Internal Revenue Service

Number: **202222005**
Release Date: 6/3/2022

Index Number: 9100.00-00

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:B03
PLR-122537-21

Date:
March 07, 2022

In Re:

Legend:

Taxpayer =

Advisor 1 =

Advisor 2 =

Preparer =

Tax Advisor =

Target =

State A =

$A =

$B =

Date 1 =

Date 2 =

Date 3 =

Dear :

This letter responds to your correspondence dated October 28, 2021, requesting an extension of time under §§ 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations for Taxpayer to make the safe harbor election for success-based fees described in Rev. Proc. 2011-29, 2011-18 I.R.B. 746. 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

1. Taxpayer Information

Taxpayer, the common parent of an affiliated group of corporations that join in filing a consolidated U.S. federal income tax return, is a domestic corporation incorporated under the laws of State A. Taxpayer has a calendar year-end and uses an accrual method of accounting.

On Date 1, Taxpayer, in a taxable acquisition, acquired all of the outstanding membership interests and all other equity interests of Target, a State A limited liability company regarded as a partnership for U.S. federal income tax purposes (Transaction). Taxpayer represents that the Transaction is a covered transaction under Treas. Reg.§ 1.263(a)-5(e)(3)(i).

2. Description of Success-Based Fees

Taxpayer engaged Advisor 1 and Advisor 2 as financial advisors for services performed in the process of investigating or otherwise pursuing the Transaction. Taxpayer paid Advisor 1 a success-based fee of $A and Advisor 2 a success-based fee of $B (Success-Based Fees). Taxpayer represents that the Success-Based Fees were contingent upon the successful closing of the Transaction as described under Treas. Reg. § 1.263(a)-5(f).

Taxpayer engaged Preparer to prepare the U.S. federal income tax return for the taxable year ended Date 2 (Election Return). The Taxpayer also engaged Tax Advisor to analyze the proper U.S. federal income tax treatment of various costs incurred in connection with the Transaction (Transaction Costs). Tax Advisor determined that the Taxpayer was eligible to apply the safe harbor under Rev. Proc. 2011-29 to the Success-Based Fees. Accordingly, Tax Advisor advised the Taxpayer that the Success-Based Fees should be treated as 70% deductible and 30% capitalizable and prepared the election statement for the Success Based Fees, as required by Rev. Proc. 2011-29 (Election Statement). Tax Advisor provided its conclusions regarding the proper U.S. federal income tax treatment of the Transaction Costs to the Taxpayer in a report, which

included the calculation, the Election Statement and supporting documentation (Tax Advisor Analysis).

The Taxpayer provided the Tax Advisor Analysis to Preparer. In preparing the Election Return, Preparer relied on the Tax Advisor Analysis and reflected on the Election Return the Success-Based Fees as 70% deductible and 30% capitalizable. However, Preparer inadvertently overlooked the requirement of filing the Election Statement. As a result, no Election Statement was attached to the Election Return. Although the Taxpayer reviewed the Election Return and was aware that the Election Statement was required to be attached thereto, it did not detect the missing Election Statement.

On Date 3, during the Service's audit of the Election Return, the examining agent discovered the missing Election Statement. The examining agent issued a draft Form 5701, Notice of Proposed Adjustment, proposing the disallowance of the safe harbor treatment to the Success-Based Fees. The Taxpayer immediately started discussions with the examining agent, and the agent suggested the Taxpayer request relief under Treas. Reg. §§ 301.9100-1 and 301.9100-3 for an extension of time to properly file the Election Statement. The Taxpayer promptly informed Preparer and requested that Preparer commence preparation of this Request.

LAW & ANALYSIS

Section 263(a)(1) of the Internal Revenue Code and § 1.263(a)-2(a) of the Income Tax Regulations provide that no deduction shall be allowed for any amount paid 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). 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 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) ("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.

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).

Section 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) and activities that do not facilitate the transaction if the taxpayer satisfies three requirements. First, the taxpayer must treat seventy percent of the amount of the success-based fee as an amount that does not facilitate the transaction. Second, the taxpayer must capitalize the remaining amount of the success-based fee as an amount which does facilitate the transaction. Third, 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. This statement must: (a) state that the taxpayer is electing the safe harbor; (b) identify the transaction; and (c) state the success-based fee amounts deducted and capitalized.

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 301.9100-1(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.

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 an extension of time to make a regulatory election will be granted only when the interests of the Government are not 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 (taking into account the time value of money). Section 301.9100-3(c)(1)(i).

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 under § 6501(a) before the taxpayer's receipt of a ruling granting relief under this section. Section 301.9100-3(c)(1)(ii).

Taxpayer's election is a regulatory election as defined in § 301.9100-1(b) because the due date of the election is prescribed in section 4.01(3) of Rev. Proc. 2011-29. 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.

CONCLUSION

Based solely on the information provided and representations made, we conclude that Taxpayer acted reasonably and in good faith and granting relief will not prejudice the interests of the Government. Accordingly, Taxpayer has met the requirements of §§ 301.9100-1 and 301.9100-3.

Subject to the requirements of § 6511, Taxpayer is granted an extension of time until 60 days following the date of this ruling to file an amended tax return for the taxable year ending Date 2 to elect the safe harbor for success-based fees pursuant to Rev. Proc. 2011-29. The amended return must include an election statement stating 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.

CAVEATS

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. Although this office has not verified any of the material submitted in support of the request for the ruling, it is 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 under any other provision of the Code. In particular, no opinion is expressed or implied as to 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. The relief provided in this letter is conditioned on proper adjustments to affected returns and tax attributes for Taxpayer and its affiliates.

Enclosed is a copy of the letter ruling showing the deletions proposed to be made in the letter when it is disclosed under § 6110 of the Code.

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.

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

A copy of this ruling must be attached to Taxpayer's Federal income 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.

Sincerely,

BRINTON T. WARREN
Chief, Branch 3
(Income Tax & Accounting)

Enclosure: Copy of the letter for section 6110 purposes

cc: