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:B02
PLR-122450-16
Date: January 5, 2017

In Re:

c/o Designated Substitute Agent

Dear :

TY:

Legend

Taxpayer =
A=
B=
C=
D=
E=
F=
G=
Financial Advisor=
First Tax Advisor=
Second Tax Advisor=
Financial Auditor=
Senior Tax Manager=
Partner=
Date1=
Date2=
Date3=
Date4=
a=
Year1=

Summary Report=

This is in response to a letter dated Date1, requesting an extension of time to file the required election statement to make a 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 short 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 was a prior to merging out of existence in conjunction with the transaction described below. Taxpayer's main operating subsidiary was A (now known as B), which provides .

On Date 2, Taxpayer and its subsidiaries were purchased by C (the Transaction). In conjunction with the Transaction, Taxpayer and three of its subsidiaries, D, E, and A, converted from state-law corporations to limited liability companies. Taxpayer merged with its subsidiary, F, with F surviving. F then merged with its subsidiary G, with G surviving.

Taxpayer engaged Financial Advisor to provide it with financial advisory services with respect to the Transaction. These services included general business and financial analyses, transaction feasibility analysis, company valuation, and advice on opportunities to sell the company. Taxpayer paid Financial Advisor $a for the services, payment of which was contingent upon the closing of the transaction.

Following the Transaction's closing, First Tax Advisor prepared a transaction costs analysis of the various fees and services associated with C's purchase of Taxpayer. First Tax Advisor identified the fees paid to Financial Advisor as success-based fees qualifying for safe harbor treatment for allocating success-based fees under Rev. Proc. 2011-29.

In addition, First Tax Advisor prepared a Summary Report summarizing the income tax treatment of various transaction costs incurred by Taxpayer. The Summary Report included the $a in fees paid to Financial Advisor and broke them down into deductible and capitalizable portions. The amounts reflected under each portion corresponded to 70 percent and 30 percent of the total fees paid to Financial Advisor, thus reflecting application of the safe harbor treatment under Rev. Proc. 2011-29. However, the Summary Report did not specifically identify these fees as success-based fees qualifying for treatment under Rev. Proc. 2011-29 and did not mention the election under the revenue procedure.

A performed all tax-related tasks for the entities in the Taxpayer consolidated group. A also engaged Second Tax Advisor to prepare the Taxpayer consolidated group's Form 1120, *U.S. Corporation Income Tax Return*, for the Year1 taxable year, as well as for the short taxable year ending Date2, the date the Transaction closed. During the course of preparing the return, Second Tax Advisor was provided with the Summary Report prepared by First Tax Advisor, but did not receive the full transactions costs analysis prepared by First Tax Advisor. The Summary Report included all transaction costs incurred by Taxpayer, not just those paid to Financial Advisor. As noted above, the Summary Report did not specifically identify the fees as success-based fees or reference the safe-harbor election provided by Rev. Proc. 2011-29 despite the fact that the fees paid to Financial Advisor were allocated between deductible and capitalizable amounts, reflecting 70 percent and 30 percent, as provided under section 4.01 of the revenue procedure. Because Second Tax Advisor was not provided with a copy of the full transaction costs analysis report prepared by First Tax Advisor, Second Tax Advisor did not identify the fees paid to Financial Advisor as success-based fees qualifying for treatment under Rev. Proc. 2011-29.

The Form 1120 for the short taxable year ending Date2 was prepared by Second Tax Advisor and incorporated the information provided by Taxpayer in the Summary Report prepared by First Tax Advisor. Several drafts of the return were provided to the Senior Tax Manager at A, and the other members of the tax team, for review. The issue of the treatment of the success-based fees paid to Financial Advisor did not arise during the course of the return preparation and review process. Although the Form 1120 filed for the short taxable year ending Date2 allocated the success-based fees as permitted under Rev. Proc. 2011-29, the election statement required by section 4.01(3) of the revenue procedure to make the election was not included with the return.

During the review of Taxpayer's financial statements for the short taxable year ended Date2, its auditors at Financial Auditor inquired about the election for success-based fees under Rev. Proc. 2011-29. The auditor at Financial Auditor raised the issue with the Senior Tax Manager at A, noting that no election statement was included with the return. The Senior Tax Manager at A then contacted Partner at Second Tax Advisor, on Date3, to discuss whether relief was available to file the required election statement. Upon being advised that such relief was available, it was determined to submit the instant request under Treas. Reg. §§ 301.9100-1 and 301.9100-3.

The Form 1120 of Taxpayer, for the short taxable year ending Date2, was electronically filed, pursuant to extension, on Date4. The Form 1120 for that year is not currently under examination by the Internal Revenue Service (Service). Taxpayer has not received any other notification from the Service indicating that the Service discovered that Taxpayer did not make the election relating to the success-based fees discussed herein on its federal income tax return for the short taxable year ending Date2.

LAW

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 70 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 section 4.01(3) of Rev. Proc. 2011-29 to its return by amending its original filed return for the short taxable 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 file the statement required under section 4.01(3) of Rev. Proc. 2011-29 stating that it is electing the safe harbor treatment for success-based fees, identifying the transaction, and stating the success-based fee amounts that are deducted and capitalized for the short taxable year ending Date2.

CAVEATS

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 yours,

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NORMA ROTUNNO
Senior Technician Reviewer, Branch 2
Office of Associate Chief Counsel
(Income Tax & Accounting)

Enclosure:

Copy for § 6110 purposes