

Internal Revenue Service

Department of the Treasury
Washington, DC 20224

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Legend

Taxpayer=
Advisor=
Year1=
Date A=
Date B=
Taxable Year 1=

Dear :

This is in response to the letter dated May 16, 2012, submitted on your behalf by your authorized representative, Advisor. In the letter, you request permission to attach an election statement to Taxpayer's originally filed federal tax return for Taxable Year 1. The election statement was not included with Taxpayer's originally filed federal tax return for Taxable Year 1 although it was required in order for Taxpayer to use a safe harbor method of accounting. The request is made in accordance with §§ 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations.

Taxpayer represents the following facts:

Taxpayer and its shareholders began the process of trying to sell itself in Year 1. Taxpayer was successful, and entered into a stock purchase agreement on Date A. On Date B, the taxpayer executed the stock purchase agreement and sold itself to new, unrelated shareholders, which resulted in a short tax year for the period Taxable Year 1.

In connection with its sale in Year 1, Taxpayer incurred transaction costs, including success-based fees. These success-based fees were paid upon the closing of the transaction on Date B. Taxpayer capitalized the transaction costs in accordance

with § 263 of the Internal Revenue Code and § 1.263(a)-2(a) and § 1.263(a)-5 of the Income Tax Regulations. Taxpayer capitalized 30 percent of the success-based fees, and deducted the remaining 70 percent, on its Taxable Year 1 return consistent with the safe harbor election provided in Revenue Procedure 2011-29, 2011-18 I.R.B. 746.

Taxpayer timely filed its Taxable Year 1 return, prepared by Advisor, but failed to attach the mandatory statement required in Revenue Procedure 2011-29 for any taxpayer electing to use the safe harbor method of allocating success-based fees. This oversight was uncovered prior to Taxpayer filing any other returns and prior to any discovery by the Service.

Taxpayer requests that an extension of time be granted solely for the purposes of allowing taxpayer to attach to its Taxable Year 1 return the mandatory statement regarding the election to use the safe harbor method of allocating success-based fees.

Section 263(a)(1) and § 1.263(a)-2(a) 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 (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). 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.

Section 1.263(a)-5(f) provides that an amount 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 the 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.

Because the treatment of success-based fees was a continuing subject of controversy between taxpayers and the Service, the Service published Revenue Procedure 2011-29. Revenue Procedure 2011-29 provides a safe harbor method of accounting for allocating success-based fees paid in business acquisitions or reorganizations

described in regulations section 1.263(a)-5(e)(3). In lieu of maintaining the documentation required by section 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 (i.e., amounts that can be deducted). The remaining portion of the fee must be capitalized as an amount that facilitates the transaction.

Section 4.01 of Revenue Procedure 2011-29 allows the taxpayer to make a safe harbor election with respect to success-based fees. Section 4.01 provides that the Service will not challenge the 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 (cost that may be deductible) if the taxpayer does three things. First, the taxpayer must treat 70 percent of the amount of the success-based fee as an amount that does not facilitate the transaction and thus may be deductible. Second, the taxpayer must capitalize the remaining amount of the success-based fee as an amount which does facilitate the transaction. Finally, 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 (treated as *not* facilitating the transaction) and capitalized (treated as facilitating the transaction).

It is this last requirement that Taxpayer requests permission to accomplish with this ruling request. Taxpayer requests permission with this ruling request to attach the statement required by Section 4.01 of Revenue Procedure 2011-29 to its return, by amending its original filed return and superseding it with a return with the proper election statement completed and attached.

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.

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.

Section 301.9100-3(c)(2) provides special rules for accounting method regulatory elections. Section 301.9100-3(c)(2) provides that the interests of the government are deemed prejudiced, except in unusual or compelling circumstances, if the accounting method regulatory election for which relief is requested is subject to the advance consent procedures for method changes, requires a § 481(a) adjustment, would permit a change from an impermissible method of accounting that is an issue under consideration by examination or in any other setting, or provides a more favorable method of accounting if the election is made by a certain date or taxable year.

CONCLUSION

Based upon our analysis of the facts as represented, Taxpayers acted reasonably and in good faith, and granting relief will not prejudice the interests of the government, and therefore the requirements of §§ 301.9100-1 and 301.9100-3 have been met.

Furthermore, granting relief will not result in Taxpayer having a lower tax liability in the aggregate for all taxable years affected by the election than Taxpayer would have had if the election had been timely made, nor will any closed years be affected. Therefore, the interests of the government will not be prejudiced by granting the request for relief.

Furthermore, granting relief will not prejudice the interests of the government associated with the special rules for accounting method regulatory elections, in this case the safe harbor election for success-based fees. The election provided by Revenue Procedure 2011-29 for allocating the success-based fees is granted on an automatic basis (if all proper procedures including the attaching the mandatory statement are followed), does not require a § 481(a) adjustment, is not an issue under consideration, and does not provide a more favorable method of accounting if the election is made by a certain date or taxable year.

Taxpayer is granted an extension of 45 days from the date of this ruling to file its mandatory statement 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 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.

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. *In particular, no opinion is expressed as to whether Taxpayer properly included the correct costs as its success-based fees subject to the retroactive election, or whether Taxpayer's transaction was within the scope of Revenue Procedure 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 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.

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

Sincerely,

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

cc: