Internal Revenue Service

Department of the Treasury
Washington, DC 20224

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Person To Contact:
, ID No.

Telephone Number:

Refer Reply To:
CC:ITA:B01
PLR-113358-18

In Re:

Date:
October 03, 2018

LEGEND

Date1	=
Taxpayer	=
State1	=
City1	=
State2	=
Y	=
Date2	=
Date3	=
A	=
Acquired	=
Amount1	=
Date4	=
b	=
Amount2	=
Accounting Firm1	=
Law Firm	=
Accounting Firm2	=
Date5	=
Tax Year1	=
Executive	=
Date 6	=
Year3	=
Tax Year2	=
Partner	=

Dear :

This is in response to a letter dated Date1, requesting an extension of time to file the required election statement to make the safe harbor election under Rev. Proc. 2011-29, 2011-1 C.B. 746, to allocate success-based fees between facilitative and non-facilitative amounts for Taxpayer's transaction during 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.

FACTS AND REPRESENTATIONS

Taxpayer represents the following:

Taxpayer is a domestic limited liability company organized under the laws of State1. It is headquartered in City1, State2. Taxpayer is a holding company and the parent company of a consolidated group. Its subsidiaries comprise a United States network of companies providing Y.

On Date3, Taxpayer entered a stock purchase agreement pursuant to which Taxpayer would acquire a% of the issued and outstanding stock of Y firm, Acquired (including its b subsidiaries), for approximately $Amount1 ("Transaction"). The Transaction closed on Date4. Effective Date4, Acquired and its subsidiaries consented to be included in the Taxpayer's consolidated return group.

As of the Date4 closing date, Taxpayer had incurred $Amount2 in success-based fees for services performed in the process of investigating and otherwise pursuing the Transaction. Taxpayer engaged Accounting Firm1, Law Firm, and others to negotiate the Transaction, to advise on the structure, technical considerations, financial terms and considerations, and other financial matters with respect to the acquisition of Acquired, as well as to perform valuation analysis and to assist with coordinating due diligence.

After Taxpayer purchased Acquired, it engaged Accounting Firm2 to prepare its state income tax returns and its consolidated group's Form 1120, *U.S. Corporation Income Tax Return* ("Return") for Tax Year1. The extended due date for Taxpayer's Return was on or about Date5. As part of this engagement, Taxpayer asked Accounting Firm2 to perform an analysis of the success-based fees it incurred with respect to the purchase of Acquired and to prepare any documentation to establish the portion of the success-based fees allocable to activities that did not facilitate the transaction. On or about Date6, Accounting Firm2's compliance team prepared the election statement to be included with Taxpayer's Return, pursuant to which Taxpayer would elect to use the safe harbor method of accounting under § 4.01 of Rev. Proc. 2011-29 relative to the allocation of the success-based fees associated with the

purchase of Acquiring ("Election Statement"). However, Accounting Firm2 inadvertently failed to attach this Election Statement to the Return it filed electronically with the Internal Revenue Service ("Service") as required by § 4.01(3) of Rev. Proc. 2011-29.

Taxpayer and Executive, who oversees compliance for Taxpayer, were unaware that the Election Statement had not been attached to Taxpayer's electronically filed Tax Year1 Return. Executive states that, on or about Date5, she received a copy of the Return prepared by Accounting Firm2 for review. Through inadvertent oversight, she did not identify that the Election Statement was missing from the copy of the Return and authorized Accounting Firm2 to electronically file it. Further, had Executive known, prior to the filing of the Taxpayer's Tax Year1 Return, that the Election Statement was not included, she would have requested that it be included prior to filing.

Partner states that, despite Accounting Firm2's best efforts to prepare, compile, and file a complete, executed copy of the Taxpayer's Return, it inadvertently failed to attach the Election Statement to the Tax Year1 Return it filed electronically. Although Accounting Firm2 mistakenly failed to include the copy of the Election Statement with the Taxpayer's Tax Year1 Return, when it filed it, it was prepared consistent with having made a timely election under § 4.01 of Rev. Proc. 2011-29. In other words, the Taxpayer capitalized thirty percent of the success-based fees and, on its Tax Year1 Return, reported the remaining seventy percent as an amount that did not facilitate the purchase of Acquired.

While preparing Taxpayer's Tax Year2 Return during the summer of Year3, Accounting Firm2 discovered that it had not attached the statement to Taxpayer's Tax Year1 Return. Accounting Firm2 told Executive about the error and advised that, pursuant to §§ 301.9100-1(c) and 301.9100-3 of the Procedure and Administration Regulations, Taxpayer could request an extension of time to make the safe harbor election. Accordingly, Taxpayer engaged Accounting Firm2 to file this request for relief for an extension of time to file its Election Statement under § 4.01(3) of Rev. Proc. 2011-29 for Taxpayer's taxable year ending Date2. This request is made in accordance with §§ 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations. The Service has not notified Taxpayer that its Return for the taxable year ending Date2 is under examination. Taxpayer filed this request before the Service discovered that the Election Statement had not been attached to Taxpayer's Tax Year1 Return.

LAW AND ANALYSIS:

Section 263(a)(1) of the Internal Revenue Code and § 1.263(a)-2(a) of the Income Tax Regulations 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 thus 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, and thus may be deductible.

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. See section 2.04 of Rev. Proc. 2011-29.

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. Rev. Proc. 2011-29 provides a safe harbor method of accounting 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 seventy 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) and activities that do not facilitate the transaction if the taxpayer does three things. 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 should: state that the taxpayer is electing the safe harbor; identify the transaction; and state the success-based fee amounts that are deducted and capitalized. It is this third requirement that Taxpayer requests permission to accomplish with this ruling request. Taxpayer requests

permission to attach the statement required by § 4.01(3) of Rev. Proc. 2011-29 to its return by amending its original filed return for the tax year ending Date2 and superseding it with a return attaching a completed Election Statement.

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 extensions of time for regulatory elections 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, in general, 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, 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, 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 is deemed to have not 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 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 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 under § 6501(a) before the taxpayer's receipt of a ruling granting relief under this section.

Section 301.9100-3(c)(2) provides special rules for accounting method regulatory elections. Section 301.9100-3(c)(2) provides that the interests of the Government are deemed prejudiced, except in unusual or compelling circumstances, if the accounting method regulatory election for which relief is requested is subject to the advance consent procedures for method changes, requires a § 481(a) adjustment, would permit a change from an impermissible method of accounting that is an issue under consideration by examination or any other setting, or provides a more favorable method of accounting if the election is made by a certain date or taxable year.

Taxpayer's election is a regulatory election as defined in § 301.9100-1(b) because the due date of the election is prescribed in § 1.263(a)-5(f) of the Income Tax Regulations. 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 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 attach the statement required by § 4.01(3) of Rev. Proc. 2011-29 to its return by amending its original filed return for the tax year ending Date2 and superseding it with a return attaching a completed Election Statement with respect to the Transaction for its taxable year ending Date2.

The rulings contained in this letter are based on 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 tax consequences of any aspect of any transaction or item discussed or referenced in this letter. In particular, no opinion is expressed as to whether Taxpayer properly included the correct costs as its success-based fees subject to the retroactive election, or whether Taxpayer's Transaction is within the scope of Rev. Proc. 2011-29.

A copy of this letter must be attached to any income tax return to which it is relevant. Alternatively, a taxpayer filing its return electronically may satisfy this requirement by attaching a statement to its return that provides the date and control number of the letter ruling.

In accordance with the provisions of the power of attorney currently 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 § 6110.

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.

Sincerely,

Norma C. Rotunno
Chief, Branch 1
Office of Associate Chief Counsel
(Income Tax & Accounting)

Enclosure:
Copy for § 6110 purposes

cc: