Internal Revenue Service

Department of the Treasury
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Person To Contact:
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CC:ITA:B01
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Date:
May 29, 2020

In Re:

Taxpayer =
Date 1 =
Date 2 =
Date 3 =
Date 4 =
Date 5 =
State A =
X Corp =
Y Corp =
Agreement =
Target =
%*a* =
$*a* =
Advisor A =
Advisor B =
$*b* =
Firm =
Individual =

Dear :

This letter responds to your letter, dated Date 1, submitted on behalf of Taxpayer, requesting an extension of time under §§ 301.9100-1 and 301.9100-3 of the

Procedure and Administration Regulations to make a late election to treat success-based fees in accordance with Rev. Proc. 2011-29, 2011-18 I.R.B. 746, which requires attaching a statement to Taxpayer's original federal income tax return for taxable year ended Date 2. This letter ruling is being issued electronically in accordance with Rev. Proc. 2020-29, 2020-21 I.R.B. 859. A paper copy will not be mailed to Taxpayer.

FACTS

Taxpayer represents the facts as follows:

Taxpayer is a State A corporation that uses an accrual method of accounting and files a consolidated Federal income tax return on a calendar year basis. It is a holding company that conducts its operations through its wholly owned subsidiary, X Corp and its subsidiaries. It is in the business of renting and selling new and used equipment including related supplies, parts and services to customers.

X Corp is a sole owner of Y Corp, a State A corporation, which was formed solely for the purpose of entering into the Agreement and consummating the transaction contemplated by the Agreement. Y Corp did not engage in any business other than in connection with the Agreement. Target is an unrelated State A corporation that is in the business of renting construction and industrial equipment.

On Date 3, X Corp, Target, and Y Corp entered into the Agreement, pursuant to which X Corp acquired %*a* percent of Target's equity via a merger of Y Corp with and into Target, with Target being the survivor as a direct wholly-owned subsidiary of X Corp. The transaction involving the acquisitions described above ("Transaction"), valued at approximately $*a*, closed on Date 4.

For Federal income tax purposes, the Taxpayer treated the Transaction as a taxable stock purchase under § 1001 of the Internal Revenue Code in which X Corp obtained a cost basis in the stock of Target under § 1012. Immediately after the Transaction, X Corp directly owned %*a* of the stock of Target.

In conjunction with the transaction, Taxpayer engaged Advisor A and Advisor B as financial advisors for services performed in the process of investigating or otherwise pursuing the transaction. Taxpayer paid success based fees in the total amount of $*b* to Advisor A and Advisor B. The fees were contingent upon the successful closing of the transaction.

The Taxpayer prepared its Federal income tax return for the taxable year ended Date 2 and determined that it was eligible to apply the safe harbor under Rev. Proc. 2011-29 to the success-based fees, and intended to make an election to do so. The Taxpayer complied with the substantive requirements of Rev. Proc. 2011-29 by deducting 70% of the success-based fees and capitalizing the remaining 30% of such fees.

Despite the intention of Taxpayer to make the election, the Taxpayer failed to attach a statement to its return, as required by Rev. Proc. 2011-29, stating that Taxpayer was making the safe harbor election (the "Election Statement"). Although aware of the Election Statement requirement, the Taxpayer overlooked the requirement and inadvertently did not include it with the return (Election Return).

On Date 5, the Taxpayer reviewed the Election Return for its annual financial statement audit and discovered that the Election Statement for the success-based fees was not attached to Taxpayer's return. Upon discovery, Taxpayer reached out to its tax advisors, Firm, for assistance in remediating the missed Election Statement. Upon consultation, Taxpayer requested Firm to file this request for an extension of time to properly make the safe harbor election under §§ 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations to make the election described in section 4 of Rev. Proc. 2011-29.

LAW

Section 263(a) provides generally that no deduction is allowed for any amount paid out for new buildings or for permanent improvements or betterments made to increase the value of any property or estate or any amount expended in restoring property or in making good the exhaustion thereof for which an allowance is or has been made. Section § 1.263(a)-1(d)(3) of the Income Tax Regulations provides that no deduction is allowed for an amount paid to acquire or create an intangible, which under §§ 1.263(a)-4(c)(1)(i) and 1.263(a)-4(d)(2)(i)(A) includes an ownership interest in a corporation or other entity. See also § 1.263(a)-4(a).

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 the business acquisition or reorganization transactions 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 of 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) (i.e., a success-based fee) is presumed to facilitate the transaction. 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.

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 § 1.263(a)-5(e)(3). In lieu of maintaining the documentation required by § 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 and 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.

The revenue procedure applies to covered transactions described in § 1.263(a)-5(e)(3). The covered transactions include any of the following transactions; (1) a taxable acquisition by the taxpayer of assets that constitute a trade or business; (2) 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) and (3) 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).

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(b) defines the term "regulatory election" as an election whose due date is prescribed by a regulation published in the Federal Register, or a revenue ruling, procedure, notice or announcement published in the Internal Revenue Bulletin.

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 301.9100-3(a) provides extensions of time to make a regulatory election under Code sections other than those for which § 301.9100-2 expressly permits automatic extensions. 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) states that a taxpayer will be deemed to have acted reasonably and in good faith if the taxpayer meets any one of the following; (1) requests relief before the failure to make the regulatory election is discovered by the Service, (2) if failed to make the election because of intervening events beyond the taxpayer's control, (3) failed to make the election because, after exercising due diligence, the taxpayer was unaware of the necessity for the election, (4) reasonably relied on the written advice of the Service, and (5) 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.

Under § 301.9100-3(b)(3), a taxpayer will not be considered to have acted reasonably and in good faith if the taxpayer meets any one of the following; (1) 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 (taking into account § 1.6664-2(c)(3)) and the new position requires or permits a regulatory election for which relief is requested, (2) was informed in all material respects of the required election and related tax consequences, but chose not to file the election, and (3) 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.

Section § 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. Section § 301.9100-3(c)(1)(i) provides, in part, 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 (taking into account the time value of money). Section § 301.9100-3(c)(1)(ii) provides, in part, that 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.

ANALYSIS

Taxpayer's election is a regulatory election, as defined under Section § 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 §§ 301.9100-1 and 301.9100-3 to grant an extension of time to file a late regulatory election.

Taxpayer represents that it qualifies to make the election under Rev. Proc. 2011-29 and that the transaction is a covered transaction described in § 1.263(a)-5(e)(3)(ii).

Taxpayer has represented that under §§ 301.9100-3(b)(1)(i) and (v), it requested relief before the failure to properly make the regulatory election was discovered by the Service and that it reasonably relied on a qualified tax professional, and the tax professional failed to make the election. Taxpayer has also represented that none of the circumstances listed in § 301.9100-3(b)(3) apply.

CONCLUSION

Based solely on the facts and representations submitted, 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 an amended return including the mandatory statement required by Section 4.01 of Revenue Procedure 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.

The rulings contained in this letter are 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 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, including whether Taxpayer properly included the correct costs as success-based fees subject to the retroactive election, or whether Taxpayer's transactions were within the scope of Rev. Proc. 2011-29.

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 ruling should be attached to Taxpayer's federal tax returns for the tax years affected. 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 provisions of the power of attorney currently on file with this office, a copy of this letter is being sent to your authorized representatives.

Sincerely,

Sean M. Dwyer
Senior Technician Reviewer, Branch 1
Office of Associate Chief Counsel
(Income Tax & Accounting)

cc: