**Internal Revenue Service**

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Department of the Treasury
Washington, DC 20224

Third Party Communication: None
Date of Communication: Not Applicable

Person To Contact:
, ID No.

Telephone Number:

Refer Reply To:
CC:ITA:B02
PLR-131891-14

Date:
February 19, 2015

| | |
|---|---|
| Taxpayer | = |
| LLC | = |
| Corporation | = |
| Merger Subsidiary | = |
| CPA | = |
| Taxable Year | = |
| Amount 1 | = |
| State 1 | = |
| Year 1 | = |
| Date 1 | = |
| Date 2 | = |
| Date 3 | = |
| Date 4 | = |
| Date 5 | = |

Dear :

This is in response to your letter submitted on Date 1 on behalf of the Taxpayer, requesting rulings that, pursuant to Treas. Reg. § 301.9100-1, the Internal Revenue Service grant the Taxpayer an extension of time to file an election statement required by section 4.01(3) of Rev. Proc. 2011-29 with respect to the Taxable Year.

## FACTS

On Date 2, the Taxpayer was formed as a limited liability company pursuant to the laws of State 1. On Date 3, the Taxpayer filed a Form 8832 with the I.R.S. and elected to be treated as a corporation for U.S. federal income tax purposes. The Taxpayer's sole owner was LLC, an entity treated as a partnership for U.S. income tax purposes.

On Date 4, pursuant to a plan of merger, the Taxpayer acquired 100% of the stock of Corporation through a wholly-owned subsidiary, Merger Sub. Pursuant to the plan of merger, the Taxpayer caused Merger Sub to merge into Corporation, with Corporation surviving the merger as a direct, wholly-owned subsidiary of the Taxpayer. The Taxpayer has represented that the transaction qualified as a taxable acquisition of Corporation stock by the Taxpayer, pursuant to Rev. Rul. 73-427, as well as a covered transaction, pursuant to Treas. Reg. § 1.263(a)-5(e)(3)(ii).

In the process of pursuing the merger with Corporation, the Taxpayer incurred transaction costs, including fees paid to professional advisors for legal, accounting, and consultative services. Some of the costs were attributable to fees paid by the Taxpayer to a professional financial advisor due only upon the successful closing of the merger with Corporation (success-based fee). Upon completion of the merger, the Taxpayer remitted a success-based fee in the amount of Amount 1 to the financial advisor.

The Taxpayer represents that it does not have in-house tax knowledge or expertise with respect to U.S. federal tax filings. Due to its lack of knowledge and expertise with respect to U.S. federal tax filings, the Taxpayer has historically engaged professional tax advisors in the ordinary course of its business to prepare all of its required U.S. federal tax return filings.

In Year 1, the Taxpayer engaged CPA to prepare the Taxpayer's U.S. federal income tax return for the Taxable Year. The Taxpayer represents that it believed and understood that CPA had extensive experience in preparing income tax returns and advising clients regarding all statements and other information that should be included on such returns.

On Date 5, the Taxpayer filed a consolidated U.S. federal income tax return for the Taxable Year. The Taxpayer elected to capitalize 30% of the success-based fee pursuant to section 263(a), and treated the remaining 70% of the success-based fee as a deductible start-up cost, pursuant to the safe harbor election set forth in section 4 of Rev. Proc. 2011-29. The Taxpayer represents that CPA failed to attach the election statement required by section 4.01(3) of Rev. Proc. 2011-29 to the Taxpayer's return for the Taxable Year. Subsequent to the filing of the return, the Taxpayer engaged CPA to file a request for relief to file the election statement, pursuant to Treas. Reg. § 301.9100-1.

## LAW

Section 263(a)(1) provides generally that no deduction shall be allowed for any amount paid in exchange for property having a useful life extending beyond the end of the taxable year. See also Treas. Reg. § 1.263(a)-2(a). Costs incurred in the process of acquisition or reorganization of a business entity that produce significant long-term benefits must be capitalized. Indopco v. Commissioner, 503 U.S. 79, 89-90 (1992);

Treas. Reg. § 1.263(a)-5(a) (providing that taxpayers must capitalize amounts paid to facilitate certain transactions set forth in that section).

Treas. Reg. §1.263(a)-5(b)(1) provides that an amount is paid to facilitate a transaction if the amount is paid in 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.

Treas. Reg. § 1.263(a)-5(f) sets forth the rule governing success-based fees, and provides that an amount paid that is contingent on the successful closing of a transaction described in Treas. Reg. § 1.263(a)-5(a) is treated as an amount paid to facilitate the transaction, except to the extent the taxpayer maintains sufficient documentation to establish that a portion of the fee is allocable to activities that do not facilitate the transaction. This documentation must be completed on or before the due date of the taxpayer's timely filed original federal income tax return (including extensions) for the taxable year during which the transaction closes.

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 section 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 Treas. Reg. § 1.263(a)-5(e)(3). Pursuant to Section 4.01 of Rev. Proc. 2011-29, the Service will not challenge a taxpayer's allocation of success-based fees between activities that facilitate a transaction described in Treas. Reg. § 1.263(a)-5(e)(3) and activities that do not facilitate the transaction, if the taxpayer: 1) treats 70% of the amount of the success-based fee as an amount that does not facilitate the transaction; 2) capitalizes the remaining 30% as an amount that does facilitate the transaction; and 3) attaches a statement to its original federal income tax return for the tax year the success-based fee is paid or incurred, stating that the taxpayer is electing the safe harbor, identifying the transaction, and stating the amount of the success-based fees that are deducted and capitalized.

Treas. Reg. §§ 301.9100-1 sets forth the standards the Commissioner will use to determine whether to grant an extension of time to make a regulatory election. Treas. Reg. § 301.9100-1(b) provides that a regulatory election is 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. Pursuant to Treas. Reg. § 301.9100-1(c), the Commissioner has discretion to grant a reasonable extension of time under the rules set forth in Treas. Reg. §§ 301.9100-2 and 301.9100-3 to make a regulatory election.

Treas. Reg. § 301.9100-2 sets forth the rules applicable to automatic 12-month extensions of time to make certain regulatory elections. Treas. Reg. § 301.9100-3 sets forth the rules applicable to requests for extensions of time for regulatory elections that do not meet the requirements of Treas. Reg. § 301.9100-2. Requests for relief pursuant to Treas. Reg. § 301.9100-3 will be granted when the taxpayer provides evidence (including affidavits described in Treas. Reg. § 301.9100-3(e)) that establishes that the taxpayer acted reasonably and in good faith, and that the grant of relief will not prejudice the interests of the government.

Treas. Reg. § 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 reasonable diligence (taking into account the taxpayer's experience and the complexity of the return at issue), 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 taxpayer failed to make, or to advise the taxpayer to make, the election.

Treas. Reg. § 301.9100-3(b)(3) provides that a taxpayer will not be deemed to have 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.

Treas. Reg. § 301.9100-3(c)(1) provides that an extension of time to make a regulatory election will be granted only when the interests of the government are not prejudiced by the granting of relief. The interests of the government are prejudiced if granting relief would result in a 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). Treas. Reg. § 301.9100-3(c)(1)(i).

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 under section 6501(a) before the taxpayer's receipt of a ruling granting relief under this section. Treas. Reg. § 301.9100-3(c)(1)(ii).

Treas. Reg. § 301.9100-3(c)(2) provides special rules for accounting method regulatory elections. The interests of the government are deemed to be prejudiced except in unusual and compelling circumstances if the accounting method regulatory election for which relief is requested:

(i) is subject to the procedure set forth in Treas. Reg. § 1.446-1(e)(3)(i) of this chapter (requiring advance written consent of the Commissioner);
(ii) requires an adjustment under section 481(a) (or would require an adjustment under section 481(a) if the taxpayer changed to the method of accounting for which relief is requested in a taxable year subsequent to the taxable year the election should have been made);
(iii) would permit a change from an impermissible method of accounting that is an issue under consideration by examination, an appeals office, or a federal court and the change would provide a more favorable method or more favorable terms and conditions than if the change were made as part of an examination; or
(iv) provides a more favorable method of accounting or more favorable terms and conditions if the election is made by a certain date or taxable year.

## CONCLUSION

Based upon on the information submitted and representations made, we conclude that the Taxpayer acted reasonably and in good faith, and granting relief will not prejudice the interests of the government. Therefore, the requirements of Treas. Reg. §§ 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 its mandatory statement as required by section 4.01 of Rev. Proc. 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.

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 the Taxpayer properly included the correct costs as its success-based fees subject to the retroactive election, or whether the Taxpayer's transaction was within the scope of Rev. Proc. 2011-29.

This ruling is directed only to the taxpayer requesting it. Pursuant to Treas. Reg. § 6110(k)(3), this ruling may not be used or cited as precedent.

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 their return that provides the date and control number of the letter ruling.

The rulings contained in this letter are based upon information and representations submitted by the 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.

Sincerely,

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Thomas D. Moffitt
Branch Chief
(Income Tax & Accounting)

cc: