Internal Revenue Service

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Department of the Treasury
Washington, DC 20224

Third Party Communication: None
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Person To Contact:
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CC:ITA:B03
PLR-111987-21

Date:
November 8, 2021

Legend

Taxpayer	=
Target	=
State	=
x	=
Firm A	=
Firm B	=
Firm C	=
Date 1	=
Date 2	=
Date 3	=
Date 4	=
Date 5	=
Date 6	=
Date 7	=
Date 8	=
Date 9	=
Date 10	=
Taxable Year	=

Dear :

This responds to a letter ruling request dated June 1, 2021, submitted on behalf of Taxpayer. Taxpayer requests an extension of time under 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 in accordance with Rev. Proc. 2011-29, 2011-1 I.R.B. 746, which requires that a statement be attached to Taxpayer's original federal income tax return for Taxable Year.

FACTS

Taxpayer represents the facts are as follows:

Taxpayer, a State corporation, provides payment processing services to merchants. Taxpayer uses an overall accrual method of accounting and has a calendar year end. Taxpayer was interested in acquiring Target, a State corporation. Target provided payment and software solutions to merchant locations and financial institutions. Target was the common parent of an affiliated group of corporations filing a consolidated federal income tax return.

On Date 1, pursuant to a merger agreement, each share of Target common stock issued and outstanding immediately prior to Date 2 was converted into the right to receive x shares of Taxpayer common stock in a reorganization described in section 368(a)(1)(A) of the Internal Revenue Code (Code). As a result, Taxpayer became the parent of Target affiliated group of corporations that elected to join in the filing of consolidated federal income tax returns under section 1.1502-75(a)(1) of the Income Tax Regulations.

The merger was a covered transaction described in section 1.263(a)-5(e)(3). During Taxable Year, Target incurred success-based fees within the meaning of section 1.263(a)-5(f) in connection with the merger.

Target engaged Firm A and Firm B as financial advisors in connection with the merger.

On Date 5, Taxpayer became aware of the possibility that section 1.1502-76 may not apply to the merger, such that the original due date for Target’s consolidated U.S. federal income tax return for Taxable Year would have been Date 4, rather than the due date of Taxpayer’s consolidated U.S. federal income tax return for the taxable year ended Date 3.

On Date 6, Taxpayer electronically filed the extension for both Target’s consolidated U.S. federal income tax return for Taxable Year and Taxpayer’s consolidated U.S. federal income tax return for the taxable year ended Date 3.

On Date 7, Taxpayer reached out to Firm C for Firm C’s opinion as to the appropriate due date for Target’s consolidated U.S. federal income tax return for Taxable Year. On

Date 8, Firm C confirmed that section 1.1502-76 did not apply to the merger, and the due date was Date 4.

On Date 9, Taxpayer filed Target's consolidated U.S. federal income tax return for Taxable Year, which included the safe harbor election under Rev. Proc. 2011-29. After consulting with Firm C, Taxpayer discovered that it had inadvertently failed to timely file its return and associated elections for the taxable year ended Date 1 as Target's consolidated U.S. federal income tax return for Taxable Year should have been filed by Date 4 instead of by Date 10.

Because Target's consolidated U.S. federal income tax return for Taxable Year was not timely filed, the safe harbor election under Rev. Proc. 2011-29 for success-based fees associated with this tax return was also not timely filed. Upon discovery, Taxpayer engaged Firm C for advisory services related to the late filing. Firm C advised Taxpayer that it should formally request for an extension of time under sections 301.9100-1 and 301.9100-3.

LAW

Section 263(a) 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 Treas. Reg. § 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. INDOPCO, Inc. v. Commissioner, 503 U.S. 79, 89-90 (1992); Woodward v. Commissioner, 397 U.S. 572, 575-576 (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. Treas. Reg. § 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 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. The revenue procedure states that the Service 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.

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 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.

ANALYSIS

Taxpayer's election is a regulatory election, as defined under section 301.9100-1(b) of the Procedure and Administration Regulations, because the due date of the election is prescribed in section 1.263(a)-5(f) of the Income Tax Regulations. The Commissioner has the authority under sections 301.9100-1 and 301.9100-3 to grant an extension of time to file a late regulatory election.

Taxpayer represents that its acquisition of Target was a covered transaction under section 1.263(a)-5(e)(3) and that fees paid to Firm A and Firm B were success-based fees as defined in section 1.263(a)-5(f).

Taxpayer represents that it requested relief before the failure to attach the statement required to make the safe harbor election for allocating success-based fees to a timely filed return for Taxable Year has been discovered by the Service. Taxpayer further represents that it reasonably relied on a qualified tax professional, but Target's consolidated U.S. federal income tax return for Taxable Year was filed late due to an inadvertent error regarding the correct due date for the return. Thus, under sections 301.9100-3(b)(1)(i) and (v), Taxpayer will be deemed to have acted reasonably and in good faith. Taxpayer also represents that none of the circumstances listed in section 301.9100-3(b)(3) apply.

Based on the facts of the case Taxpayer provided, 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 Taxpayer would have had if the election had been timely made (taking into account the time value of money). Furthermore, Taxpayer has represented that the taxable year in which the regulatory election should have been made and any taxable years that would have been affected had it been timely made, are not closed by the period of assessment.

CONCLUSION

In the present situation, the requirements of sections 301.9100-1 and 301.9100-3(b)(1) of the Procedure and Administration Regulations have been satisfied. The information and representations made by Taxpayer establish that Taxpayer acted reasonably and in good faith. Furthermore, granting an extension will not prejudice the interests of the Government under section 301.9100-3(c)(1). Accordingly, Taxpayer is granted an extension to make the safe harbor election for allocating success-based fees for Taxable Year. In this regard, we will consider this election made by Taxpayer on Target's not timely filed consolidated U.S. federal income tax return for Taxable Year, filed on Date 9, to be timely made.

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. 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 federal income tax consequences of any aspect of any transaction or item discussed or referenced in this ruling including whether Taxpayer properly included the correct costs as its success-based fees subject to the election, or whether Taxpayer's transaction was within the scope of Rev. Proc. 2011-29.

Further, this ruling does not grant any extension of time for filing Target's consolidated U.S. federal income tax return for Taxable Year.

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. 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.

Sincerely,

Brinton Warren
Branch Chief, Branch 3
(Income Tax & Accounting)

cc: