Internal Revenue Service

Department of the Treasury
Washington, DC 20224

Number: **202018004**
Release Date: 5/1/2020

Index Number: 9100.00-00

Third Party Communication: None
Date of Communication: Not Applicable

Person To Contact:
, ID No.

Telephone Number:

Attn:

Refer Reply To:
CC:ITA:B02
PLR-118395-19

Date:
January 30, 2020

LEGEND:

Taxpayer	=
A	=
B	=
C	=
D	=
E	=
F	=
G	=
Firm	=
Date 1	=
Date 2	=
Date 3	=
Date 4	=
Date 5	=
Month	=
X	=
W	=
Amount 1	=
Amount 2	=

Dear :

This responds to a letter ruling request dated Date 1, submitted on behalf of Taxpayer. Taxpayer requests an extension of time under Treas. Reg. §§ 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 in which the transaction closed.

FACTS

Taxpayer represents the facts as follows:

Taxpayer is a limited liability company organized under the laws of the state of W and has elected to be treated as a corporation for tax purposes. Taxpayer has a calendar year end and uses the accrual method of accounting.

Taxpayer is a holding company, and through its operating subsidiaries, is in the business of X.

Prior to the transaction described below, Taxpayer was principally owned by A. Also prior to the transaction described below, Taxpayer and its subsidiaries joined in the filing of consolidated U.S. federal income tax return with Taxpayer as the common parent.

On Date 2, Taxpayer, A, B, and C, entered into an Agreement and Plan of Merger ("Agreement"). The Agreement provided that B would acquire all of Taxpayer's equity via a merger of C with and into Taxpayer, with Taxpayer surviving as a direct wholly-owned subsidiary of B. The transaction, valued at Amount 1, closed on Date 3.

For U.S. federal income tax purposes, Taxpayer treated the transaction as a taxable stock purchase under § 1001 in which B obtained a § 1012 cost basis in the stock of Taxpayer. Immediately after the transaction, B directly owned 100% of the stock of Taxpayer.

Taxpayer engaged D, E, F, and G as financial advisors for services performed in the process of investigating or otherwise pursuing the transaction. Taxpayer paid success-based fees totaling Amount 2 between the four advisors. The fees were contingent upon the successful closing of the transaction.

Taxpayer engaged Firm to prepare the U.S. federal income tax return for the taxable year ended on Date 3. The return was mistakenly prepared for a taxable year ending Date 4. Taxpayer relied on Firm for compliance with all U.S. federal income tax filing obligations associated with the taxable year ended Date 3, including all filing requirements related to the transaction. Firm determined that Taxpayer was eligible to apply the safe harbor under Rev. Proc. 2011-29 to the success-based fees, and explained to Taxpayer that once the election was made, 70% of the success-based fees would be deductible and the remaining 30% would have to be capitalized, in accordance with the substantive requirements of Rev. Proc. 2011-29.

When Firm prepared Taxpayer's return, it inadvertently failed to attach a statement to Taxpayer's return, as required by Rev. Proc. 2011-29, noting that Taxpayer was making the safe harbor election (the "Election Statement"). Taxpayer's return was timely filed on Date 5. Because the Taxpayer was unaware that Election Statement was required, it did not detect the missing Election Statement.

In Month, Taxpayer reviewed the Election Return. At that time, Taxpayer learned that the Election Statement for the success-based fees should have been attached to Taxpayer's return and that it was not attached. Taxpayer promptly reached out to Firm for assistance regarding the missed Election Statement. 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 make the safe harbor election.

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. Treasury Regulation § 1.263(a)-1(d)(3) provides that no deduction is allowed for an amount paid to acquire or create an intangible, which under Treas. Reg. §§ 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 Treas. Reg. § 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 Treas. Reg. § 1.263(a)-5, a taxpayer must capitalize an amount paid to facilitate a business acquisition or reorganization transaction described in Treas. Reg. § 1.263(a)-5(a). In general, an amount is paid to facilitate a transaction described in Treas. Reg. § 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. Treasury Regulation § 1.263(a)-5(b)(1).

Treasury Regulation § 1.263(a)-5(f) provides that an amount that is contingent on the successful closing of a transaction described in Treas. Reg. § 1.263(a)-5(a), or a 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 Treas. Reg. § 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 Treas. Reg. § 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 § 267(b) or § 707(b); or

(iii) A reorganization described in § 368(a)(1)(A), (B), or (C) or a reorganization described in § 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 § 354 or § 356 (whether the taxpayer is the acquirer or the target in the reorganization).

Treasury Regulations §§ 301.9100-1 through 301.9100-3 provide the standards the Commissioner uses to determine whether to grant an extension of time to make a regulatory election. Treasury Regulation § 301.9100-2 provides automatic extensions of time for making certain elections. Treasury Regulation § 301.9100-3 provides extensions of time for making elections that do not meet the requirements of Treas. Reg. § 301.9100-2.

Treasury Regulation § 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.

Treasury Regulation § 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.

Treasury Regulation § 301.9100-3(a) provides extensions of time to make a regulatory election under Code sections other than those for which Treas. Reg. § 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.

Treasury Regulation § 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 Treas. Reg. § 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 § 6662 at the time the taxpayer requests relief (taking into account Treas. Reg. § 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.

Treasury Regulation § 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. Treasury Regulation § 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). Treasury Regulation § 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 § 6501(a) before the taxpayer's receipt of a ruling granting relief.

ANALYSIS

Taxpayer's election is a regulatory election, as defined under Treas. Reg. § 301.9100-1(b), because the due date of the election is prescribed in Rev. Proc. 2011-29. As such, the Commissioner has the authority under Treas. Reg. §§ 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 qualifies as a covered transaction described in Treas. Reg. § 1.263(a)-5(e)(3)(ii), the transaction was a taxable purchase of stock of Taxpayer by B, and immediately after the transaction, Taxpayer and B were related within the meaning of §§ 267(b) or 707(b).

Taxpayer in this case has represented that under Treas. Reg. §§ 301.9100-3(b)(1)(i) and (v), 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. As such, Taxpayer acted reasonably and in good faith. Taxpayer has also represented that none of the circumstances listed in Treas. Reg. § 301.9100-3(b)(3) apply.

CONCLUSION

Under the facts as represented by Taxpayer, the requirements of Treas. Reg. §§ 301.9100-1 and 301.9100-3(b)(1) have been satisfied. The information and representations made by Taxpayer establish that Taxpayer acted reasonably and in good faith and that granting an extension of time to file the election will not prejudice the interests of the government under Treas. Reg. § 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 limitations on assessment.

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 3 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. We also understand that Taxpayer will include the proper year-end date of Date 3 on its amended return.

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. 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) provides that this ruling 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 § 6110.

Sincerely,

Bridget Tombul
Branch Chief, Branch 2
Office of Associate Chief Counsel
(Income Tax & Accounting)