Internal Revenue Service

Number: **202052002**
Release Date: 12/24/2020

Index Number: 263.00-00, 9100.00-00

Department of the Treasury
Washington, DC 20224

[Third Party Communication:
Date of Communication: Month DD, YYYY]

Person To Contact:
, ID No.

Telephone Number:

Refer Reply To:
CC:ITA:B03
PLR-105482-20

Date:
September 29, 2020

In Re:

Legend

Date 1 =
Taxpayer =
Taxable Year =
State =
Corporation =
Advisor =
Advisor 2 =
Date 2 =
$a =
$b =
Date 3 =
Accounting Firm =

Dear :

This letter responds to a letter ruling request dated Date 1, 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 originally filed 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 limited liability company,

.

Taxpayer timely elected to be treated as a corporation for federal income tax purposes, has a calendar year end, and uses an overall accrual method of accounting.

Taxpayer incurred transaction costs including success-based fees related to the purchase of Corporation. Taxpayer retained Advisor and Advisor 2 as financial advisors for services performed in the process of investigating and otherwise pursuing the transaction. Taxpayer successfully acquired the Corporation's assets constituting a trade or business in a taxable acquisition transaction on Date 2. Pursuant to Taxpayer's agreements with Advisor and Advisor 2, Taxpayer paid success-based fees of $a and $b, respectively, at the time of the successful closing of the transaction.

Taxpayer engaged Accounting Firm to prepare its federal income tax return for Taxable Year, including the proper allocation of the success-based fees and any associated elections. Taxpayer capitalized the transaction costs in accordance with § 263 of the Internal Revenue Code and §§ 1.263(a)-2 and 1.263(a)-5 of the Income Tax Regulations, and in a manner consistent with the safe harbor election outlined in Rev. Proc. 2011-29.

An IRS agent alerted Taxpayer during an ongoing federal audit during Date 3 that although Taxpayer capitalized 30 percent of the success-based fees and deducted the remaining 70 percent on its timely filed federal income tax return for Taxable Year, Taxpayer had failed to include the election statement with its timely filed return. Upon review, Taxpayer and Accounting Firm determined that the election statement should have been attached to the election return. Thus, Taxpayer promptly requested an extension of time to allow Taxpayer to attach to the required statement regarding the election to use the safe harbor method for allocating success-based fees to its federal income tax return for Taxable Year.

LAW

Section 263(a)(1) of the Internal Revenue Code and § 1.263(a)-2(a) of the Income Tax Regulations 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 the facts and circumstances. Section 1.263(a)-5(b)(1).

Under § 1.263(a)-5(f) 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) (covered transactions), including a taxable acquisition by the taxpayer of assets that constitute a trade or business. 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, meaning that amount that can be deducted. The remaining portion (30 percent) 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 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)(costs that must be capitalized) and activities that do not facilitate the transaction (costs that may be deductible) 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 thus must be capitalized; 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 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 §§ 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

The Commissioner has the authority to grant an extension of time to file a later regulatory election under §§ 301.9100-1 and 301.9100-3. Taxpayer's election is a regulatory election under §301.9100-1(b) because it is prescribed under Rev. Proc. 2011-29.

Taxpayer represents that its acquisition of Corporation was a covered transaction under §1.263(a)-5(e)(3) and that fees $a and $b paid to Advisor and Advisor 2 were success-based fees as defined in §1.263(a)-5(f). The payment of the fees was 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 the federal income tax return for Taxable Year as though the safe harbor had been elected, failed to attach the required statement to Taxpayer's federal income tax return for Taxable Year. 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 Corporation 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