Internal Revenue Service

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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-127056-20
Date:
May 24, 2021

TY:

Legend:

Taxpayer	=
Tier Parent1	=
Tier Parent2	=
Common Parent	=
Financial Consultant	=
Tax Consultant	=
Tax Return Preparer	=
Taxpayer's Short Taxable Year	=
Tier Parent2's Taxable Year	=
Former Group Taxable Year	=
Date1	=
Date2	=
Date3	=
Date4	=
Date5	=
Date6	=
$a	=

Dear :

This letter responds to your letter ruling request dated November 23, 2020, submitted by Taxpayer. Taxpayer requests an extension of time pursuant to sections 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 as provided by Rev. Proc. 2011-29, 2011-1 C.B. 746, which requires that a statement be attached to a taxpayer's original Federal income tax return for the taxable year of election.

FACTS

Taxpayer is a domestic C corporation that operates private grade schools. Prior to its acquisition, Taxpayer served as the parent of a consolidated group of affiliated C Corporations. Currently, Taxpayer is wholly owned by Tier Parent1, a domestic C corporation. Tier Parent1, itself, is wholly owned by Tier Parent2, a domestic C corporation. Tier Parent2, in turn, is wholly owned by Common Parent, a China-based investment firm.

Taxpayer engaged Financial Consultant to assist in the sale of its business; to advise Taxpayer with respect to the structure of that sale, and provide technical advice, perform valuation analyses, assist with due diligence, and to eventually negotiate the sale on behalf of Taxpayer. Pursuant to its engagement agreement with Financial Consultant, Taxpayer was required to pay Financial Consultant a compensatory fee contingent upon the successful closing of the sale; the amount of Financial Consultant's fee would be calculated as a percentage of the aggregate consideration arising from that transaction.

On Date1, Common Parent formed Tier Parent2 and Tier Parent1 for the sole purpose of facilitating Common Parent's acquisition of Taxpayer. On Date2, the acquisition of Taxpayer closed in a taxable stock acquisition, and Taxpayer became a subsidiary of Tier Parent1 (Acquisition Transaction). As a result and upon the successful closing of the Acquisition Transaction, Taxpayer incurred and paid a success-based fee to Financial Consultant in the amount of $a (Success-Based Fee).

Common Parent engaged Tax Consultant to provide tax advice and due diligence with respect to the acquisition of Taxpayer. Tax Consultant informed Common Parent that Taxpayer's former consolidated group terminated at the time of the Acquisition Transaction. Accordingly, Tax Consultant advised Common Parent that (1) Taxpayer should file a consolidated Federal income tax return for Taxpayer's Short Taxable Year, and (2) Tier Parent2, serving as the common parent of the post-acquisition consolidated group, should elect to file a consolidated Federal income tax return for Tier Parent2's Taxable Year. (Collectively, Tax Consultant's Initial Advice).

Taxpayer engaged Tax Return Preparer to prepare a consolidated Federal income tax return for its affiliated group in a manner consistent with Tax Consultant's initial advice. Rather than preparing the short-year return necessitated by Taxpayer's sale, Tax Return Preparer prepared a full-year consolidated Federal income tax return for the Taxpayer's Former Group's Taxable Year (Initial Return).

On that initial return, Tax Return Preparer reported Taxpayer's payment of the Success-Based Fee in a manner comporting with having made the safe-harbor election provided by Rev. Proc. 2011-29. Accordingly, on that initial return Taxpayer claimed a deduction for 70 percent of the Success-Based Fees paid to Financial Consultant and capitalized the remaining 30 percent.

On Date3, Taxpayer timely filed its initial return believing that the return was correct, complete, accurate, and prepared in accord with Tax Consultant's Initial Advice. The initial return, however, inadvertently failed to include a statement indicating that Taxpayer was electing safe-harbor treatment, as required by section 4.01(3), Rev. Proc. 2011-29 (Required Election Statement).

On Date4, Tax Consultant informed Common Parent that the initial return prepared by Tax Return Preparer did not comport with Tax Consultant's advice.

Accordingly, Taxpayer and Tier Parent2 retained Tax Consultant to, respectively, (1) prepare an amended consolidated Federal income tax return for Taxpayer's Short Taxable Year, and (2) request the Commissioner's permission to file a late election to file a consolidated Federal income tax return for Tier Parent2's Taxable Year.

On Date5, the Commissioner granted Tier Parent2's request to file a late election to file a consolidated Federal income tax return for Tier Parent2's Taxable Year.

On Date6, Tax Consultant determined that Taxpayer's initial return also failed to include the Required Election Statement for safe-harbor treatment under Rev. Proc. 2011-19.

On November 23, 2020, Taxpayer filed the present letter ruling request, seeking an extension of time to file the Required Election Statement for Taxpayer's Short Taxable Year, pursuant to sections 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations.

Taxpayer represents that the period of limitation on assessment under section 6501(a) of the Internal Revenue Code (Code) for Taxpayer's Short Taxable Year has not expired.

LAW

Section 263(a) of the 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.

Section 1.263(a)-1(d)(3) of the Income Tax Regulations provides that no deduction is allowed for an amount paid to acquire or create an intangible, which under sections

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 section 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. See INDOPCO, Inc. v. Commissioner, 503 U.S. 79, 89-90 (1992); Woodward v. Commissioner, 397 U.S. 572, 575-576 (1970).

Under section 1.263(a)-5, a taxpayer must capitalize an amount paid to facilitate a business acquisition or reorganization transaction described in section 1.263(a)-5(a). In general, an amount is paid to facilitate a transaction described in section 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. 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 section 1.263(a)-5(a), or 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. Section 4.01 of 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 section 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.

It is this last requirement that Taxpayer requests permission to accomplish with this ruling request. Taxpayer requests permission with this ruling request to attach the

statement required by section 4.01(3) of Rev. Proc. 2011-29 to its return, by amending its original filed return and superseding it with a return with the proper election statement completed and attached.

Section 3 of Rev. Proc. 2011-29 provides that the revenue procedure applies to covered transactions described in section 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 section 267(b) or section 707(b); or

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

Sections 301.9100-1 through 301.9100-3 of the Procedure and Administration Regulations provide the standards the Commissioner uses to determine whether to grant an extension of time to make a regulatory 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 section 301.9100-2.

Section 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.

Section 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.

Section 301.9100-3(a) provides extensions of time to make a regulatory election under Code sections other than those for which section 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.

Section 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 section 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 section 6662 at the time the taxpayer requests relief (taking into account section 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.

Section 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. Section 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). Section 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 section 6501(a) before the taxpayer’s receipt of a ruling granting relief under this section.

ANALYSIS

Taxpayer represents that for Federal income tax purposes Acquisition Transaction was a taxable acquisition of an ownership interest of Taxpayer within the meaning of section 267(b) of the Code, and section 1.263(a)-5(a)(3) and (e)(3)(ii) of the Income Tax Regulations. That transaction, then, is considered a covered transaction pursuant to section 1.263(a)-5(e)(3), and Taxpayer qualifies to make the safe-harbor election provided by Rev. Proc. 2011-29.

As a result of Acquisition Transaction, Taxpayer incurred and subsequently paid an amount of success-based fees during Taxpayer's Short Taxable Year. Taxpayer complied with the substantive requirements for making the safe-harbor election by deducting 70 percent and capitalizing 30 percent of those success-based fees on its Initial Return. Taxpayer, however, failed perfect its safe-harbor election by inadvertently omitting the Required Election Statement from that return. It is with respect to that failure that Taxpayer requests an extension of time to amend its original filed return, to supersede that original return with one that includes the required election statement as an attachment.

Taxpayer's request pertains to a regulatory election as defined in section 301.9100-1(b) of the Procedure and Administration Regulations, as the due date for the making the safe-harbor election is prescribed by section 1.263(a)-5(f) of the Income Tax Regulations. Accordingly, the Commissioner has the authority under sections 301.9100-1 and 301.9100-3, to grant Taxpayer's request for an extension of time to file the safe-harbor election for Taxpayer's Short Taxable Year.

The information submitted, and representations made by Taxpayer establish that Taxpayer acted reasonably and in good faith under section 301.9100-3(b)(1) and (2). Taxpayer requested relief before its failure to properly make the regulatory election was discovered by the Commissioner. Additionally, despite Taxpayer's reasonable reliance on qualified tax professionals to properly advise it in the preparation of its consolidated Federal income tax return for Former Group's Taxable Year, the required election statement was inadvertently omitted from Taxpayer's initial return. Accordingly, Taxpayer will be considered to have acted reasonably and in good faith.

Moreover, Taxpayer should not be deemed to have acted unreasonably or in a manner lacking good faith. Taxpayer's representations indicate that none of the circumstances listed in section 301.9100-3(b)(3) apply.

Based on Taxpayer's representation of the facts, granting an extension of time to file the election will not prejudice the interests of the government under section 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 would have resulted had Taxpayer timely made the election (taking into account the time value of money). Further, Taxpayer has represented that the period of limitations on

assessment under section 6501(a) has not closed for Taxpayer's Short Taxable Year, or for any taxable years that would have been affected had Taxpayer timely made the election.

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 sections 301.9100-1 and 301.9100-3(b)(1) of the regulations have been satisfied.

Taxpayer is granted an extension of time until 60 days following the date of this ruling to file an amended tax return 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.

The rulings contained in this letter are based upon 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 Federal income tax consequences of any aspect of any transaction or item discussed or referenced in this ruling under any other provision of the Code. In particular, no opinion is expressed or implied as to 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) of the Code provides that it may not be used or cited as precedent.

A copy of this ruling must be attached to Taxpayer's Federal income tax returns for the tax years affected. 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 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 when it is disclosed under section 6110 of the Code.

Sincerely,

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

Enclosure: Copy of the letter for section 6110 purposes

cc: