Internal Revenue Service
Appeals Office
1000 S. Pine Island Rd., Room 350
Plantation, FL 33324

Department of the Treasury

Release Number: 201119038
Release Date: 5/13/2011
Date: September 9, 2010

A
B

Name of Plan/Plan Number:
A

Taxpayer Identification Number:
C

Form Number:

Plan Year(s) Ended:

Person to Contact/ID Number:

Telephone Number:

UIL Code: 7474.00-00

CERTIFIED MAIL

Dear

This is a final revocation letter. The above named plan does not meet the requirements of section 401(a) of the Internal Revenue Code effective for plan year ending July 31, 1995, and subsequent plan years. The trust is not exempt under section 501(a) of the Code for the trust year ending with or within the affected plan year. In addition, our favorable determination letter to you dated January 31, 1992 is revoked. The explanation of our revocation is attached.

You may petition the United States Tax Court for a declaratory judgment as to the qualification of this plan. If you do so, the petition must be filed before 92 days after the date this letter was mailed to you. The enclosed Publication 1020, *Appeal Procedures Employee Plans Examination*, provides specific instructions under the heading "Tax Court Declaratory Judgment Cases." The time you have to file a petition with the Tax Court is fixed by Law, and cannot be extended or suspended. Thus, contacting the Internal Revenue Service (IRS) for more information, or receiving other correspondence from the IRS will not change the allowable period for filing a petition with the Tax Court.

If you have any questions, please contact the person whose name and telephone number are shown above. If you write, please include your telephone number, the best time for us to call if we need more information, and a copy of this letter to help us identify your account.

Sincerely,

IRS Commissioner
By

Charles Fisher
Team Manager

Enclosure:
Publication 1
Publication 1020
Explanation of Revocation
Return Envelope

Internal Revenue Service
TE/GE: Employee Plans
210 Walnut, Stop 4926:hjs
Des Moines, IA 50309-2109

Department of the Treasury

Name of Plan/Plan Number:

Taxpayer Identification Number:

Form Number:

Plan Year(s) Ended:

Person to Contact/ID Number:

Telephone Number:

Date: July 15, 2008

CERTIFIED MAIL

Dear

We propose to disqualify the above-named plan because our examination found that the plan does not meet the equirements of section 401(a) of the Internal Revenue Code. Enclosed is an explanation of this isqualification, which is effective for plan year(s) ending after December 1, 19 and subsequent lan years. We also propose to revoke our favorable determination letter to you dated January 31, 19 . 'herefore, the trust will no longer be exempt from tax under section 501(a) of the Code for the trust year(s) nding with or within the affected plan year(s).

you do not agree with this revocation, you may appeal within 30 days from the date of this letter. To file your ppeal, please follow the instructions in the enclosed Publication 1020, *Appeal Procedures Employee Plans xaminations*, under the heading "If You Don't Agree." If you do not appeal, your ability to obtain a eclaratory judgment in the Tax Court as to the qualification of this plan may be impaired. Internal Revenue ode section 7476(b)(3) provides, in part, that "The Tax Court shall not issue a declaratory judgment or decree ıder this section in any proceeding unless it determines that the petitioner has exhausted administrative medies available to him within the Internal Revenue Service." We believe that an appeal is necessary to haust the administrative remedies available within the Internal Revenue Service. If you do not file an appeal ithin 30 days from the date of this letter, we will issue a final revocation letter.

ou have the right to contact the office of the Taxpayer Advocate. Taxpayer Advocate assistance is not a bstitute for established IRS procedures, such as the formal appeals process. The Taxpayer Advocate can not verse a legally correct tax determination, nor extend the time, as fixed by law, that you have to file a petition in U.S. Tax Court. The Taxpayer Advocate can, however, see that a tax matter not resolved through normal annels, gets prompt and proper handling. You may call toll-free 1-877-777-4778 to request Taxpayer lvocate assistance.

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We have also enclosed Publication 1 and Publication 594. Publication 1 includes information on your rights as a taxpayer, and Publication 594 includes information on the IRS collection process.

If you have any questions concerning this matter, please call the contact person at the telephone number shown in the heading of this letter. If you write, please include your telephone number and the best time for us to call if we need to contact you.

Thank you for your cooperation.

Sincerely,

Michael D. Julianelle
Director, EP Examinations

Enclosure(s):
Publication 1
Publication 594
Publication 1020
Revenue Agent Report (Form 886-A – Explanation of Items)
Return Envelope

I: Determinations:

1. There have been failures to amend the plan timely to meet certain I.R.C. § 401(a) form requirements.

2. There has been a failure to use an independent appraiser to perform annual valuations of the employer securities held by the trust as required by I.R.C. § 401(a)(28)(C).

3. Annual additions in excess of the dollar limit of I.R.C. § 415(c)(1)(A) were allocated to a participant's account.

4. Eight employees were excluded improperly from participation in the plan during the plan year ending July 31, 19XX.

II: Facts and Analysis:

Issue One:

The A Employee Stock Ownership Plan ("Plan") was adopted with an initial effective date of December 1, 19XX. According to Internal Revenue Service records, a favorable determination letter was to be issued on or about January 31, 19XX regarding the qualification of the Plan as initially adopted. However, there is no record of the actual date the letter was issued.

The Plan was restated on December 21, 20XX (effective August 1, 20XX) to attempt to achieve compliance with the changes in the law collectively referred to as "GUST" and it was submitted with an application for a favorable determination letter to the Internal Revenue Service. The application for a favorable determination letter was later withdrawn after the Internal Revenue Service requested clarification and correction of the Plan document.

The Plan, as restated December 21, 20XX, contains the following disqualifying provisions:

- The definition of "leased employee" in Article 24, which includes the primary direction or control test of I.R.C. § 414(n)(2)(C), was not made effective under the Plan until August 1, 20XX. I.R.C. § 414(n)(2)(C), as amended by the Small Business Job Protection Act of 1996 ("SBJPA") is required to be effective for years beginning after December 31, 19'

- The definition of "highly compensated employee" in Articles 4 and 24 does not meet the requirements of I.R.C. § 414(q), as amended by SBJPA.

- The provision in Article 4 that contributions, benefits and service credit with respect to qualified military service will be provided in accordance with I.R.C. § 414(u) was not made effective under the Plan until August 1, 20XX. I.R.C. § 414(u), as added by SBJPA, requires the provision to be effective on and after December 12, 1994.

- The definition of "compensation" in Article 24 (effective August 1, 20XX) used for purposes of applying the limitations on contributions and other additions to a participant's account under the Plan does not meet the requirements of I.R.C. § 415(c)(3), as amended by SBJPA, effective for limitation years beginning after December 31, 1997.

- The provisions in Articles 4 and 24 excluding hardship withdrawals of amounts attributable to elective contributions from the Plan's definition of "eligible rollover distribution" pursuant to I.R.C. § 402(c)(4)(C), as added by Restructuring and Reform Act of 1998 ("RRA '98"), were not made effective until August 1, 20XX. I.R.C. § 402(c)(4)(C), as added by RRA '98, applies to distributions made after December 31, 1998.

I.R.C. § 401(b) provides for a remedial amendment period in which necessary plan amendments may be adopted after the year such amendments are required by law, provided the amendments are made retroactively effective to the first day the applicable law requires the provision to be effective. Revenue Procedure 2000-27, as modified by Revenue Procedure 2001-55, extended the deadline for an individually designed plan to be amended to comply with GUST until February 28, 2002.

Based on the information above, the GUST remedial amendment period for individually designed plans ended on February 28, 20 At the present time, the Plan has not been amended to comply with all of the GUST requirements. Since the required amendments were not made by the expiration of the GUST remedial amendment period, the form of the plan failed to meet the qualification requirements of Code section 401(a), effective for the plan year ending July 31,19XX and each subsequent plan year thereafter.

Issue Two:

An employee stock ownership plan must use an independent appraiser to make annual valuations of employer securities which are not readily tradable on an established securities market. I.R.C. § 401(a)(28)(C).

It has been determined that the Plan did not use an independent appraiser to make annual valuations of the employer securities held by the trust for the plan year ending July 31, 20XX. As a result, the Plan does not satisfy the requirements relating to employee stock ownership plans stated in I.R.C. § 401(a)(28)(C) and is not a qualified plan under I.R.C. § 401(a), effective for the plan year ending July 31, 20XX and all subsequent plan years.

Issue Three:

Under I.R.C. § 415(c), the annual additions to a participant's account under a defined contribution plan for each year are limited. For the limitation years ending July 31, 19XX and July 31, 20XX, a participant's annual additions were limited under I.R.C. § 415(c)(1) to the lesser of $30,000 or 25% of the participant's compensation. If a participant's annual additions exceed the I.R.C. § 415(c) limit for a limitation year, the plan fails the requirements of I.R.C. § 401(a)(16) and, as a result, is not a qualified plan under I.R.C. § 401(a). Because of the situations described below, the Plan exceeded the annual addition limits under I.R.C. § 415(c) for the plan years ending July 31, 19XX and July 31, 20XX.

Facts for excess annual addition for the plan year ending July 31, 19XX: On May 15, 1995, the Plan entered into a purported loan agreement with B for $ The purported purpose of the note was to refinance a prior ESOP debt of $ and to assume an $ corporate debt of A, the employer sponsoring the plan. However, after assuming the $ in company debt, the Plan received no additional company stock until 16 months later. On or about September 25, 19XX, the company issued 65,147 shares of its common stock, valued at $ to the Plan. The 65,147 shares of common stock were allocated and released to the Plan participants on or about September 25, 19XX. The allocation and release of all of the shares to plan participants occurred prior to the full repayment of the corresponding indebtedness.

Facts for excess annual addition for the plan year ending July 31, 20XX: During the plan year ending July 31, 20XX, the company paid purported dividends on its shares of company common stock. The Plan used the purported dividends to repay a stock acquisition loan it entered into on May 15, 19XX. The result of the purported dividend payment was the release of shares of employer common stock valued at $ which was allocated to participants on account of the plan year ending July 31, 20XX as trust earnings.

The effect of this financing was to provide the plan sponsor with a deduction for the principal payments on the loan used to capitalize the plan sponsor with no corresponding income recognition by either the Plan or the participant. This, in turn, increased the value of the stock held by the Plan by the value of the income tax savings. Earnings of the employer sponsoring the Plan were being transferred to the Plan and allocated as earnings to the participants rather than contributions allowing the I.R.C. § 415(c) limits on annual additions to a Plan to be circumvented.

Analysis: Treas. Reg. § 1.415-6(b)(2)(i) provides that the Internal Revenue Service may in an appropriate case, considering all facts and circumstances, treat certain allocations to participants' accounts as giving rise to annual additions. Given the facts and circumstances of this case, it is appropriate for the Internal Revenue Service to recharacterize: (i) the allocation and release of 65,147 shares of company common stock, valued at $ on account of the plan year ending July 31, 19XX; and (ii) the purported dividends in the amount of $ used to repay security acquisition loans and allocated to C as annual additions.

The prorata share of the 65,147 shares of company common stock, valued at $ allocated to participants during the limitation year ending July 31, 19 , should be recharacterized as annual additions. Also, the $ allocated to C and the $ allocated to C during the limitation year ending July 31, 20XX, should be recharacterized as annual additions. The applicable dollar limit under I.R.C. § 415(c)(1) was $30,000 for each limitation year. Consequently, annual additions to C Plan account and C Plan account for the limitation years ending July 31, 19XX and 20XX exceeded the limits of I.R.C. § 415(c)(1)(A), causing the Plan to fail to meet the qualification requirements of I.R.C. § 401(a)(16), effective for plan year ending July 31, 19XX, and all subsequent plan years.

Issue Four:

A trust for qualified plan purposes constitutes a qualified trust if the plan of which such trust is a part satisfies minimum participation requirements. I.R.C. § 410. I.R.C. § 410(a)(1)(A) provides that a trust shall not constitute a qualified trust under I.R.C. § 401(a) if the plan of which it is a part requires, as a condition of participation in the plan, that an employee complete a period of service with the employer or employers maintaining the plan extending beyond the later of the following dates —

(i) the date on which the employee attains the age of 21; or

(ii) the date on which he completes 1 year of service.

A plan shall be treated as not meeting the minimum age and service conditions of I.R.C. § 410(a)(1) unless it provides that any employee who has satisfied the minimum age and service requirements of I.R.C. § 410(a)(1), and who is otherwise entitled to participate in the plan, commences participation in the plan no later than the earlier of —

(i) the first day of the first plan year beginning after the date on which such employee satisfied such requirements, or

(ii) the date 6 months after the date on which he satisfied such requirements,

unless such employee was separated from the service before the date referred to in subparagraph (i) or (ii) above, whichever is applicable.

Section 5 of the Plan provides in pertinent part:

As of each Accounting Date during your participation, you share in the Employer Contributions, Forfeitures and Income of the Trust for the year. The total Employer Contributions and Forfeitures will be allocated among

Participants' Accounts in proportion to their Compensation. The net income of the Trust will be allocated to Participants prorated according to your individual Account Balances as of the preceding Accounting Date.

Census information provided by the plan sponsor to the Internal Revenue Service during the examination indicated that the following eight employees met the Plan's minimum participation requirements for the plan year ending July 31, 19XX:

(i) D
(ii) D
(iii) D
(iv) D
(v) D
(vi) D
(vii) D
(viii) D

None of the 8 employees listed above received an allocation of the 65,147 shares of company stock which were allocated to participants in the plan year ending July 31, 19XX. As a result, the Plan failed to meet the minimum participation requirements required under I.R.C. § 401(a)(3) for plan years ending July 31, 19XX and all subsequent plan years.

III: Conclusion:

It is determined that the Plan is not qualified under I.R.C. § 401(a) for the plan years ending July 31, 19XX and all subsequent plan years. As a result, the Plan trust is not exempt from taxation under I.R.C. § 501(a) for trust years ending July 31, 19XX and all subsequent trust years.