Internal Revenue Service

Number: **202410009**
Release Date: 3/8/2024

Index Number: 9100.00-00

Department of the Treasury
Washington, DC 20224

Third Party Communication: None
Date of Communication: Not Applicable

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Refer Reply To:
CC:ITA:1
PLR-115334-23

Date:
December 08, 2023

Re: PLR Request for an Extension of Time to Make an Election

Taxpayer =

A =
B =
C =
D =
E =
F =
G =
H =
I =
Date1 =
Date2 =
Date3 =
Date4 =
Date5 =
Date6 =
Date7 =
Amount$1 =
Amount$2 =
Amount€3 =
Amount€4 =

Dear :

This letter responds to your letter, dated June 27, 2023, and supplemental correspondence, dated September 22, 2023, and November 9, 2023, 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 the election

described in Section 4 of Rev. Proc. 2011-29, 2011-18 I.R.B. 746 by filing the requisite election statement for Taxpayer's taxable year ended Date1.

FACTS

Taxpayer is the common parent of an affiliated group of corporations ("Taxpayer's Group") that files Form 1120, U.S. Corporation Income Tax Return. Taxpayer uses an overall accrual method of accounting and has a fiscal year ending on Date2. Taxpayer is a wholly owned indirect subsidiary of F, a country H entity.

On Date3, A, a member of Taxpayer's Group, acquired all the shares of B, pursuant to an Agreement and Plan of Merger ("Agreement") dated Date4. Pursuant to the Agreement, B merged with and into C, with B surviving. At all relevant times, C was a wholly owned subsidiary of A. B became a wholly owned subsidiary of A immediately following the merger and a member of Taxpayer's Group.

Taxpayer represents that D incurred Amount$1 of costs in connection with the acquisition of B. The B acquisition was of an entity that operated within the E line of business and D is the legal entity responsible for this business. A wholly owns D and, accordingly, D is also a member of Taxpayer's Group.

F entered into an engagement letter agreement with G for G to provide financial services in connection with the acquisition of B. The engagement letter agreement between F and G was dated Date6, or less than one week prior to the Agreement. The engagement letter agreement provided for a success-based fee and a separate discretionary fee. Taxpayer describes the discretionary fee as being dependent upon F's assessment of the quality of the services provided by G. The engagement letter agreement stated that the discretionary fee was dependent upon G's negotiation support, valuation support and other factors. On Date7, G invoiced F for both the success-based fee and the discretionary fee. G provided a fairness opinion to the management board and supervisory board of F dated Date4, the same date as the Agreement. The costs for the fairness opinion were included in the G invoice to F in the amount of Amount€3; thus, no separate charge was stated for the fairness opinion cost subject to capitalization under § 1.263(a)-5(e)(2)(i) of the Income Tax Regulations.

Taxpayer represents and claims that the discretionary fee is a success-based fee under Rev. Proc. 2011-29. Taxpayer also represents that if the transaction had not closed, G would not have been paid for any of their services rendered in connection with the transaction, including for the fairness opinion. Taxpayer further represents and claims that any and all fees payable to G were contingent on the successful closing of the transaction.

F paid the G fees and a VAT in its currency. Taxpayer represents that the G fees were paid on behalf of D. Consistent therewith, D reimbursed F for the success-based fee and the discretionary fee of Amount€4, but not for the VAT. The reimbursement

payment was paid in U.S. dollars and was Amount$2. Taxpayer reported these costs in the amount of Amount$2 on its consolidated federal income tax return for the taxable year ended Date1 as 70% deductible and 30% capitalizable in accordance with the Rev. Proc. 2011-29 safe harbor.

During the process of preparing the tax return for the next fiscal year ending Date5, Taxpayer Group's Director of Tax Compliance, I, discovered that for the taxable year ended Date1, D and Taxpayer failed to file an election statement as required under Rev. Proc. 2011-29. I also discovered that D incorrectly deducted 70% of Amount$1 and capitalized the remaining amount of 30% of Amount$1 into B's stock basis.[1]

Taxpayer represents the following: Taxpayer's consolidated federal income tax return for taxable year ended Date1 is not currently and was not previously under examination, before Appeals, or before a Federal court; the subject letter ruling request was made before the failure to make the regulatory election was discovered by the IRS; Taxpayer was never informed in all material respects of the election described in Rev. Proc. 2011-29 and related tax consequences but nevertheless chose not to file the election described in Rev. Proc. 2011-29; and Taxpayer's decision to file this request for an extension of time to make the election described in Rev. Proc. 2011-29 does not involve hindsight because no specific facts have changed since the due date for filing the election that make the election advantageous to Taxpayer had the election been timely made.

LAW

Sections 301.9100-1 through 301.9100-3 of the Procedure and Administration Regulations 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

[1] This ruling does not address the treatment of amounts other than the G fees.

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: (1) requests relief before the failure to make the regulatory election is discovered by the Service, (2) 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, or (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: (1) seeks to alter a return position for which an accuracy-related penalty has been or could be imposed under § 6662 of the Internal Revenue Code 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, or (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.

Taxpayer has represented 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 Taxpayer requested relief. Furthermore, Taxpayer has represented that it is not using hindsight in requesting relief and that no specific facts have changed since the original deadline that would make the election more advantageous to Taxpayer now than if made timely.

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. Under these criteria, the interests of the government are not prejudiced in this case.

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). 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(e)(2) provides that an amount paid in the process of investigating or otherwise pursuing a covered transaction facilitates that transaction if the amount is inherently facilitative, regardless of whether the amount is paid for activities performed prior to the date determined in § 1.263(a)-5(e)(1). Among other things, an amount is inherently facilitative if the amount is paid for securing an appraisal, factual written determination, or fairness opinion related to the transaction.

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) is presumed to facilitate the transaction and, thus, must be capitalized. 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 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.

To reduce controversy between the Service and taxpayers over the documentation required to allocate success-based fees between the activities that facilitate the transaction and activities that do not facilitate the transaction, the Service issued Rev. Proc. 2011-29.

Section 4.01 of Rev. Proc. 2011-29 states that the Service will not challenge a taxpayer's allocation of a success-based fee between activities that facilitate the transaction described in § 1.263(a)-5(e)(3) and activities that do not facilitate the transaction if the taxpayer: (1) treats 70 percent of the amount of the success-based fee as an amount that does not facilitate the transaction; (2) capitalizes the remaining 30 percent as an amount that 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.

The revenue procedure applies to covered transactions described in § 1.263(a)-5(e)(3), which includes, *inter alia*, a taxable acquisition by the taxpayer of assets that constitute

a trade or business and 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). *See* § 1.263(a)-5(e)(3)(i) and (ii).

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, we are satisfied that 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 the election statement required by Section 4.01 of Rev. Proc. 2011-29.

This ruling is based upon information and representations submitted by Taxpayer and accompanied by a penalty of perjury statement executed by an appropriate party. This office has not verified any of the material submitted in support of the request for rulings, the facts and representations herein are 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 the discretionary fees and the unstated portion of the fee associated with obtaining an appraisal are success-based fees or otherwise eligible for the Rev. Proc. 2011-29 safe harbor. No opinion is expressed on the appropriate amount of the success-based fee eligible for the safe harbor election. Further, no opinion is expressed on the treatment or deductibility of the Amount$2 fee or on the treatment of any other acquisition related costs, including under § 162 or § 195.

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.

Sincerely,

Patrick E. White

Patrick E. White
Senior Counsel, Branch 1
Office of Associate Chief Counsel
(Income Tax & Accounting)

Enclosure (1):
Copy for § 6110 purposes

CC: