Internal Revenue Service

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Attn:

Department of the Treasury
Washington, DC 20224

Third Party Communication: None
Date of Communication: Not Applicable

Person To Contact:
, ID No.

Telephone Number:

Refer Reply To:
CC:ITA:B02
PLR-128438-19

Date:
May 29, 2020

Taxpayer	=
State1	=
State2	=
A	=
B	=
C	=
D	=
E	=
U	=
V	=
W	=
X	=
Y	=
x	=
y	=
Business	=

Date1	=
Date2	=
Date3	=
Date4	=
Date5	=
Date6	=
Date7	=
$a	=
$b	=
$c	=
$d	=
$e	=

Dear ,

This letter responds to a letter ruling request dated Date1, submitted on behalf of Taxpayer. Taxpayer requests an extension of time under §§ 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 short taxable year ending Date6.

FACTS

Taxpayer represents the following:

Taxpayer is a corporation formed in Date2 under the laws of State1. Taxpayer's trade or business is Business. Prior to the transaction described below, x shares of Taxpayer were owned by C and y shares of Taxpayer were owned by D, a State1 non-profit corporation doing business as E (together "Sellers").

U is a disregarded entity formed under the laws of State2. U is wholly owned by V, another disregarded entity formed under the laws of State2. V is wholly owned by W, classified as a foreign partnership for U.S. federal income tax purposes. W is mainly owned by entities affiliated with X, a private equity firm.

On Date4, a merger agreement was executed by Taxpayer, Sellers, and U and Y, as buyers. The transaction closed on Date3, on which date Taxpayer merged with Y, with Taxpayer surviving. Following the transaction, U is the owner of all the shares of Taxpayer. The taxpayer represents that this transaction is a covered transaction under §1.263(a)-5(e)(3) of the Income Tax Regulations.

Pursuant to an engagement letter dated Date5, Taxpayer engaged A to provide financial advisory and investment banking services in conjunction with a potential sale or other transaction associated with any portion of the business, assets, or equity interests of Taxpayer. Under the agreement, A would provide its services to Taxpayer and Taxpayer would pay a flat fee of $a contingent upon the consummation of a transaction between Taxpayer and X, or any affiliate of X. Regardless of whether any transaction was consummated, Taxpayer would also reimburse A for its reasonable and reasonably documented out-of-pocket expenses incurred from time to time in connection with its services. Pursuant to the engagement, the amount of the success-based fee payable to A at the time of closing was $a.

Taxpayer engaged B to prepare and file electronically its federal and state tax returns. B prepared a Form 1120, *U.S. Corporation Income Tax Return*, for the short taxable year ending Date6. Taxpayer also engaged B to prepare a transaction cost analysis with respect to costs it incurred in conjunction with the transaction. B determined that $b of fees paid by Taxpayer to A ($a flat fee plus $c in out of pocket expenses) constituted success-based fees subject to the safe-harbor election provided for in Rev. Proc. 2011-29. In its final report on the transaction costs, B included a draft election statement setting forth the total amount of the success-based fees, ($b) the portion of the fees to be deducted ($d), and the portion of the fees to be capitalized ($e).[1] B discussed the safe-harbor election with Taxpayer, who agreed to make the election.

Taxpayer's Form 1120 for the short taxable year ending Date6 reflected the amounts to be deducted ($d) and to be capitalized ($e) as if the election had been made. However, the statement required by Rev. Proc. 2011-29 was not included with the return when it was provided to Taxpayer for review prior to filing. The Taxpayer's Form 1120 for the short taxable year ending Date6 was electronically filed, pursuant to extension on Date7 without the required statement attached.

Subsequent to the filing of the return, B noticed that the election statement required under Rev. Proc. 2011-29 was not included with the return when it was filed. Upon notification of the omission and receiving a recommendation that Taxpayer make this request, Taxpayer filed this request for an extension of time to make an election concerning the treatment of success-based fees in accordance with Rev. Proc. 2011-29.

LAW AND ANALYSIS

Section 263(a)(1) of the Internal Revenue Code 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

[1] Taxpayer has represented that the proper amount of success-based fees was $a, and that it should have applied the percentages in Rev. Proc. 2011-29 to $a to determine the fees to be deducted and to be capitalized.

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. 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.

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.

Section 4.01 of Rev. Proc. 2011-29 provides a safe harbor election for taxpayers that pay or incur success-based fees for services performed in the process of investigating or otherwise pursuing a covered transaction described in § 1.263(a)-5(e)(3). In lieu of maintaining the documentation required by § 1.263(a)-5(f), a taxpayer may elect to allocate a success-based fee between activities that facilitate the transaction and activities that do not facilitate the transaction by treating 70 percent of the amount of the success-based fee as an amount that does not facilitate the transaction and by capitalizing the remaining 30 percent as an amount that does facilitate the transaction. In addition, 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, stating that the taxpayer is electing the safe harbor, identifying the transaction, and stating the success-based fee amounts that are deducted and capitalized in accordance with 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.

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 (other than automatic changes covered under § 301.9100-2) 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 that granting relief will not prejudice the interests of the Government.

Section 301.9100-3(b)(1) provides 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, 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 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 could be imposed under § 6662 at the time the taxpayer requests relief and the new position requires 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. The interests of the Government are prejudiced if: (1) granting relief would result in a 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; or (2) 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). 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, 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, for the short taxable year ending Date6. Per Taxpayer's representation, the amount of the success-based fee is $a, and the percentages in Rev. Proc. 2011-29 will be applied to that amount.

CAVEATS

This ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) provides that it may not be used or cited as precedent.

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. 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 federal income tax consequences of any aspect of any transaction or item discussed or referenced in this ruling including Taxpayer's classification of its costs as success-based fees or whether Taxpayer's transaction was within the scope of Rev. Proc. 2011-29.

In accordance with the Power of Attorney on file with this office, copies of this letter are being sent to your authorized representatives.

A copy of this ruling should be attached to any income tax return to which it is relevant. Alternatively, taxpayers filing 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,

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Amy S. Wei
Senior Counsel, Branch 2
Office of Associate Chief Counsel
(Income Tax and Accounting)

cc: