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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ID No.

Telephone Number:

Refer Reply To:
CC:ITA:B02
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Date: May 4, 2017

TY:

Legend

Taxpayer =
Taxpayer's Subsidiary =
Equity Firm =
City =
Country =
Holding Company =
Sellers' Representative =
Merger Subsidiary =
State Secretary =
Spreadsheet =
President and CEO =
Senior Director =

Financial Advisor =
CPA =
Tax Advisor Firm =
Agreement=

Date1 =
Date2 =
Date3 =
Date4 =
Date5 =
Date6 =
Date7 =
Date8 =
Month =
Year =
$a =
$b =
Taxable Year =

Dear :

This responds to the letter of Date1, filed on your behalf by your authorized representative. In the letter, you requested an extension to time to a make a safe harbor election under Rev. Proc. 2011-29, 2011-18 I.R.B. 746, to allocate success-based fees between facilitative and non-facilitative amounts for a covered transaction for Taxpayer's Taxable Year. The 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:

1. Statement of Taxpayer's Business Operations and Ownership Structure

Taxpayer wholly owns Taxpayer Subsidiary located in City, Country. Prior to the transaction described below, the shares of Taxpayer were primarily held by Equity Firm.

2. Facts Relating to the Request for Relief

   a. The Transaction

On Date2, the Agreement was executed by Taxpayer, certain of its stockholders and option-holders, Holding Corporation, Merger Subsidiary, and Sellers' Representative.

Pursuant to the terms of the Agreement, Holding Corporation remitted the merger consideration to the Sellers' Representative in exchange for the extinguishment of all of Taxpayer's outstanding shares and options. Buyer also remitted separate funds to pay the Taxpayer's outstanding liabilities, including Taxpayer's transaction costs. Taxpayer's transaction costs were not considered part of the merger consideration and were not remitted to the Sellers' Representative. The Sellers' Representative deducted all of the shareholders' and option holders' transaction costs from the merger consideration and distributed the remainder to the Taxpayer's shareholders and option holders pro rata. To effect the transaction, Holding Company formed Merger Subsidiary into which Taxpayer merged. The transaction closed on Date3, and on that date the Certificate of Merger of Taxpayer and Merger Subsidiary was filed with the State Secretary.

Pursuant to an engagement letter of Date4, Taxpayer engaged Financial Advisor to provide financial advisory services in conjunction with a potential sale of Taxpayer. The Engagement Letter set forth a schedule of fees to be paid to Financial Advisor contingent upon a successful sale of Taxpayer. As set forth in the engagement letter, the success-based fees to be paid to Financial Advisor were in no case to be lower than $a. In fact, the fee paid to Financial Advisor at the time of closing was $b. The amount of the fee paid to Financial Advisor was included in the Spreadsheet dated, Date5. This document reflected the amount of consideration paid with respect to the Transaction, as well as associated expenses.

b. Preparation of Form 1120 for Taxpayer and Discovery of the Missed Election

Taxpayer did not have its own internal tax department so it hired outside advisor, CPA. Taxpayer relied on CPA for tax return preparation. Pursuant to their engagement, CPA would prepare Taxpayer's Forms 1120, U.S. Corporation Income Tax Return, and following review, President and CEO would sign the returns. Consistent with this arrangement, a final stand-alone Form 1120 was prepared by CPA for Taxpayer's short taxable year ending on Date3. The terms of the merger agreement provided that drafts of all pre-closing period tax returns were to be delivered to Holding Company for its review and approval at least thirty days prior to the due date of any of the returns. The final Taxpayer's return would be filed only after it had been reviewed by Holding Company.

However, Taxpayer's Form 1120 for Taxable Year was filed on Date6 without being reviewed by Holding Company. While preparing the Form 1120 for Holding Company for its taxable year ending Date7 (the year in which the Transaction occurred) the Senior Director at Holding Company requested information from CPA regarding the Taxable Year return for Taxpayer. On Date8, the President and CEO of Taxpayer responded by forwarding certain correspondence from CPA regarding the transaction

costs and merger consideration. With respect to the merger consideration document, CPA identified the success-based fees paid to Financial Advisor, but noted that he deemed the safe harbor success- based fee deduction under Rev. Proc. 2011-29 not applicable because the fees were remitted out of the closing proceeds. CPA did not provide any additional advice with respect to making the safe harbor election to allocate success-based fees. Taxpayer relied on CPA and the success-based fees were not accounted for on Taxpayer's final Form 1120.

The success-based fees paid to Financial Advisor were an obligation of Taxpayer as reflected in the engagement letter Taxpayer executed with Financial Advisor. The costs were recorded as a liability on the books of Taxpayer, and the Agreement provided that the success-based fees would not be considered part of the merger consideration paid to Taxpayer's shareholders and option holders in exchange for the extinguishment of all of the outstanding shares and options. After reviewing all the documents CPA sent to Senior Director, Senior Director believed that Taxpayer was eligible to make the safe harbor election under Rev. Proc. 2011-29. In that regard, Senior Director consulted with Tax Advisor Firm in Month and Year to consider whether relief was available to make the safe harbor election out of time. Upon being advised that such relief was available, Taxpayer submitted this relief request in accordance with §§ 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations.

Taxpayer's Form 1120, for Taxable Year ending Date3, was electronically filed pursuant to extension, on Date6. The Form 1120 for that year is not currently under examination by the Internal Revenue Service.

Accordingly, Taxpayer is requesting an extension of time to make a safe harbor election under Rev. Proc. 2011-29, to allocate success-based fees between facilitative and non-facilitative amounts for Taxpayer's transaction.

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.

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 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) (costs that must be capitalized) and activities that do not facilitate the transaction (costs that may be deductible) if the taxpayer does three things. First, the taxpayer must treat 70 percent of the amount of the success-based fee as an amount that does not facilitate the transaction and thus may be deducted. 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, stating that the taxpayer is electing the safe harbor, identifying the transaction, and stating the success-based fee amounts that are deducted (treated as not facilitating the transaction) and capitalized (treated as facilitating the transaction).

Sections 301.9100-1 through 301.9100-3 of the Procedure and Administration Regulations 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 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.

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.

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.

In the present situation, Taxpayer has satisfied the requirements of §§ 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations. The information and representations made by Taxpayer establish that it acted reasonably and in good faith. The affidavits presented show that Taxpayer reasonably relied on qualified tax professionals for the proper filing of Taxpayer’s federal return including the safe harbor election for success-based fees under Rev. Proc. 2011-29. Taxpayer represents that CPA‘s failure to make the safe harbor election on behalf of Taxpayer on Taxpayer’s return was a legal error. Upon discovery of the error, Taxpayer filed for relief before the government discovered the failure to properly make the regulatory election.

The information and representations presented establish that Taxpayer is not seeking to alter a return position for which an accuracy-related penalty had been or could be imposed under § 6662 at the time relief was requested. Taxpayer reasonably relied on

CPA to file its income tax return properly, but CPA did not think Taxpayer was entitled to use Rev. Proc. 2011-29 to account for the success-based fees. Senior Director, however, believes that Taxpayer is eligible for the safe harbor election in Rev. Proc. 2011-29. Furthermore, Taxpayer is not using hindsight in requesting relief, and no facts have changed since the time of the original filing deadline.

Finally, granting an extension will not prejudice the interests of the government. It is represented that Taxpayer would not have a lower tax liability in the aggregate for all taxable years affected by the safe harbor election under Rev Proc. 2011-29, if given permission to make the election at this time than Taxpayer would have had if the safe harbor election had been properly made by the original deadline for making the election. Taxpayer has represented that the taxable years that would have been affected by the election had it been timely made, are not closed by the period of limitations on assessment. Finally, the Taxpayer was not under audit by the IRS before Taxpayer filed for relief. Therefore, the granting of relief will not prejudice the government.

CONCLUSION:

Based upon our analysis of the facts as represented, 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 an amended return electing safe harbor treatment for its success-based fees under Rev. Proc. 2011-29.

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 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.

In accordance with the power of attorney on file with this office, a copy of this letter is being sent to your authorized representatives. Enclosed is a copy of the letter ruling showing the deletions proposed to be made in the letter when it is disclosed under § 6110 of the Code.

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.

This ruling is based upon 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.

Sincerely,

Bridget E. Tombul

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BRIDGET E. TOMBUL
Chief, Branch 2
Office of Associate Chief Counsel
(Income Tax & Accounting)

Enc: copy for § 6110 purposes