Internal Revenue Service

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Department of the Treasury
Washington, DC 20224

Third Party Communication: None
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Person To Contact:
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PLR-123836-20

Date:
April 14, 2021

Legend

Taxpayer =

Year 1 =
Year 2 =
Date 1 =
State A =
Target 1 =
Target 2 =
Advisor =
$a =
Preparer =

Dear :

This letter responds to your correspondence dated October 9, 2020, and December 21, 2020, requesting an extension of time under §§ 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations for Taxpayer to make the safe harbor election for success-based fees described in Rev. Proc. 2011-29, 2011-18 I.R.B. 746.

FACTS

Taxpayer is a C corporation incorporated under the laws of State A and uses an accrual method of accounting for federal income tax purposes. Taxpayer is the parent corporation of a U.S. consolidated group, which files an annual U.S. income tax return on a 52/53 week basis.

On Date 1, Taxpayer, in a taxable acquisition, acquired all of the outstanding stock of Target 1 and Target 2 (Transaction). Taxpayer represents that the Transaction is a covered transaction described in § 1.263(a)-5(e)(3)(ii) of the Income Tax Regulations.

Taxpayer engaged Advisor to perform advisory services in the process of investigating or otherwise pursuing the Transaction. Taxpayer paid $a in success-based fees to Advisor at the time of the closing of the Transaction. Taxpayer did not conduct a transaction cost analysis with respect to the costs it incurred in conjunction with the Transaction. Taxpayer filed its Year 1 return without making the safe harbor election pursuant to Rev. Proc. 2011-29 and deducted the full amount of the fee.

Taxpayer is currently under examination by the Internal Revenue Service (IRS) for Year 1. In Year 2, Taxpayer received an Information Document Request (IDR) from the IRS requesting information on the transaction costs associated with the Transaction but the IDR did not reference the safe-harbor election pursuant to Rev. Proc. 2011-29. The IDR prompted the Taxpayer to review the transactions that were eligible for the Rev. Proc. 2011-29 safe-harbor election during Year 1. During that review, Taxpayer discovered that it had not made the safe-harbor election on its Year 1 return for the Transaction.

In preparing the Year 1 return, the Taxpayer's tax department did not fully appreciate the need to conduct a transaction cost analysis for the Transaction, and therefore inadvertently overlooked the advisability to make the Rev. Proc. 2011-29 safe-harbor election for the Transaction. The Taxpayer had already owned approximately 80% of Target 1 and Target 2 prior to the Transaction, which resulted in the Taxpayer being the sole owner of Target 1 and Target 2. Since the Taxpayer already owned a majority interest in Target 1 and Target 2, the Transaction did not trigger the same level of scrutiny for the reporting of the Transaction and led to the Taxpayer's oversight to identify the potential to make the safe-harbor election. Had the tax department recognized that a transaction cost analysis should have been conducted for the Transaction, like it had done for similar stock acquisition transactions in past and future years, the tax department would have identified the availability and advisability of making the safe-harbor election under Rev. Proc. 2011-29. In addition, the lack of an election was not identified by Preparer prior to signing the Year 1 tax return.

In March of Year 2, Taxpayer contacted Preparer to discuss options for resolving the missed safe-harbor election. Pursuant to this discussion, Preparer informed Taxpayer that the fees are of the type contemplated by Rev. Proc. 2011-29 and that Taxpayer may request relief to make a late election under §§ 301.9100-1(c) and 301.9100-3, for Year 1. At that time, Taxpayer decided to submit this request for relief for an extension of time to make the safe-harbor election under Rev. Proc. 2011-29.

LAW & ANALYSIS

Section 263(a)(1) of the Internal Revenue Code and § 1.263(a)-2(a) provide that no deduction shall be allowed for any amount paid 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). 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) (“success-based fee”) is presumed to facilitate the transaction. 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.

Rev. Proc. 2011-29, provides a safe harbor election for taxpayers that pay or incur success-based fees for services performed in the process of investigating or otherwise pursuing a covered transaction described in § 1.263(a)-5(e)(3).

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) and activities that do not facilitate the transaction if the taxpayer satisfies three requirements. First, the taxpayer must treat seventy 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 must: (a) state that the taxpayer is electing the safe harbor; (b) identify the transaction; and (c) state the success-based fee amounts deducted and capitalized. Taxpayer requests permission to amend its Year 1 return and attach the statement required by section 4.01(3) of Rev. Proc. 2011-29.

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 301.9100-3(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 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 not be deemed 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 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 an extension of time to make a regulatory election will be granted only when the interests of the Government are not prejudiced by the granting of relief. 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). Section 301.9100-3(c)(1)(i).

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 under § 6501(a) before the taxpayer's receipt of a ruling granting relief under this section. Section 301.9100-3(c)(1)(ii).

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

CONCLUSION

Based solely on the information provided and representations made, we conclude that Taxpayer acted reasonably and in good faith and granting relief will not prejudice the interests of the Government. Accordingly, Taxpayer has met the requirements of §§ 301.9100-1 and 301.9100-3.

Subject to the requirements of § 6511, Taxpayer is granted an extension of 60 days from , to amend its Year 1 return to elect the safe harbor for success-based fees pursuant to Rev. Proc. 2011-29.

CAVEATS

The ruling contained in this letter is based upon information and representations submitted by Taxpayer and accompanied by a penalty of perjury statement executed by an appropriate party. Although this office has not verified any of the material submitted in support of the request for the ruling, it is subject to verification on examination.

Except as expressly set forth 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, including whether: (1) Taxpayer incurred a liability of $a, as success-based fees in Year 1; or (2) Transaction was within the scope of Rev. Proc. 2011-29. The relief provided in this letter is conditioned on proper adjustments to affected returns and tax attributes for Taxpayer and its affiliates.

Enclosed is a copy of the letter ruling showing the deletions proposed to be made in the letter when it is disclosed under § 6110 of the Code.

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.

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.

Sincerely,

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

Enclosure (1)
Copy for § 6110 purposes

cc: