

**Internal Revenue Service**

Department of the Treasury  
Washington, DC 20224

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Date:  
October 29, 2008

TY:

Legend

Taxpayer =  
Date 1 =  
Corporation =  
Date 2 =

Dear :

This letter responds to a letter ruling request dated , submitted on behalf of Taxpayer. Taxpayer requests an extension of time under §§ 301.9100-1 and -3 to of the Income Tax Regulations to complete the documentation of success-based fees required under § 1.263(a)-5(f), thereby excluding these fees from amounts that are required to be capitalized under § 263(a) of the Internal Revenue Code.

Taxpayer uses the accrual method of accounting. On Date 1, Corporation acquired Taxpayer in a taxable stock acquisition. The due date for Taxpayer's return without regard to extension was Date 2.

Taxpayer incurred success-based fees in connection with the taxable stock acquisition on Date 1. Shortly after the acquisition, Corporation engaged an outside accounting firm to identify and compile documentation for the success-based fees associated with the Corporation's acquisition of Taxpayer.

As a general rule, § 263(a) and § 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. Section 1.263(a)-5(b)(1). However, there is an exception to

this requirement for certain “success-based fees”. Section 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.

Corporation mailed an application for an automatic extension of time for Taxpayer to file its return before Date 2. After Date 2, the application was returned for lack of postage. Because it was returned for lack of postage, the application was not considered timely filed. Thus, the documentation could not be completed before the due date for its return (including extensions). Taxpayer filed this request for relief before the date it would have had to file its return if the extension of time had been properly filed.

Under § 301.9100-1(c), the Commissioner has discretion to grant a reasonable extension of time to make a regulatory election under all subtitles of the Code, except subtitles E, G, H and I, provided that the taxpayer acted reasonably and in good faith and granting relief will not prejudice the interests of the government.

Section 301.9100-3 provides 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.

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

Based on the facts and information submitted, we conclude that Taxpayer satisfies the requirements of § 301.9100-3. The Taxpayer reasonably relied upon Corporation to timely file its application for extension to file its return. The application was mailed before Date 2 and the failure to attach proper postage was not known until after Date 2. Soon after the notice of the failure, Taxpayer requested this extension.

## RULING

Accordingly, the consent of the Commissioner is hereby granted for an extension of time under §§ 301.9100-1 and -3 to complete the documentation of success-based fees required under § 1.263(a)-5(f). The taxpayer has an extension of 60 days from date of this ruling in which to make this election.

The granting of an extension is not a determination that Taxpayer is otherwise eligible to make the election. Section 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 success-based fees, including whether Taxpayer's documentation is adequate for purposes of section 1.263(a)-5(f).

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.

In accordance with the Power of Attorney on file with this office, a copy of this letter is being sent to your authorized representative.

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.

The rulings contained in this letter are 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 rulings, it is subject to verification on examination.

Sincerely,

Robert M. Casey  
Senior Technical Reviewer, Branch 3  
(Income Tax & Accounting)