200639003

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

TAX EXEMPT AND
GOVERNMENT ENTITIES
DIVISION

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404.08-00

JUL - 5 2006

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LEGEND:

Employer A:

Employer B:

Plan X:

Accounting System 1:

Accounting System 2:

Amount 1:

Amount 2:

Amount 3:

State W:

State X:

Date 1:

Date 2:

Date 3:

Date 4:

Date 5:

Month 1:

Month 2:

Month 3:

Gentlemen:

This is in response to the , ruling request submitted on your behalf by your authorized representative, as supplemented by correspondence dated , , , and , in which you request letter rulings authorizing the return of certain employer contributions to a defined contribution plan qualified within the meaning of section 401(a) of the Internal Revenue Code ("Code"), because said contributions were made as a result of a "mistake of fact". The following facts and representations support your ruling request.

Employer A was a limited liability partnership organized under the laws of State W. As of Date 1, , Employer A merged into Employer B, a State X limited liability partnership. As of the date of merger, Employer A ceased to exist. Employer A maintained its books and records on a calendar year, cash basis. Employer B also maintains its books and records on a calendar year, cash basis.

Plan X is a single-employer, participant-directed, profit-sharing, defined contribution plan which contains an arrangement described in Code section 401(k). Plan X was effective as of Date 2, 1982, and received its most recent favorable determination letter dated Date 3, 2002. In anticipation of the above-referenced merger, as of Date 1, Plan X was terminated and no further contributions were made thereto although no final Form 5500, Annual Report/Return of Employee Benefit Plan, for calendar year has been filed with respect to Plan X.

Section 4.05(a) of Plan X authorizes the return of employer contributions made because of a "mistake of fact" (unadjusted for earnings attributable to the mistaken amount) within a one-year period after the contribution was made.

Your authorized representative has presented, on your behalf, evidence of five (5) accounting mistakes that occurred as a result of a calendar year conversion from Accounting System 1 to Accounting System 2. As a result of difficulties that arose out of the conversion: (1) income was overstated; (2) non-billable costs were treated as billable; (3) certain advances were taken into income twice; (4) income was understated as a result of a failure to implement certain accounting changes during the conversion; and (5) income was reported that was not supported by journal entries. The net result of these five errors was that Employer A's income was overstated in the amount of Amount 1.

As a result of the above described overstatement of income, "excess" profit-sharing contributions totaling Amount 2 were made to the accounts in Plan X of Employer A's with respect to the period January, until August. Said "excess" contri-

butions were made beginning with Date 4, and ending with Date 5, Only a portion of Amount 2, specifically Amount 3 which represents contributions made for Months 1, 2, and 3, is at issue in this ruling request.

Based on the above facts and representations, you, through your authorized representative, request the following letter rulings:

1. That the "excess" profit-sharing contributions made to the Plan X accounts of Employer A's equity partners based on the overstated income, referenced above, were made because of "mistakes of fact"; and

2. As a result, "excess" profit-sharing contributions, made for Months 1, 2, and 3, and totaling Amount 3, may be returned to Employer A.

With respect to your ruling requests, section 401(a)(2) of the Internal Revenue Code ("Code"), provides, in general, that a plan qualified within the meaning of Code section 401(a) may not at any time prior to the satisfaction of all liabilities with respect to employees and their beneficiaries use or divert any part of the plan's assets for purposes other than the exclusive benefit of the employees and their beneficiaries.

Section 403 (c)(2)(A) of the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, for which there is no parallel provision in the Code, provides that a contribution which is made by an employer by a mistake of fact may be returned to the employer within one year after payment of the contribution.

Revenue Ruling 91-4, 1991-1 C.B. 57, provides that a plan qualified within the meaning of Code section 401(a) may contain a provision authorizing return of employer contributions made because of a "mistake of fact" as provided in section 403(c)(2)(A) of ERISA. As noted above, Plan X contains such a provision.

With respect to the issue of whether the contributions which are the subject matter of this ruling request were made as a result of a "mistake of fact", Amount 2 was contributed to Plan X based on Employer A's error to the effect it had income totaling Amount 1 upon which to support said contribution. As a result of auditing activities associated with the above-referenced merger of Employer A and Employer B, it was determined that the equity partners of Employer A did not have the compensation (i.e. earned income) upon which to support the contribution of Amount 2 to Plan X. Therefore, in short, Employer A's error in determining the amount of the compensation of the was the cause of Employer A's contributing Amount 2 to Plan X. Such a mistake constitutes a "mistake of fact" as contemplated in section 403(c)(2)(A) of ERISA. As a result, Amount 3, the amount contributed to Plan X within one year of the date of this ruling letter, may be returned to Employer A.

Thus, with respect to your ruling requests, we conclude as follows:

1. That the "excess" profit-sharing contributions made to the Plan X accounts of Employer A's based on the overstated income, referenced above, were made because of "mistakes of fact"; and

2. As a result, "excess" profit-sharing contributions, made for Months 1, 2, and 3, and totaling Amount 3, may be returned to Employer A.

This letter ruling is based on the assumption that Plan X was and is qualified within the meaning of Code section 401(a) at all times relevant thereto. It also assumes the correctness of all representations made with respect thereto.

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

Any questions regarding this letter ruling should be addressed to Esq., (ID:) at (phone-not a toll-free number) or (FAX).

Sincerely yours,

Frances V. Sloan

Frances V. Sloan, Manager,
Employee Plans Technical Group 3

Enclosures:

Deleted copy of ruling letter
Notice of Intention to Disclose