Internal Revenue Service

Number: **201505009**
Release Date: 1/30/2015

Index Number: 9100.00-00

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:B02
PLR-116769-14

Date:
October 17, 2014

In Re:

Legend:
Taxpayer =
Corporation =
Date1 =
Date2 =
CPA =
Taxable Year =

Dear

This ruling is in response to a letter dated April 14, 2014, requesting permission to attach an election statement to Taxpayer's originally filed federal tax return for Taxable Year. The election statement was not included with the return although it was required in order for Taxpayer to use a safe harbor method of accounting for success-based fees under Rev. Proc. 2011-29, 2011-18 I.R.B. 746. The request is made in accordance with §§ 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations.

FACTS

Taxpayer incurred transaction costs including success-based fees upon closing on Date1, in Taxable Year related to the purchase of Corporation. Taxpayer capitalized the transaction costs in accordance with §263 of the Internal Revenue Code and §§ 1.263(a)-2 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 timely filed return for Taxable Year, which is consistent with the safe harbor election provided in Rev. Proc. 2011-29.

Although the tax return was timely filed, it did not include the mandatory statement required under Rev. Proc. 2011-29 for taxpayers electing to use the safe harbor method

of allocating success based fees. The return was prepared and reviewed by Taxpayer's trusted CPA, but Taxpayer failed to attach the statement. CPA discovered this oversight on Date2, and immediately informed Taxpayer, who instructed CPA to contact the Service and expeditiously rectify the oversight.

Accordingly, Taxpayer requests an extension of time be granted for the purpose of allowing Taxpayer to attach to its Taxable Year 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 of the regulations, a taxpayer must capitalize an amount paid to facilitate a business acquisition or reorganization transaction described in § 1.62(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.

Under § 1.263(a)-5(f), 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 Rev. Proc. 2011-29. Rev. Proc. 11-29 provides a safe harbor method of accounting for allocating success-based fees paid in business acquisitions or reorganizations described in regulations § 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 that is, 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 Rev. Proc. 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 (costs 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 Rev. Proc. 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 §§ 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 the 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 on the information submitted and representations made, we concluded that Taxpayer acted reasonably and in good faith, and granting relief will not prejudice the interests of the government. Therefore, 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 its mandatory statement as required by section 4.01 of Rev. Proc. 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.

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 Rev. Proc. 2011-29.

This ruling is directed only to the taxpayer requesting it. Under § 6110(k)(3) this ruling 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, a taxpayer filing its return electronically may satisfy this requirement by attaching a statement to their return that provides the date and control number of the letter ruling.

Sincerely,

_____

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