

200402029



DEPARTMENT OF THE TREASURY  
INTERNAL REVENUE SERVICE  
WASHINGTON, D.C. 20224

TAX EXEMPT AND  
GOVERNMENT ENTITIES

DIVISION

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OCT 16 2003

T:EP:BA:UK

Legend:

Taxpayer A

= \*\*\*\*\*

Taxpayer B

= \*\*\*\*\*

Attorney C

= \*\*\*\*\*

Trust F

= \*\*\*\*\*

Trust Q

= (\*\*\*\*\*)

Trust U

= (\*\*\*\*\*)

Trust W

= (\*\*\*\*\*)

IRA X

= \*\*\*\*\*  
\*\*\*\*\* (\*\*\*\*\*)

Amount E

= \$\*\*\*\*\*

State N

= \*\*\*\*\*

Statute Y

= \*\*\*\*\*

Provisions Z

= \*\*\*\*\*;  
\*\*\*\*\*;  
\*\*\*\*\*; and  
\*\*\*\*\*

Date 1

= \*\*\*\*\*

Date 2

= \*\*\*\*\*

Date 3

= \*\*\*\*\*

Date 4

= \*\*\*\*\*

Date 5

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Date 6 = \*\*\*\*\*

Date 7 = \*\*\*\*\*

Date 8 = \*\*\*\*\*

Dear Taxpayer A:

This is in response to your request for a letter ruling dated March 3, 2003, as supplemented by correspondence dated April 21, 2003, April 28, 2003 and October 1, 2003, in which you requested a waiver of the 60-day rollover requirement contained in section 408(d)(3) of the Internal Revenue Code.

The following facts and representations have been submitted under penalties of perjury in support of the ruling requested:

On Date 1, 1995, Taxpayer A and Taxpayer B established revocable Trust F as grantors and co-trustees. Trust F was amended on Date 2, 1996, and on Date 3, 1998.

Trust F, as amended, provides, in relevant part, that, upon the death of Taxpayer B, Trust F is to be subdivided into Trust W, Trust Q and Trust U. Trust Q contains the remainder of the community property which is deemed owned by Individual B as well as his separate property. Trust U contains the maximum estate amount which Individual B could own without imposition of the federal estate tax.

Trusts Q and U were to become irrevocable upon the death of Taxpayer B.

Trust F provided, in relevant part with respect to Trust Q, that during the life of Taxpayer A, the Trustee "...shall pay to her all of the net trust income, in convenient installments at least as often as quarterly, and so much of the trust principal as the Trustee determines from time to time to be reasonably required for her health, maintenance in reasonable comfort, and support in her accustomed manner of living." No other person is entitled to receive any distribution from Trust Q during Taxpayer A's lifetime.

Article 3.1(d) of Trust W (concerning assets subsequently added) provides that "As long as Trust W remains unrevoked, additional property may be added and the Trustee may be made beneficiary of additional life insurance policies by the Grantor Wife..."

Article 3.3(b) of Trust F (that governs Trust W), provides that if Trust W is revoked in its entirety by the Grantor Wife, the trustee shall pay all of the accumulated trust income and all the principal to the Grantor Wife as she may otherwise direct in writing.

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Article 6.8 of Trust F provides that this agreement and the dispositions hereunder shall be construed and regulated and their validity and effect shall be determined by the laws of State N. Provisions Z of Statute Y of State N authorize the trustee of Trust F to allocate Trust F assets between income and principal to the extent said trustee considers necessary. Provisions Z sets forth a number of factors which a trustee must consider in making his allocations including, but not limited to, the anticipated tax consequences of his allocation.

Taxpayer B owned IRA X. On Date 3, 1998, Taxpayer B signed a designation of beneficiary drafted by Attorney C designating the Trustee of Trust F as the beneficiary of his IRA X. The designation provides, in relevant part, that if Taxpayer A were to survive Taxpayer B, the Trustee of Trust F were to allocate his IRA X between Trusts U and Q as established under the terms of Trust F "taking into account the guidance provided with respect to allocation in the said trust agreement."

When Taxpayer B died on Date 4, 2001, his wife, Taxpayer A was well over age 70½. Under the terms of Trust F, she became the sole trustee of Trust F (including Trusts U, Q and W). At that time she had major back surgery and was hospitalized for 21 days. While she was still recovering, she believed she must receive a required distribution from IRA X and requested application forms from its custodian. She was confused by the impact of recent back surgery and hospitalization. She did not act reasonably and consult with Attorney C as she should have when she completed the application forms. She applied for a total distribution of Amount E from IRA X instead of periodic payments to be made from Trust Q over her life expectancy as the original beneficiary designation had specified. Between Date 5 and Date 6, 2002, the custodian of IRA X transferred title to assets valued at Amount E to Trust F. Taxpayer A did not exercise her discretion as Trustee under Provisions Z of Statute Y to reallocate the re-titled assets from Trust F to Trust Q until five months later after the 60-day rollover period ended.

On Date 7, 2002, Attorney C realized what Taxpayer A had done. He attempted to rectify the adverse tax consequences by having assets valued at Amount E (now held by Trust F) re-titled to Trust Q. He advised Taxpayer A to transfer the re-titled assets in Trust Q to Trust W. His intention was to make Amount E taxable to Taxpayer A personally, and ask IRS to extend the 60-day rollover period. If an extension were granted, Taxpayer A could then make a spousal rollover. On Date 8, 2002, Taxpayer A, exercised her discretion under Provisions Z of Statute Y and transferred Amount E from Trust Q to Trust W.

As noted above, on March 3, 2003, Taxpayer A requested a ruling from this office for an extension of the 60-day period to allow her to set up and maintain an IRA in her own name.

With respect to Taxpayer A's allocation of the IRA proceeds to herself, section 408(d)(1) of the Code provides that, except as otherwise provided, any amount paid or distributed out of an individual retirement plan shall be included in the gross income of the payee or distributee.

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Section 408(d)(3) of the Code provides that section 408(d)(1) does not apply to a rollover contribution if such contribution satisfies the requirements of sections 408(d)(3)(A) and (d)(3)(B).

Section 408(d)(3)(A) of the Code provides that section 408(d)(1) of the Code does not apply to any amount paid or distributed out of an IRA to the individual for whose benefit the IRA is maintained if—

- (i) the entire amount received (including money and any other property) is paid into an IRA for the benefit of such individual not later than the 60th day after the day on which the individual receives the payment or distribution; or
- (ii) the entire amount received (including money and any other property) is paid into an eligible retirement plan (other than an IRA) for the benefit of such individual not later than the 60th day after the date on which the payment or distribution is received, except that the maximum amount which may be paid into such plan may not exceed the portion of the amount received which is includible in gross income (determined without regard to section 408(d)(3)).

Section 408(d)(3)(B) of the Code provides that section 408(d)(3) does not apply to any amount described in section 408(d)(3)(A)(i) received by an individual from an IRA if at any time during the 1-year period ending on the day of such receipt such individual received any other amount described in section 408(d)(3)(A)(i) from an IRA, which was not includible in gross income because of the application of section 408(d)(3).

Section 408(d)(3)(C)(i) of the Code provides, in pertinent part, that, in the case of an inherited IRA, section 408(d)(3) shall not apply to any amount received by an individual from such account (and no amount transferred from such account to another IRA shall be excluded from income by reason of such transfer), and such inherited account shall not be treated as an IRA for purposes of determining whether any other amount is a rollover contribution.

Section 408(d)(3)(C)(ii) of the Code provides that an IRA shall be treated as inherited if the individual for whose benefit the account is maintained acquired such account by reason of the death of another individual, and such individual was not the surviving spouse of such other individual. Thus, pursuant to Code section 408(d)(3)(C)(ii), a surviving spouse who acquires IRA proceeds from and by reason of the death of her husband, may elect to treat those IRA proceeds as her own and roll them over into her own IRA.

On April 17, 2002, "Final" Income Tax Regulations were published in the Federal Register with respect to Code Sections 401(a)(9) and 408(a)(6). (See also 2002-19 I.R.B. 852, May 13, 2002.) Section 1.408-8 of the "Final" Regulations, Question and Answer 5, provides that a surviving spouse of an IRA owner may elect to treat the spouse's entire interest as a beneficiary in an individual's IRA as the spouse's own IRA. In order to make this election, the spouse must be the sole beneficiary of the IRA and have an unlimited right to withdraw amounts from the IRA. If a

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trust is named as beneficiary of the IRA, this requirement is not satisfied even if the spouse is the sole beneficiary of the trust.

The Preamble to the "Final Regulations" provides, in relevant part, that the surviving spouse who actually receives a distribution from an IRA is permitted to roll that distribution over into his/her own IRA even if the spouse is not the sole beneficiary of the deceased's IRA as long as the rollover is accomplished within the requisite 60 day period. A rollover may be accomplished even if IRA assets pass through either a trust or an estate.

The Preamble to the "Final Regulations" also provides, in relevant part, that a surviving spouse's election to treat a deceased's IRA as her own may be made only after the minimum required distribution for the year of death, if any, is made to the extent it was not made prior to the deceased's IRA owner's death. The same rule exists with respect to a surviving spouse's ability to roll over the IRA of a decedent into her own IRA.

In this case, assets of IRA X valued at Amount E were paid to Trust F at Taxpayer A's request. Taxpayer A as Trustee had the authority to reallocate such amounts from Trust F to Trust Q, and from Trust Q to Trust W, her revocable grantor trust. She was authorized further to revoke Trust W under Article 3.3(b) of Trust F (which governs Trust W). Upon revocation of Trust W, Taxpayer A had the right to receive free of the trust a distribution of the proceeds of IRA X. Upon receipt, Taxpayer A would have had the right to roll over said proceeds into an IRA set up and maintained in her name. Said rollover would have had to have been made within the 60 day period mandated by Code section 408(d)(3). However, as described above, said rollover was not timely made.

Section 408(d)(3)(I) of the Code provides that the Secretary may waive the 60-day requirement under sections 408(d)(3)(A) and 408(d)(3)(D) of the Code where failure to waive such requirement would be against equity or good conscience, including casualty, disaster, or other events beyond the reasonable control of the individual subject to such requirement. Only distributions that occurred after December 31, 2001, are eligible for the waiver under section 408(d)(3)(I) of the Code.

Rev. Proc. 2003-16, 2003-4 I.R.B. 359 (January 27, 2003), provides that in determining whether to grant a waiver of the 60-day rollover requirement pursuant to section 408(d)(3)(I), the Service will consider all relevant facts and circumstances, including: (1) errors committed by a financial institution; inability to complete a rollover due to death, disability, hospitalization, incarceration, restrictions imposed by a foreign country or postal error; (3) the use of the amount distributed (for example, in the case of payment by check, whether the check was cashed); and (4) the time elapsed since the distribution occurred.

In this case, Taxpayer A received a distribution from IRA X under extraordinary circumstances. She was confused and suffering from the impact of back surgery that required lengthy hospitalization. Thus, she did not act reasonably nor with prudence when she completed the IRA distribution application. The facts in this case indicate Taxpayer A was acting under a

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substantial hardship. Her failure to apply for periodic payments from IRA X and to reallocate the total distribution to Trust F among Trusts Q and W, and to then revoke W and deposit amount E into an IRA in her own name within the 60-day period was beyond her reasonable control. The failure to waive the 60-day requirement would be against equity or good conscience.

Therefore, pursuant to section 408(d)(3)(I) of the Code, the Service hereby waives the 60-day rollover requirement with respect to the distribution of IRA X of the Amount E. Taxpayer A is granted a period of 60 days from the issuance of this ruling letter to contribute amount E, in cash or other property, into another IRA in her own name. Provided all other requirements of section 408(d)(3) of the Code are satisfied, except the 60-day requirement with respect to such contribution, then, this contribution will be considered a rollover contribution with the meaning of section 408(d)(3) of the Code.

It has been represented that Taxpayer B had attained age 70 ½ as of his date of death. In that regard, please note that, to the extent, if any, Taxpayer B had not received his minimum required distribution for 2001, said required distribution may not be rolled over into any IRA set up and maintained in the name of Taxpayer A.

No opinion is expressed as to the tax treatment of the transaction described herein under the provisions of any other section of either the Code or regulations, which may be applicable thereto.

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

A copy of this letter is being sent to your authorized representative in accordance with a power of attorney filed with this office.

If you have any questions please contact

at

Sincerely yours,



Alan C. Pipkin, Jr., Manager  
Employee Plans Technical Group 4

Enclosures:

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