ID: CCA-923105-08

Number: **200913062**
Release Date: 3/27/2009

Office:

UILC: 413.04-00

From:
Sent: Tuesday, September 23, 2008 10:51 AM
To:
Cc:
Subject: RE: Your views on plan revocation

You have asked two questions in your E-mail:

Question 1 - Can a sponsoring employer who participates in a plan covering employees of more than one employer, but is not a trustee of the plan, sign an extension of the statute of limitations that binds the trust?

Question 2 - Does a qualification failure by one employer in a multiple employer plan disqualify the plan for all employers?

I have a few thoughts on the questions you raise, but I may need some clarification of the facts, especially on Question 2. My answers are as follows:

Question 1 - I think that this is really an issue for , so I have copied , the on this E-mail.

Question 2 - Plans covering employees of more than one employer are governed by section 413(c) of the Code. The regulations under that section provide that "the failure by one employer maintaining the plan (or by the plan itself) to satisfy an applicable qualification requirement will result in the disqualification of the section 413(c) plan for all employers maintaining the plan." Treas. Reg. sec. 1.413-2(a)(3)(iv) (1977). Thus, under section 413(c), the basic rule is that "one rotten apple spoils the barrel" and the plan in this case would be disqualified if the employer under examination has violated any of the qualification requirements.

I am not sure, however, whether the actions of the employer under examination in your case have, in fact, disqualified the plan. If the "cash or deferred arrangement" that you mention in your E-mail was part of the plan and provided the employees of the participating employers with a right that they could "exercise" in order to receive additional wages in lieu of the employer's contributions to the plan, then the plan may be qualified. However, if the plan required contributions on behalf of all employees, and the employer simply disregarded plan terms when it allowed its employees to elect additional cash wages instead of plan participation, then the

employer's failure to follow plan terms would have disqualified the plan for all employers. This may be a harsh result, but it is clearly mandated by the regulation cited above.

You have discussed the Service Contract Act of 1965 in your E-mail. I am not familiar with that statute, so I am not sure how it may affect the analysis of the qualification issue you have raised. Section 401(k) was added to the Code by the Revenue Act of 1978, so the legislative history of the Service Contract Act of 1965 will not, of course, make any reference to section 401(k) plans. However, the effective date provision applicable to the addition of section 401(k) makes reference to certain "cash or deferred arrangements in effect on June 27, 1974" and preserves the tax treatment of those arrangements under prior law, as reflected in several old revenue rulings from the 1950's and 60's. Revenue Act of 1978, Pub. L. No. 95-600, section 135(c), citing, Rev. Rul. 56-497 (1956-2 C.B. 284); Rev. Rul. 63-180 (1963-2 C.B. 189); and Rev. Rul. 68-89 (1968-1 C.B. 402). I have not researched either the law that has developed under the Service Contract Act of 1965 or these old Revenue Rulings, so I don't know whether the Service Contract Act would have allowed the employer in your case to participate in a plan that permitted employees to elect to receive cash in lieu of the pension benefits otherwise required under the Act. Also, even if the Service Contract Act permitted it, the terms of the plan would have to authorize the employees of participating employers to make a cash or deferred election in order to avoid disqualifying the plan.

[redacted]

Please call me at [redacted] or send me an E-mail if you have any questions.