Internal Revenue Service

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Department of the Treasury
Washington, DC 20224

Third Party Communication: None
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Person To Contact:
, ID No.

Telephone Number:

Refer Reply To:
CC:ITA:B02
PLR-101512-20

Date:
June 05, 2020

Legend:

Taxpayer	=
Date1	=
Date2	=
Date3	=
Date4	=
Date5	=
A	=
B	=
C	=
D	=
E	=
F	=
G	=
State1	=
State2	=
$a	=
$b	=

Dear :

This is in response to a letter ruling request dated Date1, requesting an extension of time to file a safe-harbor election under Rev. Proc. 2011-29, 2011-1 C.B. 746, to allocate success-based fees for the taxable year ending Date2. This request is made in accordance with §§ 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations. This letter ruling is being issued electronically in accordance with Rev. Proc. 2020-29, 2020-21 I.R.B. 859. A paper copy will not be mailed to Taxpayer.

FACTS AND REPRESENTATIONS

Taxpayer represents the following:

Taxpayer is a corporation organized under the laws of State1 with its headquarters located in State2. Taxpayer is the common parent of an affiliated group of corporations that join in filing a consolidated U.S. federal income tax return. Taxpayer has a calendar year end and uses an accrual method of accounting. Taxpayer is in the business of G.

On Date3, Taxpayer, A, and B (a wholly-owned subsidiary of Taxpayer) entered into the transaction agreement ("Agreement"). On Date4, pursuant to the Agreement, B acquired all of the issued and outstanding common shares of A. B then underwent an amalgamation with A, with A being the survivor. Upon completion of the transaction, A became a wholly-owned subsidiary of Taxpayer and is treated as a controlled foreign corporation for U.S. federal income tax purposes. Taxpayer represents that immediately after the transaction, Taxpayer directly owned 100% of the stock of A and Taxpayer and A were related within the meaning of § 267(b). The Agreement consideration was approximately $a cash. For U.S. federal income tax purposes, Taxpayer treated the transaction as a taxable stock purchase under § 1001 of the Internal Revenue Code.

Taxpayer paid fees to both C and D to serve as financial advisors in the process of investigating or otherwise pursuing the transaction. The fees paid to C and D, totaling $b, are the fees that Taxpayer treats as success-based fees for purposes of this request. The fees were contingent on the successful closing of the transaction and were paid at the time of closing. No portion of the success-based fees was a guaranteed payment incurred upon the occurrence of a specified milestone or upon some other date or event other than the successful closing of the transaction, and no portion of the success-based fees was related to financing costs or reimbursed expenses.

Taxpayer represents that Taxpayer paid or incurred success-based fees of $b as defined by § 1.263(a)-5(f) of the Income Tax Regulations, and that Taxpayer's transaction was a "covered transaction" as defined by § 1.263(a)-5(e)(3).

Taxpayer prepared the U.S. federal income tax return for the taxable year ending Date2. The tax return was filed timely and treated the success-based fees consistently with the making of an election under Rev. Proc. 2011-29, with 70 percent of the success-based fees treated as amounts that did not facilitate the transaction. However, Taxpayer failed to attach the required election statement to Taxpayer's original federal tax return for the taxable year ending Date2. Taxpayer relied on E, the former Tax Director of Taxpayer, to properly prepare the tax return and include all appropriate elections therewith, but by mere oversight, Taxpayer failed to attach the election statement.

In Date5, Taxpayer was finalizing its tax calculations as part of its annual financial statement audit. At that time, F, Taxpayer's financial statement auditor, discovered that the required election statement under Rev. Proc. 2011-29 was not attached to Taxpayer's tax return for the taxable year ending Date2. F promptly informed Taxpayer and Taxpayer requested that F commence preparation of this request.

LAW AND ANALYSIS:

Sections 263(a)(1) and 1.263(a)-2(a) 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, therefore, 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.

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 election 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: (1) treats 70 percent of the amount of the success-based fee as an amount that does not facilitate the transaction and thus may be deducted; (2) capitalizes the remaining amount of the success-based fee as an amount which does facilitate the transaction; and (3) attaches 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 pursuant to the safe harbor election. Section 4.03 of Rev. Proc. 2011-29 provides that the election does not constitute a change in method of accounting for success-based fees generally. Accordingly, a § 481(a) adjustment is neither permitted nor required.

The revenue procedure applies to covered transactions described in § 1.263(a)-5(e)(3), which include (i) a taxable acquisition by the taxpayer of assets that constitute a trade or business; (ii) a taxable acquisition of an ownership interest in a business entity (whether the taxpayer is the acquirer in the acquisition or the target of the acquisition) if, immediately after the acquisition, the acquirer and the target are related within the meaning of § 267(b) or § 707(b); or (iii) a reorganization described in § 368(a)(1)(A), (B), or (C) or a reorganization described in § 368(a)(1)(D) in which stock or securities of the corporation to which the assets are transferred are distributed in a transaction which qualifies under § 354 or § 356 (whether the taxpayer is the acquirer or the target in the reorganization).

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.

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 for success-based fees under Rev. Proc. 2011-29 for its taxable year ending Date2.

The ruling contained in this letter is 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 Taxpayer's classification of its costs as success-based fees 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, copies of this letter are being sent to your authorized representatives. We are also sending a copy of this letter to the appropriate operating division director.

This letter 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,

_____
Amy S. Wei
Senior Counsel, Branch 2
(Income Tax & Accounting)
Office of Associate Chief Counsel

Enclosure: Copy for § 6110 purposes

cc: