**Internal Revenue Service**

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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-100261-21
Date:
June 29, 2021

DO: TY:

Legend

| | |
|---|---|
| Taxpayer | = |
| Year 1 | = |
| Year 2 | = |
| Owner | = |
| Target | = |
| Advisor A | = |
| Advisor B | = |
| Advisor C | = |
| Advisor D | = |
| Accounting Firm A | = |
| Business | = |
| | |
| A | = |
| Date 1 | = |
| Date 2 | = |
| Date 3 | = |
| Date 4 | = |
| $A | = |
| $B | = |
| $C | = |
| $D | = |

Dear :

This letter responds to your correspondence dated Date 4, requesting an extension of time under §§ 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations for Taxpayer and Target to make the safe harbor election for success-

based fees described in Rev. Proc. 2011-29, 2011-18 I.R.B. 746. This letter ruling is being issued electronically in accordance with Rev. Proc. 2020-29, 2020-21 I.R.B. 859. A paper copy will not be mailed to Taxpayer.

## FACTS

Taxpayer is the parent of a consolidated group and is a Business. Taxpayer is owned by funds affiliated with Owner.

Pursuant to an agreement and plan of merger executed on Date 1, Target became an indirect, wholly-owned subsidiary of Taxpayer ("the Transaction"). The Transaction closed on Date 2. Taxpayer represents that the Transaction is a covered transaction as defined in § 1.263(a)-5(e)(3) of the Income Tax Regulations.

Pursuant to a consulting services agreement executed between Target, Taxpayer, and Advisor A, Taxpayer appointed Advisor A to render various advisory and consulting services in connection with the Transaction, as well as various advisory services to Target following the Transaction. For its services Advisor A was entitled to receive a non-refundable and irrevocable fee of $B, of which $A is at issue in this request. Taxpayer represents that Taxpayer and Target are not related to Advisor A for purposes of § 267.

In addition, Owner also engaged Advisor B and Advisor C to provide services associated with the acquisition of Target. Under the terms of the engagement letters, Advisor A and Advisor B would each be paid a fee of $C.

Pursuant to an engagement letter executed between Advisor D and Target, Advisor D was engaged by Target to act as a financial advisor in connection with a possible transaction involving Target. Advisor D was paid a fee of $D in connection with the Transaction.

Taxpayer represents that amounts paid to Advisors A, B, C, and D ($A, $C, $C, and $D, respectively) are success-based fees eligible for the safe harbor treatment afforded by Rev. Proc. 2011-29.

Following the Transaction, Taxpayer maintained an engagement with Accounting Firm A to prepare, sign as preparer, and file the tax return for Target through the date of the Transaction and to perform the same services with respect to its tax return for the taxable year ending Date 3. As part of the engagement with Accounting Firm A, Target and, following the Transaction, Taxpayer, relied on Accounting Firm A to provide tax advice on matters associated with the application of Treasury Regulations to determine taxable income and allowable deductions, including the rules applicable to treatment of transaction costs. Taxpayer and Target also relied on Accounting Firm A to advise them on available and appropriate tax elections.

There was no consideration of how to treat the costs associated with the Transaction, and, therefore, there was no discussion of the ability to make a safe-harbor election to allocate the success-based fees, as provided by Rev. Proc. 2011-29. Consequently, neither Taxpayer's nor Target's tax returns contained any indication that they were making the safe-harbor election.

In Year 2, A joined Target as Chief Financial Officer. While reviewing the returns filed by Taxpayer and Target for the taxable years on which the Transaction costs would otherwise have been reported, A noted that they had not been reported on the returns consistent with having made a safe-harbor election or, in fact, accounted for at all.

Taxpayer requests an extension of time to make the safe harbor election under Rev. Proc. 2011-29 to allocate success-based fees for the Transaction.

## LAW & ANALYSIS

Section 263(a)(1) and § 1.263(a)-2(a) provide that no deduction shall be allowed for any amount paid 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). 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 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) ("success-based fee") is presumed to facilitate the transaction, and thus must be capitalized. 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, 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.

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).

Section 4.01 of Rev. Proc. 2011-29, 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 satisfies three requirements. First, the taxpayer must treat 70 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 must: (a) state that the taxpayer is electing the safe harbor; (b) identify the transaction; and (c) state the success-based fee amounts deducted and capitalized. Section 4.03 states that the election does not constitute a change in method of accounting for success-based fees generally, and an adjustment under § 481(a) is neither permitted or required.

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 301-9100-1(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(b)(1) provides that 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 (taking into account the taxpayer's experience and the complexity of the return at issue), 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, 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 deemed 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.

Section 301.9100-3(c)(1) provides that an extension of time to make a regulatory election will be granted only when the interests of the Government are not 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 (taking into account the time value of money). Section 301.9100-3(c)(1)(i).

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 under § 6501(a) before the taxpayer's receipt of a ruling granting relief under this section. Section 301.9100-3(c)(1)(ii).

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 regulatory election.

## CONCLUSION

Based solely on the information provided and representations made, we conclude that Taxpayer acted reasonably and in good faith and granting relief will not prejudice the interests of the Government. Accordingly, Taxpayer has met the requirements of §§ 301.9100-1 and 301.9100-3.

Taxpayer is granted an extension of 60 days from the date of this letter ruling to amend its tax return for Year 1 to elect the safe harbor for success-based fees pursuant to Rev. Proc. 2011-29. Also, Target is granted an extension of 60 days from the date of this letter ruling to amend Target’s tax return for the taxable year ending on Date 2 to elect the safe harbor for success-based fees pursuant to Rev. Proc. 2011-29.

## 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. Although this office has not verified any of the material submitted in support of the request for the ruling, it is subject to verification on examination.

Except as expressly set forth 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: (1) Taxpayer or Target incurred any liability in Year 1 that was a success-based fee; (2) the Transaction was within the scope of Rev. Proc. 2011-

29; or (3) Taxpayer satisfied the requirements to file an amended return for Year 1 or Target satisfied the requirements to file an amended return for the taxable year ending on Date 2. Further, no opinion is expressed or implied concerning the applicability of § 267 to any payment or liability that is at issue in this letter. The relief provided in this letter is conditioned on proper adjustments to affected returns and tax attributes for Taxpayer and its affiliates.

A copy of this ruling should be attached to Taxpayer's and Target'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 returns that provides the date and control number of the letter ruling.

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.

This ruling is directed only to the taxpayer that is requesting it. Section 6110(k)(3) provides that it may not be used or cited as precedent.

In accordance with the provisions of the power of attorney currently on file with this office, we are sending a copy of this letter ruling to your authorized representatives. We are also sending a copy of this letter ruling to the appropriate operating division director.

Sincerely,

Amy S. Wei
Senior Counsel, Branch 2
Office of Associate Chief Counsel
(Income Tax & Accounting)

Enclosure: Copy for § 6110 purposes

cc: