Internal Revenue Service

Number: **202441009**
Release Date: 10/11/2024
Index Number: 9100.00-00

Department of the Treasury
Washington, DC 20224

Person To Contact:
, ID No.
Telephone Number:

Refer Reply To:
CC:ITA:B02
PLR-105851-24
Date:
July 17, 2024

In Re:

LEGEND:

Taxpayer	=
Business	=
Acquirer	=
Interest Holder 1	=
Interest Holder 2	=
Advisor	=
Date 1	=
Date 2	=
Date 3	=
Date 4	=
Month	=
Taxable Year	=
Prior Taxable Year	=
$a	=
$b	=
$c	=
A%	=
B%	=
State	=

Dear :

This is in response to a letter ruling request dated Date 1, submitted on behalf of Taxpayer. Taxpayer requests an extension of time to file a safe harbor election under Rev. Proc. 2011-29, 2011-1 C.B. 746, to allocate a success-based fee for Taxable Year. 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 under section 7.02(2) of Rev. Proc. 2024-1, 2024-1 I.R.B. 1, 32. A paper copy will not be mailed to Taxpayer.

FACTS AND REPRESENTATIONS

Taxpayer is a limited partnership formed under the laws of State. Taxpayer is in the industry of Business. Taxpayer is classified as a partnership for U.S. federal tax purposes. Currently, Taxpayer is owned by Acquirer, Interest Holder 1, and Interest Holder 2.

On Date 2, Taxpayer entered into a transaction with Acquirer, whereby Acquirer acquired A% ownership interest in Taxpayer by contributing cash to Taxpayer ("Transaction"). The completion of Transaction results in a sale of a majority interest in Taxpayer to Acquirer.

Pursuant to an engagement letter dated Date 3, Taxpayer and Interest Holder 2 engaged Advisor as a financial advisor for the potential acquisition of either a minority or majority interest in Taxpayer. The engagement letter set forth a graduated schedule of sale transaction fees based on the aggregate consideration when a sale of a majority interest ownership is closed. Pursuant to the engagement letter, if the aggregate consideration paid was $a or less, the transaction fee would be $b plus B% of the aggregate consideration. On Date 4, Advisor issued an invoice for a transaction fee of $c. Taxpayer represents that the transaction fee of $c is a success-based fee that was contingent upon the successful closing of Transaction.

Prior to Taxable Year, Taxpayer had engaged Accounting Firm 1 to prepare its Form 1065. Accounting Firm 1 also prepared a transaction costs analysis ("Analysis") with respect to the costs Taxpayer incurred in connection to Transaction. Accounting Firm 1 determined that the transaction fee of $c paid to Advisor in connection with the closing of Transaction constituted a success-based fee subject to the safe harbor election of Rev. Proc. 2011-29. Accounting Firm 1 also indicated that 70 percent of $c should be deducted, and 30 percent should be capitalized under Rev. Proc. 2011-29. Accounting Firm 1 discussed the safe harbor election with Taxpayer, and Taxpayer indicated to Accounting Firm 1 its intention to make the election. Accounting Firm incorporated Analysis into workpapers for Taxpayer's Form 1065 for Prior Taxable Year.

Starting from Taxable Year, Taxpayer engaged Accounting Firm 2 to become its primary tax advisor and tax return preparer. While preparing Taxpayer's Form 1065 for Taxable Year, Accounting Firm 2 reviewed workpapers prepared by Accounting Firm 1 and became aware of the success-based fee associated with Transaction. Accounting

Firm 2 prepared Taxpayer's Form 1065 for Taxable Year with the safe harbor election for allocating the success-based fee paid to Advisor under Rev. Proc. 2011-29. Accounting Firm 2, however, inadvertently did not prepare and include the required statement to Taxpayer's Form 1065 for Taxable Year to make the safe harbor election. Taxpayer's internal tax department also failed to notice the omission of the required statement during a review of its Form 1065 for Taxable Year.

On its timely filed Form 1065 for Taxable Year, 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 Taxable Year.

Subsequent to the filing of the return, the Service commenced an examination of Taxpayer's Form 1065 for Prior Taxable Year regarding a matter unrelated to the success-based fee safe harbor election. In Month, while preparing a response to the Service's Information Document Request, Taxpayer and Accounting Firm 2 reviewed the workpapers for Taxpayer's Form 1065 for Prior Taxable Year and noticed that the election statement required under Rev. Proc. 2011-29 was not included with Taxpayer's Form 1065 for Taxable Year.

Upon discovering the omission, Taxpayer discussed with Accounting Firm 2 and directed Accounting Firm 2 to file a request, pursuant to Treas. Reg. §§ 301.9100-1 and 301.9100- 3, for an extension of time to make an election concerning the treatment of success-based fees in accordance with Rev. Proc. 2011-29.

LAW AND ANALYSIS

Section 263(a)(1) of the Internal Revenue Code 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). 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.

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, meaning that amount can be deducted. The remaining 30 percent of the fee must be capitalized as an amount that facilitates the transaction.

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) (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), including 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(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 with a due date that 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, 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: (i) 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, (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)(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.

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'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.

Taxpayer represents that it is eligible for an extension of time to file the regulatory election to be granted because Transaction was a covered transaction under § 1.263(a)-5(e)(3)(ii) and the $c paid to Adviser was a success-based fee as defined in § 1.263(a)-5(f). The payment of the fee was contingent upon the successful closing of Transaction.

Taxpayer represents 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 information and representations made by Taxpayer, 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.

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. In particular, no opinion is expressed as to Taxpayer's classification of its costs as success-based fees or whether Taxpayer's transaction 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, 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.

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 representatives.

Sincerely,

Ronald J. Goldstein
Senior Technician Reviewer, Branch 2
(Income Tax & Accounting)

cc: