Internal Revenue Service

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Department of the Treasury
Washington, DC 20224

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Person To Contact:
, ID No.

Telephone Number:

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Date:
March 31, 2015

Taxpayer =
Taxable Year =
X =

Y =

Acquirer =
Merger Sub =
Date =
Firm =
Advisor =

Dear :

This letter responds to your letter dated December 3, 2014, submitted on behalf of Taxpayer requesting an extension of time under §§ 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations to make the election described in Section 4 of Rev. Proc. 2011-29, 2011-18 I.R.B. 746, which includes attaching statements to Taxpayer's original federal income tax return for Taxable Year.

FACTS

Taxpayer is the wholly-owned subsidiary of Acquirer, the common parent of a consolidated group engaged in the business of X. Taxpayer is engaged in the business of Y and uses the cash method of accounting.

On Date, Acquirer acquired 100% of the stock of Taxpayer through the merger of Merger Sub with and into Taxpayer, with Taxpayer surviving as a wholly-owned

subsidiary of Acquirer. The separate corporate existence of Merger Sub ceased, and Taxpayer continued thereafter as the surviving entity of the merger as a wholly-owned subsidiary of Acquirer. For federal income tax purposes, Taxpayer treated the transaction as a taxable stock acquisition under § 1001 of the Internal Revenue Code in which Acquirer obtained a § 1012 cost basis in the acquired stock. The Taxpayer disregarded the existence of Merger Sub and its merger into Taxpayer and treated the acquisition as if Acquirer purchased Taxpayer stock directly in a taxable acquisition. *See, e.g.,* Rev. Rul. 90-95, 1990-2 C.B. 67. In connection with this acquisition, Taxpayer incurred success-based fees payable to Firm, its financial banking investment advisor.

On Taxpayer's original federal income tax return for Taxable Year prepared by Advisor, Taxpayer properly attached the mandatory statements as required by Section 4.01 of Revenue Procedure 2011-29, stating that it elected the safe harbor for success-based fees, identifying the transaction, and setting forth the success-based fee amounts that are deducted and capitalized. However, in reliance on Advisor, Taxpayer did not properly reflect the amount of success-based fees incurred.

LAW

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, 112 S. Ct. 1039, 117 L. Ed. 2d 226 (1992); *Woodward v. Commissioner*, 397 U.S. 572, 575-576, 90 S. Ct. 1302, 25 L. Ed. 2d 577 (1970).

Under § 1.263(a)-5, a taxpayer must capitalize an amount paid to facilitate the business acquisition or reorganization transactions 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. 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) (i.e., a success-based fee) is presumed to facilitate the transaction. 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.

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 and 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.

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.

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 301.9100-3(a) provides that requests for relief 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. See also § 301.9100-3(b) and (c).

CONCLUSION

Based solely on the facts and representations submitted, 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 45 days from the date of this ruling to file an amended return to properly capitalize and deduct success-based fees related to the acquisition consistent with the election made under Revenue Procedure 2011-29. Taxpayer also has 45 days from the date of this ruling to file amended mandatory statements as required by Section 4.01 of Revenue Procedure 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 rulings contained in this letter are based upon information and representations submitted by Taxpayer and accompanied by a penalty of perjury statement executed by an appropriate party. 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, including whether Taxpayer properly included the correct costs as success-based fees subject to the retroactive election, or whether Taxpayer's transactions were within the scope of Rev. Proc. 2011-29.

This ruling does not express or imply any opinion whether Taxpayer's acquisition is within the scope of Rev. Rul. 90-95. Moreover, this ruling does not express or imply any opinion concerning whether Taxpayer appropriately reported on Acquirer's consolidated return for Taxable Year the success-based fees that Taxpayer incurred, as opposed to Taxpayer reporting those success-based fees on its return for the short taxable year ending at the close of Date.

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 should be attached to Taxpayer's federal 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 provisions of the power of attorney currently on file with this office, a copy of this letter is being sent to your authorized representative.

Sincerely,

Lewis K Brickates
Chief, Branch 1
Office of Associate Chief Counsel
(Income Tax & Accounting)

cc: