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:B03
PLR-126208-13

Date:
October 28, 2013

Parent =
EIN =

Taxpayer =
EIN =

Subsidiary =

Corportion P =

A =

Year 1 =

X =

$p =

Dear :

This responds to the letter dated June 7, 2013 submitted on your behalf by your authorized representative. That letter requests an extension of time for Taxpayer to file the required election statement as set forth in Rev. Proc. 2011-29, 2011-18 I.R.B. 746. This request is made in accordance with sections 301.9100-1 and 301.9100-3 of the

Procedure and Administration Regulations. Taxpayer files a consolidated tax return and uses the accrual method of accounting and has a calendar year end.

FACTS

Taxpayer is in the business of X. Taxpayer is a member of the Parent consolidated group that timely filed its consolidated Federal Income Tax return for Year 1. In Year 1, Taxpayer, through its wholly-owned shell, Subsidiary, acquired all of the stock of Corporation P. In connection with the acquisition of Corporation P, Taxpayer incurred $p of transaction costs that were contingent upon the success of the transaction. Taxpayer relied on its tax preparer, A, to attach a statement required by Rev. Proc. 2011-29 to its original Federal Income Tax return required for any taxpayer electing to use the safe harbor method of allocating success-based fees. However, A failed to attach the statement. Approximately one month after the return was electronically filed, A discovered that the statement was not attached to the timely electronically filed Federal Income Tax return for Year 1 and promptly notified Taxpayer. Taxpayer is requesting relief under section 301.9100-3 because of its failure to attach the required statement to its return.

LAW

Section 263(a)(1) of the Internal Revenue Code and section 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 (1992); Woodward v. Commissioner, 397 U.S. 572, 575-576 (1970).

Section 1.263(a)-5(f) provides, that “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.”

Revenue Procedure 2011-29 provides a safe harbor election for allocating success-based fees. It states that the Service will not challenge a taxpayer’s allocation of a success-based fee between activities that facilitate a transaction described in section 1.263(a)-5(e)(3) and activities that do not facilitate the transaction, if the taxpayer:

1. Treats 70% of the amount of the success-based fee as an amount that does not facilitate the transaction;
2. Capitalizes the remaining 30% as an amount that does facilitate the transaction, and
3. Attaches a statement to its original Federal income tax return for the tax 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.

Taxpayer satisfied the first two requirements of Rev. Proc. 2011-19 by deducting 70% of the success-based fees and capitalizing 30%, but failed to attach the statement required in item three.

Section 301.9100-1(a) gives the Service discretionary authority to grant a reasonable extension of time to make a regulatory election, provided that the time for making such election is not expressly prescribed by statute. Section 301.9100-1(b) defines the term "regulatory election" as including an election whose due date is prescribed by a regulation, revenue ruling, revenue procedure, notice, or announcement. Sections 301.9100-1 through 301.9100-3 provides the standards the Service will use to determine whether to grant an extension of time to make a regulatory election. Section 301.9100-2 provides automatic extensions of time for making certain elections. Section 301.9100-3 provides extensions of time for making regulatory elections that do not meet the requirements of section 301.9100-2.

Section 301.9100-3 provides that 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) states that a taxpayer will be deemed to have acted reasonably and in good faith if the taxpayerB

(i) requests relief before the failure to make the regulatory election is discovered by the Service;
(ii) inadvertently failed to make the election because of intervening events beyond the taxpayer's control;
(iii) failed to make the election because, after exercising due diligence, 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, and the tax professional failed to make, or advise the taxpayer to make, the election.

The affidavits presented show that Taxpayer acted reasonably and in good faith, having reasonably relied on a qualified tax professional who failed to attach the statement required by Rev. Proc. 2011-29.

Under section 301.9100-3(b)(3), a taxpayer will not be considered 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 section 6662 at the time the taxpayer requests relief (taking into account section 1.6664-2(c)(3) of the Income Tax Regulations) and the new position requires 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. If specific facts have changed since the original deadline that make the election advantageous to a taxpayer, the Service will not ordinarily grant relief.

Taxpayer is not seeking to alter a return position for which an accuracy-related penalty has been or could be imposed under section 6662 at the time relief is requested and was not informed in all material respects of the required election, and its related tax consequences and chose not to make the election. Furthermore Taxpayer is not using hindsight in requesting relief. Taxpayer has represented that specific facts have not changed since the original deadline that make the election advantageous to Taxpayer.

Section 301.9100-3(c)(1)(i) provides, in part, 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 (taking into account the time value of money). Section 301.9100-3(c)(1)(ii) provides, in part, 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.

Under these criteria, the interests of the government are not prejudiced in this case. Taxpayer has represented that granting relief would not result in Taxpayer having a lower tax liability in the aggregate for all taxable years affected by the election than if the election had been timely made (taking into account the time value of money). Furthermore, the taxable year in which the regulatory election should have been made and any taxable years that would have been affected by the election had it been timely made, are not closed by the period 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.

Granting relief will not prejudice the interests of the government associated with the special rules for accounting method regulatory elections. The election provided by Rev. Proc. 2011-29 for allocating 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.

Therefore, 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, indentifying the transaction, and stating the success-based fee amounts that are deducted and capitalized.

These rulings contained in this letter are based upon information and representations submitted by Taxpayer and accompanied by a penalty of perjury statement executed by appropriate parties. 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 set forth above, we express no opinion concerning the tax consequences of the facts described above under any other provision of the Code. Specifically, no opinion is expressed or implied concerning 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 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 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, we are sending copies of this letter to Taxpayer's authorized representative. We are also sending a copy of this letter to the appropriate operating division director. 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 Internal Revenue Code.

Sincerely,

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Christopher F. Kane
Branch Chief, Branch 3
Office of the Associate Chief Counsel
(Income Tax & Accounting)