Internal Revenue Service

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Department of the Treasury
Washington, DC 20224

[Third Party Communication:
Date of Communication: Month DD, YYYY]

Person To Contact:
, ID No.

Telephone Number:

Refer Reply To:
CC:ITA:B01
PLR-105240-21

Date:
April 19, 2022

Attn:

In Re:

LEGEND:

Taxpayer	=
State A	=
Merger Sub I	=
Merger Sub II	=
X	=
Y	=
Advisor	=
Accounting Firm A	=
Accounting Firm B	=
Year 1	=
Date 1	=
Date 2	=
Date 3	=
Date 4	=
Date 5	=
Date 6	=
Date 7	=
Date 8	=
Date 9	=
Date 10	=
$a	=

$b =

$c =
a% =

Dear :

This letter responds to your correspondence of Date 1, received by the Internal Revenue Service on Date 2. This letter replaces a letter dated September 3, 2021 that contained an error. Your correspondence requests an extension of time under §§ 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations for Taxpayer to make the safe harbor election for success-based fees described in Rev. Proc. 2011-29, 2011-18 I.R.B. 746 in connection with Taxpayer's acquisition of X on Date 3 (the Transaction).

FACTS

Taxpayer is an C corporation, incorporated under the laws of State A, and the parent of an affiliated group of corporations that file consolidated federal income tax returns. Taxpayer employs an overall accrual method of accounting and has a fiscal taxable year ending on Date 4. Presently, Taxpayer's consolidated federal income tax return for Year 1 is under examination by the Internal Revenue Service.

On Date 5, Taxpayer formed Merger Sub I and Merger Sub II as limited liability companies under the laws of State A for the sole purpose of effecting the Transaction.

On Date 6, Taxpayer effectuated two mergers that Taxpayer represents qualified as a nontaxable acquisition of stock under § 368 (a)(1)(A) of the Internal Revenue Code. First, Merger Sub I merged with and into X (the "Merger"). Following the Merger, the separate existence of Merger Sub I ceased, and X continued as the surviving corporation and became a direct, wholly owned subsidiary of Taxpayer. Second, X then merged with, and into, Merger Sub II (the "Second Merger"). Following the Second Merger, the separate existence of X ceased, and Merger Sub II continued as the surviving corporation and as a directly and wholly owned subsidiary of Taxpayer.

On Date 7, in furtherance of the Transaction, Taxpayer engaged Advisor to assist Taxpayer with feasibility analysis, to evaluate financial strategies, and to provide related services. Taxpayer agreed to compensate Advisor $a for such services rendered upon the successful closing of the Transaction less a credit for fees paid by Taxpayer to Advisor in connection with the financing of the Transaction equal to the lesser of $b or a%. On Date 8, Taxpayer paid Advisor $c for the services ($c is net of

the finance fee and represents the amount that was contingent on the successful closing of the Transaction). The Transaction occurred during Taxpayer's Year 1 taxable year.

Taxpayer engaged Accounting Firm A to prepare a transaction cost analysis to determine the federal income tax treatment of the transaction costs incurred by Taxpayer and X with respect to the Transaction. Accounting Firm A advised them to make the safe harbor election provided by Rev. Proc. 2011-29 and treat 70 percent of the success-based fees incurred and paid to Advisor in connection with the Transaction as an amount that does not facilitate the Transaction and capitalize the remaining 30 percent as an amount that does facilitate the Transaction. Accounting Firm A prepared the election statements and advised Taxpayer to attach its election statement to its consolidated federal income tax return for Year 1 as required by Section 4.01 of Rev. Proc. 2011-29.

Taxpayer engaged Accounting Firm B to review and sign Taxpayer's consolidated federal income tax return for Year 1 that was assembled by Y consistent with the safe harbor election, i.e., Taxpayer deducted 70 percent of the success-based fees paid to Advisor and capitalized the remainder. However, Y failed to include with the return the statement required to make the safe harbor election. Taxpayer and Accounting Firm B reviewed and signed the return, and Taxpayer timely filed it on Date 9, prior to Date 10, the return's extended due date. Nonetheless, Taxpayer inadvertently failed to include the election statement with its timely filed return.

Taxpayer represents that it failed to make the safe harbor election under Rev. Proc. 2011-29, in part, due to high turnover of professional personnel in its tax department and to the addition of hundreds of new entities to its tax structure in Year 1.

LAW & ANALYSIS

Section 263(a)(1) of the Internal Revenue Code and § 1.263(a)-2(a) provide that no deduction shall be allowed for any amount paid 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) ("success-based fee") is presumed to facilitate the transaction. 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.

Rev. Proc. 2011-29 provides a safe harbor election for taxpayers that pay or incurring success-based fees for services performed in the process of investigating or otherwise pursuing a covered transaction described in § 1.263(a)-5(e)(3).

Section 4.01 of Rev. Proc. 2011-29, 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 satisfies three requirements. 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 must: (a) state that the taxpayer is electing the safe harbor; (b) identify the transaction; and (c) state the success-based fee amounts deducted and capitalized. Taxpayer requests permission to amend its Year 1 return and attach the statement required by section 4.01(3) of Rev. Proc. 2011-29.

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 301.9100-3(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(b)(1) provides 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 not be deemed 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 § 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 an extension of time to make a regulatory election will be granted only when the interests of the Government are not prejudiced by the granting of relief. 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). Section 301.9100-3(c)(1)(i).

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 under § 6501(a) before the taxpayer's receipt of a ruling granting relief under this section. Section 301.9100-3(c)(1)(ii).

Taxpayer's election is a regulatory election as defined in § 301.9100-1(b) because the due date of the election is prescribed in section 4.01(3) of 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.

CONCLUSION

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

Subject to the requirements of § 6511, Taxpayer is granted an extension of 60 days from the date of this letter ruling to amend its consolidated federal income tax return for Year 1 to elect the safe harbor for success-based fees pursuant to Rev. Proc. 2011-29.

CAVEATS

The ruling contained in this letter is 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 set forth 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, including whether: (1) Taxpayer incurred a liability of $c, as a success-based fee in the Return Year; (2) the Transaction was within the scope of Rev. Proc. 2011-29; or (3) Taxpayer satisfied the requirements to file an amended consolidated federal income tax return for Year 1. The relief provided in this letter is conditioned on proper adjustments to affected returns and tax attributes for Taxpayer and its affiliates.

A copy of this ruling should be attached to Taxpayer's Federal tax returns for the tax years affected. Alternatively, taxpayers filing their returns electronically may satisfy this requirement by attaching a statement to their returns 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) 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 ruling to the appropriate operating division director.

Sincerely,

/s/

Sean M. Dwyer
Senior Technician Reviewer
Branch 1
Office of Associate Chief Counsel
(Income Tax & Accounting)

Enclosure:

Copy § 6110 purposes

cc: