Internal Revenue Service

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Attn:

Department of the Treasury
Washington, DC 20224

Third Party Communication: None
Date of Communication: Not Applicable

Person To Contact:
, ID No.
Telephone Number:

Refer Reply To:
CC:ITA:B2
PLR-117042-22
Date:
March 06, 2023

LEGEND

Taxpayer =
Taxable Year =
Accounting Firm =
Adviser =
State =
Business =
Acquisition =

Date 1 =
Date 2 =
Date 3 =
Date 4 =
$X =

Dear :

This letter is in response to a letter ruling request dated Date 1, requesting an extension of time to file the statement to elect the safe harbor provided in Rev. Proc. 2011-29, 2011-1 C.B. 746, to allocate success-based fees for Taxable Year (Request). This request is made in accordance with §§ 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations. This ruling letter is being issued electronically as permissible under sections 7.02(2) and 9.04(3) of Rev. Proc. 2022-1, 2022-1 I.R.B. 1, 33, 49.

FACTS AND REPRESENTATIONS

Taxpayer represents the following:

Taxpayer is a corporation organized under the laws of State. Taxpayer is the common parent of an affiliated group of corporations (Group) that files a consolidated U.S. federal income tax return. Taxpayer has a calendar year end and uses an overall accrual method of accounting. Taxpayer is engaged in Business.

On Date 2, Taxpayer entered into an agreement to engage in Acquisition, which was completed on Date 3. In connection with Acquisition, Taxpayer incurred *$X* of success-based fees for services performed by Adviser in the process of investigating or otherwise pursing the transaction.

Acquisition was a covered transaction under § 1.263(a)-5(e)(3)(iii) of the Income Tax Regulations. The *$X* paid to Adviser was for success-based fees as defined in § 1.263(a)-5(f), and the payment of the fees was contingent upon the successful closing of the transaction.

Accounting Firm was engaged to advise Taxpayer on the proper tax treatment of the success-based fees and to prepare its U.S. federal income tax return for Taxable Year. While the prepared return complied with the substantive requirements of Rev. Proc. 2011-29 by deducting 70 percent of the success-based fees and capitalizing the remaining 30 percent, the Rev. Proc. 2011-29 safe harbor election statement was inadvertently not filed with the return. Thus, Taxpayer had not made a proper election for success-based fees under Rev. Proc. 2011-29 for Taxable Year.

On Date 4, as a result of an inquiry from the Internal Revenue Service (Service) regarding the election statement, the inadvertent failure to file the election statement with its return was discovered by Accounting Firm. Accounting Firm immediately notified Taxpayer that it must seek relief for an extension to file the election statement, and Taxpayer asked Accounting Firm to prepare this Request.

LAW AND ANALYSIS

Section 263(a)(1) and § 1.263(a)-2(a) 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 can be deducted. The remaining 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 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 with a due date that 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 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 not be deemed 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 § 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 late 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 it is eligible for an extension of time to file the regulatory election to be granted because Acquisition was a covered transaction under § 1.263(a)-5(e)(3) and the $X paid to Adviser 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.

The information provided and representations made by Taxpayer establish that the Taxpayer acted reasonably and in good faith. Taxpayer filed its federal income tax return and calculated its tax liability for Taxable Year pursuant to the safe harbor but Accounting Firm failed to attach the required election statement. Taxpayer reasonably relied on Accounting Firm, a qualified tax professional, to file its return accurately. Therefore, Taxpayer acted reasonably and in good faith under § 301.9100-3(b)(1)(v).

Based on the information provided and representations made by Taxpayer, granting relief will not prejudice the interests of the government. Because Taxpayer calculated its tax liability pursuant to the safe harbor, granting relief to attach the required election statement will 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. Furthermore, Taxpayer represents that the Taxable Year in which the regulatory election should have been made was not closed at the time Request was submitted, and any taxable years that would have been affected had it been timely made, are not closed by the period of assessment.[1] Therefore, 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 an 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 a safe harbor election statement for success-based fees under Rev. Proc. 2011-29 for Taxable Year.

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[1] Taxpayer signed Form 872, Consent to Extend Time to Assess Tax, for Taxable Year.

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 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 costs as success-based fees or whether Taxpayer's transaction 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 Taxpayer. Section 6110(k)(3) provides that it may not be used or cited as precedent.

In accordance with the power of attorney, a copy of this letter ruling is being sent electronically to each of Taxpayer's authorized representatives. A copy is also being sent to the appropriate operating division.

Sincerely yours,

Ronald J. Goldstein
Senior Technician Reviewer, Branch 2
Office of Associate Chief Counsel
(Income Tax & Accounting)

cc: