Internal Revenue Service

Number: **201650001**
Release Date: 12/9/2016

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:B02
PLR-104140-16

Date:
July 28, 2016

TY:

Legend

Taxpayer =
TP's Subsidiary=
Parent1 =
Subsidiary1 =
CPA =

CPA Firm =
Parent1's Tax Manager =

Date1 =
Date2 =
Date3 =
Year =
Taxable Year =

Dear Taxpayer:

This is in response to your letter of Date1 requesting permission to attach an election statement to Taxpayer's originally filed consolidated Federal tax return for Taxable Year. The election statement was not included with the return although it was required in order for Taxpayer to use a safe harbor method of accounting for success-based fees under Rev. Proc. 2011-29, 2011-18 I.R.B. 746. The request is made in accordance with §§ 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations.

FACTS AND REPRESENTATIONS:

Taxpayer represents the following:

On Date2, Parent1's wholly-owned subsidiary, Subsidiary1, purchased all of the stock of Taxpayer, which owned all of the stock of TP's Subsidiary. As a result of the successful purchase, TP's Subsidiary paid a success-based fee to a broker responsible for the successful transaction. For tax purposes, Parent1 and Taxpayer were each the parent corporation of their respective consolidated return group.

Parent1's Tax Manager provided CPA with the relevant facts regarding the transaction and Taxpayer's desire to make the safe harbor election under to Rev. Proc. 2011-29, for the success-based fees. Although both Parent1's Tax Manager and CPA were aware of the safe harbor election, Parent1's Tax Manager did not know that an election statement was required to be filed with the return, and CPA inadvertently omitted the mandatory election statement from the return. Even so, CPA prepared Taxpayer's final consolidated tax return as if the election had been properly made. All deductions regarding the success-based fees were taken as if the election statement were properly included with the return, thereby resulting in a deduction of 70% and a capitalization of 30% of the success-based fees paid by TP's Subsidiary. Taxpayer relied on tax professionals to properly file all necessary documents for its Taxable Year return. Upon the return's completion, Parent1's Tax Manager reviewed and approved the return without the mandatory statement and the Taxpayer's consolidated return for the period ended Taxable Year was timely filed without the statement.

The omitted statement was not discovered until CPA Firm was preparing Parent1's consolidated return for its year ended Date3. CPA Firm reviewed the Taxable Year return CPA prepared for Taxpayer and realized that CPA had inadvertently omitted from the return the mandatory election statement required by section 4.01(3) of Rev. Proc. 2011-29, for a safe harbor election for success-based fees.

To date, Taxpayer has not received any notification from the Internal Revenue Service (IRS) that its federal return for Taxable Year is under examination, nor has it received notification that the failure to include the election statement was discovered by the IRS. Accordingly, Taxpayer requests permission to file an amended consolidated return for the period ended Taxable Year which will include the mandatory election statement required to use the safe harbor method of accounting for success-based fees under section 4.01(3) of Rev. Proc. 2011-29.

LAW AND ANALYSIS:

Section 263(a)(1) of the Internal Revenue Code and § 1.263(a)-2(a) of the Income Tax Regulations generally 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. 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 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.

A taxpayer's method for determining the portion of a success-based fee that facilitates a transaction and the portion that does not facilitate the transaction is a method of accounting under § 446.

Because the treatment of success-based fees was a continuing subject of controversy between taxpayers and the Service, the Service published Rev. Proc. 2011-29. 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). 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, i.e., an amount that can be deducted. The remaining portion of the fee must be capitalized as an amount that facilitates the transaction.

Section 4.01 of Rev. Proc. 2011-29 allows a 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 does three things. First, the taxpayer must treat 70 percent of the amount of the success-based fee as an amount that does not facilitate the transaction and thus may be deducted. 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, stating that the taxpayer is electing the safe harbor, identifying the transaction, and stating the success-based fee amounts that are deducted (treated as not facilitating the transaction) and capitalized (treated as facilitating the transaction).

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 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.

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 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(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.

Section 301.9100-3(c)(2) provides special rules for accounting method regulatory elections. Section 301.9100-3(c)(2) provides that the interests of the government are deemed prejudiced, except in unusual or compelling circumstances, if the accounting method regulatory election for which relief is requested is subject to the advance consent procedures for method changes, requires a § 481(a) adjustment, would permit a change from an impermissible method of accounting that is an issue under consideration by examination or any other setting, or provides a more favorable method of accounting if the election is made by a certain date or taxable year.

In the present situation, Taxpayer has satisfied the requirements of §§ 301.9100-1 and 301.9100-3 of the Procedure and Administration regulations. The information and representations made by Taxpayer establish that it acted reasonably and in good faith. The affidavits presented show that Taxpayer reasonably relied on qualified tax professionals for the proper filing of Taxpayer's consolidated return including the safe harbor election for success-based fees under Rev. Proc. 2011-29. However, the tax professionals failed to file the required mandatory statement under section 4.01of Rev. Proc. 2011-29. The affidavits presented show that the tax professionals were unaware of the statement requirement. Upon discovery of the error, Taxpayer filed for relief before the government discovered the failure to properly make the regulatory election.

The information and representations presented establish that Taxpayer is not seeking to alter a return position for which an accuracy-related penalty had been or could be imposed under § 6662 at the time relief was requested. Taxpayer was not informed in all material respects of the required filing requirements of the election, and its related tax consequences. Furthermore, Taxpayer is not using hindsight in requesting relief, and no facts have changed since the time of the original filing deadline.

Finally, granting an extension will not prejudice the interests of the government. It is represented that Taxpayer would not have a lower tax liability in the aggregate for all taxable years affected by the safe harbor election under Rev Proc. 2011-29, if given permission to make the election at this time than Taxpayer would have had if the safe harbor election had been properly made by the original deadline for making the election. Taxpayer has represented that the taxable years that would have been affected by the election had it been timely made, are not closed by the period of limitations on assessment. And, the IRS had not discovered the improperly made election before Taxpayer filed for relief. Therefore, the granting of relief will not prejudice the government.

CONCLUSION:

Based upon our analysis of the facts as represented, 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 its mandatory statement as required by section 4.01(3) of Rev. Proc. 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.

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 whether Taxpayer properly included the correct costs as its success-based fees subject to the retroactive election, or whether Taxpayer's transaction was 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.

In accordance with the power of attorney on file with this office, a copy of this letter is being sent to your authorized representative. 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.

A copy of this ruling should be attached to any income tax return to which it is relevant. Alternatively, taxpayers filing returns electronically may satisfy this requirement by attaching a statement to their return that provides the date and control number of the letter ruling.

This ruling is based upon information and representations submitted by Taxpayer and accompanied by a penalty of perjury statement executed by appropriate parties. 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.

Sincerely,

Bridget T. Tombul

BRIDGET E. TOMBUL
Chief, Branch 2
Office of Associate Chief Counsel
(Income Tax & Accounting)

cc:

Enc: copy for § 6110 purposes