Internal Revenue Service

Department of the Treasury
Washington, DC 20224

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Person To Contact:
, ID No.

Telephone Number:

Refer Reply To:
CC:ITA:B2
PLR-121365-20

Attn:

Date:
September 30, 2021

LEGEND:

Taxpayer =
Group =
Entity 1 =
Entity 2 =
Taxable Year =
Accounting Firm =
Adviser =
State 1 =
State 2 =
Business =
Acquisition =
Date 1 =
Date 2 =
Date 3 =
Date 4 =
Date 5 =
$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. This request is made in accordance with §§ 301.9100-1 and 301.9100-3 of the Procedure and

Administration Regulations. This letter ruling is being issued electronically in accordance with section 7.02(5) of Rev. Proc. 2021-1, 2021-1 IRB 1, 35.

FACTS AND REPRESENTATIONS

Taxpayer represents the following:

Taxpayer is a corporation organized under the laws of State 1, but its corporate headquarters are located in State 2. 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 transacted 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)(ii) of the Income Tax Regulations. The *$X* paid to Advisor 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. For U.S. federal income tax purposes, Taxpayer treated the transaction as a taxable acquisition under § 1001 of the Internal Revenue Code.

Taxpayer has an internal tax department that prepares its returns, and Taxpayer relies on that tax department to prepare its returns accurately and to consult with external tax professionals as needed. Taxpayer's internal tax department engaged Accounting Firm to perform an analysis of the costs incurred in connection with Acquisition. Accounting Firm did that analysis and informed Taxpayer's tax department that Taxpayer could make a success-based fee safe-harbor election under Rev. Proc. 2011-29 and deduct 70 percent of the success-based fees and capitalize 30 percent of the success-based fees. However, Accounting Firm did not inform Taxpayer's tax department how to make the safe-harbor election. When preparing Taxpayer's return for Taxable Year, Taxpayer's tax department failed to follow the proper procedure to make a safe-harbor election to allocate success-based fees under Rev. Proc. 2011-29.

Taxpayer timely filed its original federal tax return on Date 4 and allocated the success-based fees as if it had made an election under Rev. Proc. 2011-29 by deducting 70 percent of the success-based fees as amounts that did not facilitate the transaction, but Taxpayer did not attach the election statement that is required to make an election under Rev. Proc. 2011-29.

On Date 5, Taxpayer was informed by another advisor about the election statement requirement. That is when Taxpayer realized that it had not made a proper election under Rev. Proc. 2011-29 for Taxable Year. Taxpayer promptly informed Accounting

Firm and asked that this relief request be prepared. Taxpayer filed this request for relief before the Internal Revenue Service (Service) discovered that Taxpayer failed to make a success-based fee safe-harbor election.

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 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. 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 that can be deducted. The remaining portion (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(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. Acquisition was a covered transaction under § 1.263(a)-5(e)(3) and that $X paid to Advisor 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.

Taxpayer represents that, although Accounting Firm analyzed the transaction costs and informed Taxpayer's tax department about the safe harbor provision of Rev. Proc. 2011-

29 for success-based fees, Accounting Firm did not inform Taxpayer how to elect the safe harbor. Taxpayer's tax department then failed to follow the proper procedure for making the safe-harbor election for success-based fees. Taxpayer also represents that it relied on its internal tax department working with Accounting Firm to file its return accurately. Accordingly, Taxpayer timely filed its federal income tax return for Taxable Year as though the safe harbor had been elected but failed to attach the required election statement. Based on these representations, Taxpayer reasonably relied on its internal and external tax professionals to work in conjunction and file its return accurately. Taxpayer also represents that it requested this relief before the Service learned of Taxpayer's failure to make the success-based fee election. Therefore, Taxpayer is deemed to have acted reasonably and in good faith under § 301.9100-3(b)(1)(i) and (v).

Taxpayer represents that granting relief would 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 (taking into account the time value of money). Furthermore, Taxpayer represents that the Taxable Year in which the regulatory election should have been made and any taxable years that would have been affected had it been timely made, are not closed by the period of assessment. Based on these representations, 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 for success-based fees under Rev. Proc. 2011-29 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 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. 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,

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Bridget Tombul
Chief, Branch 2
Office of Associate Chief Counsel
(Income Tax & Accounting)

Enclosure:

Copy for § 6110 purposes

cc: