Internal Revenue Service

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Department of the Treasury
Washington, DC 20224

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Person To Contact:
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Telephone Number:

Refer Reply To:
CC:ITA:B03
PLR-133159-18
Date:
June 11, 2019

TY:

Legend:

Taxpayer	=
Parent	=
Acquirer	=
Business1	=
Merger Subsidiary	=
Target	=
Financial Advisor	=
Tax Return Advisor	=
Tax Director	=
Date1	=
Date2	=
Date3	=
Date4	=
Date5	=
Month 1	=
Taxable Year	=
$a	=

Dear :

This letter responds to a letter ruling request dated Date1, submitted by Parent on behalf of Taxpayer. Taxpayer requests an extension of time under sections 301.9100-1

and 301.9100-3 of the Procedure and Administration Regulations to make a late election concerning the treatment of success-based fees in accordance with Rev. Proc. 2011-29, 2011-1 C.B. 746, which requires that a statement be attached to Taxpayer's original federal income tax return for Taxable Year.

FACTS

Parent is the common parent of Taxpayer, an affiliated group of corporations that files a consolidated U.S. federal income tax return. Parent is the parent of Acquirer. Taxpayer is engaged in the business of Business1. Taxpayer uses an overall accrual method of accounting and has a calendar year end.

On Date2, Parent, Acquirer, and Merger Subsidiary, a wholly-owned subsidiary of Acquirer, entered into an agreement and plan of merger with Target. Pursuant to this agreement, Merger Subsidiary merged with and into Target on Date3. For federal income tax purposes, the transaction was treated as a direct taxable purchase of stock of Target by Acquirer. Immediately after the transaction, Acquirer and Target were related within the meaning of section 267(b) of the Internal Revenue Code (Code), and Target became a member of Taxpayer. Taxpayer represents that the transaction qualifies as a covered transaction under section 1.263(a)-5(e)(3)(ii) of the Income Tax Regulations (Regulations).

Taxpayer engaged Financial Adviser for services performed in the process of investigating or otherwise pursuing the transaction. The fee for Financial Adviser's services included a success-based fee of $a that was contingent upon the successful closing of the transaction. The success-based fee was incurred during Taxable Year.

Tax Director, Parent's former Director of Domestic Compliance, supervised the preparation of Taxpayer's consolidated U.S. federal income tax return for Taxable Year. In addition, Taxpayer engaged Tax Return Adviser to provide advisory services related to its consolidated U.S. federal income tax return for Taxable Year. As part of these services, Tax Return Adviser reviewed and approved Taxpayer's analysis applying the safe harbor set forth in Rev. Proc. 2011-29 to the success-based fee incurred during Taxable Year. On its timely-filed consolidated U.S. federal income tax return for Taxable Year, Taxpayer deducted 70% of Financial Adviser's success-based fee and capitalized the remaining 30%, consistent with the safe harbor election in Rev. Proc. 2011-29. However, due to mere oversight, Tax Director unintentionally failed to attach a statement making the election to Taxpayer's consolidated U.S. federal income tax return for Taxable Year, as required by Rev. Proc. 2011-29.

In Month 1, Parent's Senior Director of Mergers & Acquisitions asked Tax Director to verify the amount taken as a deduction as a result of the election on Taxpayer's consolidated U.S. federal income tax return for Taxable Year. While verifying this amount, Tax Director discovered that the election statement had been omitted, and

informed Parent. Parent requested Tax Return Adviser commence preparation of this request.

The period of limitation on assessment under section 6501(a) for Taxable Year has not expired. On Date4, Parent on behalf of Taxpayer executed a Form 872, Consent to Extend the Time to Assess Tax, with the Internal Revenue Service to extend the period of limitation on assessment for Taxable Year until Date5.

LAW

Section 263(a) of the Code provides generally that no deduction is allowed for any amount paid out for new buildings or for permanent improvements or betterments made to increase the value of any property or estate or any amount expended in restoring property or in making good the exhaustion thereof for which an allowance is or has been made.

Section 1.263(a)-1(d)(3) of the Regulations provides that no deduction is allowed for an amount paid to acquire or create an intangible, which under sections 1.263(a)-4(c)(1)(i) and 1.263(a)-4(d)(2)(i)(A) includes an ownership interest in a corporation or other entity. See also section 1.263(a)-4(a).

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. See INDOPCO, Inc. v. Commissioner, 503 U.S. 79, 89-90 (1992); Woodward v. Commissioner, 397 U.S. 572, 575-576 (1970).

Under section 1.263(a)-5, a taxpayer must capitalize an amount paid to facilitate a business acquisition or reorganization transaction described in section 1.263(a)-5(a). In general, an amount is paid to facilitate a transaction described in section 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 section 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 states that the IRS would not challenge a taxpayer's allocation of a success-based fee between activities that facilitate a transaction described in section 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.

It is this last requirement that Taxpayer requests permission to accomplish with this ruling request. Taxpayer requests permission with this ruling request to attach the statement required by section 4.01(3) of Rev. Proc. 2011-29 to its return, by amending its original filed return and superseding it with a return with the proper election statement completed and attached.

Section 3 of Rev. Proc. 2011-29 provides that the revenue procedure applies to covered transactions described in section 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 section 267(b) or section 707(b); or

(iii) A reorganization described in section 368(a)(1)(A), (B), or (C) or a reorganization described in section 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 section 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 section 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 section 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 section 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 section 6662 at the time the taxpayer requests relief (taking into account section 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 section 6501(a) before the taxpayer's receipt of a ruling granting relief under this section.

ANALYSIS

Taxpayer's election is a regulatory election, as defined under section 301.9100-1(b), because the due date of the election is prescribed in the Regulations under section 1.263(a)-5(f). The Commissioner has the authority under sections 301.9100-1 and 301.9100-3 to grant an extension of time to file a late regulatory election.

The information and representations submitted by Taxpayer establish that Taxpayer has acted reasonably and in good faith under sections 301.9100-3(b)(1) and (2). Taxpayer requested relief before the failure to properly make the regulatory election was discovered by the Service. Additionally, Taxpayer reasonably relied on Tax Director, a qualified tax professional, to properly prepare its federal income tax return for Taxable Year, and the tax professional inadvertently failed to attach the election statement to the tax return.

Moreover, the information and representations submitted by Taxpayer demonstrate that none of the circumstances listed in section 301.9100-3(b)(3) apply, and thus, Taxpayer will not be deemed to have not acted reasonably and in good faith. Taxpayer is not seeking to alter a return position for which an accuracy-related penalty has been or could be imposed under section 6662 at the time of this request for relief. It is not the case that Taxpayer was informed in all material aspects of the election and related tax consequences but chose not to file the election. Taxpayer's decision to seek relief did not involve hindsight, and no specific facts have changed since the due date for filing

the election that make the election advantageous to Taxpayer had the election been timely made.

Based on the facts of the case Taxpayer provided, granting an extension of time to file the election will not prejudice the interests of the government under section 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 period of limitations on assessment under section 6501(a) has not closed for the taxable year in which the election should have been made or any taxable years that would be affected by the election had it been timely made.

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 sections 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 an amended tax return for Taxable Year electing safe harbor treatment of its success-based fees under section 4.01(3) of Rev. Proc. 2011-29. The amended return must include an election statement stating that Taxpayer is electing the safe harbor for success-based fees, identifying the transaction, 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 the 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. 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 section 6110 of the Code.

Sincerely,

Brinton T. Warren
Chief, Branch 3
Office of the Associate Chief Counsel
(Income Tax & Accounting)

Enclosure: Copy of the letter for section 6110 purposes