Internal Revenue Service

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Department of the Treasury
Washington, DC 20224

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Person To Contact:
, ID No.

Telephone Number:

Refer Reply To:
CC:ITA
PLR-107563-24

Date:
October 16, 2024

TY:

LEGEND:

Taxpayer	=
Subsidiary	=
Tax Firm	=
Holdings	=
Company	=
Investment Bank	=
$A	=
$B	=
$C	=
$D	=
Year 1	=
Year 2	=
Date 1	=
Date 2	=

Date 3 =

Date 4 =

Date 5 =

Widgets =

Dear :

This letter responds to your letter ruling request dated Date 1, submitted on behalf of Taxpayer. Taxpayer requests a ruling under § 301.9100-3 of the Procedure and Administration Regulations to grant it an extension of time to make a late election with respect to success-based fees described under Rev. Proc. 2011-29, 2011-1 C.B. 746, which requires that a statement be attached to a taxpayer's original Federal income tax return for the taxable year of the election.

Facts

Subsidiary is a US Corporation and wholly owned subsidiary and member of Taxpayer, primarily operates a chain of retail stores that sell Widgets.

On Date 2, Subsidiary acquired all issued and outstanding shares of common stock of Holdings in a taxable stock acquisition ("Transaction"), making the parties related within the meaning of § 267(b) of the Internal Revenue Code, a covered transaction as described in § 1.263(a)-5(e)(3)(ii) of the Income Tax Regulations.

Subsidiary hired Company and Investment Bank to facilitate the Transaction and paid $A in fees with respect to the Transaction. Taxpayer engaged Tax Firm to prepare and provide tax advice with respect to Taxpayer's Form 1120-S for the taxable year beginning Date 4 and ending Date 2. Taxpayer also engaged Tax Firm to provide transaction cost recovery services with respect to certain costs incurred in connection with the Transaction.

Transaction cost recovery services primarily consisted of analyzing external transaction costs (e.g., accounting, investment banking, legal fees) incurred in connection with the Transaction to determine what portion of the external transaction costs paid could properly be considered success-based fees. Tax Firm determined that $B of the external transaction costs constituted success-based fees.

Tax Firm was tasked with making the proper regulatory safe harbor election under section 4.01 of Rev. Proc. 2011-29 ("Success-based Fees Safe Harbor Election"), which

would permit Taxpayer to treat 70% of Buyer's success-based fees paid as an amount that did not facilitate the Transaction and capitalize the remaining 30% as an amount that did facilitate the Transaction. The Success-based Fees Safe Harbor Election required Taxpayer to account for the success-based fees accordingly and attach a statement to its original U.S. federal income tax return for the taxable year in which the success-based fees were paid or incurred. The purpose of the statement is to state that Taxpayer is making the safe harbor election, to identify the Transaction, and to identify the portion of the success-based fees that were to be deducted and the portion that was to be capitalized.

Tax Firm prepared and Taxpayer timely filed its Year 2 Form 1120-S ("Year 2 return") on Date 3, which complied with the substantive requirements of the Success-based Fees Safe Harbor Election by deducting 70% of the success-based fees ($C) as an amount that did not facilitate the Transaction and capitalizing 30% of the success-based fees ($D) as an amount that facilitated the Transaction in accordance with sections 4.01(1) and (2) of Rev. Proc. 2011-29. Tax Firm prepared the statement required by section 4.01(3) of Rev. Proc. 2011-29. However, the statement was inadvertently omitted from Taxpayer's timely filed Year 2 return, the taxable year in which the success-based fees were paid or incurred.

Tax Firm discovered the inadvertent omission of the statement when it reviewed the filed version of the Year 2 return sometime in late Year 1, and Taxpayer was notified in Date 5 of the omission, and was advised that the required action to correct the inadvertent omission is to file for relief under § 301.9100-3.

Law & Analysis

Section 263(a)(1) and § 1.263(a)-2(a) 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. Comm'r*, 503 U.S. 79, 89-90 (1992); *Woodward v. Comm'r*, 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.

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.

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.

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 Year 2 tax return, by amending its original filed return and superseding it with a return containing the proper election statement completed and attached. Taxpayer represents that it intended to take advantage of the safe harbor provisions of Rev. Proc. 2011-29, filed its return for Year 2 reflecting those provisions, but failed to include the required election statement. Taxpayer is not using hindsight in requesting relief.

Taxpayer represents that the return for the taxable year 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.

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.

Further, based on the facts represented by Taxpayer, granting an extension will not prejudice the interests of the Government.

Conclusion

Based upon our analysis of the facts as represented, we conclude that Taxpayer acted reasonably and in good faith and granting relief will not prejudice the interests of the government. Accordingly, the requirements of Treas. Reg. §§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 the statement required by section 4.01(3) of Rev. Proc. 2011-29. Taxpayer must state that it is electing the safe harbor for success-based fees, identify the transaction, and state the success-based fee amounts that are deducted and capitalized.

The ruling contained in this letter is based upon information and representations submitted by the taxpayer and accompanied by penalty of perjury statements executed by the appropriate parties. This office has not verified any of the materials submitted in support of the request for a ruling and the information materials 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 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.

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 representatives. We are also sending a copy of this letter to the appropriate operating division director.

Sincerely,

/s/

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

cc: