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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:
January 17, 2020

Taxpayer	=
Date1	=
Date2	=
Date3	=
Date4	=
Date5	=
Date6	=
State	=
A	=
B	=
%a	=
C	=
D	=
E	=
F	=
Agreement	=
G	=
$a	=
$b	=
Firm	=
Individual A	=
$c	=
$d	=
Individual B	=

Dear :

This letter responds to your letter, dated June 22, 2019, 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 ended Date1.

FACTS

Taxpayer is a State limited partnership that was formed on Date2. Taxpayer is the sole owner of A, a State limited liability company disregarded for U.S. federal income tax purposes. A is the sole owner of B, another State limited liability company disregarded for U.S. federal income tax purposes. Taxpayer and its two subsidiaries were formed in conjunction with a transaction through which B acquired %a percent of the membership interests of C and D. C and D are the respective owners of E and F, which are leading broadband providers in their respective regions, with technologically advanced networks that offer a full suite of internet, video, and phone services.

On Date3, B entered into a Agreement with G and C, pursuant to which it acquired %a percent of the membership interests of C. Also on Date3, B entered into a Agreement to acquire %a percent of the membership interests of D. The combined consideration for the transactions was $a, and they closed on Date4.

In conjunction with the transactions involving the acquisitions described above, B engaged several organizations to provide financial advisory services. Each of these organizations provided financial advisory services for which fees were payable only upon the successful closing of the transaction. Hence, Taxpayer paid success-based fees in the total amount of $b to the organizations.

Taxpayer engaged Firm as its tax return preparer and also to prepare a transaction costs analysis with respect to costs Taxpayer incurred in conjunction with the acquisition of C and the assets of D. Firm concluded that the transaction costs paid by Taxpayer in the total amount of $b to the organizations that provided financial advisory services constituted success-based fees for purposes of the safe-harbor election provided by Rev. Proc. 2011-29.

Firm also provided a draft election statement with the transaction costs analysis noting that the amount of $b of the fees paid by Taxpayer would be subject to allocation under Rev. Proc. 2011-29. The draft election statement also showed the deductible portion (70 percent of the fees) and the capitalizable portion (30 percent of the fees). Firm discussed the transaction costs analysis with Individual A, on Date5, at which time Individual A indicated that the transaction costs analysis should be finalized.

Subsequently, Firm prepared Taxpayer's original federal income tax return for the taxable year ended Date1 relying on the transaction costs analysis by deducting 70 percent of the fees and capitalizing 30 percent of the fees, consistent with making the election under Rev. Proc. 2011-29. However, despite the intention of Taxpayer to make the election and the explicit indication in the transaction costs analysis that an election statement was required, the statement required by Rev. Proc. 2011-29 was inadvertently not included with the return that was provided to Taxpayer for review prior to filing. Individual B reviewed the return but, although aware of the intention to make

the election, Individual B did not notice that the election statement was not included with the Taxpayer's original federal income tax return for the taxable year ended Date1. Individual B signed the return, which was filed electronically, pursuant to extension, on Date6.

Subsequently, after the Taxpayer's original federal income tax return for the taxable year ended Date1 was filed, Firm realized that the safe harbor election statement was omitted inadvertently from the return as filed. Upon consultation by Firm, Taxpayer has filed this request for 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. Taxpayer's federal income tax return for the taxable year ended Date1 is not under examination by the Service.

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).

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 IRS; (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 IRS; 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.

Taxpayer's election is a regulatory election as defined in § 301.9100-1(b) because the due date of the election is prescribed in section 4.01(3) of Rev. Proc. 2011-29. 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.

Section 2.04 of Rev. Proc. 2011-29 provides that a taxpayer's method for determining the portion of a success-based fee that facilitates a transaction and the portion that does not facilitate a transaction is a method of accounting under § 446. Elections relating to methods of accounting are subject to special rules. Section 301.9100-3(c)(2). However, Taxpayer is not seeking to change its method of accounting for the success-based fees, only to file the statement required by section 4.01(3) of Rev. Proc. 2011-29.

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 its 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 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 representatives.

Sincerely,

Sean M. Dwyer

Sean M. Dwyer
Senior Technician Reviewer
Office of Associate Chief Counsel
(Income Tax & Accounting)

cc: