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:

Refer Reply To:
CC:ITA:B01
PLR-103648-19

Date:
August 28, 2019

In re: Request for an Extension to File Election Statement

LEGEND

Taxpayer	=
X	=
A	=
B	=
Date a	=
Date b	=
Date c	=
Date d	=
Date e	=
Date f	=
$a	=
%a	=
Products	=
City	=
Year 1	=

Dear :

This is in response to a letter dated January 10, 2019, requesting an extension of time to file the required election statement to make the safe harbor election under Rev. Proc. 2011-29, 2011-1 C.B. 746, to allocate success-based fees between facilitative and non-facilitative amounts for Taxpayer's transaction during the taxable period Date a, through Date b. This request is made in accordance with §§ 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations.

FACTS

Taxpayer is the common parent of an affiliated group of corporations that files a consolidated Federal income tax return. Taxpayer uses an overall accrual method of accounting. Taxpayer is engaged in the wholesale distribution of Products.

On Date b, %a of the stock of Taxpayer was acquired by X ("Transaction"). As of that date, Taxpayer had incurred $a in success-based fees for services performed in the process of investigating and otherwise pursuing the Transaction.

After X purchased Taxpayer, it engaged an accounting firm, A, to prepare and file Taxpayer's Form 1120, *U.S. Corporation Income Tax Return*, for Taxpayer's short taxable year beginning Date a, and ending Date b ("Return"). The extended due date for Taxpayer's Return was Date c.

Taxpayer had previously engaged A for accounting and tax assistance since Date d. A is a regional accounting firm located in City, with a significant CPA tax practice providing services which include corporate tax compliance and tax return preparation.

As part of the preparation of the Return, Taxpayer asked A to properly advise it regarding the treatment of various fees it had incurred with regard to certain transactions in the taxable year. A performed an analysis of the success-based fees Taxpayer had incurred with respect to the Transaction and determined that Taxpayer could deduct seventy percent of those fees and capitalize the remaining thirty percent by making the election provided by Rev. Proc. 2011-29. On Date e, A provided to X an email containing the statement required by section 4.01(3) of Rev. Proc. 2011-29 ("Election Statement"), which A represented would be attached to Taxpayer's Return. On Date f, after reviewing the Return, B signed the Return as well as the Form 8879-C, *IRS e-file Signature Authorization for Form 1120*, authorizing A to e-file the Return along with the attached Election Statement.

However, A inadvertently failed to attach the Election Statement to the Return which it had filed electronically, as required by section 4.01(3) of Rev. Proc. 2011-29. Taxpayer and B, who oversaw the approval and signing of Taxpayer's Federal income tax return, were unaware that the Election Statement had not been attached to Taxpayer's electronically filed Return.

In Year 1 the Internal Revenue Service ("IRS") began an audit of the Return. An agent of the IRS informed Taxpayer that he or she was unable to locate the Election Statement attached to the Return as filed.

B inquired with A and was informed that the Election Statement was omitted from the filing of the Return. A stated that the Election Statement was inadvertently and

erroneously excluded from the Return due to an administrative error of not attaching the Election Statement to the electronic copy of the Return that was filed with the IRS.

Taxpayer's Return was prepared consistent with having made an election under section 4.01 of Rev. Proc. 2011-29. In other words, Taxpayer capitalized thirty percent of the success-based fees and, on its Return, deducted the remaining seventy percent as an amount that did not facilitate the purchase of Taxpayer.

Taxpayer filed this request for relief for an extension of time to file its Election Statement under section 4.01(3) of Rev. Proc. 2011-29 for Taxpayer's taxable year ending Date b. This request is made in accordance with §§ 301.9100-1 and 301.9100-3. Taxpayer filed this request after the IRS discovered that the Election Statement had not been attached to Taxpayer's Return.

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.

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 seventy 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 the 70/30 safe harbor election with respect to success-based fees. Section 4.01(3) of Rev. Proc. 2011-29 provides that 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 deducted and capitalized. 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 for the tax year ending Date b, and superseding it with a return attaching a completed Election Statement.

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 extensions of time for regulatory elections 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, in general, 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 IRS; (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, the taxpayer was unaware of the necessity for the election; (iv) reasonably relied on the written advice of the IRS; or (v) reasonably relied on a qualified tax professional, 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 is deemed to have not 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 section 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 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 under § 6501(a) before the taxpayer's receipt of a ruling granting relief under this section.

Taxpayer's election is a regulatory election as defined in § 301.9100-1(b) because the due date of the election is prescribed in section 4.01(3) of Rev. Proc. 2011-29. 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.

Section 2.04 of Rev. Proc. 2011-29 provides that a taxpayer's method for determining the portion of a success-based fee that facilitates a transaction and the portion that does not facilitate a transaction is a method of accounting under § 446. Elections relating to methods of accounting are subject to special rules. Section 301.9100-3(c)(2). However, Taxpayer is not seeking to change its method of accounting for the success-based fees, only to file the statement required by section 4.01(3) of Rev. Proc. 2011-29.

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 attach the statement required by section 4.01(3) of Rev. Proc. 2011-29 to its return by amending its original filed return for the tax year ending Date b, and superseding it with a return attaching a completed Election Statement with respect to the Transaction for its taxable year ending Date b.

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 appropriate parties. 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. 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 under § 6110.

This ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) provides that it may not be used or cited as precedent.

Sincerely,

Sean M. Dwyer
Senior Technician Reviewer, Branch 1
Office of Associate Chief Counsel
(Income Tax & Accounting)

Enclosure (1):
Copy for § 6110 purposes

cc: