Internal Revenue Service

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Department of the Treasury
Washington, DC 20224

Third Party Communication: None
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Date:
June 20, 2016

Taxpayer	=
Parent	=
A	=
B	=
C	=
D	=
E	=
F	=
G	=
H	=
I	=
Date1	=
Date2	=
Date3	=
Date4	=
Date5	=
$Amount1	=
$Amount2	=
$Amount3	=
$Amount4	=

Dear :

This letter responds to your letter dated December 14, 2015, and supplemental correspondence, submitted on behalf of Taxpayer requesting an extension of time under §§ 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations to make the election described in Section 4 of Rev. Proc. 2011-29, 2011-18 I.R.B. 746, which includes attaching statements to Taxpayer's original federal income tax return for the taxable year ended Date1.

FACTS

Taxpayer is the holding company for C based A companies, which operate in B states and engage in the research, development, manufacture, sales and service of A products. The A companies serve a broad spectrum of industries in C. Taxpayer uses the accrual method of accounting and has a March 31 fiscal year end.

On Date3, Taxpayer completed the purchase of D percent of the stock of E. Immediately before the purchase, Taxpayer had established an acquisition vehicle, F, to purchase the shares of E. The terms of the deal included that immediately following the purchase, E and F would merge, with E remaining as the surviving corporation and a wholly owned subsidiary of Taxpayer.

In connection with the acquisition of E, Taxpayer incurred several deal-related expenses, e.g., costs of due diligence, legal and accounting costs, and investment banking fees. All deal-related expenses were paid on behalf of Taxpayer directly by its G parent company, Parent.

Taxpayer filed its original federal income tax return for the taxable year ending Date1 on Date 2. On this tax return, which was prepared by Taxpayer's return preparer, H, Taxpayer did not capitalize or deduct any of the deal-related costs pertaining to the above transaction that occurred on Date3. When the tax return was filed, Taxpayer's Tax Director believed that the costs at issue were the responsibility of Parent. Further, H did not advise Taxpayer about the potential deductibility of the costs at issue. Taxpayer's tax return for the taxable year ending Date1 reported a net operating loss.

In Date4, Taxpayer became aware that the costs at issue paid by Parent on behalf of Taxpayer were potentially deductible by Taxpayer. Taxpayer retained the accounting firm, I, to confirm the deductibility of the costs at issue and to perform a transaction cost analysis to determine whether the costs at issue were deductible or capitalizable. I concluded that the costs at issue were allocable to Taxpayer and should have either been deducted or capitalized by Taxpayer for its taxable year ended Date1.

Further, I provided a transaction cost analysis to determine the deductibility of the costs at issue. Pursuant to this, Taxpayer filed an amended federal income tax return for the taxable year ended Date1 on Date5. The amended tax return reflected additional deductions for non-facilitative costs in connection with the transaction that occurred on Date3 that reduced Taxpayer's taxable income from $Amount1 to $Amount2. As a result of the amended tax return, Taxpayer's net operating loss carryforward increased from $Amount3 to $Amount4.

In the days before filing its amended tax return, Taxpayer attempted to execute a Form 872, Consent to Extend Limitations Period, in order to extend the statute of limitations for Taxpayer's taxable year ended Date1. The Form 872 was not duly executed by the Taxpayer and the Internal Revenue Service.

On Date5, which is the day before the statute of limitations for Taxpayer's taxable year ended Date1 expired, Taxpayer filed the subject request for an extension of time under §§ 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations to make the election described in section 4.01(3) of Rev. Proc. 2011-29 for success-based fees, which includes attaching statements to Taxpayer's original income tax return for the taxable year ended Date1.

LAW

Section 263(a)(1) of the Internal Revenue Code and § 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, 112 S. Ct. 1039, 117 L. Ed. 2d 226 (1992); *Woodward v. Commissioner*, 397 U.S. 572, 575-576, 90 S. Ct. 1302, 25 L. Ed. 2d 577 (1970).

Under § 1.263(a)-5, a taxpayer must capitalize an amount paid to facilitate the business acquisition or reorganization transactions described in § 1.263(a)-5(a). In general, 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 paid that is contingent on the successful closing of a transaction described in § 1.263(a)-(5)(a) (i.e., a success-based fee) is presumed to facilitate the transaction. A taxpayer may rebut this presumption by maintaining sufficient documentation to establish that a portion of the fee is allocable to activities that do not facilitate the transaction.

Section 4.01 of Rev. Proc. 2011-29 provides a safe harbor election for taxpayers that pay or incur success-based fees for services performed in the process of investigating or otherwise pursuing a covered transaction described in § 1.263(a)-5(e)(3). In lieu of maintaining the documentation required by § 1.263(a)-5(f), a taxpayer may elect to allocate a success-based fee between activities that facilitate the transaction and activities that do not facilitate the transaction and by treating 70 percent of the amount of the success-based fee as an amount that does not facilitate the transaction and by capitalizing the remaining 30 percent as an amount that does facilitate the transaction.

In addition, 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 and capitalized.

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(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 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, 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)(2) provides that a taxpayer will not be considered to have reasonably relied on a qualified tax professional if the taxpayer knew or should have known that the professional was not (i) competent to render advice on the regulatory election; or (ii) aware of all relevant facts.

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 section 6501(a) before the taxpayer's receipt of a ruling granting relief under this section.

ANALYSIS AND CONCLUSION

The Service is adverse and cannot grant relief to Taxpayer's request on two separate grounds. First, pursuant to section 301.9100-3(c)(1)(ii), the interests of the Government will be prejudiced because a letter ruling granting relief would necessarily need to be issued after the statute of limitations has closed for the taxable year in which Taxpayer is requesting to make the late election at issue. Taxpayer asserts that that the closing of the statute of limitations does not lead to a dispositive conclusion that the interests of the Government are prejudiced under section 301.9100-3(c)(1)(ii). Taxpayer asserts that it merely leads to a rebuttable presumption that may be overcome. Taxpayer asserts that this presumption of prejudice to the interests of the Government can be overridden by an actual determination that the granting of relief will not result in Taxpayer having a lower tax liability in the aggregate for all taxable years affected by the election than Taxpayer would have had if the election had been timely made as set forth in section 301.9100-3(c)(1)(i). In this regard, Taxpayer states that for the taxable year ended Date1, Taxpayer had no tax liability due to utilization of net operating loss carryforward amounts and that the granting of relief will only increase its net operating loss carryforward amounts.

We disagree that the presumption of prejudice to the interests of the Government can be overridden by an actual determination that the granting of relief will not result in Taxpayer having a lower tax liability in the aggregate for all taxable years affected by the election than Taxpayer would have had if the election had been timely made as set forth in section 301.9100-3(c)(1)(i). Specifically, section 301.9100-3(c)(1)(i) and section 301.9100-3(c)(1)(ii) are separate and distinct requirements. Satisfying the requirements under section 301.9100-3(c)(1)(i) does not in itself lead to a conclusion that the requirements under section 301.9100-3(c)(1)(ii) are satisfied.

Second, the Service is adverse on the grounds that pursuant to section 4.01(3) of Rev. Proc. 2011-29, the safe harbor election must be made on an original tax return, but because Taxpayer already has filed an amended tax return for the tax year at issue, the election can no longer be made on its original tax return.

Taxpayer disagrees with the Service's interpretation of this provision and asserts that an amended tax return is not recognized as a separate tax return from the original tax

return and does not displace the original tax return. Further, Taxpayer states that it has merely filed an amended tax return that includes a protective claim for refund for success-based fees. Finally, Taxpayer asserts that in PLR 201102031, the Service had no objections where the taxpayers had filed an amended tax return after filing its original tax return and the taxpayers requested relief under section 301.9100-3 for an extension of time to make an election under section 163.

We disagree with Taxpayer's assertion that an amended tax return is not recognized as a separate tax return from the original tax return and does not displace the original tax return. The Service does distinguish between an original tax return and an amended tax return. In this regard, a "superseding tax return", a return that is filed subsequent to the original filed return and filed within the filing period (including extensions) is treated the same as the original tax return. On the other hand, an amended tax return, a return that is filed subsequent to the originally filed or superseding tax return and filed after the expiration of the filing period (including extensions), is deemed not to incorporate anything into the original tax return. *See Haggar Co. v. Helvering*, 308 U.S. 389 (1940). *Also see Badaracco v. Commissioner*, 464 U.S. 386 (1984).

Next, Taxpayer's assertion that it has merely filed an amended tax return that includes a protective claim for refund for success-based fees is unpersuasive.

Finally, Taxpayer's assertion about PLR 201102031 is inaccurate and not on point. In PLR 201102031, the election in question under § 163(d)(4)(B)(iii) is required to be made on or before the due date (including extensions) of the income tax return for the taxable year at question. *See* Treas. Reg. § 1.163(d)-1(b). This is distinguishable from the election under section 4.01(3) of Rev. Proc. 2011-29, which is required to be made on the original tax return for the taxable year at question.

Thus, Taxpayer's request for an extension of time to make the safe harbor election under Section 4 of Rev. Proc. 2011-29 is not granted.

The rulings contained in this letter are based upon 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, including whether Taxpayer is the proper party to account for the costs that are the subject of this request and whether Taxpayer's transactions were 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 ruling should 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 provisions of the power of attorney currently on file with this office, a copy of this letter is being sent to your authorized representatives.

Sincerely,

Christina M. Glendening

Christina M. Glendening
Senior Counsel, Branch 5
Office of Associate Chief Counsel
(Income Tax & Accounting)