



TAX EXEMPT AND  
GOVERNMENT ENTITIES  
DIVISION

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

200846024

AUG 18 2008

UIL Code: 408.03-00

LEGEND:

Taxpayer A:

Company M:

Company N:

Company O:

Company P:

Company Q:

Plan X:

Amount 1:

Amount 2:

Amount 3:

Amount 4:

Amount 5:

Amount 6:

Date 1:

Date 2:

Date 3:

Date 4:

Date 5:

Date 6:

Date 7:

Date 8:

Month 1:

Month 2:

Month 3:

Month 4:

Month 5:

Percentage 1:

Dear

This is in response to the \_\_\_\_\_, request for letter rulings submitted on your behalf by your authorized representative, as supplemented by correspondence dated \_\_\_\_\_, and \_\_\_\_\_, in which you request letter rulings under section 402 of the Internal Revenue Code (“Code”). The following facts and representations support your ruling request.

Taxpayer A was employed with Company M from Month 1, 1989 until Date 1, 2003. Taxpayer A was a participant in Plan X maintained by Company M.

Pursuant to a letter dated Date 2, 2004, Company M sent Taxpayer A a Plan X distribution package which included the notice required by Code section 402(f). In pertinent part, this Date 2, 2004 letter indicated that “...because the stock in your account has a value greater than \$75,000, you will be paid that amount in equal installments over five years. The first installment will be made after we receive your election and with it will be a promissory note evidencing this obligation to pay you the remaining four installments”. Additionally, the Date 2, 2004 letter provided “...As an option to you, enclosed are documents for establishing an IRA with Company N which has agreed to accept these promissory notes in IRA accounts for which it serves as custodian”. On Date 3, 2004, Taxpayer A requested that his Plan X account balance be distributed directly to him and not be transferred into an individual retirement account (“IRA”). As a result, in a letter dated Date 4, 2004, Company M advised Taxpayer A that he would be receiving all of the stock in his Plan X account balance as follows: 1/5<sup>th</sup> in a check, and 4/5ths in a promissory note payable in installments beginning with Month 2, 2005 through 2008. Taxpayer A neither responded nor

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objected to said letter. The total due Taxpayer A from Plan X (excluding an amount not pertinent to this ruling request) was Amount 1.

During Month 3, 2004, Taxpayer A received a check dated Date 5, 2004, in the amount of Amount 2. Furthermore, at approximately the same time, during Month 3, 2004, Taxpayer A received a copy of a promissory note dated Date 6, 2004 ("Promissory Note"), in the amount of Amount 3. Taxpayer A timely rolled over Amount 2 into an IRA. He did not contribute the Promissory Note into an IRA.

The Promissory Note bore interest at the rate of Percentage 1 per annum. The note also indicated that it was secured by an "...irrevocable standby letter of credit..." issued by Company O.

With respect to the Promissory Note, as noted above, Company M had arranged with Company N for Company N to accept Plan X's promissory notes into IRAs which it sponsored as rollover contributions. Taxpayer A was aware that he could have contributed his Promissory Note into an IRA set up and maintained with Company N but did not do so. In this regard, Taxpayer A's authorized representative has asserted that "...when Taxpayer (A) received the IRA rollover option offered by Company N he discarded it because Taxpayer (A) was distrusting of the representations made by Employer (Company M) on behalf of the ESOP (Plan X)".

It has been represented that Taxpayer A maintained an IRA with Company P. Subsequent to receiving the Promissory Note, Taxpayer A discussed contributing the assets received from Plan X into his Company P IRA with a "service representative" employee of Company P. This representative advised Taxpayer A that the Promissory Note evidenced amounts due him and that as he received said amounts he could contribute each payment into an IRA as a rollover contribution.

It has also been represented on behalf of Taxpayer A that, subsequent to his receiving the Promissory Note, he discussed contributing amounts received from Plan X into a Company N IRA with a "service representative" employed by Company N. The Company N service representative also advised Taxpayer A that he could contribute payments received under the Promissory Note into a Company N IRA.

During Month 4, 2005, Taxpayer A received a 2004 Form 1099-R, Distributions From Pensions, Annuities, Retirement or Profit-Sharing Plans, IRAs, Insurance Contracts, etc. indicating that Taxpayer A received a total distribution from Plan X during 2004 of Amount 4 (the sum of Amount 2 and Amount 3).

During Month 2, 2005, Taxpayer A received a second check dated Date 7, 2005, representing the second installment of amounts due him under the Promissory Note in the amount

of Amount 5. He contributed Amount 5 to an IRA maintained with Company Q within 60 days of the date he received this check.

During Month 5, 2006, Taxpayer A received a third check, dated Date 8, 2005, representing all remaining amounts due him under the Promissory Note in the amount of Amount 6. Taxpayer A contributed Amount 6 to his IRA maintained with Company Q within 60 days of the date he received this check.

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

1. That, pursuant to Code section 402(c)(3)(B), the Internal Revenue Service waives the 60-day rollover period applicable to the amounts due under the Promissory Note received by Taxpayer A during Month 3, 2004;
2. That, as a result of our response to the first ruling request (above), the second check dated Date 7, 2005, in the amount of Amount 5, which Taxpayer A received from Plan X, will be deemed to have been properly rolled over by Taxpayer A into an IRA set up and maintained in his name; and
3. That, as a result of our response to the first ruling request (above), the third check dated Date 8, 2005, in the amount of Amount 6, which Taxpayer A received from Plan X, will be deemed to have been properly rolled over by Taxpayer A into an IRA set up and maintained in his name.

With respect to your ruling requests, Code section 401(a) provides the qualification rules applicable to retirement plans set up by employers exclusively to benefit their employees and their beneficiaries.

Code section 4975(e)(7) provides that an "employee stock ownership plan" (ESOP) is a defined contribution plan—(A) which is a stock bonus plan which is qualified, or a stock bonus plan and a money purchase plan both of which are qualified under section 401(a), and which are designed to invest primarily in qualifying employer securities; and (B) which is otherwise defined in regulations prescribed by the Secretary.

Section 402(a)(1) of the Code provides that, except as otherwise provided in this section, any amount actually distributed to any distributee by any employees' trust described in section 401(a) which is exempt from tax under section 501(a) shall be taxable to the distributee, in the taxable year of the distributee in which distributed, under section 72.

Section 402(e)(4)(D)(i) of the Code defines the term "lump sum distribution", in part, as a distribution or payment within one taxable year of the recipient of the balance to the credit of an

employee which becomes payable to the recipient on account of the employee's death, after the employee attains age 59 1/2, on account of the employee's separation from service, or after the employee has become disabled, from a trust which forms a part of a plan described in section 401(a) and which is exempt from tax under section 501.

Section 402(c) of the Code provides that if any portion of the balance to the credit of an employee in a qualified trust is paid to the employee in an eligible rollover distribution, and the distributee transfers any portion of the property received in such distribution to an eligible retirement plan, and in the case of a distribution of property other than money, the amount so transferred consists of the property distributed, then such distribution (to the extent transferred) shall not be includible in gross income for the taxable year in which paid.

Section 402(c)(4) of the Code provides, in general, that an "eligible rollover distribution" means any distribution to an employee of all or any portion of the balance of the credit of the employee in a qualified trust. Section 402(c)(4) also provides, in relevant part, that an eligible rollover distribution shall not include any distribution to the extent such distribution is required under section 401(a)(9), or any distribution which is one of a series of substantially equal periodic payments (not less frequently than annually) made (i) for the life (or life expectancy) of the employee or the joint lives (or joint life expectancy) of the employee and the employee's designated beneficiary, or (ii) for a period of ten years or more.

Code section 402(c)(6)(A) provides that the transfer of an amount equal to any portion of the proceeds from the sale of property received in the distribution shall be treated as the transfer of property received in the distribution. Code section 402(c)(6)(B) provides that the excess of the fair market value of property on sale over its fair market value on distribution shall be treated as property received in the distribution. Code section 402(c)(6)(D) provides that no gain or loss shall be recognized on any sale described in subparagraph (A) to the extent that an amount equal to the proceeds is transferred pursuant to paragraph (1).

Section 402(c)(8) of the Code, in relevant part, defines "eligible retirement plan" as (i) an individual retirement account described in section 408(a), or (ii) an individual retirement annuity described in section 408(b) (other than an endowment contract).

Section 1.402(c)-2, Question and Answer 11, of the Income Tax Regulations states that if an eligible rollover distribution is paid to an employee and the employee contributes all or part of the eligible rollover distribution to an eligible retirement plan no later than the 60th day following the date the employee received the distribution, the amount contributed is not currently includible in gross income.

Section 402(c)(3)(A) states that, except as provided in subparagraph (B), any rollover within the meaning of Code section 402(c) must be accomplished within 60 days of the day on which the distributee received the property.

Section 402(c)(3)(B) of the Code provides, in relevant part, that the Secretary may waive the 60-day requirement under sections 402(c) where the 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 402(c)(3)(B) of the Code.

Revenue Procedure 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 402(c)(3) of the Code, the Service will consider all relevant facts and circumstances, including: (1) errors committed by a financial institution; (2) 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 general, neither the Internal Revenue Code nor the Regulations promulgated thereunder prohibit the rollover of a promissory note into an IRA. Furthermore, Code section 408, in relevant part, provides rules governing (im)permissible IRA investments (see e.g. Code section 408(m)). However, an IRA's holding a promissory note is not precluded under Code section 408.

Thus, in short, Taxpayer A could have transferred, or rolled over, the Promissory Note he received during calendar year 2004 into an IRA set up and maintained in his name.

The facts presented, and representations made, on behalf of Taxpayer A indicate that, after he received the Promissory Note, Taxpayer A contacted representatives of both Company N and Company P to determine if he could roll over the Promissory Note into an IRA and, if so, how to accomplish said rollover. Each representative indicated to him that he could roll over the proceeds due under the Promissory Note. As noted above, Taxpayer A contributed, as rollover contributions, each payment due under the Promissory Note within the requisite 60-days of receipt.

With respect to whether it is appropriate to grant a waiver of the 60-day rollover period in this case, we note that although the above-cited advice was incorrect, Taxpayer A did not act unreasonably in relying upon it. Therefore, the Service will grant relief under Code section 402(c)(3)(B), and will grant waivers of the 60-day rollover period found in Code section 402(c), to Taxpayer A with respect to his contributing Amount 5 to his Company Q IRA during calendar year 2005, and with respect to his contributing Amount 6 to his Company Q IRA during calendar year 2006. As a result, his contributions into his IRA of the checks he received during calendar years 2005 and 2006 which represented proceeds due him under the Promissory Note and which checks were both received by Taxpayer A and contributed by him into his IRA after the expiration of the 60-day rollover period applicable to his receipt of the Promissory Note constituted valid rollover transactions within the meaning of Code section 402(c)(3)(A).

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

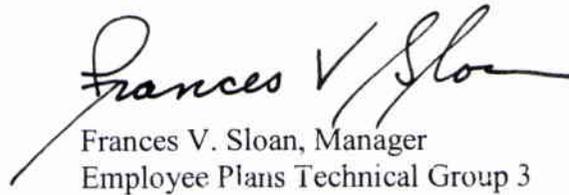
1. That the Internal Revenue Service waives the 60-day rollover period applicable to the amounts due under the Promissory Note received by Taxpayer A during Month 3, 2004;
2. That, as a result of our response to the first ruling request (above), the second check dated Date 7, 2005, in the amount of Amount 5, which Taxpayer A received from Plan X, was properly rolled over or contributed by Taxpayer A into an IRA set up and maintained in his name; and
3. That, as a result of our response to the first ruling request (above), the third check dated Date 8, 2005, in the amount of Amount 6, which Taxpayer A received from Plan X, was properly rolled over or contributed by Taxpayer A into an IRA set up and maintained in his name.

This letter ruling is based on the assumption that Plan X is a plan qualified within the meaning of Code section 401(a), and an ESOP as defined in Code 4975(e)(7). It also assumes the correctness of all facts and representations found therein.

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

The author of this ruling is \_\_\_\_\_, Esquire (ID: - \_\_\_\_\_) who may be reached at \_\_\_\_\_ (phone-not a toll-free number) or \_\_\_\_\_ (FAX).

Sincerely yours,

  
Frances V. Sloan, Manager  
Employee Plans Technical Group 3

Enclosures:

Deleted copy of letter ruling  
Form 437