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:B02
PLR-104823-15

Date:
August 05, 2015

TY:

Legend

Taxpayer =

X =
Y =

Z =
Vice President of Finance =
CPA Firm =
Tax Return Preparer =
Month =
Date1 =
Date2 =
Date3 =
Date4 =
Date5 =
Date6 =
LLC1=
LLC2 =
LLC3 =
Corp. =
Year1 =
Year2 =
City =

State =
$a =
$b =
$c =
$d =
$e =
$f =

Dear :

This is in response to your letter of Date1, requesting permission to attach an election statement to Taxpayer's originally filed federal tax return for taxable Year1. The election statement was not included although it was required in order for Taxpayer to use a safe harbor method of accounting under section 4.01 of Rev. Proc. 2011-29, 2011-1 C.B. 746. This request is made in accordance with §§ 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations.

FACTS AND REPRESENTATIONS

Taxpayer represents the following:

Taxpayer is an X company headquartered in City, State. It provides a diversified range of Y services to Z.

In tax Year1, Taxpayer acquired the equity interest in LLC1 in a taxable transaction dated Date2. The transaction qualifies as a covered transaction under § 1.263(a)-5 of the Income Tax Regulations. In connection with the acquisition of the equity interest, Taxpayer incurred success-based transaction fees in the amount of $a. Taxpayer elected to deduct 70% or $b and capitalize the remaining 30% or $c.

Additionally in tax Year1, Taxpayer acquired the assets of LLC2 on Date3, the assets of LLC3 on Date4, and the equity interest in Corp. on Date5. All three of these acquisitions qualify as covered transactions under § 1.263(a)-5 of the regulations. In connection with the transactions, Taxpayer incurred success-based transaction fees in the amount of $d. Taxpayer elected to deduct 70% or $e and capitalize the remaining 30% or $f.

Taxpayer engaged CPA Firm to prepare and file its Year1 federal income tax return. Taxpayer relied upon CPA Firm to accurately prepare the return.

After discussions with Tax Return Preparer, who was a partner in CPA Firm, about the transactions, success-based fees, and the availability of the safe harbor election in

Revenue Procedure 2011-29, Taxpayer's Vice President of Finance informed Tax Preparer that Taxpayer decided to use the safe harbor election that Tax Return Preparer suggested for tax Year1. Taxpayer provided documentation and information relating to the transactions to Tax Return Preparer. Taxpayer and Taxpayer's Vice President of Finance relied on Tax Return Preparer as a qualified tax professional to prepare a complete and accurate federal income tax return for tax Year1 using the safe harbor election they discussed. The federal income tax return was timely filed under extension on or about Date6, and included a deduction of 70% of the success-based fee while the remaining 30% of the success-based fee was capitalized, consistent with the requirements of the safe harbor election.

In Month of Year2, Tax Return Preparer discovered that he had accidentally omitted from the tax Year1 return the statement required under section 4.01(3) of Rev. Proc. 2011-29 for taxpayers electing to use the safe harbor method of allocating success-based fees. This oversight was discovered by Tax Return Preparer before any discovery by the Internal Revenue Service. Tax Return Preparer had not informed Taxpayer about the need to attach the statement to the return in order to properly make the election. Upon discovering the omission, Tax Return Preparer immediately contacted Taxpayer and informed Taxpayer of the oversight and the need to file a letter ruling request for relief under §§ 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations.

Accordingly, Taxpayer requests that an extension of time be granted to allow Taxpayer to attach to its Year1 return the mandatory statement regarding the election to use the safe harbor method of allocating success-based fees under Rev. Proc. 2011-29.

LAW AND ANALYSIS:

Section 263(a)(1) of the Internal Revenue Code and § 1.263(a)-2(a) of the Income Tax Regulations generally 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. 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. See § 1.263(a)-5(b)(1).

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 § 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, i.e., an amount 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 a taxpayer to make a safe harbor election with respect to success-based fees. Section 4.01 provides that 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) (costs that must be capitalized) and activities that do not facilitate the transaction (costs that may be deducted) 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 deducted. Second, the taxpayer must capitalize the remaining amount of the success-based fee as an amount which does facilitate the transaction. Third, 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 third requirement that Taxpayer requests permission to accomplish with this ruling request. Taxpayer requests permission to attach the statement required by section 4.01(3) 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.

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 301.9100-1(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.

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 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 and representations provided, 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 for the tax Year1 transactions, as required by section 4.01(3) of

Rev. Proc. 2011-29, stating that Taxpayer is electing the safe harbor for success-based fees, identifying the transactions, and stating the success-based fee amounts that are deducted and capitalized for tax Year1.

The rulings contained in this letter are based on information and representations submitted by 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 transactions are within the scope of Rev. Proc. 2011-29.

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 its return that provides the date and control number of the letter ruling.

In accordance with the provisions of the power of attorney currently on file with this office, a copy of this letter is being sent to your authorized representatives. 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.

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.

Sincerely,

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NORMA C. ROTUNNO
Senior Technician Reviewer, Branch 2
Office of Associate Chief Counsel
(Income Tax & Accounting)