Internal Revenue Service

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Department of the Treasury
Washington, DC 20224

Third Party Communication: None
Date of Communication: Not Applicable

Person To Contact:
, ID No.

Telephone Number:

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CC:ITA:B02
PLR-107549-23

Date:
October 04, 2023

Legend

Taxpayer	=
Date A	=
Date B	=
Date C	=
Subsidiary A	=
$A	=
A Shares	=
Date D	=
Accounting Firm	=
$B	=

Firm A =

Date E =

Dear :

This letter is in response to a request for a private letter ruling ("Request") submitted Date A by Taxpayer for an extension of time, pursuant to §§ 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations, to make an election under § 4.01 of Rev. Proc. 2011-29, 2011-1 C.B. 746, to allocate success-based fees incurred relative to its acquisition of Subsidiary A for the taxable year ending on Date B. This Request is being issued electronically in accordance with §§ 7.02(5) and 9.04(3) of Rev. Proc. 2023-1, 2023-1 I.R.B. 1, 35, 49-50.

FACTS AND REPRESENTATIONS

Taxpayer represents the following:

Taxpayer is the parent of a consolidated group that files a federal income tax return. Taxpayer operates businesses in the hospitality services industry. Taxpayer files its consolidated return on the basis of a calendar year and uses an overall accrual method of accounting for federal income tax purposes.

On Date C, Taxpayer acquired Subsidiary A pursuant to an agreed plan of merger that qualified as a reorganization under section 368(a)(1)(A) of the Internal Revenue Code. Shareholders of Subsidiary A received (for each share of Subsidiary A) $A and A Shares of stock in Taxpayer. Subsidiary A became a part of Taxpayer's consolidated group on Date C.

As part of the merger transaction, Taxpayer paid fees of $B to Firm A for services performed in the process of investigating or otherwise pursuing the transaction. The fees were contingent on the successful closing of the transaction and were paid at the time of closing (i.e., success-based fees). No portion of the success-based fees was a guaranteed payment incurred upon the occurrence of a specified milestone or upon some other date or event other than the successful closing of the transaction, and no portion of the success-based fees was related to financing costs or reimbursed expenses. Accordingly, Taxpayer represents that the fees described above are success-based fees as described by § 1.263(a)-5(f) of the Income Tax Regulations, and Taxpayer further represents that the merger transaction with Subsidiary A was a "covered transaction" as defined by § 1.263(a)-5(e)(3).

Taxpayer retained the services of Accounting Firm to prepare its consolidated income tax return for the taxable year ending Date B. Accounting Firm advised Taxpayer that it should make an election to apply the safe harbor under § 4.01 of Rev. Proc. 2011-29 to the success-based fees incurred pursuant to the acquisition of Subsidiary A.

On Date D, Taxpayer filed its tax return for the tax year ending Date B, and the return was prepared consistent with Taxpayer properly electing to use the safe harbor method in accordance with § 4.01 of Rev. Proc. 2011-29, i.e., the return reflects 70% of the success-based fees as deductible and 30% as capitalized. However, Accounting Firm inadvertently failed to include with Taxpayer's filed return the required election statement that Accounting Firm had previously prepared. See Rev. Proc. 2011-29, § 4.01(3) (requiring statement to be filed).

On Date E, during the IRS's examination of Taxpayer's return for the tax year ending Date B, Taxpayer and Accounting Firm realized that Taxpayer inadvertently failed to properly make the election. Taxpayer filed this request to obtain from the Commissioner an extension of time under Treas. Reg. §§ 301.9100-1(c) and 301.9100-3 to file an election to use the safe harbor under § 4.01 of Revenue Procedure 2011-29 to allocate success-based fees incurred from the acquisition of Subsidiary A for the tax year ending Date B.

LAW AND ANALYSIS

Section 263(a)(1) of the Internal Revenue Code and § 1.263(a)-2(a) generally 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). 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 of the facts and circumstances. See § 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 § 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.

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). 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, i.e., an amount that can be deducted. The remaining portion of the fee must be capitalized as an amount that facilitates the transaction.

In particular, § 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 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 deducted) 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 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.

The scope of the revenue procedure applies to covered transactions described in § 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 § 267(b) or § 707(b); or (iii) a reorganization described in § 368(a)(1)(A), (B), or (C) or a reorganization described in § 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 § 354 or § 356 (whether the taxpayer is the acquirer or the target in the reorganization). As noted, Taxpayer has represented that its merger transaction with Subsidiary A was a “covered transaction” as defined by § 1.263(a)-5(e)(3).

Section 301.9100-1(c) provides that the Commissioner has the 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 whose due date is prescribed by regulations published in the Federal Register, or in a revenue ruling, revenue procedure, notice, or announcement published in the Internal Revenue Bulletin.

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

Requests for relief under § 301.9100-3 will be granted when a taxpayer provides evidence to establish to the satisfaction of the Commissioner (i) that the taxpayer acted reasonably and in good faith and (ii) that granting relief will not prejudice the interest of the government. See Treas. Reg. § 301.9100-3(a).

Treas. Reg. § 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 a 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, the taxpayer was unaware of the necessity of the election;

(iv) reasonably relied on 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 is deemed not 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 and chose not to file the election; or

(iii) uses hindsight in requesting relief.

Section 301.9100-3(c)(1)(i) 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 tax years affected by the election than the taxpayer would have had if the election had been timely made. The section also provides that, if the tax consequences of more than one taxpayer are affected by the election, the government's interests are prejudiced if extending the time for making the election may result in the affected taxpayers, in the aggregate, having a lower tax liability than if the election had been timely made.

Section 301.9100-3(c)(1)(ii) provides, in part, that the interests of the government are ordinarily prejudiced if the tax year in which the regulatory election should have been made, or any tax 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.

Section 301.9100-3(f), Ex. 2., illustrates that where a failure to file an election is discovered by the IRS during an examination, a taxpayer may nevertheless be granted relief under § 301.9100-3 if the taxpayer reasonably relied upon the advice of a tax professional.

CONCLUSION

On the basis of Taxpayer's representations, we conclude that the requirements of Treas. Reg. §§ 301.9100-1(c) and 301.9100-3 have been satisfied. Accordingly, we hereby grant an extension of time until 60 days following the date of this ruling for Taxpayer to file an amended tax return (for the tax year ending Date B) making an election to use the safe harbor under § 4.01 of Rev. Proc. 2011-29 to allocate success-based fees incurred from the acquisition of Subsidiary A. The amended return must include an election statement indicating 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.

Except as expressly set forth above, we neither express nor imply any opinion concerning the tax consequences of the facts described above under any other provision of the Code or regulations. Specifically, we have no opinion, either expressed or implied, concerning whether Taxpayer’s merger transaction is within the scope of Rev. Proc. 2011-29, or whether Taxpayer properly included the correct costs as its success-based fees subject to the election.

The ruling contained in this letter is based upon 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 this Request for an extension of time to make an election to use the safe harbor method of accounting under § 4.01 of Rev. Proc. 2011-29, all material is subject to verification on examination.

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 on file with this office, a copy of this letter is being sent to each of Taxpayer's authorized representatives.

A copy of this ruling must be attached to Taxpayer's federal income tax returns for the tax years affected. Alternatively, if Taxpayer files returns electronically, Taxpayer may satisfy this requirement by attaching a statement to the return that provides the date and control number (PLR-107549-23) of this letter ruling.

Sincerely,

Robert A. Martin
Senior Technician Reviewer, Branch 2
(Income Tax & Accounting)

CC: