Internal Revenue Service

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CC:ITA:B03
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Date:
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Legend

Taxpayer =
Taxable Year =
Fiscal Year =
Date 1 =
Date 2 =
Date 3 =
Date 4 =
Business =
Service =

Parent Company =
Acquirer Company =
Tax Advisor =
Financial Advisor 1 =
Financial Advisor 2 =
Financial Advisor 3 =
Financial Advisor 4 =

Dear :

This letter responds to a ruling request dated Date 1, submitted on behalf of Taxpayer. Taxpayer requests an extension of time under §§ 301.9001-1 and 301.9001-3 of the Procedure and Administration Regulations to make a late election concerning the treatment of success-based fees in accordance with 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 Taxpayer's Taxable Years.

FACTS

Taxpayer makes the following representations:

Taxpayer is a Business engaged in Service. Historically, Taxpayer was included in a Fiscal Year consolidated Form 1120, U.S. Corporation Income Tax Return, filed by Parent Company as common parent company.

On Date 2, Acquirer Company acquired all the issued and outstanding stock of the Taxpayer in a taxable stock acquisition transaction via acquisition of 100% the outstanding equity of the Taxpayer's former common parent company, Parent Company.

As a result of the acquisition transaction, the Parent Company consolidated return group terminated, effective Date 2, and its entities, including the Taxpayer, joined Acquirer Company's consolidated return group as of Date 3.

The Taxpayer's tax advisor, Tax Advisor, determined that the consolidated return group of Parent Company terminated, and the Taxpayer joined Acquirer Company's initial consolidated return group. Accordingly, the Taxpayer was included as a consolidated subsidiary in two separate short period returns as a result of the transaction: (1) final consolidated federal income tax return filed by Parent Company for the taxable year ended Date 2, and (2) initial consolidated federal income tax return for Acquirer Company for the taxable year ended Date 4.

Tax Advisor was engaged to prepare the pre-closing consolidated federal income tax return for Parent Company (year ended Date 2) and the post-closing consolidated federal income tax return for Acquirer Company (year ended Date 4).

In connection with preparation of the pre-closing consolidated federal income tax return for Parent Company for the taxable year ended Date 2, which included sell-side transaction costs incurred by the Taxpayer, Tax Advisor advised that amounts paid to Financial Advisor 1, Financial Advisor 2, and Financial Advisor 3 qualified as success-based fees eligible for the safe harbor treatment afforded by Rev. Proc. 2011-29. Likewise, during preparation of the post-closing consolidated federal income tax return for Acquirer Company for the taxable year ended Date 4, which included buy-side transaction costs, Tax Advisor advised that amounts paid to Financial Advisor 4 qualified as success-based fees eligible for the safe harbor treatment afforded by Rev. Proc. 2011-29. Accordingly, the returns prepared by Tax Advisor reflected deduction of 70% of the identified success-based fees and capitalization of 30% of the identified success-based fees, consistent with the intended safe harbor elections under Rev. Proc. 2011-29. However, Tax Advisor inadvertently failed to include the election statements required by Section 4.01(3) of Rev. Proc. 2011-29 with the returns presented to the Taxpayer for submission with the Internal Revenue Service.

The failure to attach the election statements to the transaction year returns was subsequently discovered during IRS examination of the consolidated federal income tax return filed by Parent Company and Acquirer Company for the taxable years ended Date 2 and Date 4, respectively, which included the Taxpayer as a consolidated subsidiary. Upon discovery of the missed elections, the Taxpayer and Tax Advisor discussed various aspects of the situation and potential avenues to rectify the problems, including requesting administrative relief under relief for the late-filed success-based fees elections under Treas. Reg. § 301.9100-1 and 301.9100-3.

The Taxpayer represents that it did not have knowledge or understanding of the requirement to include a statement to make the safe harbor election under Rev. Proc. 2011-29 with respect to the success-based fees incurred by it in connection with the transaction. The Taxpayer represents it relied upon Tax Advisor for the preparation of the tax returns and for advice regarding the proper tax treatment of the transaction-related items.

LAW AND ANALYSIS

Section 263(a) of the Internal Revenue Code provides generally that no deduction is allowed for any amount paid for new buildings or for permanent improvements or betterments made to increase the value of any property or estate or any amount expended in restoring property or in making good the exhaustion thereof for which an allowance is or has been made. Section 1.263(a)-1(d)(3) of the Regulations provides that no deduction is allowed for an amount paid to acquire or create an intangible, which under sections 1.263(a)-4(c)(1)(i) and 1.263(a)-4(d)(2)(i)(A) includes an ownership interest in a corporation or other entity. See also section 1.263(a)-4(a).

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, 575-576 (1970).

Under section 1.263(a)-5, a taxpayer must capitalize an amount paid to facilitate a business acquisition or reorganization transaction described in section 1.263(a)-5(a). In general, an amount is paid to facilitate a transaction described in section 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. Section 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 section 1.263(a)-5(a), or success-based fee, is presumed to facilitate the transaction. 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. 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.

To reduce controversy between the IRS 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 IRS issued Rev. Proc. 2011-29. Section 4.01 of the revenue procedure states that the IRS would not challenge a taxpayer's allocation of a success-based fee between activities that facilitate a transaction described in section 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.

It is the last requirement that Taxpayer requests permission to accomplish with this ruling request. Taxpayer requests permission with this ruling request to attach the statement required by section 4.01(3) of Rev. Proc. 2011-29 to its return, by amending its original filed return and superseding it with a return with the proper election statement completed and attached.

Section 3 of Rev. Proc. 2011-29 provides that the revenue procedure applies to covered transactions described in section 1.263(a)-5(e)(3), which include—
(i) A taxable acquisition by the taxpayer of assets that constitute a trade or business;
(ii) 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 section 267(b) or section 707(b); or
(iii) A reorganization described in section 368(a)(1)(A), (B), or (C) or a reorganization described in section 368(a)(1)(D) in which stock or securities of the corporation to which the assets are transferred are distributed in a transaction which qualifies under section 354 or 356 (whether the taxpayer is the acquirer or the target in the reorganization).

Sections 301.9100-1 through 301.9100-3 of the Procedure and Administration Regulations provide the standards the Commissioner uses to determine whether to grant an extension of time to make a regulatory 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 section 301.9100-2.

Section 301.9100-3(b) defines the term “regulatory election” as an election whose due date is prescribed by a regulation published in the Federal Register, or a revenue ruling, procedure, notice or announcement published in the Internal Revenue Bulletin. Section 301.9100-1(c) provides that the Commissioner may grant a reasonable extension of time to make a regulatory election, or a statutory election (but no more than six months except in the case of a taxpayer who is abroad) under all subtitles of the Internal Revenue Code except subtitles E, G, H and I.

Section 301.9100-3(a) provides extension of time to make a regulatory election under Code sections other than those for which section 301.9100-2 expressly permits automatic extensions. Requests for extensions of time for regulatory elections 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 granting relief will not prejudice the interests of the Government.

Section 301.9100-3(b)(1) states that a taxpayer will be 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 due 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, including a tax professional employed by the taxpayer, and the tax professional failed to make, or advise the taxpayer to make the election.

Under section 301.9100-3(b)(3), 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 section 6662 at the time the taxpayer requests relief (taking into account section 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
(ii) 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) provides that the Commissioner will grant a reasonable extension of time only when the interests of the Government will not be prejudiced by

the granting of relief. Section 301.9100-3(c)(1)(i) provides, in part, that the interest 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 (taking into account the time value of money). Section 301.9100-3(c)(1)(ii) provides, in part, 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 under section 6501(a) before the taxpayer's receipt of a ruling granting relief under this section.

Section 301.9100-3(f), Ex. 2, illustrates that where a failure to file an election is discovered by the IRS during an examination, the taxpayer may be granted relief under section 301.9100-3 if the taxpayer relied on a qualified tax professional to render advice and the tax professional failed to notify the taxpayer of the requirement to file the 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: