Internal Revenue Service

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Department of the Treasury
Washington, DC 20224

Third Party Communication: None
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Person To Contact:
, ID No.
Telephone Number:

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CC:ITA:B02
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Date:
August 23, 2019

Taxpayer	=
X	=
A	=
B	=
C	=
D	=
Amount 1	=
Amount 2	=
Year 1	=
Date 1	=
Date 2	=
Date 3	=
Date 4	=
Date 5	=
Date 6	=
Month	=

Dear :

This letter responds to your letter of Date 5, and supplemental correspondence of Date 6, 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, 2011-1 C.B. 746, which includes attaching a statement to Taxpayer's original federal income tax return for the taxable year ending Date 1.

FACTS

Taxpayer represents that the facts are as follows:

Taxpayer is the parent of a consolidated group, whose primary business is X. Taxpayer uses the accrual method of accounting and has a Month (52/53 week) fiscal year end.

On Date 2, Taxpayer completed the purchase of the stock of A. Taxpayer used its subsidiary, B, to purchase the shares of A.

In connection with its acquisition of A, Taxpayer entered into an agreement with C, where C provided financial advisory services in conjunction with Taxpayer's acquisition of A. Under this agreement, Taxpayer agreed to pay C Amount 1 for these services if the acquisition closed successfully. The acquisition closed successfully, and Taxpayer paid C Amount 2 for services rendered, including the Amount 1 described above.

Taxpayer had an internal tax department with approximately tax professionals, and it also hired D for general tax consulting and also to prepare Taxpayer's Year 1 Form 1120 tax return. Taxpayer's internal tax department prepared the tax computations for the Form 1120, and D reviewed the computations and prepared the return and any accompanying statements and disclosures. D filed Taxpayer's return electronically and signed it as the paid preparer. Taxpayer also hired D to prepare a transaction cost analysis ("TCA") with respect to costs Taxpayer incurred in conjunction with its acquisition of A. This TCA concluded that the fees paid to C were "success-based fees" under Rev. Proc. 2011-29, and that the fees were therefore eligible to be allocated under the safe harbor election contained therein, with 70 percent being deductible as non-facilitative and 30 percent required to be capitalized as facilitative. This TCA noted that an election statement was required to be attached to Taxpayer's Year 1 tax return to make this election. D discussed this TCA with Taxpayer's internal tax personnel. D gave the TCA to both Taxpayer's internal tax personnel and to the D personnel who were preparing Taxpayer's Year 1 return. D prepared Taxpayer's Year 1 return consistent with the making of a safe-harbor election under Rev. Proc. 2011-29, but the statement required by Rev. Proc. 2011-29 was not attached to the return. Therefore, the election was not made.

On Date 3, the IRS notified Taxpayer that it had selected Taxpayer's Year 1 return for examination. On Date 4, the IRS told Taxpayer representatives that it would issue a Notice of Proposed Adjustment disallowing Taxpayer's deduction of the fee it paid to C in connection with its acquisition of A because Taxpayer had not elected the safe harbor for allocating those fees under Rev. Proc. 2011-29. D advised Taxpayer to request this private letter ruling.

LAW

Section 263(a)(1) of the Internal Revenue Code and § 1.263(a)-2 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.

Section 1.263(a)-1(d)(3) provides that no deduction is allowed for an amount paid to acquire or create an intangible, which under §§ 1.263(a)-4(c)(1)(i) and 1.263(a)-4(d)(2)(i)(A) includes an ownership interest in a corporation or other entity.

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, 575-76, 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.

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. Section 4 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.

Taxpayer requests permission with this ruling for an extension of time to make the election under Rev. Proc. 2011-29 to treat 70 percent of its success-based fee as non-facilitative, and therefore deductible.

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 extensions of time for regulatory elections, other than those covered by §301.9100-2, 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)(v) provides that a taxpayer is deemed to have acted reasonably and in good faith if the taxpayer 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 not be considered to have 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. If specific facts have changed since the original deadline that make the election advantageous to a taxpayer, the IRS will not ordinarily grant relief.

Section 301.9100-3(c)(1) provides that the Commissioner will grant a reasonable extension of time to make a regulatory election only when the interests of the Government will not be prejudiced by the granting of relief. 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. 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 in any other setting, and the change would provide a more favorable method or more favorable terms and conditions than if the change were made as part of an examination, or provides a more favorable method of accounting or more favorable terms and conditions if the election is made by a certain date or taxable year.

RULING

Based upon our analysis of the facts, as represented by Taxpayer, 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 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 for its taxable year ending Date 1.

CAVEATS

The ruling contained in this letter is based upon information and representations submitted by Taxpayer and accompanied by a penalty of perjury statement executed by an appropriate party. This office has not verified any of the material submitted in support of the request for ruling, and it is all 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. No opinion is expressed as to the federal tax treatment of the transaction under any other provisions of the Internal Revenue Code and the Treasury Regulations that may be applicable or under any other general principles of federal income taxation. This letter ruling is only applicable to matters under our jurisdiction. See Rev. Proc. 2019-1, 2019-1 I.R.B. 1, 11, section 3.03. No opinion is expressed as to the tax treatment of any conditions existing at the time of, or effects resulting from, the

transaction that are not specifically covered by the above ruling. 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) provides that it may not be used or cited as precedent.

A copy of this ruling 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.

Enclosed is a copy of this letter ruling showing the deletions proposed to be made in the letter when it is disclosed under § 6110.

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.

Sincerely,

Bridget Tombul
Branch Chief, Branch 2
Office of Associate Chief Counsel
(Income Tax & Accounting)