Internal Revenue Service

Department of the Treasury
Washington, DC 20224

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Person To Contact:
, ID No.

Telephone Number:

Refer Reply To:
CC:ITA:B03-
PLR-128453-19

EIN:

Attn:

Date:
May 29, 2020

In re:

Legend

Date 1	=
Taxpayer	=
Taxable Year	=
State	=
Date 2	=
Advisor	=
Target	=
Date 3	=
$a	=
$b	=
$c	=
$d	=
$e	=
$f	=
Accounting Firm	=
Date 4	=
Date 5	=

Dear :

This letter responds to a letter ruling request dated Date 1, submitted on behalf of Taxpayer, requesting an extension of time to make a late safe harbor election under Rev. Proc. 2011-29, 2011-18 I.R.B. 746. Taxpayer failed to attach the required election statement to its Federal income tax return for Taxable Year 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 Taxable Year return.

FACTS

Taxpayer, a State corporation, is a company. Taxpayer

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Pursuant to an engagement letter dated Date 2, Taxpayer engaged Advisor in conjunction with the possible acquisition of Target, an company focused on . Under the terms of the engagement letter, Taxpayer agreed to pay Advisor a fee of between $a and $b if Taxpayer acquired more than percent of Target's outstanding ordinary share capital or assets, or a fee determined at Taxpayer's discretion if Taxpayer acquired less than percent of Target's outstanding ordinary share capital or assets. Taxpayer also agreed to consider engaging Advisor to perform additional services in connection with the acquisition. In the event Taxpayer were to engage Advisor for such additional services, Advisor agreed to credit $c (or a lesser amount agreed to by the parties) of the fees described above against any fees that became payable to Advisor for the additional services.

Taxpayer successfully closed the acquisition transaction on Date 3, acquiring Target for $d and paying Advisor a fee of $e. Taxpayer also incurred fees for additional services in the amount of $f.

Taxpayer engaged Accounting Firm to prepare a transaction costs analysis (TCA) with respect to the acquisition of Target, and to prepare and electronically file its Federal and state tax returns for Taxable Year. Accounting Firm determined that the $e fee paid to Advisor constituted a success-based fee subject to the safe harbor election provided in Rev. Proc. 2011-29. Accounting Firm drafted a statement setting forth the total amount of the success-based fee of $e, as well as the portion of the fee to be deducted and the portion to be capitalized pursuant to the safe harbor election in Rev. Proc. 2011-29.

Accounting Firm provided the TCA and draft election statement to Taxpayer and to Accounting Firm personnel responsible for preparing Taxpayer's Form 1120, U.S. Corporation Income Tax Return, for Taxable Year. Accounting Firm also provided Taxpayer with a letter noting that, to elect the safe harbor treatment under Rev. Proc. 2011-29, an election statement was required to be filed with the Form 1120.

The Form 1120 prepared by Accounting Firm and filed by the Taxpayer reflected the portion of the success-based fee to be deducted and the portion to be capitalized, as if the safe harbor election under Rev. Proc. 2011-29 had been made. In other words, Taxpayer deducted 70 percent of $e and capitalized the remaining 30 percent on its Form 1120 for Taxable Year. However, despite the intention of the Taxpayer to make

the election, the election statement required by Rev. Proc. 2011-29 was not included with the Form 1120 when it was delivered to the Taxpayer for review. Although Taxpayer's internal tax personnel reviewed the Form 1120 for Taxable Year, they did not detect the missing election statement.

The Form 1120 was signed by a partner with Accounting Firm and the Chief Financial Officer of Taxpayer. The Chief Financial Officer of Taxpayer also signed Form 8453-C, U.S. Corporation Income Tax Declaration for an IRS e-file Return. The Form 1120 was electronically filed, pursuant to an extension, on Date 4.

By a letter dated Date 5, the Internal Revenue Service (IRS) notified Taxpayer that its return for Taxable Year had been selected for examination. During that examination, an IRS Revenue Agent requested a copy of the statement required by Rev. Proc. 2011-29. At that point, Taxpayer discovered that the statement had been omitted from the Form 1120 when filed.

Taxpayer and Accounting Firm determined that relief to make the election was potentially available under §§ 301.9100-1(c) and 301.9100-3. Taxpayer determined to request such relief and advised the Revenue Agents handling the examination of Taxpayer's return for Taxable Year of its intent to do so.

LAW

Section 263(a)(1) of the Internal Revenue Code and § 1.263(a)-2(a) of the Income Tax Regulations generally 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 § 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. Section 1.263(a)-5(b)(1). 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 § 1.263(a)-5(a) ("success-based fee") is presumed to facilitate the transaction and, therefore, 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. Section 1.263(a)-5(f). Section 4.01 of Rev. Proc. 2011-29 provides a safe harbor election for allocating success-based fees paid in business acquisitions or reorganizations described in

§ 1.263(a)-5(e)(3) (“covered transactions”). 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, and thus, can be deducted, and to treat 30 percent of the success-based fee as an amount that facilitates the transaction and must be capitalized.

Specifically, section 4.01 provides that the Service will not challenge a taxpayer’s allocation of success-based fees between activities that do not facilitate a covered transaction and activities that do facilitate the covered 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 and thus may be deducted; (2) capitalizes the remaining amount of the success-based fee as an amount which does facilitate the transaction; and (3) attaches a statement to its original federal income tax return for the taxable year that 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 pursuant to the safe harbor election.

Sections 301.9100-1 through 301.9100-3 provide the standards that 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 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 or 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)(2) provides that a taxpayer will not be considered to have reasonably relied on a qualified tax professional if the taxpayer knew or should have known that the professional was not:

(i) Competent to render advice on the regulatory election; or
(ii) Aware of all relevant facts.

Section 301.9100-3(b)(3) provides that a taxpayer will be 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.

ANALYSIS

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

Taxpayer represents that Taxpayer's acquisition of Target was a covered transaction as defined by § 1.263(a)-(5)(e)(3)(ii), and that the fee of $e paid by Taxpayer to Advisor was a success-based fee as defined in § 1.263(a)-5(f). Further, Taxpayer specifically represents that no portion of the $e fee reflected services for which payment was not contingent upon the successful closing of the transaction.

Taxpayer represents that Accounting Firm, although identifying the safe harbor provision of Rev. Proc. 2011-29 and completing Form 1120 as though that safe harbor had been elected, failed to include with Taxpayer's return for Taxable Year the statement required to make the election. Taxpayer further represents that its own failure to detect the omitted election statement was inadvertent. Based on these representations, Taxpayer reasonably relied on a qualified tax professional and, under § 301.9100-3(b)(1)(v), is deemed to have acted reasonably and in good faith.

Taxpayer represents 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 represents 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. Based on these representations, granting an extension of time to file the election will not prejudice the interests of the government under § 301.9100-3(c)(1).

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 the election statement required by Section 4.01(3) of Rev. Proc. 2011-29, stating that it is electing the safe harbor for success-based fees for Taxable Year, identifying the covered transaction, and stating the success-based fee amounts that are deducted and capitalized, in accordance with Taxpayer's representations.

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 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 Taxpayer's classification of its fees as success-based fees or whether Taxpayer's acquisition of Target 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.

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.

In accordance with the provisions of the power of attorney currently on file with this office, copies of this letter are being sent to your authorized representative. We are also sending a copy of this letter to the appropriate operating division director.

Sincerely,

BRINTON T. WARREN
Chief, Branch 3
Office of Associate Chief Counsel
(Income Tax and Accounting)

By:
SUSIE K. BIRD
Senior Counsel, Branch 3

Enclosure: Copy for § 6110 purposes

cc: