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Department of the Treasury
Washington, DC 20224

[Third Party Communication:
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Person To Contact:
, ID No.

Telephone Number:

In Re:

Refer Reply To:
CC:ITA:B02
PLR-122622-18
Date:
February 15, 2019

Legend:

TY =

Taxpayer =

A =

B =

C =

D =

E =

F =

G =

H =

State1 =

CountryA =

Date1 =

Date2 =

Date3 =

Date4 =

Date5 =

Date6 =

Date7 =

Amount1 =

Amount2 =

Amount3 =

Amount4 =

Amount5 =

Year1 =

Month1 =

a% =

b% =

c% =

Dear :

This is in response to a letter dated Date1, requesting an extension of time to file and perfect a safe-harbor election under Rev. Proc. 2011-29, 2011-18 C.B. 746. This safe-harbor election is needed to allocate success-based fees between facilitative and non-facilitative amounts for Taxpayer's transaction during the short taxable year ending Date2. This 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:

1. Taxpayer Information

Taxpayer is a corporation organized under the laws of State1. Taxpayer has a calendar year end and uses an accrual method of accounting for federal income tax purposes.

Taxpayer is a holding company. Through its operating subsidiaries, Taxpayer provides consulting, engineering, and testing services.

Taxpayer was acquired by A on Date2 (the Acquisition). Prior to the acquisition of Taxpayer by A, Taxpayer was principally owned by B, a State1 limited partnership and investment fund. Also prior to the Acquisition, Taxpayer and its subsidiaries joined in the filing of consolidated U.S. federal tax returns with Taxpayer as the common parent (the "Taxpayer Group").

2. Facts Relating to the Acquisition

Overview of the Acquisition

On Date 3, C, D,[1] Taxpayer, and B entered into an Agreement and Plan of Merger (the "Merger Agreement"). The Merger Agreement provided that A would acquire all issued and outstanding shares of Taxpayer via a merger of D with and into Taxpayer, with Taxpayer surviving as a direct wholly-owned subsidiary of A. The Acquisition, valued at Amount1, closed on Date2.

Immediately after the Acquisition, A directly owned all of the stock of Taxpayer. Consequently, following the Acquisition, A and Taxpayer were members of a controlled group. Taxpayer became a member of the affiliated group of corporations that joined in filing consolidated U.S. federal income tax returns with A as the common parent (the A Group).[2] The Acquisition is a covered transaction under § 1.263(a)-5(e)(3)(ii) of the Income Tax Regulations.

Description of Success-Based Fees

Taxpayer paid a success-based fee of Amount2 to E (the "E Advisory Fee") in connection with the Acquisition. This payment was for services performed in the

[1] D was wholly owned by A and, like A, was formed solely for the purpose of entering into the Merger Agreement (defined herein) and consummating the transaction contemplated by the Merger Agreement. Neither A nor D engaged in any activity other than as required in connection with the Acquisition.

[2] Prior to and immediately after the Acquisition, A was directly owned by C, a private company formed under the laws of CountryA. On Date7, A was transferred to H, a wholly owned subsidiary of C. As a result, Taxpayer, which remains a wholly owned subsidiary of A, is currently a member of an affiliated group of corporations that join in filing a consolidated U.S. federal income tax return, of which H is the parent (the "H Group").

process of investigating or otherwise pursuing the Acquisition. Taxpayer also paid non-success based fees of Amount3 for out-of-pocket expenses.

Taxpayer also paid F a success-based fee of Amount4 (the "F Fee") for services performed in the process of investigating or otherwise pursuing the Acquisition. The E Advisory Fee and the F Fee (collectively, the "Success-Based Fees") totaling Amount 5 were contingent upon the successful closing of the Acquisition as described in § 1.263(a)-5(f).

The Discovery of the Missed Election

On or about Date4, C engaged G to prepare Taxpayer's final consolidated U.S. federal income tax return for the TY. On Date 5, Taxpayer provided G with the total deductible amount for costs incurred by Taxpayer in connection with the Acquisition (the "Acquisition Costs"). The information provided by Taxpayer was from an analysis that had been prepared by a different tax advisor (the "Other Advisor") for the Year1 year-end tax provision for the audited financial statements ("Financial Statements") and did not include detailed information about the Acquisition Costs. For purposes of the Financial Statements, the E Advisory Fee was treated as a% deductible and a% capitalizable. The F Fee was treated as b% deductible and c% capitalizable.

G used these figures to prepare the return for the TY because G was unable to obtain additional information about the fees prior to the filing of the return for the TY on Date6 and G had no reason to question the work done by Other Advisor. Because the F Fee was treated as b% deductible and c% capitalizable, G assumed that the F Fee was a success-based fee at the time the return for the TY was prepared. However, G inadvertently overlooked the ministerial requirement of filing the election statement for the F Fee, as required by Rev. Proc. 2011-29 (the "Election Statement"). At that time, G was not aware that the E Advisory Fee was a success-based fee eligible for the safe harbor election under Rev. Proc. 2011-29.

In Month1, G undertook a more detailed review of the Acquisition Costs to determine whether some of the costs that had been capitalized could be appropriately deducted. During the Month1 review, G, discovered that the Election Statement had not been filed for the F Fee. G promptly informed Taxpayer, and Taxpayer requested that G commence preparation of a request for relief under §§ 301.9100-1 and 301.9100-3.

Also, during the Month1 review, G discovered that the E Advisory Fee is also a success-based fee. G determined that the E Advisory Fee is eligible for the safe harbor election under Rev. Proc. 2011-29.

Accordingly, Taxpayer is seeking relief to file and perfect an election under Rev. Proc. 2011-29 with respect to the Success-Based Fees incurred in connection with the services provided by E and F.

LAW

Section 263(a)(1) of the Internal Revenue Code generally provides 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. See section 2.04 of Rev. Proc. 2011-29.

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) and activities that do not facilitate the transaction if the taxpayer does three things. 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 should: state that the taxpayer is electing the safe harbor; identify the transaction; and state the success-based fee amounts that are 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 301.9100-2 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 extensions of time for regulatory elections 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, in general, 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, 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, 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 is deemed to have not 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 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 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 under § 6501(a) before the taxpayer's receipt of a ruling granting relief under this section.

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.

Taxpayer's election is a regulatory election as defined in § 301.9100-1(b) because the due date of the election is prescribed in § 1.263(a)-5(f). 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 upon our analysis of the facts and representations provided, 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 comply with the requirements of section 4.01 of Rev. Proc. 2011-29. First, the taxpayer must treat seventy percent of the amounts of the success-based fees as amounts that do not facilitate the transaction. Second, the taxpayer must capitalize the remaining amounts of the success-based fees as amounts which do facilitate the transaction. Third, the taxpayer must attach a statement to its federal income tax return for the taxable year the success-based fees are paid or incurred. This statement should: state that the taxpayer is electing the safe harbor; identify the transaction; and state the success-based fee amounts that are deducted and capitalized.

CAVEATS

The rulings contained in this letter are based on 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 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 the Acquisition is within the scope of Rev. Proc. 2011-29.

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

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

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.

Sincerely,

Jason D. Kristall
Senior Technician Reviewer, Branch 2
Office of Associate Chief Counsel
(Income Tax & Accounting)

Enclosure:

Copy for § 6110 purposes