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

TAX EXEMPT AND
GOVERNMENT ENTITIES
DIVISION

200421004

NOV 26 2003

Uniform Issue List Numbers 414.18-00 & 9100.00-00

TEP:RA:T1

Attention:

Legend:

Company A:.

Company B

Law Firm H

Plan L

Plan M

Plan N

Plan O

Territory T

State X

Date 1

Gentlemen:

This is letter is in response to your correspondence dated xxxx submitted on your behalf by your authorized representative, in which you request an extension of time pursuant to section 301.9100-1 of the Procedure and Administration Regulations to file the election provided for in section 3 of Revenue Procedure 93-40, 1993-2 C.B. 535. The following facts and representations support your request for an extension.

Company A is incorporated as a State X for-profit corporation. Company A is the parent company of 13 wholly-owned subsidiaries that constitute both a horizontally and vertically integrated provider of light and heavy petroleum products throughout Territory T. Of Company A's 13 wholly owned subsidiaries, Company B is the only subsidiary involved in the retail sale of goods to the public through the operation of retail service stations. Pursuant to Income Tax Regulations section 1.414(r)-1, Company A designates its retail service stations as single line of business due to the nature and characteristics of the retail service station workforce, which is significantly different from that of the balance of its workforce.

In 1990, Company A had only four subsidiaries, including Company B. At that time, Company A maintained two retirement plans, Plan L and Plan M, which your authorize representative asserts were and remain qualified under section 401(a) of the Internal Revenue Code, the related trust of which were and remain tax-exempt under Code section 501(a). All four of Company A's subsidiaries participated in Plans L and M. Law Firm H advised Company A that Company B could be treated as a Qualified Separate Line of Business (QSLOB) and therefore it could maintain a separate plan or plans for the employees of Company B.

Consequently, Company A terminated the participation of Company B's employees in Plans L and M, and created Plan N, a separate profit sharing plan for Company B's employees, effective September 30, 1990. Company B subsequently adopted Plan O, effective 1996. Plan O contains a Code section 401(k) arrangement.

Company A employed Law Firm H to provide legal services with respect to its employee benefit matters. In 1990, based on Notice 90-57, 1990-2 C. B. 344, Law Firm H advised Company A that it was not required to provide notice to The Internal Revenue Service (IRS) of its use of QSLOB testing until further guidance is issued. In 1993, further guidance was published by the IRS in Revenue Procedure 93-40, requiring Notice to be given to the IRS, of a QSLOB election, on or before the Notification Date for the testing year. Company A was not informed by Law Firm H of the issuance of further guidance by the Service or of its QSLOB filing requirement with respect to Plans N and O.

In 2001, Company A's director of human resources asked Law Firm H whether it had filed the QSLOB elections for Plans N and O, and if so, when were the elections filed. Law Firm H determined that QSLOB notices had not been filed.

Law Firm H subsequently timely filed QLSOB notices for the 2000 plan year for Plans N and O. However, no notice was ever filed by Law Firm H for Company B's plan years 1994 through 1999.

In an affidavit dated Date 1, 2002, the managing partner of Law Firm H stated that Law Firm H was responsible advising Company A regarding QSLOB testing for Company B's plans and filing obligations. The associate employed by Law Firm H who performed the initial research and analysis regarding QSLOB testing for Company A terminated her

employment with Law Firm H before Company A was required to file QSLOB notice. The partner who supervised said associate was transitioning his practice away from employee benefits to other types of tax around the time that further guidance was issued by the IRS.

Based on the above, you, through your authorized representative, request the following letter ruling:

That good cause has been shown for the failure to timely make the election provided for in section 3 of Rev. Proc. 93-40 with respect to its use of QSLOB testing for Plans N and O of Company B, and further that the requirements of Treasury Regulations section 301.9100-1(c) have been satisfied, and further, that the other requirements of section 301.9100-1 have been satisfied.

With respect to your request for relief under section 301.9100-1 of the regulations, Code section 414(r) (Subtitle A) provides rules for determining whether an employer operates qualified separate lines of business for purposes of Code sections 410(b), 401(a)(26), and 129(d)(8). An employer treated as operating qualified separate lines of business will be permitted to apply the aforementioned Code provisions separately with respect to the employees in each qualified separate business line. Code section 414(r)(2) requires, in pertinent part, that an employer notify the Secretary of the Treasury that it intends to operate its lines of business as separate.

Pursuant to section 1.414(r)-4(c) of the Income Tax Regulations, in order to use the QSLOB rules of Code section 414(r), Company A had to file an election with the Service indicating that it intended to use the QSLOB rules. Said election had to have been filed using such form, at such time, and in said place as prescribed by the Commissioner of the IRS.

Notice 90-57, 1990-2 C. B. 344, provided that the Code section 414(r)(2) notification was not required until further guidance was issued.

Section 3 of Revenue Procedure 93-40 sets forth procedures to be used by an employer to notify the Secretary of the Treasury that it intended to be treated as operating separate lines of business. Section 3.03 of Rev. Proc. 93-40 provides that notice must be given by filing Form 5310-A, and further provides that, until a revised Form 5310-A is available early in 1994, employers should print "QSLOB Notice" in bold letters on the top of Form 5310-A. Section 3.05 of Rev. Proc. 93-40 provides that notice for a testing year must be given on or before the Notification Date for the testing year. The Notification Date for a testing year is the later of October 15 of the year following the testing year or the 15th day of the tenth month after the close of the plan year of the plan of the employer that begins earliest in the testing year.

Section 3.06 of Rev. Proc. 93-40 provides, in pertinent part, that after the Notification Date, notice cannot be modified, withdrawn or revoked, and will be treated as applying to subsequent testing years unless the employer takes timely action to provide new notice.

Section 5 of Rev. Proc. 93-40 indicates that the notice referenced in the revenue procedure is not required to be provided for plan years beginning before January 1, 1994.

Revenue Procedure 93-40, generally required that Plans N and O make said election on a Form 5310-A, which had to be submitted to the appropriate Key District Office of the Service no later than October 15th of the year following the testing year, with respect to each plan years in question.

Your authorized representative has asserted that Company A's Rev. Proc. 93-40 notification due date was October 15, of years XXX through xxxx.

Section 301.9100-1 of the regulations provides, in pertinent part, that the Commissioner of the Internal Revenue Service, in his discretion, may, upon good cause shown, grant a reasonable extension of the time fixed by a regulation, a revenue ruling, a revenue procedure, a notice, or an announcement published in the Internal Revenue Bulletin for the making of an election or application for relief in respect of tax under, among others, Subtitle A of the Code provided-

(1) The taxpayer acted reasonably and in good faith; and

(2) The granting of the relief will not jeopardize the interests of the Government.

Sections 301.9100-2, and 301.9100-3 of the Procedure and Administration Regulations provides guidance concerning requests for relief being considered by the Service on or after December 31, 1997. Section 301.9100-2 lists certain elections for which automatic extensions of time to file are granted. Section 301.9100-3 of the regulations generally provides guidance with respect to the granting of relief with respect to those elections not referenced in section 301.9100-2. The election provided for in section 3 of Rev. Proc. 93-40 is not referenced in section 301.9100-2.

Section 301.9100-3 of the regulations provides that applications for relief that fall within section 301.9100-3 will be granted when the taxpayer provides the evidence (including affidavits described in section 301.9100-3(e)(2)) to establish that (1) the taxpayer acted reasonably and in good faith, and (2) granting relief would not prejudice the interests of the government.

Section 301.9100-3(b)(1) of the regulations provides that a taxpayer will be deemed to have acted reasonably and in good faith (i) if its request for section 301.9100-1 relief is filed before the failure to make a timely election is discovered by the Service; (ii) if the taxpayer inadvertently failed to make the election because of intervening events beyond the taxpayer's control; (iii) if the taxpayer failed to make the election because, after exercising reasonable diligence, the taxpayer was unaware of the necessity for the election; (iv) the taxpayer reasonably relied upon the written advice of the Service; or (v) the taxpayer reasonably relied on a qualified tax professional, including a tax professional employed by the taxpayer, and the tax professional failed to make, or advise the taxpayer to make, the election.

Section 301.9100-3(b)(1)(c)(1)(ii) of the regulations provides that ordinarily the interests of the government will be treated as prejudiced and that ordinarily the Service will not grant relief when tax years that would have been affected by the election had it been timely made are closed by the statute of limitations before the taxpayer's receipt of a ruling granting relief under this section.

Company A expected Law Firm H to timely file the required QSLOB Election. The associate and the partner referenced above neither prepared nor filed the QSLOB notices required by section 1.414(r)-4(c) of the regulations and Rev. Proc. 93-40. Furthermore, no other attorney employed with Law Firm H filed said QSLOB notices, until 2001.

With respect to your request for relief, we believe that, based on the information submitted and the representations contained herein, the requirements of sections 301.9100-1, 301.9100-2, and 301.9100-3 of the regulations have been met. We conclude that you reasonably relied on a qualified tax professional, employed by Company A and the tax professional failed to make, or advise you to make, the election. Further, we believe that you have acted reasonably and in good faith with respect to making the election provided for in section 3 of Rev. Proc. 93-40. Therefore, you are granted an extension of 30 days from the date of the issuance of this letter ruling to comply with said section 3 of Rev. Proc. 93-40. Section 3 should be referenced to determine the appropriate format for making said election.

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 letter is directed only to the taxpayer who requested it. Section 6100(j)(3) of the Code provides that it may not be used or cited as precedent.

Pursuant to a power of attorney on file with this office, a copy of this ruling letter is being sent to your authorized representative.

If you have any questions, please contact, SE:T:EP:RA:T1 XXX (Badge number ) at xx.

Sincerely yours,

Madan L Dua

Madan L. Dua
Acting Manager Employee Plans
Technical Group 1

cc:

cc:

Enclosures:
Copy of deleted ruling
Notice 437