Internal Revenue Service

Department of the Treasury
Washington, DC 20224

Number: **201711003**
Release Date: 3/17/2017

Index Number: 9100.00-00

Third Party Communication: None
Date of Communication: Not Applicable

Person To Contact:
, ID No.
Telephone Number:

Refer Reply To:
CC:ITA:B02
PLR-120449-16

Date:
December 23, 2016

In Re:

Dear :

TY:

Taxpayer =
A=
Taxpayer Group=
B=
C=
Financial Advisor
Qualified Accountant
Return Preparer
Tax Advisor
Date1=
Date2=
Date3=
Date4=
Date5=
$a
$b

This is in response to a letter dated Date1, requesting an extension of time to make a safe-harbor election under Rev. Proc. 2011-29, 2011-1 C.B. 746, to allocate success-based fees between facilitative and non-facilitative amounts for Taxpayer's transaction during the taxable year ending Date2. This request is made in accordance with §§ 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations.

FACTS AND REPRESENTATIONS

Taxpayer represents the following:

1. Taxpayer Information

A is the common parent of Taxpayer Group that includes B and Taxpayer. A and Taxpayer Group use an accrual method of accounting and file consolidated federal income tax returns on a calendar year basis.

2. Description of Taxpayer's Business Operations

A is a holding company and is the ultimate parent entity of B. B is the leading provider of innovative, web-based connectivity and workflow solutions that simplify clinical and administrative tasks for healthcare providers. B owns 100% of the capital stock of Taxpayer. Taxpayer is a provider of electronic healthcare solutions.

Facts Relating to Request

On Date3, A acquired Taxpayer in a taxable stock purchase, wherein Taxpayer survived a merger with C, a merger subsidiary formed by B, an indirect subsidiary of A (hereinafter the "Transaction").

Taxpayer engaged Financial Advisor to provide financial services to Taxpayer in connection with evaluating strategic and financial alternatives including, but not limited to, a merger or sale of all or a part of the equity or business assets of Taxpayer. Taxpayer paid fees and expenses to Financial Advisor of $a, including a success-based fee in the amount of $b (hereinafter the "success-based fee").

Taxpayer had no in-house tax expertise and engaged Qualified Accountant to prepare its federal income tax return for the short taxable year ending Date2 (hereinafter the "Short Period Return"). Qualified Accountant is a certified public accountant with more than 30 years of relevant experience.

Taxpayer timely filed the Short Period Return on Date4. Taxpayer claimed a deduction on the Short Period Return for all transaction costs incurred in connection with the Transaction expensed for financial reporting purposes, including the entire success-based fee. However, Qualified Accountant did not compile any documentation supporting the position that all of the success-based fee did not facilitate the Transaction (and hence was deductible). Also, Qualified Accountant did not advise Taxpayer of the need to do so. Furthermore, Qualified Accountant did not advise Taxpayer about the safe harbor election for allocating success-based fees in Rev. Proc. 2011-29 (hereinafter the "safe harbor election under Rev. Proc. 2011-29"), which would have permitted Taxpayer to deduct 70 percent of the success-based fee as an amount that that did not facilitate the Transaction and capitalize 30 percent of the fee as an amount that did facilitate the Transaction.

A learned of Taxpayer's failure to document the deductibility of the success-based fee and make the safe harbor election under Rev. Proc. 2011-29 after it acquired

Taxpayer. Specifically, A engaged Return Preparer to prepare its consolidated federal income tax return for the taxable year ending Date5. This return included the income of Taxpayer for the period beginning immediately after the end of the period used for the Short Period Return and ending on Date5. Return Preparer discovered the improper deduction of the entire success-based fee on the Short Period Return during the process of preparing A's consolidated return for the taxable year ending Date5. Return Preparer then advised A of this error.

A contacted Tax Advisor to discuss possible corrective actions and Tax Advisor advised A that it could request an extension of time under Treas. Reg. § 301.9100 to make the safe harbor election under 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 thus 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, and thus may be deductible.

A taxpayer's method for determining the portion of a success-based fee that facilitates a transaction and the portion that does not facilitate the transaction is a method of accounting under § 446.

Because the treatment of success-based fees was a continuing subject of controversy between taxpayers and the Service, the Service published Rev. Proc. 2011-29. Rev. Proc. 2011-29 provides a safe harbor method of accounting 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. The remaining portion of the fee must be capitalized as an amount that facilitates the transaction.

Section 4.01 of Rev. Proc. 2011-29 allows a taxpayer to make a safe harbor election with respect to success-based fees. 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) and activities that do not facilitate the transaction if the taxpayer does three things. First, the taxpayer must treat 70 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 should: state that the taxpayer is electing the safe harbor; identify the transaction; and state the success-based fee amounts that are treated as not facilitating the transaction and the success-based fee amounts that are treated as facilitating the transaction.

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 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. The safe harbor election under Rev. Proc. 2011-29 falls within the purview of § 301.9100-1(c).

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(c)(1) 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. 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.

Section 301.9100-3(c)(2) provides special rules for accounting method regulatory elections. Section 301.9100-3(c)(2) provides that the interests of the Government are deemed prejudiced, except in unusual or compelling circumstances, if the accounting method regulatory election for which relief is requested is subject to the advance consent procedures for method changes, requires a § 481(a) adjustment, would permit a change from an impermissible method of accounting that is an issue under consideration by examination or any other setting, or provides a more favorable method of accounting if the election is made by a certain date or taxable year.

CONCLUSION:

Based upon our analysis of the facts and representations provided, 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 under Rev. Proc. 2011-29 for the TY with respect to the success-based fee discussed herein on an amended return.

The rulings contained in this letter are based on 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 tax consequences of any aspect of any transaction or item discussed or referenced in this letter. In particular, no opinion is expressed as to whether Taxpayer properly included the correct costs as its success-based fees subject to the retroactive election, 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, a taxpayer filing its return electronically may satisfy this requirement by attaching a statement to its return that provides the date and control number of the letter ruling.

In accordance with the provisions of the power of attorney currently 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. Enclosed is a copy of the letter ruling showing the deletions proposed to be made in the letter when it is disclosed.

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.

Sincerely yours,

_____

BRIDGET TOMBUL
Chief, Branch 2
Office of Associate Chief Counsel
(Income Tax & Accounting)

Enclosure:

Copy for § 6110 purposes

cc: