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CC:ITA:B03
PLR-100260-22

Date:
July 01, 2022

LEGEND

Date 1	=
Date 2	=
Date 3	=
Date 4	=
Date 5	=
Date 6	=
Accounting Firm	=
Taxpayer	=
Transaction Year	=
Business 1	=
Acquiror	=
Investment Banker	=
Investment Banker Fee	=
Year 1	=

Dear :

This letter responds to a letter ruling request dated Date 1, submitted by Accounting Firm 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 Transaction Year in order to make the safe harbor election to allocate success-based fees, related to a taxable merger transaction completed on Date 2, 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 Transaction Year return.

FACTS

Taxpayer is engaged in the business of Business 1. Prior to the taxable merger transaction described below, Taxpayer and Acquiror each filed consolidated U.S. Corporation Income Tax Returns (Form 1120) with calendar year-ends.

Acquiror was merged with and into Taxpayer on Date 2 pursuant to an Agreement and Plan of Merger dated Date 3 ("Merger"). Merger was structured to qualify as reorganization under § 368(a)(1)(A) of the Internal Revenue Code for U.S. federal income tax purposes. Although Taxpayer was the legal acquiror and surviving entity in Merger, more than 50 percent of the value of Taxpayer's shares become owned by former shareholders of Acquiror as a result of Merger. Therefore, Merger was treated as a reverse acquisition under § 1.1502-75(d)(3) of the Income Tax Regulations, with the result being that Acquiror was treated as the acquiror for U.S. federal income tax purposes.

As a result of the reverse acquisition treatment, Taxpayer's consolidated return group terminated effective Date 2, and the Acquiror's consolidated return group continued in existence with Taxpayer as the common parent company of the post-Merger group in accordance with § 1.1502-75(d)(3), and as a result:

1. A short period consolidated Form 1120 was filed by the Taxpayer group for the taxable period Date 4 through Date 2.
2. A full year consolidated Form 1120 was filed by the Acquiror group for the taxable period Date 4 through Date 5, with Taxpayer listed as the common parent company on Page 1 of Form 1120.

In connection with Merger, Taxpayer engaged Investment Banker to act as an independent financial advisor and to provide assistance relative to analyzing, structuring, negotiating, and effecting a business combination with Acquiror. A full scope of services was provided in an engagement letter dated Date 6. Pursuant to the terms of the engagement letter, Taxpayer paid the Investment Banker Fee to Investment Banker as compensation for its services. The Investment Banker Fee was expressly contingent upon the successful consummation of Merger and became due and payable on Date 2, the closing date. No fee would have been due to Investment Banker if Merger was not completed. The Investment Banker Fee does not include nonrefundable amounts paid prior to the closing of Merger that was later credited against the fee owed upon the successful closing of Merger.

Accounting Firm, a qualified tax return preparer, was engaged in Year 1 to prepare the Transaction Year tax returns including Taxpayer's short period consolidated Form 1120 for the taxable period beginning Date 4 and ending on Date 2 (short period Form 1120).

The short period Form 1120 included the transaction costs incurred by Taxpayer in connection with Merger, including Investment Banker Fee.

Accounting Firm determined that the Investment Banker Fee qualified as success-based fee eligible for the safe harbor election provided by Rev. Proc. 2011-29. Accordingly, the short period Form 1120 prepared by Accounting Firm reflected a deduction of 70 percent of the Investment Banker Fee and capitalization of 30 percent of the Investment Banker Fee. However, the election statement required by Section 4.01(3) of Rev. Proc. 2011-29 was inadvertently omitted from the short period Form 1120 filed with the Internal Revenue Service.

The failure to attach the election statement to the short period Form 1120 filed by Taxpayer was subsequently discovered in connection with file review by the engagement team personnel during the preparation of the full year consolidated Form 1120 for the continuing Acquiror group. Taxpayer relied on Accounting Firm for the correct preparation of its short period Form 1120, including the proper treatment of transaction costs. Had Taxpayer been aware that the required election statement was inadvertently excluded from its short period Form 1120 resulting in an imperfected election under Rev. Proc. 2011-29, Taxpayer would have corrected this error immediately. Upon discovery of the missed election, Taxpayer and Accounting Firm promptly investigated possible relief and determined that a private letter ruling requesting administrative relief for the late success-based fee election under §§ 301.9100-1 and 301.9100-3 was required, resulting in this request for a letter ruling.

LAW

Section 263(a)(1) of the Code and § 1.263(a)-2(a) of the regulations provides that no deduction shall be allowed for any amount paid for property having a useful life substantially beyond the taxable year. Specifically with respect to an acquisition or reorganization of a business entity, costs that are incurred in this process 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, 575-76 (1970).

Under § 1.263(a)-5, a taxpayer must capitalize an amount paid to facilitate certain enumerated transactions, including under § 1.263(a)-5(a)(4), reorganizations described in § 368. Section 1.263(a)-5(b)(1) provides, in part, that 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, and whether an amount is paid in the process of investigating or otherwise pursuing the transaction is determined based on all the facts and circumstances.

Under § 1.263(a)-5(e)(2), an amount paid in the process of investigating or otherwise pursuing a covered transaction facilitates that transaction if the amount is inherently facilitative. Section 1.263(a)-5(e)(3)(iii) provides that a covered transaction includes a reorganization described in § 368(a)(1)(A).

Section 1.263(a)-5(f) provides that an amount paid 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 of Rev. Proc. 2011-29 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 §§ 301.9100-1(c), 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 under § 6501(a).

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. 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 late regulatory election.

Taxpayer represents that the Investment Banker Fee was a success-based fee as defined in § 1.263(a)-5(f)(3) and was contingent upon the successful closing of a covered transaction as defined in § 1.263(a)-5(e)(3)(iii).

Taxpayer represents that it acted with ordinary care and prudence by engaging a qualified tax return preparer to prepare the short period Form 1120 related to Merger and relied on Accounting Firm to correctly prepare its tax returns, including the proper tax treatment of transaction costs and the inclusion of all necessary elections and election statements. The failure to attach the election statement was subsequently discovered in connection with a file review during the preparation of the full year consolidated Form 1120 for the continuing Acquiror group. Upon discovery of the missed election, Taxpayer worked with Accounting Firm to investigate available relief to determine how to correct the issue, resulting in this request for a letter ruling. 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 none of the factors listed in § 301.9100-3(b)(3) that result in deeming Taxpayer to not have acted reasonably and in good faith are applicable.

Taxpayer also 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 limitations on 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 solely on the facts submitted and the representations made, we conclude that Taxpayer acted reasonably and in good faith and that granting the request for an extension to file the safe harbor election will not prejudice the interests of the government. Accordingly, the requirements of §§ 301.9100-1 and 301.9100-3 have been satisfied with respect to the Investment Banker Fee.

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 paid to Investment Banker for the Transaction Year, identifying the covered transaction, and stating the success-based fee amounts paid to Investment Banker 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. If any of the information or representations provided are subsequently determined to be inaccurate and/or incomplete this ruling and its conclusions are void.

Except as expressly provided herein, no opinion is expressed or implied concerning the tax consequences arising from the facts described above under any other provision of the Code or regulations.

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,

SUSIE K. BIRD
Senior Counsel, Branch 3
(Income Tax & Accounting)
Office of Chief Counsel

Enclosure: Copy for § 6110 purposes

cc: