Internal Revenue Service

Department of the Treasury
Washington, DC 20224

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Person To Contact:
, ID No.

Telephone Number:

Refer Reply To:
CC:ITA:B02
PLR-110487-23

Date: June 3, 2024

In Re:

LEGEND:

Taxpayer	=
Date1	=
Date2	=
Date3	=
Date4	=
Date5	=
Date6	=
Date7	=
Date8	=
Date9	=
Date10	=
Date11	=
Date12	=
A	=
B	=
C	=
D	=
$a	=
$b	=
$c	=

Dear :

This is a response to a letter ruling request dated Date1, and supplemental correspondence, dated Date2 and Date3, requesting an extension of time to file a safe-harbor election under Rev. Proc. 2011-29, 2011-1 C.B. 746, to allocate success-based fees for the taxable year ending Date4. This request is made in accordance with §§ 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations. This letter ruling is being issued electronically as permissible under section 7.02(2) of Rev. Proc. 2023-1, 2023-1 I.R.B. 1, 33. A paper copy will not be mailed to Taxpayer.

FACTS AND REPRESENTATIONS

Taxpayer represents the following:

Taxpayer is the common parent of an affiliated group of corporations that files Form 1120, U.S. Corporation Income Tax Return. Taxpayer has a fiscal year-end and uses an accrual method of accounting. Taxpayer is engaged in the business of A.

On Date5, B, a subsidiary of Taxpayer, acquired all the shares of C, pursuant to an Agreement and Plan of Merger ("Agreement") dated Date7. Upon completion of the transaction, C became a wholly-owned subsidiary of B, and C joined Taxpayer's consolidated group as of Date6. Taxpayer represents that immediately after the transaction, Taxpayer and C became related within the meaning of § 267(b) of the Internal Revenue Code.

B entered into an engagement letter agreement with D for D to provide financial services in connection with the acquisition of C. The engagement letter agreement between B and D was dated Date7. The engagement letter agreement provided for a success-based fee of $a and a separate discretionary fee (likewise payable upon completion of the acquisition) of $b. Taxpayer describes the discretionary fee as being dependent upon B's assessment of the quality of the services provided by D. On Date8 and Date9, D invoiced B for the success-based fee and the discretionary fee, respectively. Taxpayer represents that the discretionary fee of $b is a success-based fee, and thus it paid or incurred total success-based fees of $c under Rev. Proc. 2011-29.

B, with a support and operations teams separate from Taxpayer, was responsible for preparing the pro-forma tax returns for its subsidiaries included in Taxpayer's consolidated group. Once the pro-forma returns were prepared, Taxpayer's compliance team performed a consolidation of the U.S. federal income tax return with its affiliated entities for the taxable year ending Date4. Any statements or attachments related to B's subsidiaries were prepared by B and provided to Taxpayer for incorporation in the consolidated return filing.

Taxpayer timely filed its return and elected to use the safe harbor election for allocating fees paid to D under Rev. Proc. 2011-29. On its return, Taxpayer reported the deduction and capitalization of success-based fees consistent with having made the election. Taxpayer, however, failed to attach the required election statement to its original federal tax return for the taxable year ending Date4.

Taxpayer relied on B's internal tax professionals to properly prepare the pro-forma tax returns and include all appropriate elections therewith. Due to miscommunication, increased workload on tax compliance team with the acquisitions, high turnover, and integration of tax employees from different entities during the COVID-19 pandemic, B failed to attach the election statement.

In Date10, during the process of preparing the tax return for the next fiscal year ending Date11, B's compliance team discovered the omission of the required election statement under Rev. Proc. 2011-29 for the return for the taxable year ending Date4. On Date12, Taxpayer submitted its request for this ruling.

LAW AND ANALYSIS

Section 263(a)(1) and § 1.263(a)-2(a) of the Income Tax Regulations generally 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 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, therefore, 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.

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 published Rev. Proc. 2011-29.

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). 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 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) (costs that must be capitalized) and activities that do not facilitate the transaction (costs that may be deducted) if the taxpayer: (1) treats 70 percent of the amount of the success-based fee as an amount that does not facilitate the transaction and thus may be deducted; (2) capitalizes the remaining amount of the success-based fee as an amount which 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 pursuant to the safe harbor election.

The revenue procedure applies to covered transactions described in § 1.263(a)-5(e)(3), which include, *inter alia*, a taxable acquisition by the taxpayer of assets that constitute a trade or business and 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)(i) and (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 301.9100-2 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(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 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 301.9100-3(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, in part, that a taxpayer is deemed to have acted reasonably and in good faith if the taxpayer requests relief before the failure to make the regulatory election is discovered by the Service or 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 considered to have acted reasonably and 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 of the Internal Revenue Code at the time the taxpayer requests relief (taking into account § 1.6664-2(c)(3)) 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 and related tax consequences, but chose not to file the election, or (3) 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)(i) 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. Section 301.9100-3(c)(1)(ii) provides 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.

Taxpayer's election is a regulatory election, as defined under § 301.9100-1(b), because the due date of the election is prescribed in 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 represented the transaction qualifies as a covered transaction described in § 1.263(a)-5(e)(3)(ii).

Taxpayer has represented that it requested relief before the failure to make the regulatory election was discovered by the Service and that it reasonably relied on qualified tax professionals, and the tax professionals failed to make, or advise Taxpayer to make, the election. Thus, under §§ 301.9100-3(b)(1)(i) and (v), Taxpayer is deemed to have acted reasonably and in good faith. Taxpayer has also represented that none of the circumstances listed in § 301.9100-3(b)(3) apply.

Based on the facts Taxpayer provided, granting an extension of time to file the election will not prejudice the interests of the government under § 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

Based solely on the facts and representations submitted, we conclude that 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 file a safe harbor election for success-based fees under Rev. Proc. 2011-29 for its taxable year ending Date4.

This ruling is based upon information and representations submitted by Taxpayer and accompanied by a penalty of perjury statement executed by an appropriate party. This office has not verified any of the material submitted in support of the request for rulings, the facts and representations herein are 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, including whether the discretionary fees are success-based fees or otherwise eligible for the Rev. Proc. 2011-29 safe harbor. No opinion is expressed on the appropriate amount of the success-based fee eligible for the safe harbor election. Further, no opinion is expressed on the treatment or deductibility of the $c claimed by Taxpayer as success-based fees or on the treatment of any other acquisition related costs.

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.

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

In accordance with the Power of Attorney on file with this office, a copy of this letter is being sent to your authorized representative.

Sincerely,

Robert A. Martin
Acting Branch Chief, Branch 2
(Income Tax & Accounting)

Enclosure: Copy of the letter for 6110 purposes

cc: