Internal Revenue Service

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Department of the Treasury
Washington, DC 20224

Third Party Communication:
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Person To Contact:
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Telephone Number:

Refer Reply To:
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PLR-126685-16
Date:
February 3, 2017

Taxpayer =
Date1 =
Date2 =
A =
B =
C =
D =
E =

Dear :

This letter responds to your letter dated August 8, 2016, submitted by 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 taxable year ended Date1.

FACTS

Taxpayer is a wholly-owned subsidiary of A and has a principal place of business in B. Taxpayer is engaged in the business of operating a website that provides articles, links, and directories for individuals and professionals in the eldercare industry. Taxpayer uses an accrual method of accounting.

Taxpayer was a standalone corporation that was wholly acquired on Date2 by A (the "Transaction"). Pursuant to the Transaction, C, a wholly-owned subsidiary of A, merged into Taxpayer, with Taxpayer continuing as the surviving corporation and as a direct, wholly-owned subsidiary of A.

In the process of investigating or otherwise pursuing the Transaction, Taxpayer incurred certain transaction costs, which included payments to certain professional advisors for legal, accounting, and consultative services. Some of those costs related to payments by Taxpayer to a professional financial advisor due only upon successful closing of the Transaction ("success-based fees"). Taxpayer paid the professional financial advisor success-based fees in the amount of D upon closing of the Transaction.

Taxpayer engaged E to prepare Taxpayer's federal income tax return for the short taxable year ended Date1. Taxpayer relied upon E to prepare its U.S. federal income tax returns and to advise it as to all statements and other information that should be included in its U.S. federal income tax returns. E determined that the success-based fee paid by Taxpayer to the professional financial advisor upon closing of the Transaction satisfied the requirements of Rev. Proc. 2011-29, and that the transaction qualified as a covered transaction under the requirements of § 1.263(a)-5(e)(3) of the Income Tax Regulations. Accordingly, on Taxpayer's timely filed federal income tax return for the taxable year ended Date1 prepared by E, Taxpayer capitalized under § 263(a) of the Internal Revenue Code, 30 percent of the success-based fees related to the Transaction, and deducted the remaining 70 percent, consistent with Taxpayer's intent to make the election provided in Rev. Proc. 2011-29. However, in reliance on E, Taxpayer failed to attach the mandatory statements identifying the transactions and setting forth this allocation as required by Section 4.01(3) of Rev. Proc. 2011-29.

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 provided the taxpayer treats 70 percent of the amount of the success-based fee as an amount that does not facilitate the transaction and capitalizes 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. See also § 301.9100-3(b) and (c).

CONCLUSION

Based solely on the facts and representations submitted, we conclude that Taxpayer acted reasonably and in good faith, and granting relief will not prejudice the interests of the government. Accordingly, the requirements of §§ 301.9100-1 and 301.9100-3 have been met.

Taxpayer is granted an extension of 45 days from the date of this ruling to file its mandatory statements as required by Section 4.01 of Revenue Procedure 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.

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 properly included the correct costs as success-based fees subject to the retroactive election, or 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 Taxpayer's federal tax returns for the tax years affected. 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,

TaJuana Nelson Hyde

TaJuana Nelson Hyde
Senior Technician Reviewer, Branch 1
Office of Associate Chief Counsel
(Income Tax and Accounting)