Internal Revenue Service

Number: **201809004**
Release Date: 3/2/2018

Index Number: 9100.00-00

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-121328-17

Date:
November 29, 2017

Legend

Taxpayer	=
Date1	=
Date 2	=
Date3	=
Date4	=
Date5	=
Date6	=
Date7	=
Acquirer	=
Shareholder	=
X	=

Y =

$a =

Tax Preparer =

Tax Preparer2 =

Accountant =

Dear :

This is in response to a letter dated Date1, requesting an extension of time to file a safe-harbor election under Rev. Proc. 2011-29, 2011-1 C.B. 746, to allocate success-based fees for 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 is a corporation that was the parent of an affiliated group of corporations that elected to file consolidated federal income tax returns until Date2. On Date2, Acquirer acquired with cash all of the outstanding stock of Taxpayer. The acquisition involved Acquirer, Taxpayer, and Shareholder, the sole shareholder of Taxpayer at the time of the acquisition. As a result of the acquisition, Acquirer became the new parent corporation and Taxpayer's consolidated group terminated; however, the subsidiaries of Taxpayer remained subsidiaries of Taxpayer following the acquisition.

Taxpayer paid fees to X to serve as a financial advisor in the process of investigating or otherwise pursuing the acquisition. Taxpayer also paid fees to Y to serve as a transaction advisor in the process of investigating or otherwise pursuing the acquisition. The fees paid to X and Y, totaling $a, are the fees that Taxpayer treats as success-based fees for purposes of this request. Taxpayer paid the fees at closing from the proceeds of the acquisition.

In preparing Taxpayer's tax return for the short taxable year ending Date2, Taxpayer advised Tax Preparer that Taxpayer decided to make the safe harbor election pursuant to Rev. Proc. 2011-29 to treat 70 percent of the success-based fees as amounts that do not facilitate the acquisition. The tax return, with an extension, was filed timely, and treated the success-based fees consistently with the making of an election under Rev.

Proc. 2011-29. However, Tax Preparer failed to attach the required election statement to Taxpayer's original federal tax return for the short taxable year ending Date2.

In Date3, Accountant, in performing a reconciliation of Taxpayer's taxable income to Taxpayer's financial reporting records, noticed that the required election statement under Rev. Proc. 2011-29 was not attached to Taxpayer's tax return for the short taxable year ending Date2. On Date4, Accountant contacted Tax Preparer2 of Tax Preparer to inquire about the safe harbor election statement; at this time, Tax Preparer realized that it failed to include the safe harbor election statement with Taxpayer's tax return for the short taxable year ending Date2.

On Date5, Tax Preparer2 contacted Taxpayer regarding the failure to include the safe harbor election statement with the Taxpayer's tax return for the short taxable year ending Date2 and recommended that Taxpayer file this request. On Date6, Taxpayer requested that Tax Preparer prepare this request for an extension of time to file the election statement required by Rev. Proc. 2011-29 under §§ 301.9100-1 and 301.9100-3.

Taxpayer represents that Taxpayer paid or incurred success-based fees of $a as defined by § 1.263(a)-5(f) of the Income Tax Regulations, and that the acquisition by Acquirer was a "covered transaction" as defined by Treas. Reg. § 1.263(a)-(5)(e)(3).

In a notice dated Date7, Taxpayer was notified by the Internal Revenue Service that its tax return for the short taxable year ending Date2 was selected for examination. At the time of the filing of this private letter ruling request, the examination had not yet begun. Taxpayer filed this request before the failure to make the election was discovered by the Internal Revenue Service.

LAW AND ANALYSIS:

Section 263(a)(1) of the Internal Revenue Code and Treas. Reg. § 1.263(a)-2(a) 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 Treas. Reg. § 1.263(a)-5, a taxpayer must capitalize an amount paid to facilitate a business acquisition or reorganization transaction described in Treas. Reg. § 1.263(a)-5(a). An amount is paid to facilitate a transaction described in Treas. Reg. § 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 Treas. Reg. § 1.263(a)-5(b)(1).

Treasury Regulation § 1.263(a)-5(f) provides that an amount that is contingent on the successful closing of a transaction described in Treas. Reg. § 1.263(a)-5(a) ("success-based fee") is presumed to facilitate the transaction, and, therefore, 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.

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 accounting for allocating success-based fees paid in business acquisitions or reorganizations described in Treas. Reg. § 1.263(a)-5(e)(3). In lieu of maintaining the documentation required by Treas. Reg. § 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 Treas. Reg. § 1.263(a)-5(e)(3) (costs that must be capitalized) and activities that do not facilitate the transaction (costs that may be deducted) if the taxpayer: (1) treats 70 percent of the amount of the success-based fee as an amount that does not facilitate the transaction and thus may be deducted; (2) capitalizes the remaining amount of the success-based fee as an amount which 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 pursuant to the safe harbor election.

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.

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 a safe harbor election for success-based fees under Rev. Proc. 2011-29 for its taxable year ending Date2.

The ruling contained in this letter is based on 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. In particular, no opinion is expressed as to Taxpayer's classification of its costs as success-based fees or whether the acquisition of Taxpayer by Acquirer 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 representative. We are also sending a copy of this letter to the appropriate operating division director.

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,

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

Enc: copy for § 6110 purposes

cc: