Internal Revenue Service

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Department of the Treasury
Washington, DC 20224

Third Party Communication: None
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Person To Contact:
, ID No.
Telephone Number:

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PLR-123222-19

Date:
March 16, 2020

Attn:

LEGEND

Taxpayer	=
Subsidiary	=
Acquirer	=
Sellers	=
Seller 1	=
Seller 2	=
Service	=
Taxable Year	=
Date 1	=
Date 2	=
Date 3	=
Date 4	=
Date 5	=
Tax Return Preparer	=
Advisor	=
$a	=
$b	=
$c	=
State	=
Amount 1	=

Dear :

This responds to a letter ruling request dated Date 1, submitted on behalf of Taxpayer. Taxpayer requests an extension of time under §§ 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 in accordance with Rev. Proc. 2011-29, 2011-1 C.B. 746, which requires that a statement be attached to Taxpayer's original federal income tax return for Taxable Year.

Facts

Taxpayer is a limited liability holding company formed under the laws of State and the sole owner of Subsidiary. Taxpayer, thru Subsidiary and its direct and indirect subsidiaries, supports a network of professionals who provide Service. Prior to the transaction described below. Taxpayer was classified as a partnership for U.S. federal tax purposes. At that time, % of the voting interests of Taxpayer were owned by Sellers. The sole member of Seller 1 was Seller 2 (together "Sellers").

On Date 2, a transaction agreement was executed by Taxpayer, Sellers and entities affiliated with Acquirer whereby Sellers would sell their interests in Taxpayer to Acquirer. The transaction closed on Date 3. Following the merger, Taxpayer automatically became classified as a disregarded entity and Acquirer, thru it's holding companies, held interests in Subsidiary.

Pursuant to an engagement letter dated Date 4, Subsidiary engaged Advisor as a financial advisor in conjunction with a possible sale transaction involving the equity interest or assets of Subsidiary. The engagement letter set forth the terms by which Advisor would provide its services, as well as set forth a graduated schedule of sale transaction fees based on the aggregate consideration when the transaction closed. Pursuant to the engagement letter, if the aggregate consideration paid was Amount 1 or less, the transaction fee would be one percent of the aggregate consideration. The transaction that came to fruition was a sale of partnership interests in Subsidiary to Acquirer. The aggregate consideration paid for Taxpayer was less than Amount 1 and the total amount of the transaction fee that Taxpayer paid to Advisor was $c.

Taxpayer engaged Tax Return Preparer to prepare and file electronically its federal and state tax returns. Tax Return Preparer prepared a Form 1065, *U.S. Return of Partnership Income*, for Taxable Year. As part of its tax consulting engagement, Tax Return Preparer also reviewed the services provided by Advisor related to the transaction and determined that the transaction fee paid to Advisor in conjunction with the closing of the transaction constituted a success-based fee subject to the safe-harbor election of Rev. Proc. 2011-29. Tax Return Preparer also prepared a draft election statement setting forth the total amount of the success-based fees ($c) as well as the portion to be deducted, in the amount of $a, and the potion to be capitalized, in the amount of $b. Tax Return Preparer discussed the safe-harbor election with Taxpayer.

Taxpayer's Form 1065 for Taxable Year reflected the deducted amount, $a, and the capitalized amount, $b. However, the statement required by Rev. Proc. 2011-29 was not included with the return when it was delivered to the Taxpayer for review. The Taxpayer's Form 1065 for Taxable Year was electronically filed on Date 5 without the required statement attached.

Subsequent to the filing of the return, it was noticed that the election statement required under Rev. Proc. 2011-29 was not included with the return when it was filed. On Date 1, pursuant to Treas. Reg. §§ 301.9100-1 and 301.9100- 3, Taxpayer filed a request for an extension of time to make an election concerning the treatment of success-based fees in accordance with Rev. Proc. 2011-29.

Law

Section 263(a)(1) and Treas. Reg. § 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 Treas. Reg. § 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 Treas. Reg. § 1.263(a)-5(a) if the amount is paid in the process of investigating or otherwise pursuing the transaction. Treasury Regulation §1.263(a)-5(f) provides that an amount that is contingent on the successful closing of a transaction described in Treas. Reg. § 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. 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 4.01 of Rev. Proc. 2011-29 provides a safe harbor election for taxpayers that pay or incur success-based fees for services performed in the process of investigating or otherwise pursuing a covered transaction described in Treas. Reg. § 1.263(a)-5(e)(3). In lieu of maintaining the documentation required by Treas. Reg. § 1.263(a)-5(f), a taxpayer may elect to allocate a success-based fee between activities that facilitate the transaction and activities that do not facilitate the transaction by treating 70 percent of the amount of the success-based fee as an amount that does not facilitate the transaction and by capitalizing the remaining 30 percent as an amount that does facilitate the transaction. In addition, the taxpayer must attach 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.

Treasury Regulation §301.9100-1(c) provides that the Commissioner has discretion to grant a reasonable extension of time under the rules set forth in Treas. Reg. §§ 301.9100-2 and 301.9100-3 to make certain regulatory elections. Treasury Regulation §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.

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

Treasury Regulation §301.9100-3(a) provides that requests for extensions of time for regulatory elections (other than automatic changes covered under Treas. Reg. §301.9100-2) 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.

Treasury Regulation §301.9100-3(b)(1) provides 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. inadvertently 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, and the tax professional failed to make, or advise the taxpayer to make the election.

Treasury Regulation §301.9100-3(b)(3) provides that 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 could be imposed under § 6662 at the time the taxpayer requests relief and the new position requires 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.

Treasury Regulation §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. 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. 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.

Analysis

Taxpayer's election is a regulatory election, as defined under Treas. Reg. § 301.9100-1(b), because the due date of the election is prescribed in Rev. Proc. 2011-29. As such, the Commissioner has the authority under Treas. Reg. §§ 301.9100-1 and 301.9100-3 to grant an extension of time to file a late regulatory election.

Taxpayer has represented that it acted reasonably and in good faith. Taxpayer represents that it reasonably relied on Tax Return Preparer, a qualified tax professional, to prepare its federal income tax return for Taxable Year. Taxpayer also represents that it is not seeking to alter a return position for which an accuracy-related penalty has been or could be imposed under §6662 at the time relief is requested. Taxpayer also represents that it did not affirmatively choose not to make the election after having been informed in all material respects of the required election and related tax consequences. Rather, Taxpayer represents that it intended to take advantage of the safe harbor provisions in Rev. Proc. 2011-29, filed its return for Taxable Year reflecting those provisions, but failed to include the required election statement. Taxpayer is not using hindsight in requesting relief.

Further, based on the facts as represented by the Taxpayer, granting an extension will not prejudice the interests of the Government. Taxpayer will not have a lower tax liability in the aggregate for all taxable years affected by the election if given permission to make the election at this time than Taxpayer would have had if the election had been timely made. In addition, the taxable year in which the regulatory election should have been made and any taxable years that would have been affected by the election had it been timely made will not be closed by the period of limitations on assessment under §6501(a) before Taxpayer's receipt of the ruling granting an extension of time to make a late election.

Ruling

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 Treas. Reg. §§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 success-based fees, identifying the transaction, and stating the success-based fee amounts that are deducted and capitalized.

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.

The rulings contained in this letter are based upon information and representations submitted by the taxpayer and accompanied by a penalty of perjury statement executed by an appropriate party. 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 federal income tax consequences of any aspect of any transaction or item discussed or referenced in this ruling including 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.

In accordance with the Power of Attorney on file with this office, a copy of this letter is being sent to your authorized representative.

A copy of this ruling should be attached to any income tax return to which it is relevant. Alternatively, taxpayers filing returns electronically may satisfy this requirement by attaching a statement to their return that provides the date and control number of the letter ruling.

Sincerely,

Bridget E. Tombul
Chief, Branch 2
(Income Tax & Accounting)

cc: