Internal Revenue Service

Number: **202448003**
Release Date: 11/29/2024

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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, ID No.
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Refer Reply To:
CC:ITA:B02
PLR-104415-24
Date:
August 30, 2024

TY:

Legend:

Taxpayer	=
Tier Parent	=
Operating Entity	=
Majority Acquiror	=
Financial Consultant A	=
Financial Consultant B	=
Financial Consultant C	=
$a	=
$b	=
$c	=
$d	=
Tax Advisor	=
%a	=
Date 1	=
Date 2	=
Date 3	=
Year 1	=
Year 2	=

Dear :

This letter responds to Taxpayer's letter ruling request dated March 7, 2024, as supplemented by correspondence submitted on May 10, 2024, May 14, 2024, and July 26, 2024. Taxpayer requests an extension of time pursuant to sections 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 as provided by Rev. Proc. 2011-29, 2011-1 C.B. 746, which requires that a statement be attached to a taxpayer's original Federal income tax return for the taxable year of election.

FACTS

Taxpayer incorporated on Date 1, as a calendar-year corporation using the accrual method of accounting. Taxpayer is a holding company that serves as the parent of an affiliated group that files a consolidated Federal income tax return, of which Operating Entity is a member. Operating Entity manages franchising entities under common management control. Tier Parent, a Delaware limited partnership, wholly owned Taxpayer.

In Year 1, Operating Entity engaged Financial Consultants A, B and C (collectively, Financial Consultants) to assist in and facilitate the acquisition of Tier Parent, with the objective of creating substantial value for Operating Entity through capture of additional market share and opportunities for new service operations. Each Financial Consultant performed a variety of distinct services in connection with the potential acquisition of Tier Parent. For instance, Financial Consultant A provided due diligence and screening of potential acquirors, Financial Consultant B prepared and distributed confidential information presentations to potential acquirors, and Financial Consultant C familiarized itself with Operating Entity's operations and participated in meetings with potential acquirors. Pursuant to its engagement agreements with Financial Consultants A, B and C, Operating Entity was required to pay each firm a compensatory fee contingent upon the successful closing of any acquisition of Tier Parent.

On Date 3, pursuant to a Partnership Interest Purchase Agreement (IPA) dated Date 2, Majority Acquiror acquired %a of Tier Parent and, indirectly, Taxpayer and Operating Entity (Acquisition Transaction). That same day, pursuant to and in satisfaction of the engagement agreements, Operating Entity paid Financial Consultants A, B and C amounts $a, $b, and $c, respectively, totaling $d of success-based fees (collectively, Success-Based Fees).

Taxpayer engaged Tax Advisor to prepare its Federal income tax return for Year 1 in a manner consistent with, intending to elect, the safe-harbor provided by Rev. Proc. 2011-29 (safe-harbor election). Taxpayer prepared and provided Tax Advisor with a Rev. Proc. 2011-29 election statement (required election statement) to attach to its timely filed return for Year 1. Tax Advisor prepared Taxpayer's timely filed return in a manner that complied with the substantive requirements of Rev. Proc. 2011-29 by claiming a deduction for 70 percent of the Success-Based Fees paid to Financial Consultants and

capitalizing the remaining 30 percent. The required election statement, however, was not attached to that return.

While preparing its state-level income tax returns in Year 2, Taxpayer determined that the required election statement was not included as an attachment to its timely filed Year 1 Federal income tax return.

On March 7, 2024, Taxpayer filed the present letter ruling request, seeking an extension of time to file the required election statement for Taxpayer's Taxable Year 1, pursuant to sections 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations. Taxpayer represents that the period of limitation on assessment under section 6501(a) of the internal Revenue Code (Code) for Taxpayer's Taxable Year has not expired.

LAW

Section 263(a)(1) of the Code 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 sections 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 section 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. See INDOPCO, Inc. v. Commissioner, 503 U.S. 79, 89-90 (1992); Woodward v. Commissioner, 397 U.S. 572, 575-76 (1970).

Under section 1.263(a)-5, a taxpayer must capitalize an amount paid to facilitate a business acquisition or reorganization transaction described in section 1.263(a)-5(a). In general, an amount is paid to facilitate a transaction described in section 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. Section 1.263(a)-5(b)(1).

Section 1.263(a)-5(f) provides that an amount that is contingent on the successful closing of a transaction described in section 1.263(a)-5(a), or success-based fee, is presumed to facilitate the transaction. 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. 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 IRS 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 IRS issued Rev. Proc. 2011-29. Section 4.01 of the revenue procedure states that the IRS would not challenge a taxpayer's allocation of a success-based fee between activities that facilitate a transaction described in section 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.

It is this last requirement that Taxpayer requests permission to accomplish with this ruling request. Taxpayer requests permission with this ruling request to attach the statement required by section 4.01(3) of Rev. Proc. 2011-29 to its return, by amending its original filed return and superseding it with a return with the proper election statement completed and attached.

Section 3 of Rev. Proc. 2011-29 provides that the revenue procedure applies to covered transactions described in section 1.263(a)-5(e)(3), which include --

(i) A taxable acquisition by the taxpayer of assets that constitute a trade or business;

(ii) 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 section 267(b) or section 707(b); or

(iii) A reorganization described in section 368(a)(1)(A), (B), or (C) or a reorganization described in section 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 section 354 or 356 (whether the taxpayer is the acquirer or the target in the reorganization).

Sections 301.9100-1 through 301.9100-3 of the Procedure and Administration Regulations provide the standards the Commissioner uses to determine whether to grant an extension of time to make a regulatory 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 section 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 may grant a reasonable extension of time to make a regulatory election, or a statutory election (but no more than six months except in the case of a taxpayer who is abroad) under all subtitles of the Internal Revenue Code except subtitles E, G, H and I.

Section 301.9100-3(a) provides extensions of time to make a regulatory election under Code sections other than those for which section 301.9100-2 expressly permits automatic extensions. Requests for extensions of time for regulatory elections 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 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 --

(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 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, including a tax professional employed by the taxpayer, and the tax professional failed to make, or advise the taxpayer to make the election.

Under section 301.9100-3(b)(3), 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 has been or could be imposed under section 6662 at the time the taxpayer requests relief (taking into account section 1.6664-2(c)(3)) 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.

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 section 6501(a) before the taxpayer's receipt of a ruling granting relief under this section.

ANALYSIS

Taxpayer represents that for Federal income tax purposes Acquisition Transaction was a taxable acquisition of an ownership interest of Taxpayer within the meaning of section 267(b) of the Code, and section 1.263(a)-5(a)(3) and (e)(3)(ii) of the Income Tax Regulations. That transaction, then, is considered a covered transaction pursuant to section 1.263(a)-5(e)(3), and Taxpayer qualifies to make the safe-harbor election provided by Rev. Proc. 2011-29.

As a result of Acquisition Transaction, Taxpayer incurred and subsequently paid $d of Success-Based Fees during Taxpayer's taxable Year 1. Taxpayer complied with the substantive requirements for making the safe-harbor election by deducting 70 percent and capitalizing 30 percent of the Success-Based Fees on its original Year 1 Federal income tax return. Taxpayer, however, failed to perfect its safe-harbor election by inadvertently omitting the required election statement from that return. It is with respect to that failure that Taxpayer requests an extension of time to amend its original filed return, to supersede that original return with one that includes the required election statement as an attachment.

Taxpayer's request pertains to a regulatory election as defined in section 301.9100-1(b) of the Procedure and Administration Regulations, as the due date for the making the safe-harbor election is prescribed by section 1.263(a)-5(f) of the income Tax Regulations. Accordingly, the Commissioner has the authority under sections 301.9100-1 and 301.9100-3, to grant Taxpayer's request for an extension of time to file the safe-harbor election for Taxpayer's Taxable Year 1.

The information submitted, and representations made by Taxpayer establish that Taxpayer acted reasonably and in good faith under section 301.9100-3(b)(1) and (2). Taxpayer requested relief before its failure to properly make the regulatory election was discovered by the Commissioner. Additionally, despite Taxpayer's reasonable reliance on qualified tax professionals to properly attach the election to its electronically filed Federal income tax return for Year 1, the required election statement was inadvertently omitted from Taxpayer's original return. Accordingly, Taxpayer will be considered to have acted reasonably and in good faith.

Moreover, Taxpayer should not be deemed to have acted unreasonably or in a manner lacking good faith. Taxpayer's representations indicate that none of the circumstances listed in section 301.9100-3(b)(3) apply.

Based on Taxpayer's representation of the facts, granting an extension of time to file the election will not prejudice the interests of the government under section 301.9100-3(c)(1). Taxpayer has represented that granting relief would not result in a lower tax liability in the aggregate for all taxable years affected by the election than would have resulted had Taxpayer timely made the election (taking into account the time value of money). Further, Taxpayer has represented that the period of limitations on assessment under section 6501(a) has not closed for any taxable years that would have been affected had Taxpayer timely made the election.

CONCLUSION

Based on the facts and representations submitted, we conclude that Taxpayer acted reasonably and in good faith and granting relief will not prejudice the interest of the government. Accordingly, the requirements of §§ 301.9100-1 and 301.9100-3(b)(1) have been satisfied.

Taxpayer is granted an extension of time until 60 days following the date of this ruling to file an amended tax return electing safe harbor treatment of its success-based fees under section 4.01(3) of 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.

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. 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 on whether (a) Taxpayer is otherwise eligible or otherwise qualifies to make the Rev. Proc. 2011-29 election; (b) the success-

based fees are properly treated, in whole or part, as a deductible or capitalizable cost of Taxpayer; (c) the success-based fees are in fact success-based fees under Rev. Proc. 2011-29; or (d) the success-based fees are subject to §§ 162(k), 195 or any other Code provision or regulation that would preclude the deduction or capitalization thereof. Further, no opinion is expressed as to the tax treatment of the Acquisition Transaction, or with respect to the treatment of the tax items of Tier Parent, Majority Acquiror, or any current or former owners of Tier Parent.

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 letter must be attached to any income tax return to which it is relevant. 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 Power of Attorney on file with this office, a copy of this letter is being sent to your authorized representative. We are also sending a copy of this letter to the appropriate operating division director. Enclosed is a copy of the letter ruling showing the deletions proposed to be made in the letter when it is disclosed under section 6110 of the Code.

Sincerely,

Ian Heminsley
Assistant to the Branch Chief, Branch 2
Office of the Associate Chief Counsel
(Income Tax & Accounting)

Enclosure: Copy of the letter for section 6110 purposes

cc: