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:

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ID No.

Telephone Number:

Refer Reply To:
CC:ITA:B02
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Date:
May 12, 2015

TY:

LEGEND:

Taxpayer =

Sub1 =
Sub2 =
CPA1 =
CPA2 =
Date1 =
Date2 =
Date3 =
Date4 =
Taxable Year =

Dear :

This is in response to the letter dated , submitted on your behalf by CPA2. Taxpayer requests an extension of time to file a late safe harbor election statement under Rev. Proc. 2011-29, 2011-1 C.B. 746, relating to the allocation of success-based fees paid in business acquisitions. This request for relief is made in accordance with §§ 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations.

Taxpayer represents the following facts:

On Date1, Taxpayer was created to effectuate a taxable stock purchase of and , both becoming wholly-owned

subsidiaries of Taxpayer via a “Merger Agreement” effective on Date2. Taxpayer incurred investment banking fees and transaction costs including success-based fees upon closing. With respect to the success-based fees, Taxpayer planned to use the safe harbor election provided in Rev. Proc. 2011-29, thereby capitalizing 30 percent of the success-based fees and deducted the remaining 70 percent on Taxpayer’s return for Taxable Year end.

On Date3, an executive of Taxpayer signed Form 8879-C and submitted it to CPA1, with whom they had a long-term working relationship since 2005. Taxpayer relied on CPA1 to correctly and timely file Taxpayer’s federal return as it had in years past.

However, on Date4, Taxpayer’s new CPA, CPA2, informed Taxpayer that their federal return was never filed. Taxpayer called CPA1, and they confirmed the oversight, and e-filed Taxpayer’s return. Unfortunately, the return as filed by CPA1 failed to include the mandatory statement required under section 4.01 of Rev. Proc. 2011-29 for taxpayers electing to use the safe harbor method of allocating success-based fees, which Taxpayer had intended to use. Upon learning of this error, CPA2 advised Taxpayer to file this ruling request for an extension of time to file the required statement.

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 to use the safe harbor method of allocating success-based fees under Rev. Proc. 2011-29.

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 § 1.263(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 Rev. Proc. 2011-29. Rev. Proc. 2011-29 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) (cost 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).

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, 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. 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, 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,

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THOMAS D. MOFFITT
Chief, Branch 2
Associate Chief Counsel
(Income Tax & Accounting)