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:
, ID No.
Telephone Number:

Refer Reply To:
CC:ITA:B02
PLR-108460-22

Date:
October 14, 2022

In Re:

TY:

LEGEND:

Taxpayer	=
Date1	=
Date2	=
Date3	=
Date4	=
State1	=
State2	=
A	=
B	=
C	=
D	=
E	=
$a	=
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$c	=
$d	=
$e	=

Dear :

This is a response to a letter ruling request dated Date1, requesting an extension of time to file a safe-harbor election under Rev. Proc. 2011-29, 2011-1 C.B. 746, to allocate success-based fees for 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. This letter ruling is being issued electronically as permissible under sections 7.02(2) and 9.04(3) of Rev. Proc. 2022-1, 2022-1 I.R.B. 1, 33, 49. A paper copy will not be mailed to Taxpayer.

FACTS AND REPRESENTATIONS

Taxpayer represents the following:

Taxpayer is a corporation organized under the laws of State1, with its principal place of business in State2. Taxpayer has a calendar year end and uses an accrual method of accounting. Taxpayer is engaged in the business of C.

On Date3, Taxpayer, A, and B (a wholly-owned subsidiary of Taxpayer) entered into an agreement and plan of merger, which provided that B will merge with and into A, with A surviving. Upon completion of the transaction, A became a wholly-owned subsidiary of Taxpayer. The merger was intended to qualify as a tax-free reorganization within the meaning of § 368(a) of the Code.

As part of the acquisition, Taxpayer paid $a and $b of deal-related fees to D and E, respectively, for services performed in the process of investigating or otherwise pursuing the transaction. Of the total deal-related fees paid, $c paid to D and $d paid to E were contingent on the successful closing of the transaction and were paid at the time of closing (i.e., success-based fees). No portion of the success-based fees was a guaranteed payment incurred upon the occurrence of a specified milestone or upon some other date or event other than the successful closing of the transaction, and no portion of the success-based fees was related to financing costs or reimbursed expenses.

Taxpayer paid or incurred total success-based fees of $e as defined by § 1.263(a)-5(f) of the Income Tax Regulations, and Taxpayer's transaction was a “covered transaction” as defined by § 1.263(a)-5(e)(3).

Taxpayer’s tax department prepared the U.S. federal income tax return for the taxable year ending Date2. Taxpayer timely filed its return and elected to use the safe harbor election for allocating fees paid to D and E under Rev. Proc. 2011-29. However, Taxpayer failed to attach the required election statement to Taxpayer's original federal tax return for the taxable year ending Date2. Taxpayer relied on its internal tax professionals to properly prepare the tax return and include all appropriate elections therewith. By oversight, Taxpayer failed to attach the election statement.

On Date4, Taxpayer discovered that the required election statement under Rev. Proc. 2011-29 was not attached to Taxpayer's tax return for the taxable year ending Date2. On Date1, Taxpayer submitted its request for this ruling.

LAW AND ANALYSIS

Sections 263(a)(1) and 1.263(a)-2(a) 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, therefore, 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.

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. Revenue Procedure 2011-29 provides a safe harbor election 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, i.e., an amount that can be deducted. 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) (costs that must be capitalized) and activities that do not facilitate the transaction (costs that may be deducted) if the taxpayer: (1) treats 70 percent of the amount of the success-based fee as an amount that does not facilitate the transaction and thus may be deducted; (2) capitalizes the remaining amount of the success-based fee as an amount which 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 pursuant to the safe harbor election. Section 4.03 of Rev. Proc. 2011-29 provides that the election does not constitute a change in method of accounting for success-based fees generally. Accordingly, a § 481(a) adjustment is neither permitted nor required.

The revenue procedure applies to covered transactions described in § 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 § 267(b) or § 707(b); or (iii) a reorganization described in § 368(a)(1)(A), (B), or (C) or a reorganization described in § 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 § 354 or § 356 (whether the taxpayer is the acquirer or the target in the reorganization).

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 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) in part provides that a taxpayer is deemed to have acted reasonably and in good faith if the taxpayer requests relief before the failure to make the regulatory election is discovered by the Service or 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(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.

Taxpayer's election is a regulatory election, as defined under § 301.9100-1(b), because the due date of the election is prescribed in 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 represented the transaction qualifies as a covered transaction described in § 1.263(a)-5(e)(3)(ii).

Taxpayer has represented that it requested relief before the failure to make the regulatory election was discovered by the Service and that it reasonably relied on qualified tax professionals, and the tax professionals failed to make, or advise Taxpayer to make, the election. Thus, under §§ 301.9100-3(b)(1)(i) and (v), Taxpayer is deemed to have acted reasonably and in good faith. Taxpayer has also represented that none of the circumstances listed in § 301.9100-3(b)(3) apply.

Based on the facts Taxpayer provided, granting an extension of time to file the election will not prejudice the interests of the government under § 301.9100-3(c)(1). Taxpayer has represented that granting relief would not result in a lower tax liability in the aggregate for all taxable years affected by the election than Taxpayer would have had if the election had been timely made (taking into account the time value of money). Furthermore, Taxpayer has represented that the taxable year in which the regulatory election should have been made and any taxable years that would have been affected had it been timely made, are not closed by the period of assessment.

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 for success-based fees under Rev. Proc. 2011-29 for its taxable year ending Date2.

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 (e.g., no opinion is expressed regarding the amount of success-based fees, whether those fees are success-based fees, nor whether the transaction was a qualifying transaction).

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 representative.

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.

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 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.

Sincerely,

Bridget E. Tombul
Chief, Branch 2
(Income Tax & Accounting)

Enclosure: Copy of the letter for 6110 purposes

cc: