Internal Revenue Service

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Department of the Treasury
Washington, DC 20224

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Person To Contact:
, ID No.

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PLR-125354-20

Date:
April 22, 2021

Legend

Taxpayer =
Taxable Year =
Date 1 =
Date 2 =
Date 3 =
Date 4 =
Date 5 =
Business 1 =

Business 2 =
Service 1 =

Service 2 =

Related Company =
Financial Advisor =
A =

Dear :

This letter responds to a ruling request dated Date 1, requesting that Taxpayer be granted an extension of time under §§ 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations to make an election to use the safe harbor method of accounting under § 4.01 of Rev. Proc. 2011-29, 2011-18 I.R.B. 746, to allocate success-based fees between facilitative and non-facilitative amounts with respect to the covered transaction on Date 2.

FACTS

Taxpayer makes the following representations:

Taxpayer is a Business 1 engaged in Service 1. Related Company is a Business 2 engaged in Service 2.

On Date 2, pursuant to an Agreement and Plan of Merger, dated as of Date 3, by and between Taxpayer and Related Company, Taxpayer merged with and into Related Company with Related Company surviving the merger. Pursuant to the Agreement, each share of Taxpayer's common stock issued and outstanding immediately prior to the merger owned by the reporting person converted into the right to receive A of a validly issued, fully-paid and nonassessable share of Related Party's common stock, with cash in lieu of any fractional shares.

After the transaction, Taxpayer was required to file a final short-period Form 1120 for Taxable Year. This tax return was due on Date 4. Taxpayer intended to file Form 7004, Application for Automatic Extension of Time to File Corporation Income Tax Return, to extend the due date of the tax return, however, for various reasons, the Form was not filed before the deadline on Date 4. Thus, the Form 1120 is not eligible for timely filing. The filing error was realized on Date 5.

In connection with the transaction, Taxpayer had engaged Financial Advisor to act as a transaction advisor. As part of its services, Financial Advisor completed a transaction cost analysis to determine the tax treatment of the transaction costs incurred in connection with the transaction. Financial Advisor concluded that the transaction was a business acquisition which was a covered transaction eligible for a safe harbor election and drafted a copy of the proposed election statement. Rev. Rul. 2011-29 requires the election statement to be included with a timely-filed return. Because the return may not be timely filed, the safe harbor election is not automatically available.

Taxpayer represents that none of the identified parties have been notified that the failure to file the safe harbor election was discovered by the Internal Revenue Service. None of the parties identified herein seek to alter a return position for which an accuracy-related penalty has been or could be imposed under section 6662.

LAW AND ANALYSIS

Section 263(a)(1) of the Internal Revenue Code generally provides 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. See INDOPCO, Inc. v. Commissioner, 503 U.S. 79, 89-90 (1992); Woodward v. Commissioner, 397 U.S. 572, 575-76 (1970).

Under § 1.263(a)-5 of the Income Tax Regulations, 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. See § 2.04 of Rev. Proc. 2011-29.

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 fees as an amount that does not facilitate the transaction, i.e., an amount that can be deducted currently. The remaining portion of the fees must be capitalized.

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 success-based fees as amounts that do not facilitate the transaction. Second, the taxpayer must capitalize the remaining success-based fees as amounts that do facilitate the transaction. Third, the taxpayer must attach a statement to its original federal income tax return for the taxable year the success-based fees are paid or incurred. This statement should: (i) state that the taxpayer is electing the safe harbor; (ii) identify the transaction; and (iii) state the amount of the success-based fees 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 301.9100-2 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.

Section 301.9100-3(a) provides that requests for extensions of time for regulatory elections 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, in general, 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, 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, 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 is 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 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 under § 6501(a) before the taxpayer's receipt of a ruling granting relief under this section.

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.

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

CONCLUSION

Based solely on the facts submitted and the representations made, we conclude that Taxpayer acted reasonably and in good faith, and that granting the request will not prejudice the interests of the government. Accordingly, the requirements of sections 301.9100-1 and 301.9100-3(b)(1) of the regulations have been satisfied.

Taxpayer is granted an extension of time until 60 days following the date of this ruling to file an amended tax return for Taxable Year electing safe harbor treatment of its success-based fees under section 4.01(3) of Rev. Proc. 2011-29. The amended return must include an election statement stating that Taxpayer is electing the safe harbor for success-based fees, identifying the transaction, and stating the success-based fee amounts that are deducted and capitalized.

The rulings contained in this letter are based upon information and representations submitted by the taxpayer and accompanied by a penalty of perjury statement executed by appropriate parties. 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 federal income tax consequences of any aspect of any transaction or item discussed or referenced in this ruling under any other provision of the Code. 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 Taxpayer's transaction was 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 ruling must be attached to Taxpayer's federal income tax returns for the tax years affected. 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. Enclosed is a copy of the letter ruling

showing the deletions proposed to be made in the letter when it is disclosed under section 6110 of the Code.

Sincerely,

Brinton T. Warren
Chief, Branch 3
Office of Associate Chief Counsel
(Income Tax & Accounting)

Enclosure: Copy for § 6110 purposes

cc: