

Internal Revenue Service

Department of the Treasury
Washington, DC 20224

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Legend:

Taxpayer =
Corporation X =
Firm A =
Firm B =
Date 1 =
Date 2 =
Date 3 =
Date 4 =
Date 5 =
Date 6 =
Date 7 =

Dear :

This letter responds to a letter ruling request dated January 31, 2008, submitted on behalf of Corporation X as successor-in-interest to Taxpayer. Taxpayer requests an extension of time to Date 7 under Treas. Reg. § 310.9100-3 to complete the documentation of success-based fees required under Treas. Reg. § 1.263(a)-5(f), thereby excluding the fees from the definition of amounts paid to facilitate a transaction under Treas. Reg. § 1.263(a)-5(b) that are required to be capitalized under § 263(a).

Prior to Date 1, Taxpayer and Corporation X were the parents of two separate affiliated groups of corporations filing consolidated federal income tax returns. On Date 1, Taxpayer merged into Corporation X under applicable state law, with Corporation X as the surviving entity (the acquisition). On Date 2, Corporation X engaged Firm A to assist in determining the filing deadlines for Taxpayer's federal and state tax returns for

the period ending on Date 1. On Date 4, Corporation X engaged Firm A to assist with the preparation and filing of the returns.

Firm A mistakenly believed that the acquisition was a stock acquisition in which Taxpayer remained a separate legal entity and became a member of Corporation X's consolidated group. Accordingly, Firm A incorrectly informed Taxpayer that the due date for Taxpayer's return for the period ending on Date 1 was Date 6, with an extended due date of Date 7. Taxpayer filed a request for an extension on or before Date 6 and therefore believed that the due date of its return was Date 7. The actual due date of the return was on Date 3.

Corporation X had engaged Firm B on Date 5 to compile the necessary documentation for the success-based fees. Initially, Firm B operated under the assumption that the documentation must be completed by Date 7. Firm B subsequently discovered the error in the calculation of the due date and, after Date 6, notified Taxpayer of the error. Thus, the success-based fee documentation was not completed prior to Date 3, the actual due date of the return.

As a general rule, § 263(a) and Treas. Reg. § 1.263(a)-5(a) require capitalization of amounts paid to facilitate certain acquisition transactions. The amounts required to be capitalized generally include amounts paid in the process of investigating or otherwise pursuing the transaction. Treas. Reg. § 1.263(a)-5(b)(1). However, there is an exception to this requirement for certain "success-based fees." Treas. Reg. § 1.263(a)-5(f). This exception provides:

An amount paid that is contingent on the successful closing of a transaction described in paragraph (a) of this section is an amount paid to facilitate the transaction except to the extent the Taxpayer maintains sufficient documentation to establish that a portion of the fee is allocable to activities that do not facilitate the transaction. This documentation must be completed on or before the due date of the Taxpayer's timely filed original federal income tax return (including extensions) for the taxable year during which the transaction closes. Id.

Treas. Reg. §§ 301.9100-1 through 301.9100-3 set forth the standards the Commissioner uses in determining whether to grant an extension of time to make an election.

Treas. Reg. § 301.9100-1(b) provides that an election includes an application for relief in respect of tax and a request to adopt, change, or retain an accounting method or accounting period, but does not include an application for an extension of time for filing a return under § 6081. A regulatory election means an election whose due date is prescribed by, *inter alia*, a regulation published in the Federal Register.

Treas. Reg. § 301.9100-1(c) generally provides that the Commissioner has discretion to grant a Taxpayer a reasonable extension of time to make a regulatory election under the rules set forth in Treas. Reg. §§ 301.9100-2 and 301.9100-3.

Treas. Reg. § 301.9100-2 provides automatic extensions of time in certain circumstances not applicable in this case.

Treas. Reg. § 301.9100-3(a) provides that requests for extensions of time for regulatory elections 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 the grant of relief will not prejudice the interests of the government.

In the present situation, the documentation required by Treas. Reg. § 1.263(a)-5(f) is a regulatory election as defined in Treas. Reg. § 301.9100-1(b). Therefore, the Commissioner has discretionary authority under Treas. Reg. § 301.9100-1(c) to grant Taxpayer a reasonable extension of time, provided that Taxpayer satisfies the requirements set forth in Treas. Reg. § 301.9100-3.

Based on the facts and information submitted, we conclude that Taxpayer satisfies the requirements of Treas. Reg. § 301.9100-3(a). We further conclude that Taxpayer's request for an extension of time to complete the documentation until Date 7 is a reasonable extension of time under Treas. Reg. § 301.9100-1(c).

The granting of an extension of time is not a determination that Taxpayer is otherwise eligible to make the election. Treas. Reg. § 301.9100-1(a). 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. Specifically, no opinion is expressed concerning the correct due date of Taxpayer's return or the deductibility of the success-based fees, including whether Taxpayer's documentation is adequate for purposes of Treas. Reg. § 1.263(a)-5(f).

The ruling contained in this letter is based upon information and representations submitted by the 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 ruling, it is subject to verification on examination. A copy of this letter 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.

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.

In accordance with the Power of Attorney on file with this office, copies of this letter are being sent to your authorized representatives.

Sincerely,

Thomas D. Moffitt
Branch Chief, Branch 2
Associate Chief Counsel
(Income Tax & Accounting)

cc: