Internal Revenue Service

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Department of the Treasury
Washington, DC 20224

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Person To Contact

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CC:ITA:01
PLR-121352-20

Date:
March 22, 2021

TY:

Taxpayer	=
State A	=
Parent	=
Advisor	=
Sub1	=
Sub2	=
Sub3	=
Sub4	=
Sub5	=
Merger Sub	=
Accounting Firm	=
Services	=
Goods	=
Year1	=
Date 1	=
Date 2	=
Date 3	=
Date 4	=
Date 5	
Date 6	=
$a	=
a%	=
b%	=
X	=
Employee	=

Dear :

This letter responds to correspondence, dated Date 6, submitted on behalf of Taxpayer, requesting a ruling that Taxpayer be granted an extension of time under §§ 301.9100-1(c) and 301.9100-3 of the Procedure and Administration Regulations to make a late safe-harbor election to treat success-based fees in accordance with Rev. Proc. 2011-29, 2011-18 I.R.B. 746. Section 4.01(3) of Rev. Proc. 2011-29 requires that a statement be attached to Taxpayer's original federal income tax return for taxable year ended Date 4. This letter ruling is being issued electronically in accordance with Rev. Proc. 2020-29, 2020-21 I.R.B. 859. A paper copy will not be mailed to Taxpayer.

FACTS

Taxpayer, a limited partnership organized under the laws of State A in Year1, was a publicly traded partnership within the meaning of § 7704(b) of the Internal Revenue Code and was classified as a partnership for federal income tax purposes until Date 3. Taxpayer is in the business of providing Services and Goods.

Parent, a corporation organized under the laws of the State A and classified as a corporation for federal income tax purposes, was the common parent of a consolidated group ("Group").

Before Date 3, Parent owned the stock of Sub1, which, in turn, owned the interests of Sub2 and Sub3, which together owned the interests of Sub4. Sub1, Sub2, Sub3, and Sub4, each of which was classified as a corporation for U.S. federal income tax purposes, were members of Group. Before the transaction described below, Sub4 owned, through entities disregarded as separate from its owner for federal income tax purposes ("DE Entities"), a% of Taxpayer. The general public owned the remaining b% of Taxpayer.

On Date 1, Taxpayer, Parent, and DE Entities, entered into agreement, under which a newly formed, wholly owned indirect subsidiary of Parent would merge with and into Taxpayer with Taxpayer surviving.

On Date 2, Sub4 formed Sub5, which was classified as a corporation for federal income tax purposes. Sub5 formed Merger Sub, a single member limited liability company disregarded as separate from its owner for federal income tax purposes.

On Date 3, Merger Sub merged with and into Taxpayer with the Taxpayer surviving. Parent contributed its common stock down through the ownership chain to Merger Sub in successive and proportionate capital contributions.

As part of the merger, the outstanding common units of Taxpayer, other than those already owned indirectly by Sub4, were converted into the right to receive X shares of

Parent's common stock. Taxpayer represents that the merger of Merger Sub with Taxpayer is disregarded for federal income tax purposes.

As a result of the steps, described above, Sub5 acquired b% of the outstanding common units of Taxpayer ("Transaction").

Taxpayer engaged and agreed to pay Advisor, fees in the amount $a ("Fees"), the payment of which was contingent upon the successful closing of the Transaction, to perform services in the process of investigating or otherwise pursuing the Transaction. The Fees were paid upon the successful closing of Transaction in accordance to the agreement with Advisor.

Taxpayer engaged Accounting Firm to prepare its U.S. federal income tax return for the taxable year ended on Date 4 ("Return"). Accounting Firm prepared Taxpayer's Return, in which Taxpayer capitalized 30 percent of the Fees and deducted the remaining 70 percent consistent with the safe-harbor election set forth in section 4 of Rev. Proc. 2011-29. Accounting Firm inadvertently failed to draft and attach an election statement to the Return as required by section 4.01(3) of Rev. Proc. 2011-29 ("Election Statement"). Employee, an officer of Taxpayer, supervised the preparation and review of the Return, but was unaware of the required Election Statement and did not detect the omission.

On Date 5, Employee was informed by another advisor that Taxpayer's Election Statement had been omitted from Taxpayer's Return. Employee promptly informed Accounting Firm of the omission and requested that Accounting Firm commence the preparation of this request.

As part of its request for an extension of time to file the Election Statement, Taxpayer submitted detailed affidavits from individuals having knowledge or information about the events that led to the failure to attach the required election statement to Taxpayer's Return as well as about the subsequent discovery of that failure.

LAW & ANALYSIS

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

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 301.9100-1(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 301.9100-1(c) provides that the Commissioner, in exercising his discretion, may grant a reasonable extension of time under the rules set forth in § 301.9100-3 to make a regulatory election under all subtitles of the Internal Revenue Code except subtitles E, G, H, and I.

Section 301.9100-2 provides automatic extensions of time for making certain elections. Section 301.9100-3 sets forth extensions of time for making elections that do not meet the requirements of § 301.9100-2.

Section 301.9100-3(a) provides that requests for relief under this section 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 that granting relief will not prejudice the interests of the Government.

Section 301.9100-3(b)(1) provides, in general, that 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 (taking into account the taxpayer's experience and the complexity of the return at issue), 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.

Section 301.9100-3(b)(3) provides that a taxpayer will be 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 § 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 a 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). 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.

Taxpayer represents that, for federal income tax purposes, the Transaction was a taxable acquisition by Sub5 of b% of the outstanding units of Taxpayer. Taxpayer further represents that, upon the closing of the Transaction, Taxpayer and Sub5 were related within the meaning of § 707(b). Accordingly, Taxpayer represents that the Transaction is a covered transaction described in § 1.263(a)-5(e)(3)(ii).

The election Taxpayer seeks to make is a regulatory election, as defined in § 301.9100-1(b), because the due date of the election is prescribed by Rev. Proc. 2011-29. 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.

Taxpayer is requesting permission with this ruling request to attach the Election Statement to its Return, by amending its original filed return and superseding it with a return with the proper Election Statement completed and attached.

Taxpayer represents that the Return for taxable year ended on Date 4 is not under examination and that the failure to file the Election Statement was not discovered by the Service. Thus, under § 301.9100-3(b)(1)(i), Taxpayer will be deemed to have acted reasonably and in good faith. Taxpayer also represents that none of the circumstances listed in § 301.9100-3(b)(3) apply.

Section 2.04 of Rev. Proc. 2011-29 provides that a taxpayer's method for determining the portion of a success-based fee that facilitates a transaction and the portion that does not facilitate a transaction is a method of accounting under § 446. Regulatory elections, relating to methods of accounting, are subject to special rules. § 301.9100-3(c)(2). However, Taxpayer is not seeking to change its method of accounting for the success-based fees, only to file the election statement required by section 4.01(3) of Rev. Proc. 2011-29.

CONCLUSION

Based solely on the facts provided and the representations made, we conclude that Taxpayer acted reasonably and in good faith and that granting relief will not prejudice the interests of the Government. Accordingly, Taxpayer has met the requirements of §§ 301.9100-1 and 301.9100-3.

Taxpayer is granted an extension of 60 days following the date of this ruling to file an amended tax return for taxable year ended Date 4, electing safe-harbor treatment, under section 4.01(3) of Rev. Proc. 2011-29, for its success-based fees. The amended return must include an election statement, stating that Taxpayer is electing the safe harbor for its 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 Taxpayer and accompanied by a penalty of perjury statement executed by an appropriate party. Although this office has not verified any of the material submitted in support of the request for the ruling, it is subject to verification on examination.

Except as expressly provided herein, no opinion is expressed or implied concerning the federal income tax consequences of any aspect of any transaction or item discussed or referenced in this ruling under any other provision of the Code. In particular, no opinion is expressed or implied as to whether Taxpayer properly included the correct costs as its success-based fees subject to the election, or whether the Transaction is within the scope of Rev. Proc. 2011-29.

A copy of this ruling 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 the election statement to their return that provides the date and control number of the letter ruling.

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.

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

In accordance with the provisions of the power of attorney currently on file with this office, we are sending a copy of this letter ruling to your authorized representatives. We are also sending a copy of this letter to the appropriate operating division director.

Sincerely,

Alexa T. Dubert

Alexa T. Dubert
Assistant to the Chief, Branch 1
Office of Associate Chief Counsel (Income Tax & Accounting)

cc: