, on which Taxpayer would make the safe harbor election under Rev. Proc. 2011-29 for these success-based fees.

In connection with the preparation of Taxpayer's income tax return, Tax Professional prepared an Internal Revenue Service (Service) form requesting an extension of the due date of Taxpayer's income tax return for Year 1, and provided it to Taxpayer for signature and filing with the Service.

Due to severe weather, this form was not filed with the IRS. At the time, however, Tax Professional and Taxpayer believed the form had been filed with the Service, and that Taxpayer had successfully extended the due date of its income tax return for Year 1.

Taxpayer filed its income tax return for Year 1 with the Service by the date it believed was the extended due date for the return. On this return, Taxpayer made the safe harbor election required by Rev. Proc. 2011-29 for the success-based fees, but the return was not filed timely and the election statement required by § 4.01(3) of Rev. Proc. 2011-29 attached to the return inadvertently reported incorrect fees.

The failure to timely file Taxpayer's income tax return and the reporting of incorrect fees on the election statement attached to the return was discovered by Taxpayer when the Service sent Taxpayer a notice dated Date 2 informing Taxpayer that it had been assessed a penalty for the failure to timely file its Year 1 income tax return.

LAW AND ANALYSIS

Section 263(a)(1) of the Internal Revenue Code generally provides 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. See INDOPCO, Inc. v. Commissioner, 503 U.S. 79, 89-90 (1992); Woodward v. Commissioner, 397 U.S. 572, 575-76 (1970).

Under § 1.263(a)-5 of the Income Tax Regulations, 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.

A taxpayer's method for determining the portion of a success-based fee that facilitates a transaction and the portion that does not facilitate the transaction is a method of accounting under § 446. See § 2.04 of Rev. Proc. 2011-29.

Because the treatment of success-based fees was a continuing subject of controversy between taxpayers and the Service, the Service published Rev. Proc. 2011-29. 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 fees as an amount that does not facilitate the transaction, i.e., an amount that can be deducted currently. The remaining portion of the fees must be capitalized.

Section 4.01 of Rev. Proc. 2011-29 allows a taxpayer to make a safe harbor election with respect to success-based fees. Section 4.01 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 does three things. First, the taxpayer must treat 70 percent of the success-based fees as amounts that do not facilitate the transaction. Second, the taxpayer must capitalize the remaining success-based fees as amounts that do facilitate the transaction. Third, the taxpayer must attach a statement to its original federal income tax return for the taxable year the success-based fees are paid or incurred. This statement should: (i) state that the taxpayer is electing the safe harbor; (ii) identify the transaction; and (iii) state the amount of the success-based fees that are deducted and capitalized.

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 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.

Section 301.9100-3(a) provides that requests for extensions of time for regulatory elections 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, 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 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, 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 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 § 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.

Section 301.9100-3(c)(2) provides special rules for accounting method regulatory elections. Section 301.9100-3(c)(2) provides that the interests of the Government are deemed prejudiced, except in unusual or compelling circumstances, if the accounting method regulatory election for which relief is requested is subject to the advance consent procedures for method changes, requires a § 481(a) adjustment, would permit a change from an impermissible method of accounting that is an issue under consideration by examination or any other setting, or provides a more favorable method of accounting if the election is made by a certain date or taxable year.

Taxpayer's election is a regulatory election as defined in § 301.9100-1(b) because the due date of the election is prescribed in § 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 regulatory election.

CONCLUSION

Based upon our analysis of the facts and representations provided, Taxpayer acted reasonably and in good faith, and granting relief will not prejudice the interests of the Government. Therefore, the requirements of §§ 301.9100-1 and 301.9100-3 have been met.

Taxpayer is granted an extension of 60 days from the date of this ruling to file an amended income tax return making the safe harbor election under Rev. Proc. 2011-29.

CAVEATS

The ruling contained in this letter is based on 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 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 the transaction described herein is within the scope of Rev. Proc. 2011-29 or whether the fees Taxpayer incurred are success-based fees 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, if Taxpayer files its return electronically, Taxpayer may satisfy this requirement by attaching a statement to its return that provides the date and control number of this letter ruling.

In accordance with the provisions of the power of attorney currently on file with this office, a copy of this letter is being sent to your authorized representatives. 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 ruling when it is disclosed under § 6110.

This ruling is directed only to Taxpayer. Section 6110(k)(3) provides that it may not be used or cited as precedent.

Sincerely,

David B. Silber

David B. Silber
Acting Senior Technician Reviewer, Branch 2
(Income Tax & Accounting)

Enclosure: Copy for § 6110 purposes

cc: