**Internal Revenue Service**

Department of the Treasury
Washington, DC 20224

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Person To Contact:
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Telephone Number:

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Refer Reply To:
CC:ITA:B02
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Date:
June 29, 2017

Dear :

TY:

Taxpayer=
Sponsor=
A=
B=
Tax Preparer=
Year1=
Year2=
Date1=
Date2=
Date3=
Date4=
Date5=
Date6=
Date7=
Date8
Date9=
Date10=
Date11=
Date12=
$a=

This is in response to a letter dated Date1, and additional information submitted Date2, requesting an extension of time to make a safe-harbor election under Rev. Proc. 2011-29, 2011-1 C.B. 746. This election is needed to allocate success-based fees between facilitative and non-facilitative amounts for Taxpayer's transaction during TY. 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:

Background Information

Taxpayer was formed on Date3 as a limited liability company. Taxpayer is majority owned by Sponsor.

The Transaction and Success-Based Fee

On Date4 (the "Transaction Closing Date"), pursuant to a plan of merger (the "Transaction"), Taxpayer acquired all of the stock of A through the use of a direct, wholly-owned, transitory merger subsidiary, B. Pursuant to the Transaction, Taxpayer caused B to merge with and into A, with A surviving the merger. As a result of the Transaction, Taxpayer became the direct owner all of the outstanding stock 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 consulting services. Some of those costs related to the payment by Taxpayer to a professional financial advisor ("Advisor") due only upon the successful closing of the Transaction (the "Success-Based Fee"). The amount of the Success-Based Fee paid by Taxpayer to Advisor upon the successful closing of the Transaction was $a.

Neither Sponsor nor Taxpayer has in-house tax knowledge and expertise as it relates to U.S. federal tax filings. In the ordinary course of business affairs, Sponsor and Taxpayer have relied on the expertise of professional tax advisors.

Circumstances and Discovery of Missed Election

A filed its Year1 tax return on Date6. A's personnel understood that, subsequent to the Transaction Closing Date, A would consent to file a consolidated tax return with Taxpayer (of which Taxpayer would be the common parent). On Date7, Taxpayer

requested that Tax Preparer prepare a consolidated tax return for Taxpayer and A for the tax period from Date8 to Date9 (the "Taxpayer Group Year2 Tax Year").

On or about Date10, however, it was discovered that Taxpayer had not filed its separate company pre-Transaction tax return for TY. Upon this discovery, Taxpayer requested that Tax Preparer prepare a late Form 1120 for Taxpayer's TY. In preparing Taxpayer's TY return, Tax Preparer requested financial information from Taxpayer, including a trial balance that reported all items of income, deduction, gain, or loss incurred by Taxpayer for TY in accordance with the accrual method of accounting as adopted by the Taxpayer. In addition, Tax Preparer advised Taxpayer that certain success-based acquisition-related costs incurred in the process of investigating or otherwise pursuing the Transaction can qualify for the safe-harbor provisions of Rev. Proc. 2011-29 and requested information regarding transaction costs that might have been incurred by Taxpayer on or before Date4 in connection with the Transaction, including any success-based fees. Taxpayer advised Tax Preparer that it did not incur any items of income, deduction, gain, or loss during TY. Furthermore, Taxpayer advised Tax Preparer – based upon the understanding of Taxpayer's personnel at that time – that Taxpayer did not incur any success-based fees or other transaction costs in connection with the Transaction.

Based on this information, Tax Preparer prepared the Taxpayer's TY return without taking into account any transaction related costs, without making the safe-harbor election of Section 4 of Rev. Proc. 2011-29, and without reflecting an allocation of any success-based fee between activities that facilitated the Transaction and activities that did not facilitate the Transaction. Taxpayer filed its TY return on Date11.

On Date12, Taxpayer discovered that it had, in fact, incurred certain transaction costs, including the Success-Based Fee. Taxpayer discovered this error when it was conducting certain activities related to financial statement reporting and purchase accounting in connection with the Transaction. If Taxpayer had been aware that it had incurred the Success-Based Fee at the time it filed its TY return, Taxpayer would have made the safe-harbor election on its TY return with respect to the Success-Based Fee it paid to Advisor.

Subsequently, Tax Preparer advised Taxpayer to file this request.

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. 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) and activities that do not facilitate the transaction 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. 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. This statement should: state that the taxpayer is electing the safe harbor; identify the transaction; and state the success-based fee amounts that are treated as not facilitating the transaction and the success-based fee amounts that are treated as facilitating the transaction.

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. The safe harbor election under Rev. Proc. 2011-29 falls within the purview of § 301.9100-1(c).

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 a safe harbor election under Rev. Proc. 2011-29 for TY with respect to the Success-Based Fee discussed herein on an amended return.

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 transaction is 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 yours,

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BRIDGET TOMBUL
Chief, Branch 2
Office of Associate Chief Counsel
(Income Tax & Accounting)

Enclosure:

Copy for § 6110 purposes

cc: