Internal Revenue Service

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Department of the Treasury
Washington, DC 20224

Third Party Communication: None
Date of Communication: Not Applicable

Person To Contact:
, ID No.

Telephone Number:

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CC:ITA:B01
PLR-114517-23

Date:
January 16, 2024

Taxpayer	=
Date 1	=
Date 2	=
Date 3	=
Date 4	=
Date 5	=
Date 6	=
Date 7	=
Subsidiary 1	=
X	=
Target	=
Merger Company	=
Y	=
Company A	=
Financial Advisor	=
Amount $1	=
Z	=

Dear :

This letter responds to a request for a private letter ruling filed by Taxpayer with the Internal Revenue Service (Service). In the letter ruling request and subsequent submissions, you seek an extension of time for Taxpayer to make a late safe harbor election under Rev. Proc. 2011-29, 2011-18 I.R.B. 746, ("Election") effective for the taxable year that ended on Date 1. The request is made in accordance with §§ 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations. Taxpayer's request was filed with our office on Date 2.

FACTS

Taxpayer is the parent company of a consolidated group of corporations. Subsidiary 1 is a wholly owned subsidiary of Taxpayer engaged in the X business. On Date 3, Taxpayer acquired the X business of Target. The acquisition was accomplished through a merger of Target with Merger Company, with Target surviving. Also, on Date 3, immediately following the acquisition of Target, Subsidiary 1's Y business segment was sold to Company A.

Financial Advisor was engaged, pursuant to an agreement dated Date 4 ("Agreement"), to provide transaction and financial services in connection with the acquisition of the Target business and the sale of the Y business segment. Taxpayer represents that Financial Advisor was paid an Amount $1 fee ("Fee") in conjunction with the transaction. Taxpayer represents that the Fee, paid directly by and reported on the separate company Date 5 tax return of Subsidiary 1 was contingent upon the completion of a covered transaction described in section 1.263(a)-5(e)(3)(ii). The Fee was not treated as reducing amount realized on the sale of the Y business and was not treated as increasing the basis of any business assets acquired (no section 338 election was made). Taxpayer represents that the Fee was paid in connection with a covered transaction described in section 1.263(a)-5(e)(3)(ii).

As part of the services provided under the Agreement, Financial Advisor performed an appraisal. The Agreement does not ascribe any value or charge for the appraisal. Taxpayer treated the full Amount $1 as a success-based fee because the full amount was contingent on the successful completion of the acquisition. Taxpayer did not treat any portion of the Fee as capitalized under section 1.263(a)-5(f)(2)(i) as an inherently facilitative fee.

Taxpayer employs an accrual method of accounting on a calendar year basis. Taxpayer represents that it's tax department intended but failed to make the safe-harbor election for the Fee on its Date 5 income tax return. Taxpayer reported the Fee on that return consistent with having made the Election, reporting 70 percent as deductible and capitalizing 30 percent of the Fee. Taxpayer represents the failure to attach the required election statement was an oversight that was in part caused by the return being filed during the Z.

In the spring of Date 6, the IRS began auditing various consulting and professional expenses reported on Taxpayer's Date 5 return. On Date 7 the IRS issued an information document request seeking a copy of the Rev. Proc. 2011-29 election statement. Shortly thereafter, Taxpayer's tax staff discovered that the election statement had not been filed as intended. The period of limitations for assessment of tax remains open pursuant to a Form 872 consent being executed by Taxpayer and the IRS.

LAW AND ANALYSIS

Sections 301.9100-1 through 301.9100-3 of the Procedure and Administration Regulations 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(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 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 301.9100-3(a) provides extensions of time to make a regulatory election under Code sections other than those for which § 301.9100-2 expressly permits automatic extensions. 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) states that a taxpayer will be deemed to have acted reasonably and in good faith if the taxpayer: (1) requests relief before the failure to make the regulatory election is discovered by the Service, (2) failed to make the election because of intervening events beyond the taxpayer's control, (3) failed to make the election because, after exercising due diligence, the taxpayer was unaware of the necessity for the election, (4) reasonably relied on the written advice of the Service, or (5) 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 § 301.9100-3(b)(3), a taxpayer will not be considered to have acted reasonably and in good faith if the taxpayer: (1) 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 (taking into account § 1.6664-2(c)(3)) and the new position requires or permits a regulatory election for which relief is requested, (2) was informed in all material respects of the required election and related tax consequences, but chose not to file the election, or (3) 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.

Taxpayer has represented that it is not seeking to alter a return position for which an accuracy-related penalty has been or could be imposed under § 6662 at the time

Taxpayer requested relief. Furthermore, Taxpayer has represented that it is not using hindsight in requesting relief and that no specific facts have changed since the original deadline that would make the election more advantageous to Taxpayer now than if made timely.

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 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 (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 § 6501(a) before the taxpayer's receipt of a ruling granting relief. Under these criteria, the interests of the government are not prejudiced in this case.

Section 263(a)(1) and § 1.263(a)-2(a) 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). 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(e)(2) provides that an amount paid in the process of investigating or otherwise pursuing a covered transaction facilitates that transaction if the amount is inherently facilitative, regardless of whether the amount is paid for activities performed prior to the date determined in § 1.263(a)-5(e)(1). Among other things, an amount is inherently facilitative if the amount is paid for securing an appraisal, factual written determination, or fairness opinion related to the transaction.

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) is presumed to facilitate the transaction and, thus, must be capitalized. 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 and thus may be deductible. 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 Service 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 Service issued Rev. Proc. 2011-29.

Section 4.01 of Rev. Proc. 2011-29 states that the Service will not challenge a taxpayer's allocation of a success-based fee between activities that facilitate the transaction described in § 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.

The revenue procedure applies to covered transactions described in § 1.263(a)-5(e)(3), which includes, *inter alia*, a taxable acquisition by the taxpayer of assets that constitute a trade or business and 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). *See* § 1.263(a)-5(e)(3)(i) and (ii).

CONCLUSION

Based on the facts and representation submitted, we conclude that Taxpayer acted reasonably and in good faith and granting relief will not prejudice the interests of the government. Accordingly, 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 the statement required by section 4.01(3) of Rev. Proc. 2011-29, stating that it is electing the success-based fee safe harbor, identifying the transaction, and stating the success-based fee amounts that are deducted and capitalized.

The ruling letter is based upon information and representations submitted by the taxpayer and accompanied by penalty of perjury statements executed by the appropriate parties. This office has not verified any of the materials submitted in support of the request for a ruling and the information materials are 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 on the proper amount of the success-based fee and on the application of section 1.263(a)-5(e)(2)(i).

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 should be attached to Taxpayer's federal 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.

Sincerely,

/s/

Sean M. Dwyer
Senior Technical Reviewer
(Income Tax & Accounting)

Enclosure (1):
Copy for § 6110 purposes

CC: