Internal Revenue Service

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Department of the Treasury
Washington, DC 20224

[Third Party Communication:
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Person To Contact:
, ID No.
Telephone Number:

Refer Reply To:
CC:ITA:1
PLR-100240-22

Date:
November 30, 2022

In re:

Legend

Taxpayer	=
Sub 1	=
Sub 2	=
Entity 1	=
Entity 2	=
Financial Advisor	=
Tax Executive	=
Date 1	=
Date 2	=
Date 3	=
Tax Year	=
Amount 1	=

Dear

This letter responds to your letter ruling request dated Date 1 and supplemental correspondence submitted by Taxpayer for relief under Treas. Reg. §§ 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations to make a late election with respect to specified success-based fees described under Rev. Proc. 2011-29, 2011-1 C.B. 746, for taxable year ended Date 2.

Facts

Taxpayer is the parent company of group of an affiliated group of corporations that files a consolidated federal income tax return. Taxpayer indirectly owns Sub 1 through a wholly owned first-tier subsidiary and directly owns Sub 2. Both Sub1 and Sub2 are members of Taxpayer's consolidated group.

On Date 3, Sub 1 acquired all the outstanding stock of Entity 1 and all of the issued and outstanding membership interests and other equity interests in Entity 2 (collectively Targets). Taxpayer represents that a § 338(h)(10) election was made to treat the acquisition as an asset purchase for Federal income tax purposes, and that the transaction is a covered transaction described in § 1.263(a)-5(e)(3).

Sub 1 engaged Financial Advisor to perform advisory services in the process of pursuing the acquisition of Targets. In connection with those services, Sub1 agreed to pay Financial Advisor a fee that was contingent upon the consummation of the acquisition. Taxpayer represents that the Amount 1 fee is a success-based fee described in § 1.263(a)-5(f). Taxpayer represents that the Amount 1 fee was paid by Sub 2, a sister corporation of Sub 1, on behalf of Sub 1 in accordance with § 1.263(a)-5(k).

The Amount 1 fee was reported on Taxpayer's Tax Year consolidated return as a success-based fee described in Rev. Proc. 2011-29 in that 70% of Amount 1 was deducted and the remaining 30% was capitalized. However, instead of accounting for the amounts as a cost paid or incurred by Sub 1 in computing its separate taxable income, the amounts were accounted for as a cost paid or incurred by Sub 2 in computing its separate taxable income. Sub 1 was not obligated to and did not reimburse Sub 2 for the Amount 1 fee paid by Sub 2.

As part of its request for an extension of time to file the election statement, Taxpayer submitted detailed affidavits from individuals having knowledge or information about the events that led to the failure to attach the required election statement to Taxpayer's tax return, as well as regarding the discovery of that failure. Taxpayer represents that it intended to file an election statement with its Tax Year return, but it inadvertently failed to do so as required by Rev. Proc. 2011-29. The failure to file the timely election statement was discovered by Tax Executive shortly after the return was filed, after attending training on the treatment of acquisition expenses. Shortly after determining that Taxpayer had failed to include the election statement, Taxpayer filed a request for relief to make a late election under Rev. Proc. 2011-29.

Taxpayer represents that as a condition of being granted additional time to make the late election under Rev. Proc. 2011-29, Taxpayer will amend its consolidated return, including required statements and schedules, so as to properly reflect that the Amount 1 payment was paid by Sub 2 on behalf of Sub 1. Thus, Taxpayer will treat the Amount 1 payment as giving rise to a deemed distribution by Sub 2 to Taxpayer and then as a deemed contribution of capital from Taxpayer down the chain of ownership to Sub 1 to reflect the proper treatment of the Amount 1 payment as being a 70% deductible

expense and 30% capitalizable cost of Sub 1. In addition, Taxpayer will make all necessary adjustments on its books and records to basis under § 1.1502-32 and earnings and profits (E&P) under § 1.1502-33 to reflect the proper treatment of the deemed distribution and capital contribution, as well as the deductible expense. Taxpayer represents that it will amend its consolidated return as described above within the same timeframe permitted by this letter for making the late election.

Law & Analysis

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 in § 1.263(a)-5(a). In general, 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. Whether an amount is paid in the process of investigating or otherwise pursuing the transaction is determined based on all the facts and circumstances. See § 1.263(a)-5(b)(1).

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) is presumed to facilitate the transaction and, thus, must be capitalized. A taxpayer may rebut this 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. 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.

Section 1.263(a)-5(k) states that, for purposes of § 1.263(a)-5, references to an amount paid to or by a party include an amount paid on behalf of that party.

To reduce controversy between the Internal Revenue Service (the "Service") 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 Service issued Rev. Proc. 2011-29.

Section 4.01 of Rev. Proc. 2011-29 states that the Service will not challenge a taxpayer's allocation of a success-based fee between activities that facilitate the transaction described in § 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 § 1.263(a)-5(e)(3), which includes, *inter alia*, a taxable acquisition by the taxpayer of assets that constitute a trade or business and 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). See § 1.263(a)-5(e)(3)(i) and (ii).

Sections 301.9100-1 through 301.9100-3 provide the standards the Commissioner will use to determine whether to grant an extension of time to make an election.

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 301.9100-1(c) provides that the Commissioner, in exercising his discretion, may grant a reasonable extension of time under the rules set forth in § 301.9100-3 to make a regulatory election under all subtitles of the Internal Revenue Code except subtitles E, G, H, and I.

Section 301.9100-2 provides automatic extensions of time for making certain elections. Section 301.9100-3 sets forth extensions of time for making elections that do not meet the requirements of § 301.9100-2.

Section 301.9100-3(a) provides that requests for relief under this section 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 that granting relief will not prejudice the interests of the Government.

Section 301.9100-3(b)(1) provides, in general, 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 at 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)(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 a 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). 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 under this section.

The election Taxpayer seeks to make is a regulatory election, as defined in § 301.9100-1(b), because the due date of the election is prescribed by 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.

Conclusion

Based upon our analysis of the facts as represented, we conclude that Taxpayer acted reasonably and in good faith and granting relief will not prejudice the interests of the government. Accordingly, 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 statement required by section 4.01(3) of Rev. Proc. 2011-29, stating that it is electing the safe harbor for the Amount 1 success-based fees, identifying the transaction, and stating the success-based fee amounts that are deducted and capitalized. This extension of time is conditioned on Taxpayer (i) amending its consolidated return with revised attachments under § 1.1502-75(j) so as to properly reflect that the Amount 1 payment was paid by Sub 2 on behalf of Sub 1 and (ii) making corresponding adjustments on its books and records to basis and E&P.

The ruling contained in this letter is based upon information and representations submitted by the taxpayer and accompanied by penalty of perjury statements executed by the appropriate parties. This office has not verified any of the materials submitted in support of the request for a ruling and the information materials are 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 other than conditionally granting an extension of time to make a late election under Rev. Proc. 2011-29 for the Amount 1 fee. In particular, no opinion is expressed or implied as to the treatment of any other fees paid or incurred by Taxpayer or its consolidated return members or by Entity 1 or Entity 2. Further, except as expressed herein, no opinion is expressed on the treatment of the Amount 1 capitalized portion of the fees pursuant to the late election.

Enclosed is a copy of the letter ruling showing the deletions proposed to be made in the letter when it is disclosed under § 6110.

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 letter 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 representatives. We are also sending a copy of this letter to the appropriate operating division director.

Sincerely,

Norma Rotunno
Branch Chief, Branch 1
(Income Tax & Accounting)

cc: