**Internal Revenue Service**

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Department of the Treasury
Washington, DC 20224

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Refer Reply To:
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Date:
March 22, 2022

| | |
|---|---|
| Taxpayer | = |
| Sub 1 | = |
| Sub 2 | = |
| Parent | = |
| Tax Year | = |
| $a | = |
| $b | = |
| Financial Advisor 1 | = |
| Financial Advisor 2 | = |
| Firm | = |
| Date 1 | = |
| Date 2 | = |
| Date 3 | = |
| Date 4 | = |
| Date 5 | = |

Dear :

This letter responds to your letter ruling request dated Date 1 submitted on behalf of Taxpayer. Taxpayer requests a ruling under Treas. Reg. §§ 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations to grant it an extension of time to make a late election with respect success-based fees described under Rev. Proc. 2011-29, 2011-1 C.B. 746, which requires that a statement be attached to a taxpayer's original Federal income tax return for the taxable year of election.

**Facts**

Sub 1 is a US Corporation and wholly owned subsidiary of Sub 2 and member of the Parent.

On Date 2, Sub 1 acquired all the outstanding stock of Taxpayer in a taxable transaction ("Transaction"). Effective Date 3, Taxpayer and its wholly owned US corporations became includable corporations in Parent's US federal consolidated tax return. In connection with the Transaction, Taxpayer incurred $a of success-based fees for services performed in the process of investigation or otherwise pursuing the Transaction.

Taxpayer engaged Financial Advisor 1 to assist in soliciting and evaluating proposals from potential counterparties, as well as analyzing, structuring, and negotiating the financial aspects of the Transaction. In connection with those services, Taxpayer agreed to pay Financial Advisor 1 a percentage of the Transaction value, contingent upon the consummation of the Transaction. Taxpayer deducted 70% of the $b contingent fee on their Tax Year short period return and capitalized the remaining 30% of that fee on that return. Taxpayer also engaged Financial Advisor 2 to provide financial advisory services consisting of due diligence, transaction negotiations, financial advisory, and the preparation of fairness opinions with respect to the Transaction. Taxpayer agreed to pay Financial Advisor 2 a fee equal to a percentage of the aggregate consideration paid to acquire Taxpayer if the Transaction was consummated. However, under the agreement with Financial Advisor 2, the percentage fee calculated was reduced by non-contingent amounts paid by Taxpayer to Financial Advisor 2 for fairness opinions that Taxpayer was required to pay whether the Transaction was consummated or not. The net contingent amount (less the non-contingent fairness opinion fees) was treated as success-based fees by Taxpayer, with 70% being deducted and 30% being capitalized on Taxpayer's short period return.

Following the Transaction, Taxpayer's and Parent's combined tax departments had the responsibility of tax compliance for Taxpayer's Tax Year returns. Taxpayer engaged Firm to review its Federal income tax return for Tax Year. Parent also engaged Firm to perform an analysis of the transaction costs, including success-based fees incurred by Taxpayer in association with the Transaction. A draft schedule prepared by Firm for Taxpayer set forth the success-based fees, including the portions that were deductible and capitalizable for Financial Advisor 1 and Financial Advisor 2. Internal memos also evidence Taxpayer's intent to make the election. Taxpayer intended to make the election timely, and, except for the inclusion of the election statement, the return was completed consistent with the election being made. On Date 4, Taxpayer filed its Federal income tax return that reported success-based fees in accordance with Rev. Proc. 2011-29. However, due to an inadvertent oversight by Taxpayer's internal and external tax professionals, the election statement was not included with the filed return, and as such, a proper Rev Proc. 2011-29 safe-harbor election was not made.

On Date 5, in preparing Federal income tax return information for Sub 1, Firm noticed the omission of the statement regarding success-based fees on Taxpayer's earlier filed

return. This was discovered prior to any discovery by the Internal Revenue Service. Taxpayer then submitted its request for this ruling on Date 1.

As part of its request for an extension of time to file the election statement, Taxpayer submitted detailed affidavits from individuals having knowledge or information about the events that led to the failure to attach the required election statement to Taxpayer's tax return as well as regarding the discovery of that failure.

**Law & Analysis**

Section 263(a)(1) of the Internal Revenue Code and § 1.263(a)-2(a) of the Income Tax Regulations 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(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 Internal Revenue Service (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 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)(ii).

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 301.9100-1(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 301.9100-1(c) provides that the Commissioner, in exercising his discretion, may grant a reasonable extension of time under the rules set forth in § 301.9100-3 to make a regulatory election under all subtitles of the Internal Revenue Code except subtitles E, G, H, and I.

Section 301.9100-2 provides automatic extensions of time for making certain elections. Section 301.9100-3 sets forth extensions of time for making elections that do not meet the requirements of § 301.9100-2.

Section 301.9100-3(a) provides that requests for relief under this section 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, in general, that 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 (taking into account the taxpayer's experience and the complexity of the return at issue), 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.

Section 301.9100-3(b)(3) provides that a taxpayer will be 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 § 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 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 (taking into account the time value of money). 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.

Taxpayer represents that, for federal income tax purposes, the Transaction was a taxable acquisition of Taxpayer by Parent. Taxpayer further represents that, upon the closing of the Transaction, Taxpayer and Parent were related within the meaning of § 267(b). Accordingly, Taxpayer represents that the Transaction is a covered transaction described in § 1.263(a)-5(e)(3)(ii).

The election Taxpayer seeks to make is a regulatory election, as defined in § 301.9100-1(b), because the due date of the election is prescribed by Rev. Proc. 2011-29. 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.

Taxpayer is requesting permission with this ruling request to attach the election statement to its Tax Year tax return, by amending its original filed return and superseding it with a return with the proper election statement completed and attached. Taxpayer represents that it intended to take advantage of the safe harbor provisions of Rev. Proc. 2011-29, filed its return for Tax Year reflecting those provisions, but failed to include the required election statement. Taxpayer is not using hindsight in requesting relief.

Taxpayer represents that the return for the taxable year is not under examination and that the failure to file the election statement was not discovered by the Service. Thus, under § 301.9100-3(b)(1)(i), Taxpayer will be deemed to have acted reasonably and in good faith. Taxpayer also represents that none of the circumstances listed in § 301.9100-3(b)(3) apply.

Section 2.04 of Rev. Proc. 2011-29 provides that a taxpayer's method for determining the portion of a success-based fee that facilitates a transaction and the portion that does not facilitate a transaction is a method of accounting under § 446. Regulatory

elections, relating to methods of accounting, are subject to special rules. § 301.9100-3(c)(2). However, Taxpayer is not seeking to change its method of accounting for the success-based fees, only to file the election statement required by section 4.01(3) of Rev. Proc. 2011-29.

Further, based on the facts represented by Taxpayer, granting an extension will not prejudice the interests of the Government.

**Conclusion**

Based upon our analysis of the facts as represented, 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 Treas. Reg. §§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 safe harbor for success-based fees, identifying the transaction, and stating the success-based fee amounts that are deducted and capitalized.

The ruling contained in this 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 or implied as to whether Taxpayer properly included the correct costs as its success-based fees subject to the election, or whether the Transaction is 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 letter must be attached to any income tax return to which it is relevant. 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.

Sincerely yours,

Patrick White
Senior Counsel, Branch 1
Office of Associate Chief Counsel
(Income Tax and Accounting)

cc: