Internal Revenue Service

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Department of the Treasury
Washington, DC 20224

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Person To Contact:
, ID No.

Telephone Number:

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Date:
June 10, 2015

Taxpayer	=
Taxable Year 1	=
Taxable Year 2	=
Date 1	=
Date 2	=
Date 3	=
Date 4	=
LLC 1	=
LLC 2	=
Corporation 1	=
Corporation 2	=
Corporation 3	=
Amount 1	=
Amount 2	=
Amount 3	=
State 1	=
CPA	=
Investment Bank 1	=
Investment Bank 2	=

Dear :

This is in response to your letter submitted on Date 1 on behalf of the Taxpayer, in which you request rulings, pursuant to sections 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations, to grant the Taxpayer an extension of time to file an election statement required by section 4.01(3) of Rev. Proc. 2011-29, 2011-18 I.R.B. 746, with respect to Taxable Years 1 and 2.

FACTS

The Taxpayer is a corporation organized under the laws of State 1. On Date 2, pursuant to an agreement of merger dated Date 3, LLC 1, a disregarded entity wholly-owned by LLC 2, acquired 100% of the stock of the Taxpayer. Pursuant to the agreement of merger, LLC 1 contributed Amount 1 to Corporation 1, a State 1 corporation wholly-owned by LLC 1 and created solely to effectuate the acquisition of Taxpayer stock. The Taxpayer merged into Corporation 1 in a statutory merger under State 1 law, with the Taxpayer surviving. The Taxpayer has represented that the transaction qualified as a taxable acquisition of stock, pursuant to Rev. Rul. 90-95, as well as a covered transaction, pursuant to § 1.263(a)-5(e)(3) of the Internal Revenue Regulations.

In the process of pursuing the merger with Corporation 1, the Taxpayer incurred transaction costs, including fees paid to Investment Bank 1 for investment banking services. Some of the costs were attributable to fees paid by the Taxpayer to Investment Bank 1 only upon the successful closing of the merger with Corporation 1 (success-based fee). Upon completion of the merger, the Taxpayer remitted a success-based fee in the amount of Amount 2 to Investment Bank 1.

On Date 4, the Taxpayer, through its subsidiary Corporation 2, acquired 100% of the outstanding stock of Corporation 3. The Taxpayer has represented that the transaction qualified as a taxable acquisition of Corporation 3 stock by the Taxpayer, pursuant to Rev. Rul. 90-95, as well as a covered transaction, pursuant to § 1.263(a)-5(e).

In the process of pursuing the acquisition of Corporation 3, the Taxpayer incurred transaction costs, including fees paid to Investment Bank 2 for investment banking services. Some of the costs were attributable to a success-based fee paid by the Taxpayer to Investment Bank 2. Upon completion of the acquisition, the Taxpayer remitted a success-based fee in the amount of Amount 3 to Investment Bank 2.

In Taxable Year 1, the Taxpayer engaged CPA to prepare the Taxpayer's U.S. federal income tax return for the Taxable Years 1 and 2. The Taxpayer represents that it believed and understood that CPA had extensive experience in preparing income tax returns and advising clients regarding all statements and other information that should be included on such returns, and relied on CPA to advise it of any relevant elections that should be made on its returns.

CPA prepared and filed the Taxpayer's federal corporate income tax returns for Taxable Years 1 and 2. On the Taxpayer's returns for Taxable Years 1 and 2, the Taxpayer represents that CPA inadvertently failed to make the election provided in Rev. Proc. 2011-29 to deduct 70% of success-based fees not facilitating a business acquisition as start-up costs and to capitalize the remaining 30% of success-based fees.

Subsequent to the filing of the return, the Taxpayer engaged CPA to file a request for relief to file the election statements for Taxable Years 1 and 2, pursuant to section 301.9100-1.

LAW

Section 263(a)(1) of the Internal Revenue Code provides generally that no deduction shall be allowed for any amount paid in exchange for property having a useful life extending beyond the end of the taxable year. See also section 1.263(a)-2(a). No deduction is allowed for an amount paid to acquire or create an intangible, which includes an ownership interest in a corporation or other entity. Section 1.263(a)-1(d)(3); see also sections 1.263(a)-4(c)(1)(i); 1.263(a)-4(d)(2)(i)(A). Costs incurred in the process of acquisition or reorganization of a business entity that produce significant long-term benefits must be capitalized. Indopco v. Commissioner, 503 U.S. 79, 89-90 (1992); section 1.263(a)-5(a) (providing that taxpayers must capitalize amounts paid to facilitate certain transactions set forth in that section).

Section 1.263(a)-5(b)(1) provides that an amount is paid to facilitate a transaction if the amount is paid in investigating or otherwise pursuing the transaction. Whether an amount is paid in the process of investigating or otherwise pursuing the transaction is determined based on all of the facts and circumstances.

Section 1.263(a)-5(f) sets forth the rule governing success-based fees, and provides that an amount paid that is contingent on the successful closing of a transaction described in § 1.263(a)-5(a) is treated as 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.

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.

Rev. Proc. 2011-29 provides a safe harbor election for allocating success-based fees paid in business acquisitions or reorganizations described in § 1.263(a)-5(e)(3). Pursuant to Section 4.01 of Rev. Proc. 2011-29, the Service will not challenge a taxpayer's allocation of success-based fees between activities that facilitate a transaction described in § 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 amount of the success-based fees that are deducted and capitalized.

Section 301.9100-1 sets forth the standards the Commissioner will use to determine whether to grant an extension of time to make a regulatory election. Section 301.9100-1(b) provides that a regulatory election is 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. Pursuant to § 301.9100-1(c), 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 a regulatory election.

Section 301.9100-2 sets forth the rules applicable to automatic 12-month extensions of time to make certain regulatory elections. Section 301.9100-3 sets forth the rules applicable to requests for extensions of time for regulatory elections that do not meet the requirements of § 301.9100-2. Requests for relief pursuant to § 301.9100-3 will be granted when the taxpayer provides evidence (including affidavits described in § 301.9100-3(e)) that establishes that the taxpayer acted reasonably and in good faith, and that the grant of relief will not prejudice the interests of the government.

Section 301.9100-3(b)(1) provides that a taxpayer is deemed to have acted reasonably and in good faith if the taxpayer:

(i) requests relief before the failure to make the regulatory election is discovered by the Service;
(ii) failed to make the election because of intervening events beyond the taxpayer's control;
(iii) failed to make the election because, after exercising reasonable diligence (taking into account the taxpayer's experience and the complexity of the return at issue), 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, including a tax professional employed by the taxpayer, and the tax professional failed to make, or advise the taxpayer to make, the election.

Section 301.9100-3(b)(3) provides that a taxpayer will not be deemed 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 § 6662 at the time the taxpayer requests relief, and the new position requires or permits 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.

Section 301.9100-3(c)(1) provides that an extension of time to make a regulatory election will be granted only when the interests of the government are not prejudiced by the granting of relief. The interests of the government are prejudiced if granting relief would result in a 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)(i).

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 under section 6501(a) before the taxpayer's receipt of a ruling granting relief under this section. Section 301.9100-3(c)(1)(ii).

Section 301.9100-3(c)(2) provides special rules for accounting method regulatory elections. The interests of the government are deemed to be prejudiced except in unusual and compelling circumstances if the accounting method regulatory election for which relief is requested:

(i) is subject to the procedure set forth in § 1.446-1(e)(3)(i) of this chapter (requiring advance written consent of the Commissioner);
(ii) requires an adjustment under § 481(a) (or would require an adjustment under § 481(a) if the taxpayer changed to the method of accounting for which relief is requested in a taxable year subsequent to the taxable year in which the election should have been made);
(iii) would permit a change from an impermissible method of accounting that is an issue under consideration by examination, an appeals office, or a federal court and the change would provide a more favorable method or more favorable terms and conditions than if the change were made as part of an examination; or
(iv) provides a more favorable method of accounting or more favorable terms and conditions if the election is made by a certain date or taxable year.

ANALYSIS

The Taxpayer's election is a regulatory election, as defined in § 301.9100-1(b), because the due date of the election is prescribed in the Income Tax Regulations under § 1.263(a)-5(f). The Commissioner has the authority under §§ 301.9100-1 and 301.9100-3 to grant an extension of time to file a late regulatory election.

The information provided and representations made by the Taxpayer establish that the Taxpayer acted reasonably and in good faith. The Taxpayer reasonably relied on CPA, a qualified tax professional, to prepare its federal income tax returns for Taxable Years 1 and 2. The Taxpayer is not seeking to alter a return position for which an accuracy related penalty has been or could be imposed under § 6662 at the time relief is requested. The Taxpayer did not affirmatively choose not to make the election

after having been informed in all material respects of the required election and related tax consequences. Rather, the Taxpayer relied on CPA to advise it as to any relevant elections, which CPA failed to do with respect to this election. The Taxpayer is not using hindsight in requesting relief.

Further, based on the information provided and representations made by the Taxpayer, granting an extension will not prejudice the interests of the government. The Taxpayer will not have a lower tax liability in the aggregate for all taxable years to which the election applies at this time than the Taxpayer would have had if the election had been timely made. In addition, the taxable years in which the regulatory elections should have been made and any taxable years that would have been affected by the election had it been timely made will not be closed by the period of limitations on assessment under § 6501(a) before the Taxpayer's receipt of the ruling granting an extension of time to make a late election.

CONCLUSION

Based on the information provided and representations made, we conclude that the 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.

The 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 transactions, 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 the Taxpayer properly included the correct costs as its success-based fees subject to the retroactive election, or whether the Taxpayer's transactions were within the scope of Rev. Proc. 2011-29.

This ruling is directed only to the taxpayer requesting it. Pursuant to § 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.

The rulings contained in this letter are based on 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.

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,

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