Internal Revenue Service

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Department of the Treasury
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LEGEND

Taxpayer =
Products =

Date 1 =
Date 2 =
Date 3 =
Date 4 =
Date 5 =
Date 6 =
Tax Year 1 =
State X =
Subsidiary A =
Subsidiary B =
Financial Consultant 1 =
Financial Consultant 2 =
$a =
$b =
Tax Return Preparer =

Dear :

This letter responds to your letter ruling request dated Date 1, submitted by Taxpayer. Taxpayer requests an extension of time pursuant to §§ 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations to make two late elections to allocate success-based fees, as provided by Rev. Proc. 2011-29, 2011-1 C.B. 746.

FACTS

Taxpayer makes the following representations:

Taxpayer is a publicly traded domestic corporation that manufactures, distributes, and services Products. Taxpayer was formed on Date 2 under the laws of State X and is treated as a corporation for federal income tax purposes.

On Date 3, Taxpayer entered into an engagement agreement with Financial Consultant 1 to provide financial consulting services and assistance with the acquisition of Subsidiary A. On Date 4, Taxpayer entered into an engagement agreement with Financial Consultant 2 to provide financial consulting services and assistance with the acquisition of Subsidiary B.

Pursuant to its engagement agreements with Financial Consultant 1 and 2, Taxpayer was required to pay success-based fees contingent upon the successful acquisition of Subsidiary A and/or Subsidiary B.

Taxpayer acquired 100% of Subsidiary A on Date 5 and upon the successful closing of the acquisition, Taxpayer incurred a success-based fee to Financial Consultant 1 in the amount of $a. Taxpayer acquired 100% of Subsidiary B on Date 6 and upon the successful closing of the acquisition of Subsidiary B, Taxpayer incurred a success-based fee to Financial Consultant 2 in the amount of $b.

Taxpayer engaged Tax Return Preparer to prepare its Federal income tax return for Tax Year 1. On its return, Taxpayer claimed a deduction for 70 percent of each success-based fee paid to Financial Consultant 1 and Financial Consultant 2, and capitalized the remaining 30 percent. Taxpayer’s Tax Year 1 return, however, failed to include the required statement indicating that Taxpayer was electing safe-harbor treatment under Rev. Proc. 2011-29. Taxpayer submitted sworn declarations stating that Tax Return Preparer was tasked with preparing statements electing the safe harbor under Rev. Proc. 2011-29, and attaching them to Taxpayer’s return, but failed to do so.

Despite failing to include an election statement, Taxpayer’s returns reported its acquisition-related success-based fees in a manner consistent with the safe-harbor election under Rev. Proc. 2011-29. Accordingly, Taxpayer failed to make valid elections because it failed to include the election statements required by § 4.01(3), Rev. Proc. 2011-29 (“Required Election Statement”).

After filing Taxpayer's tax return for Tax Year 1, Tax Return Preparer discovered that it had failed to include the Required Election Statements due to administrative errors. Taxpayer then filed the present letter ruling request, seeking an extension of time to file the Required Election Statements for Tax Year 1, pursuant to §§ 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations.

Taxpayer represents that the period of limitation on assessment under § 6501(a) of the Internal Revenue Code ("Code") for Tax Year 1 has not expired.

LAW

Section 263(a) of the Code provides generally that no deduction is allowed for any amount paid out for property having a useful life substantially beyond the taxable year. In the case of an acquisition 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 § 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 of 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 § 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 provides a safe-harbor stating that the IRS would not challenge a taxpayer's allocation of a success-based fee 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 --

> (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 (i.e., the Required Election Statement).

It is this last requirement that Taxpayer seeks to satisfy with this ruling request. Taxpayer requests an extension of time to perfect its safe-harbor election; to amend its original filed returns and supersede those returns with ones that include the Required Election Statement as an attachment.

Section 3 of Rev. Proc. 2011-29 provides that 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 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 § 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 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 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 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 § 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 § 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;
>
> (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.

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 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 this section.

ANALYSIS

Taxpayer represents that for Federal income tax purposes the acquisitions of Subsidiary A and Subsidiary B were taxable acquisitions considered to be covered transactions pursuant to § 1.263(a)-5(e)(3). Accordingly, Taxpayer qualifies to make the safe-harbor election provided by Rev. Proc. 2011-29.

As a result of the acquisitions, Taxpayer incurred and subsequently paid an amount of success-based fees during Tax Year 1. Taxpayer complied with the substantive requirements for making the safe-harbor election by deducting 70 percent and capitalizing 30 percent of those success-based fees on its original Federal income tax return. Taxpayer, however, failed to perfect its safe-harbor elections by inadvertently omitting the Required Election Statements from those returns. It is with respect to that failure that Taxpayer requests an extension of time to file the elections; to amend its original filed returns and supersede those returns with ones that include the Required Election Statements as an attachment.

Taxpayer's request pertains to a regulatory election as defined in § 301.9100-1(b) of the Procedure and Administration Regulations, as the due date for the making the safe-harbor election is prescribed by § 1.263(a)-5(f) of the Income Tax Regulations. Accordingly, the Commissioner has the authority under §§ 301.9100-1 and 301.9100-3, to grant Taxpayer's request for an extension of time to file the safe-harbor elections for Tax Year 1.

The information submitted, and representations made by Taxpayer establish that Taxpayer acted reasonably and in good faith under § 301.9100-3(b)(1) and (2). Taxpayer requested relief before its failure to properly make the regulatory election was discovered by the Commissioner. Additionally, despite Taxpayer's reasonable reliance on qualified tax professionals to prepare its Federal income tax return for Tax Year 1, the required election statements were inadvertently omitted from Taxpayer's return. Accordingly, Taxpayer will be considered to have acted reasonably and in good faith.

Moreover, Taxpayer should not be deemed to have acted unreasonably or in a manner lacking good faith. Taxpayer's representations indicate that none of the circumstances listed in § 301.9100-3(b)(3) apply.

Based on Taxpayer's representation of the facts, 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 would have resulted had Taxpayer timely made the election (taking into account the time value of money). Further, Taxpayer has represented that the period of limitations on assessment under § 6501(a) has not closed for Taxpayer's Tax Year 1.

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 §§ 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 amended tax returns electing safe harbor treatment of its success-based fees under § 4.01(3) of Rev. Proc. 2011-29. The amended returns must include an election statement stating that Taxpayer is electing the safe harbor for success-based fees, identifying the transactions, 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 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.

Sincerely,

RONALD J. GOLDSTEIN
Branch Chief, Branch 2
Office of the Associate Chief Counsel
(Income Tax & Accounting)

cc: