Internal Revenue Service

Department of the Treasury
Washington, DC 20224

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Person To Contact:
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Telephone Number:

Refer Reply To:
CC:ITA:B03
PLR-103933-17

Date:
July 28, 2017

In Re: A request for relief under § 301.9100-1 of the Federal Income Tax Regulations

Taxpayer Identification Number:

Legend:

Date1	=
X	=
Date2	=
Date3	=
Target	=
$a	=
Y	=
$b	=
Accountant1	=
Date4	=
$c	=
$d	=
Date4	=
Date5	=
Accountant2	=
Z	=
Date6	=
Date7	=

Dear :

This letter responds to a letter dated Date1, submitted on behalf of X ("Taxpayer"), requesting a ruling that Taxpayer be granted an extension of time under sections 301.9100-1(c) and 301.9100-3 of the Procedure and Administration Regulations to file a safe harbor election under Revenue Procedure 2011-29, 2011-18 I.R.B. 746.

Facts

According to the information submitted, Taxpayer manufactures and markets branded healthcare, pain management and fitness products. Taxpayer was formed on Date2. On Date3, Taxpayer acquired 100% of the outstanding shares of Target. The Agreement and Plan of Merger, dated Date3, set forth the terms of the acquisition, and the transaction closed on Date3 for consideration of approximately $a. In a management agreement dated Date3, Taxpayer entered into an agreement with Y for Y to provide various services with respect to the transaction, including financial and structural advice and analysis as well as assistance with due diligence investigations and negotiations. The agreement provided that Y would be paid a transaction fee of $b for the services rendered with respect to the acquisition, contingent upon successful completion of the transaction. The transaction closed on Date3, and Y was paid upon closing.

Accountant1 prepared Taxpayer's tax return for the initial short year of Date2 to Date4. On its Form 1120, Taxpayer allocated 70% of the success-based fees as deductible amounts that did not facilitate the transaction, and capitalized the remaining 30%. However, Accountant1 also determined that the 70% of the success-based fees that did not facilitate the transactions were start-up costs under § 195 of the Internal Revenue Code, and were therefore required to be amortized over 180 months. Consequently, the amount deducted on the short year tax return was only $c, with the remaining $d to be deducted over the remaining months of the amortization period. Despite allocating the success based fees in accordance with the safe harbor, Accountant1 inadvertently did not include the election required under Rev. Proc. 2011-29 with its income tax return. This omission was not discovered until Date5, when Accountant2 performed an audit of Taxpayer's accounts following its acquisition by Z on Date6. Upon discovery, Taxpayer engaged the services of Accountant2 to assist with its request to obtain relief under Treas. Reg. § 301.9100-3. In addition, because the period of limitations under § 6501(a) was close to expiring, Taxpayer executed a Form 872 to extend the statute of limitations for the tax due on its Date4 return until Date7.

Taxpayer asserts that no return that would be affected by this ruling is under examination, before Appeals, or before a Federal Court.

Law and Analysis

Treasury Regulations § 1.263(a)-5(a) requires taxpayers to capitalize amounts paid or incurred to facilitate certain transactions. Section 1.263(a)-5(a)(2) includes an acquisition of an ownership interest in a business entity as one such transaction.

Treasury Regulations § 1.263(a)-5(e)(1) provides that an amount paid by the taxpayer in the process of investigating or otherwise pursuing a covered transaction facilitates

that transaction only if the amount relates to activities performed on or after the earlier of (i) the date a letter of intent, exclusivity agreement, or similar written communication is executed, or (ii) the date on which the material terms of the transaction are approved by the taxpayer's board of directors. Section 1.263(a)-5(e)(3) defines a covered transaction as (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 or the target) if immediately after the acquisition the acquirer and the target are related within the meaning of §§ 267(b) or 707(b), or (iii) a reorganization described in §§ 368(a)(1)(A), (B), or (C), or a reorganization described in § 368(a)(1)(D) in which the stock or securities of the corporation to which the assets are transferred are distributed in a transaction that qualifies under §§ 354 or 356.

Section 1.263(a)-5(f) provides that an amount paid that is contingent on the successful closing of a covered transaction is an amount paid to facilitate the transaction except to the extent the taxpayer maintains sufficient documentation to establish that a portion of the fee is allocable to activities that do not facilitate the transaction.

Section 4 of Revenue Procedure 2011-29 provides a safe harbor election for allocating success based fees paid in business acquisitions or reorganizations described in § 1.263(a)-5(e)(3). Under the safe harbor, taxpayers may elect to treat 70% of such success based fees as amounts which do not facilitate the transaction and therefore are not required to be capitalized, provided that the taxpayer (i) capitalizes the remaining 30%, and (ii) attaches a statement to its timely filed return electing to use the safe harbor treatment.

Under § 301-9100-1(c), 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 301.9100-1(b) defines the term "regulatory election" as including an election whose deadline is prescribed by a regulation published in the Federal Register or a Revenue Procedure published in the Internal Revenue Bulletin.

Sections 301.9100-1 through 301.9100-3 provide the standards that the Commissioner will use to determine whether to grant an extension of time to make an election. Section 301.9100-1(a).

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.

Requests for relief under § 301.9100-3 will be granted when the taxpayer provides evidence to establish 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(a).

Section 301.9100-3(b)(1) provides that a taxpayer will be deemed to have acted in good faith if the taxpayer requests relief before the failure to make the election is discovered by the Service, or if the taxpayer reasonably relied on a qualified tax professional who failed to make the election or to advise the taxpayer to make the election.

Section 301.9100-3(b)(3) provides that a taxpayer will not be deemed to have acted 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 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 but chose not to file the election; or (3) uses hindsight in requesting relief, when specific facts have changed since the due date for making the election that make the election advantageous to the taxpayer.

Section 301.9100-3(c) provides that interests of the government will be prejudiced if granting relief would result in a lower tax liability in the aggregate for all tax years affected by the election than the taxpayer would have had if the election had been timely filed, or if the taxable year in which the election should have been made is closed at the time the relief would be granted.

In this case, Taxpayer represents that the issue is not under examination, and that it reasonably relied upon the advice of a tax professional. It is not the case that Taxpayer was informed of the need to file the election but chose not to do so. Taxpayer represents that it is not altering a return position for which an accuracy-related penalty could be imposed, because it is not altering its return position at all; it is filing the election that was required with its original return. Taxpayer also represents that no specific facts have changed since the due date for filing the election that make the election advantageous. Finally, taxpayer represents that its tax liability for the year at issue will not be lower if relief is granted than it would have been had the election been timely filed. The tax year at issue is not a closed year at the time relief would be granted.

Conclusion

Based solely on the facts submitted and the representations made, we conclude that Taxpayer acted reasonably and in good faith, and that granting the request will not prejudice the interests of the government. Accordingly, the requirements of §§ 301.9100-1 and 301.9100-3 have been satisfied.

Taxpayer is granted an extension of 60 days from the date of this ruling to file the statement required by § 4.01(3) of Rev. Proc. 2011-29, stating that it is electing the safe harbor for success-based fees, properly identifying the party making the election, 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 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.

Except as specifically provided herein, no opinion is expressed or implied concerning the federal tax consequences of the facts described above under any other provision of the Code. In particular, no opinion is expressed or implied as to whether the Taxpayer properly included the correct costs as its success-based fees subject to the election, whether Taxpayer's transaction was within the scope of Rev. Proc. 2011-29, or whether its decision to amortize start-up costs under § 195 was appropriate.

This ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) provides that it may not be used or cited as precedent.

In accordance with the provisions of a power of attorney currently on file, a copy of this letter is being sent to your authorized representatives. We are also sending a copy of the ruling 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 § 6110.

Sincerely,

Christopher F. Kane
Branch Chief, Branch 3
(Income Tax & Accounting)

Enclosures (2):
Copy of this letter
Copy for section 6110 purposes