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LEGEND:

Taxpayer	=
Predecessor	=
Investor	=
Business	=
Consultant A	=
Consultant B	=
Business 1	=
Business 2	=
Business 3	=
Business 4	=
Business 5	=
Amount 1	=
Amount 2	=
Amount 3	=
Amount 4	=
Amount 5	=
Date	=
Date 1	=
Date 2	=
Date 3	=
Date 4	=
Date 5	=
Year 1	=
Year 2	=

Year 3

=

Dear :

This letter responds to a request for a private letter ruling dated Date, submitted by Taxpayer. In the letter ruling request and subsequent submissions, Taxpayer requests an extension of time pursuant to §§ 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations to make the safe harbor election provided by Rev. Proc. 2011-29, 2011-1 C.B. 746 for five transactions. Taxpayer requests relief for Year 1 for four transactions, and Year 2 for one transaction.

FACTS AND REPRESENTATIONS

Taxpayer makes the following representations:

Taxpayer is a domestic limited partnership. Taxpayer employs the accrual method of accounting on a calendar year basis.

In Year 3, Predecessor contributed its Business to Taxpayer in exchange for equity in Taxpayer. Predecessor subsequently sold some of its equity in Taxpayer to Investor.

Overview of Acquisitions and Success-Based Fees

Taxpayer is a party to an agreement with Consultant A pursuant to which Consultant A identified potential acquisition targets. A written agreement was originally entered into by Predecessor and Consultant A, and Taxpayer assumed Predecessor's rights and responsibilities under this agreement when Predecessor contributed Business to Taxpayer. Taxpayer is also a party to an oral agreement with Consultant B, pursuant to which Consultant B identified a potential asset acquisition from Business 4. The oral agreement between Taxpayer and Consultant B arose from discussions among Taxpayer, Consultant B, and Investor in connection with this potential asset acquisition.

Pursuant to its agreements with Consultant A and Consultant B, Taxpayer was required to pay Consultant A and Consultant B a fee contingent upon the successful closing of certain transactions; the amount of Consultant A's fees and Consultant B's fees would be calculated as a percentage of the aggregate consideration received from the applicable transaction.

During Year 1 and Year 2, Consultant A and Consultant B provided Taxpayer with services to investigate or otherwise pursue five different transactions with five different entities: Business 1, Business 2, Business 3, Business 4, and Business 5.

On Date 1, Taxpayer closed a transaction in which it acquired assets constituting a trade or business from Business 1. As a result of the successful closing of the transaction, Taxpayer incurred and paid a success-based fee to Consultant A in the amount of Amount 1 ("**Fee 1**"). Taxpayer deducted 70 percent and capitalized 30 percent of Fee 1

on its Year 1 federal income tax return; however, Taxpayer failed to attach the required election statement pursuant to Rev. Proc. 2011-29 to such tax return.

On Date 2, Taxpayer closed a transaction in which it acquired assets constituting a trade or business from Business 2. As a result of the successful closing of the transaction, Taxpayer incurred and paid a success-based fee to Consultant A in the amount of Amount 2 ("**Fee 2**"). Taxpayer deducted 70 percent and capitalized 30 percent of Fee 2 on its Year 1 federal income tax return; however, Taxpayer failed to attach the required election statement pursuant to Rev. Proc. 2011-29 to such tax return.

On Date 3, Taxpayer closed a transaction in which it acquired assets constituting a trade or business from Business 3. As a result of the successful closing of the transaction, Taxpayer incurred and paid a success-based fee to Consultant A in the amount of Amount 3 ("**Fee 3**"). Taxpayer deducted 70 percent and capitalized 30 percent of Fee 3 on its Year 1 federal income tax return; however, Taxpayer failed to attach the required election statement pursuant to Rev. Proc. 2011-29 to such tax return.

On Date 4, Taxpayer closed a transaction in which it acquired assets constituting a trade or business from Business 4 on Date 4. As a result of the successful closing of the acquisition of assets of Business 4, Taxpayer incurred and paid a success-based fee to Consultant B in the amount of Amount 4 ("**Fee 4**"). Taxpayer capitalized 100 percent of Fee 4 on its Year 1 federal income tax return and did not attach the required election statement pursuant to Rev. Proc. 2011-29 to such tax return.

On Date 5, Taxpayer closed a transaction in which it acquired assets constituting a trade or business from Business 5. As a result of the successful closing of the transaction, Taxpayer incurred and paid a success-based fee to Consultant A in the amount of Amount 5 ("**Fee 5**"). Despite the fact that this transaction closed in Year 2, Taxpayer deducted 70 percent and capitalized 30 percent of Fee 5 on its Year 1 federal income tax return; however, Taxpayer failed to attach the required election statement pursuant to Rev. Proc. 2011-29 to such tax return.

Taxpayer incurred and paid Fee 1, Fee 2, Fee 3, Fee 4, and Fee 5 (collectively, the "**Success-Based Fees**") as a result of the completed acquisition of assets of Business 1, Business 2, Business 3, Business 4, and Business 5. Taxpayer represents that (A) each of the transactions were taxable acquisitions in which Taxpayer acquired assets that constitute a trade or business, and (B) the payments of the Success-Based Fees were contingent upon the successful closing of these transactions.

Circumstances Surrounding Missed Elections

Taxpayer's in-house accounting department prepared Taxpayer's U.S. federal income tax return for Year 1. Consistent with Taxpayer's established procedures, the employee responsible for preparation of Taxpayer's return ("**Employee**") relied on a summary schedule provided by Taxpayer's accounting department to prepare the tax return. The

summary schedule listed various transaction-related fees but did not include supporting invoices or indicate which of these fees, if any, were success-based.

When preparing Taxpayer's Year 1 return, Employee recognized that the fees paid to Consultant A were success-based fees eligible for the safe harbor election under Rev. Proc. 2011-29, and therefore Taxpayer deducted 70 percent and capitalized 30 percent of Fee 1, Fee 2, Fee 3, and Fee 5, consistent with Rev. Proc 2011-29. Employee, however, failed to attach the required election statements to Taxpayer's original federal income tax return for Year 1 because Employee was not aware of the requirement in Rev Proc 2011-29 to attach an election statement to the original federal income tax return.

When preparing Taxpayer's Year 1 return, Employee did not recognize that the fees paid to Consultant B were success-based fees eligible for the safe harbor election under Rev. Proc. 2011-29, and therefore Taxpayer capitalized 100 percent of Fee 4 on its Year 1 return and did not include the election statement required by Rev. Proc. 2011-29.

After Taxpayer filed its Year 1 return, Taxpayer's partnership representative discovered that Taxpayer (A) failed to include the required election statements and (B) inadvertently capitalized 100 percent of Fee 4. In addition, after Taxpayer filed its Year 2 return, Taxpayer determined Fee 5 was improperly accounted for in Year 1, and should be accounted for in Year 2 because the related transaction closed in Year 2. Accordingly, Taxpayer is seeking an extension of time to make a late election under Rev. Proc. 2011-29 with respect to the Success-Based Fees incurred in connection with the services provided by Consultant A and Consultant B pursuant to §§ 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations

With regard to Fee 1, Fee 2, Fee 3, and Fee 4, the related transactions closed in Year 1, and therefore Taxpayer requests an extension of time to make the safe harbor election for these fees on its Year 1 return. With regard to Fee 5, because the related transaction closed in Year 2, Taxpayer requests an extension of time to make the safe harbor election for Fee 5 on its Year 2 return.

Taxpayer represents that it requested relief before the failure to make the regulatory elections were discovered by the Service and that it reasonably relied on qualified tax professionals, and the tax professionals failed to make, or advise Taxpayer to make, the election. Taxpayer has also represented that none of the circumstances listed in § 301.9100-3(b)(3) apply.

Taxpayer has represented that, for each election, granting relief would not result in a lower tax liability in the aggregate for all taxable years affected by each election than Taxpayer would have had if the election had been timely made. Furthermore, Taxpayer has represented that the taxable years in which the regulatory elections should have been made and any taxable years that would have been affected had it been timely made, are not closed by the period of assessment.

LAW

Section 263(a)(1) of the 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.

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. Revenue Procedure 2011-29 provides a safe harbor election for 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, meaning that amount can be deducted. The remaining 30 percent of the fee must be capitalized as an amount that facilitates the transaction.

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) (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.

The revenue procedure applies to covered transactions described in § 1.263(a)-5(e)(3), which include (i) a taxable acquisition by the taxpayer of assets that constitute a trade or business; (ii) a taxable acquisition of an ownership interest in a business entity (whether the taxpayer is the acquirer in the acquisition or the target of the acquisition) if, immediately after the acquisition, the acquirer and the target are related within the meaning of § 267(b) or § 707(b); or (iii) a reorganization described in § 368(a)(1)(A), (B), or (C) or a reorganization described in § 368(a)(1)(D) in which stock or securities of the corporation to which the assets are transferred are distributed in a transaction which qualifies under § 354 or § 356 (whether the taxpayer is the acquirer or the target in the reorganization).

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 301.9100-1(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 extensions of time to make a regulatory election under Code sections other than those for which § 301.9100-2 expressly permits automatic extensions. Requests for extensions of time for regulatory elections will be granted when the taxpayer provides evidence (including affidavits described in the regulations) to establish to the satisfaction of the Commissioner that the taxpayer acted reasonably and in good faith, and granting relief will not prejudice the interests of the Government.

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: (1) requests relief before the failure to make the regulatory election is discovered by the IRS; (2) failed to make the election because of intervening events beyond the taxpayer's control; (3) failed to make the election because, after exercising reasonable diligence, the taxpayer was unaware of the necessity for the election; (4) reasonably relied on the written advice of the IRS; or (5) 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: (1) 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; (2) was informed in all material respects of the required election and related tax consequences but chose not to file the election; or (3) uses hindsight in requesting relief.

Section 301.9100-3(c)(1)(i) 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. Section 301.9100-3(c)(1)(ii) provides that 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.

ANALYSIS

Taxpayer's elections are regulatory elections as defined in § 301.9100-1(b) because the due dates of the elections are prescribed in § 1.263(a)-5(f) of the Income Tax Regulations. 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.

Taxpayer represents that for federal income tax purposes, the transactions were taxable acquisitions by Taxpayer of assets that constitute a trade or business. Thus, the transactions qualify as covered transactions described in § 1.263(a)-5(e)(3)(i). The information provided and representations made by Taxpayer establish that Taxpayer acted reasonably and in good faith. Taxpayer has represented that it requested relief before the failures to make the regulatory elections were discovered by the Service and that it reasonably relied on a qualified tax professional, and the tax professional failed to make, or advise Taxpayer to make, the elections. Taxpayer has also represented that none of the circumstances listed in § 301.9100-3(b)(3) apply.

Further, based on the information provided and representations made by Taxpayer, granting an extension will not prejudice the interests of the government under § 301.9100-3(c)(1). Taxpayer has represented will not have a lower tax liability in the aggregate for all taxable years affected by each election than Taxpayer would have had if the elections had been timely made. In addition, the taxable years in which each regulatory election should have been made and any taxable years that would have been affected by the election had it been timely made will not be closed by the period of limitations on assessment under § 6501(a) before Taxpayer's receipt of the ruling granting an extension of time to make a late election.

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 60 days from the date of this ruling to file an amended return for Year 1, electing safe harbor treatment under section 4.01(3) of Rev. Proc. 2011-29 for Fee 1, Fee 2, Fee 3, and Fee 4 on its Year 1 tax return. The Year 1 amended return must include four election statements stating that Taxpayer is electing the safe harbor for each of Fee 1, Fee 2, Fee 3, and Fee 4, identifying the associated transactions, and stating the success-based fee amounts that are deducted and capitalized pursuant to each election.

Taxpayer is also granted an extension of 60 days from the date of this ruling to (A) file an amended return for Year 1, so that Fee 5 is no longer accounted for on its Year 1 tax return, and (B) file an amended return for Year 2, electing safe harbor treatment under section 4.01(3) of Rev. Proc. 2011-29 for Fee 5 on its Year 2 tax return. The Year 2 amended return must include an election statement stating that Taxpayer is electing safe harbor treatment for Fee 5, 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.

Sincerely,

Natasha M. Mulleneaux
Senior Technician Reviewer, Branch 3
Office of the Associate Chief Counsel
(Income Tax and Accounting)

Enclosure: Copy for § 6110 purposes
cc: