



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

201005059

NOV 10 2009

TAX EXEMPT AND
GOVERNMENT ENTITIES
DIVISION

Uniform Issue List: 408.03-00

SE: T: EP: RA: T/

Legend:

| | |
|-------------------------|---|
| Taxpayer | = |
| Individual A | = |
| IRA B | = |
| SEP IRA C | = |
| IRA Account D | = |
| SEP-IRA Account E | = |
| Account F | = |
| Financial Institution G | = |
| Trust H | = |
| Individual I | = |
| Amount 1 | = |
| Amount 2 | = |
| Amount 3 | = |
| State J | = |

Dear :

This letter is in response to a request for a letter ruling dated January 21, 2008, as modified and supplemented with additional information dated August 15, September 19, and October 3, 2008, and September 16, 2009, from your authorized representative, in which you have applied for a waiver of the 60-day rollover requirement contained in section 408(d)(3) of the Internal Revenue Code ("Code"), regarding the distributions of Amount 1 and Amount 2 (collectively, Amount 3) from your former spouse's individual retirement account (IRA B) and simplified employee pension plan (SEP-IRA C), respectively.

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

Taxpayer, age 67 at the time of the distribution of Amount 1 from IRA B and Amount 2 from SEP-IRA C (collectively, Amount 3), asserts that her failure to accomplish a rollover within the 60-day period prescribed by section 408(d)(3) of the Code was due to the actions of her financial advisor (Individual I) and Financial Institution G and her depressed condition following the death of her spouse which adversely impacted her ability to manage her financial affairs at the time of the distributions. Amount 3 remains in Account F and has not been used for any purpose.

Taxpayer is the surviving spouse of Individual A, who maintained both IRA B, an individual retirement account under section 408(a) of the Code, and SEP-IRA C, a simplified employee pension plan under section 408(k) of the Code, with Financial Institution G. On September 14, Individual A named Taxpayer as the spousal beneficiary of his IRA B and SEP-IRA C. On March 23, Taxpayer and Individual A adopted Trust H, a family trust under the law of State J. In June of Individual A advised their financial advisor (Individual I) with Financial Institution G that they had adopted Trust H. Individual A also signed forms prepared by the financial advisor that established Trust H as the new named beneficiary of IRA B and SEP-IRA C. Individual A passed away on November 23, Soon thereafter, Taxpayer informed Individual I she would like to have her financial affairs simplified. In March, Individual I prepared forms which authorized the transfer of Amount 1 from IRA B to Account D and Amount 2 from SEP-IRA C to Account E, which were IRA and SEP-IRA accounts, respectively. However, Individual I also included a Letter of Authorization to transfer funds from the newly created Accounts D and E to Account F, a non-IRA account in the name of Trust H. In an affidavit prepared in September of Taxpayer asserts that she was not aware at the time that the effect of signing all of the forms was to effect a complete taxable distribution of both of her spouse's IRAs. The documents were "prefilled" and contained no

instructions other than "sign and return". Individual I never explained the effect of signing the documents that transferred all of the IRA funds to Account F. Taxpayer told Individual I that she merely wanted to consolidate the two retirement plans. Taxpayer believed that if IRA B and SEP-IRA C were in one account, there would be a reduction in unnecessary paperwork and in administrative expenses. Individual I had been a financial advisor for Taxpayer and her spouse for many years. Taxpayer relied upon Individual I to handle this transaction. Taxpayer did not intend or need to take a distribution from IRA B or SEP-IRA C. The transfers were discovered in January and February of 2006, when Taxpayer received two 1099-R Forms showing taxable distributions of Amounts 1 and 2.

Following the death of Individual A, Taxpayer was in depressed state, and, it is asserted, lacked the capacity to appreciate the financial consequences of her actions. She did not question the actions of Individual I. The ruling request is accompanied by a letter from her clinical psychologist evidencing her state of depression.

Article One, Section B, of Trust H provides "upon the death of one of us, the survivor shall continue to act as the primary trustee of this living trust, with full power and authority to deal with any and all of the assets of this trust in any manner that said survivor sees fit, except as hereinafter limited as to assets placed in a secondary trust within this living trust to be known as the Credit Shelter Trust, and except as otherwise limited under Article Two of this living trust."

Article Two, Section A, of Trust H provides "upon the death of either of us, the surviving settlor's share of the net proceeds of this trust shall remain in the living trust with the surviving settlor as primary trustee and primary beneficiary... our trustee(s) shall divide the decedent settlor's share of net proceeds of this living trust into separate shares, hereinafter referred to as the Marital Deduction Share and the Non-Marital Share. Our trustee(s) may divide community property in a non pro rata manner and shall take into account any written agreement between the settlor providing for a non pro rata division of their community property and the effect of such agreement on community property passing outside the trust."

Article Two, Section B, of Trust H provides "the Non-Marital Share shall be comprised of an amount equal to the largest amount which can pass under this Article... The Non-Marital Share shall be distributed to a Credit Shelter Trust, to be held and administered as follows: the survivor of us shall be the trustee of the Credit Shelter Trust and, during the surviving settlor's lifetime, this trust shall be administered for the benefit of the surviving spouse as hereinafter provided."

Article Two, Section C, of Trust H provides “ the Marital Deduction Share shall be comprised of the net proceeds remaining after the above provisions are complied with and shall be more particularly described as the Qualified Terminable Interest Trust (hereinafter QTIP), to be administered as follows... During the surviving spouse’s lifetime, the trustee(s) shall pay to or for the benefit of the surviving spouse the QTIP income arising from the trust estate in convenient installments, but not less frequently than annually.”

Article Three, Section C, of Trust H provides “during our joint lifetimes, we may revoke the trust with regard to our community property... With respect to the separate property of either of us, either of us may revoke the trust as to his or her separate property... After the death of the first of us, the surviving settlor may revoke the trust, in whole or in part... Upon revocation, the trustee(s) shall deliver the trust property to the surviving settlor.”

Based on the above facts and representations, you request the following rulings:

- 1) With respect to Taxpayer, the distribution of Amounts 1 and 2 from IRA B and SEP-IRA C, respectively, are eligible rollover distributions under section 408(d)(3) of the Code.
- 2) That the Internal Revenue Service (“Service”) waive the 60-day rollover requirement contained in section 408(d)(3)(A) of the Code with respect to the distribution of Amount 3.

With respect to your ruling requests, section 408(d)(1) of the Code provides that, except as otherwise provided in section 408(d) of the Code, any amount paid or distributed out of an IRA shall be included in gross income by the payee or distributee, as the case may be, in the manner provided under section 72 of the Code.

Section 408(d)(3) of the Code provides the rules applicable to IRA rollovers.

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) of the Code).

Section 408(d)(3)(B) of the Code provides that section 408(d)(3) of the Code does not apply to any amount described in section 408(d)(3)(A)(i) of the Code 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) of the Code from an IRA which was not includible in gross income because of the application of section 408(d)(3) of the Code.

Section 408(d)(3)(D) of the Code provides a similar 60-day rollover period for partial rollovers.

Section 408(d)(3)(E) of the Code provides that the rollover provisions of section 408(d) of the Code do not apply to any amount required to be distributed under section 408(a)(6) of the Code.

On April 17, 2002, Final Income Tax Regulations ("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 Question and Answer 5 of the regulations, provides that the 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 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 regulations provides, in relevant part, that a surviving spouse who actually receives a distribution from a deceased spouse's 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 and/or an estate.

With respect to your initial ruling request, Individual A had named Trust H as beneficiary of his IRA B and SEP-IRA C. Taxpayer is Individual A's surviving spouse and initially was a co-trustee of Trust H. Taxpayer became the sole, successor trustee of Trust H upon the death of Individual A. Under the terms of Trust H, Taxpayer has the power and authority and absolute right to revoke Trust H. Thus, Taxpayer could have revoked Trust H and caused the assets of

said Trust H, including the proceeds of IRA B and SEP-IRA C, to pass to Taxpayer (herself). Taxpayer then would have been able to roll over the distributions to one or more IRAs set up and maintained in her own name.

Generally, if the proceeds of a decedent's IRA are payable to either a trust or an estate (or both), and are paid to the trustee of the trust who then pays them to the decedent's surviving spouse as the beneficiary of the trust, the surviving spouse shall be treated as having received the IRA proceeds from the trust and not from the decedent. Accordingly, such surviving spouse, in general, shall not be eligible to roll over the distributed IRA proceeds into her own IRA. However, the general rule will not apply in a case where the surviving spouse is the sole trustee of the decedent's trust, has the sole authority to revoke or terminate the trust, and, upon revocation or termination, has the sole authority and discretion under the trust language to pay the IRA proceeds to herself. In such a case, the surviving spouse will be treated as having received the IRA assets directly from the IRA (or IRAs) and not from the trust. As a result, the surviving spouse may then roll over the distributed IRA amounts into an IRA set up and maintained in her name.

We note that under the facts stated above, the provisions of Trust H gave Taxpayer the right to receive all of the principal of IRA B and SEP-IRA C. No third party had any power or authority to prevent Taxpayer from receiving IRA B and SEP-IRA C. Under this set of facts, we believe it is appropriate to treat Taxpayer as the payee or distributee of IRA B and SEP-IRA C (which subsequently were re-styled IRA Account D and SEP-IRA Account E, respectively) for purposes of sections 408(d)(1) and 408(d)(3) of the Code. Thus, under the facts of this case, Taxpayer would have been able to withdraw these funds as eligible rollover distributions and roll them into one or more IRAs set up and maintained in her name.

Therefore, with respect to ruling request 1, we conclude that the distributions of Amounts 1 and 2 were eligible rollover distributions within the meaning of section 408(d) of the Code.

With respect to your second ruling request, 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 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 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) 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.

The information presented and the documentation submitted by Taxpayer is consistent with her assertion that her failure to accomplish a timely rollover of Amount 3 was due to the actions of Individual I and Financial Institution G and her failure to understand the consequences of the actions taken by Individual I due to her depressed state following the death of her spouse which precluded her from completing timely rollovers of the distributions described above.

We have concluded above that the above described distributions of Amounts 1 and 2 constituted eligible rollover distributions under section 408(d). Therefore, with respect to your second ruling request, pursuant to Code section 408(d)(3)(I), the Service hereby waives the 60-day rollover requirement with respect to the distribution of Amount 1 from IRA B (IRA Account D) and Amount 2 from SEP-IRA C (SEP-IRA Account E). Taxpayer is granted a period of 60 days as measured from the date of issuance of this letter ruling to contribute Amount 3 (or any part thereof) into a rollover IRA. Provided all other requirements of section 408(d)(3) of the Code, except the 60-day requirement, are met with respect to such contribution, the contribution of Amount 3 (or any part thereof) into one or more IRAs set up and maintained in the name of Taxpayer will be considered a rollover contribution within the meaning of section 408(d)(3) of the Code.

This ruling does not authorize the rollover of amounts that either are or were required to be distributed by section 408(a)(6) of the Code with respect to calendar years beginning with calendar year 2005 (if any).

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 6110(k)(3) of the Code provides that it may not be used or cited as precedent.

A copy of this letter ruling has been sent to your authorized representative pursuant to a power of attorney on file in this office. If you wish to inquire about this ruling, please contact _____ (Identification Number _____), _____, at () - .

Sincerely yours,

Carlton A. Watkins

Manager
Employee Plans Technical Group 1

Enclosures:

Deleted Copy of this Letter
Notice of Intention to Disclose, Notice 437

cc: