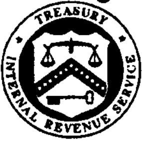
Significant Index Number 401.03-00



TAX EXEMPT AND
GOVERNMENT ENTITIES
DIVISION

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

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Re:

Dear

This letter is in response to your request for a ruling dated February 10, 2010, which was submitted by your authorized representative, regarding whether returning the Plan's surplus assets after satisfaction of all benefit liabilities upon termination of the Plan to the Taxpayer violate section 401(a)(2) of the Internal Revenue Code ("Code") and if the return of such assets constitutes an employer reversion that is subject to the excise tax on reversions of qualified plan assets to an employer under section 4980 of the Code.

The following facts and representations have been submitted:

Taxpayer =

Company 1

Company 2 =

Company 3 =

Consultant =

Insurer =

Amount 1 =

Amount 2 =

Amount 3 =

Amount 4 =

Date 1 =

Date 2 =

Date 3 =

Date 4 =

Date 5 =

Date 6 =

Date 7 =

Date 8 =

Date 9 =

Prior to the sale of its assets, Company 1 sponsored and maintained the Plan, a single-employer defined benefit plan which was originally adopted by Company 1 effective Date 1.

On Date 2, Company 1 sold substantially all of its assets to Company 2, a Delaware corporation. Company 1 and Company 2 were, and are, unrelated. As a result of the sale Company 1 discontinued the operation of its manufacturing business and substantially all of its employees became employees of Company 2 on the closing date. In connection with the sale of its assets to Company 2, Company 2 changed its name to Company 3 on Date 3. On Date 4, Company 3 was merged into the Taxpayer, an Ohio limited liability company, which was the surviving entity in the merger.

Company 2 did not wish to continue the Plan following its purchase of the assets of Company 1 and, therefore, under the asset sale agreement Company 1 (and following the merger into the Taxpayer, now the Taxpayer) agreed that it would fully fund and terminate the Plan as soon as practicable following the closing date of the asset sale. Accordingly the Taxpayer terminated the Plan effective Date 5, and on Date 6, the Taxpayer filed with the Pension Benefit Guaranty Corporation a Standard Termination Notice to terminate the Plan effective as of Date 5. The Pension Benefit Guaranty Corporation has approved the Standard Termination Notice filed by the Taxpayer and the time period for objecting to such notice has expired without comment or objection from the Pension Benefit Guaranty Corporation. The Taxpayer has also filed a Form 5310 with the Internal Revenue Service asking for a determination that the termination of the Plan will not affect the Plan's qualification but has not yet received a ruling.

In order to facilitate the termination of the Plan, the Taxpayer, with the assistance of the Consultant prepared a bid specification for the purchase of a single-premium group annuity contract to cover all of the Plan's liabilities on termination and submitted the specification to a number of insurance companies for bids. The specification included information on the participants, the benefits payable to each of the participants as of the Plan's termination date and the forms of payment available under the Plan.

In response to such bid specification, the Plan's trustee received a number of proposals including a proposal from the Insurer. After careful review of the proposals, the Taxpayer and Plan trustee determined to accept The Insurer's proposal.

In its proposal the Insurer agreed to issue a single-premium group annuity contract to the Plan pursuant to which the Insurer would assume and pay all of the benefits accrued under the Plan as of the termination date in exchange for the payment of a single-sum premium in the amount of Amount 1 to be paid on or before Date 7. The single-sum premium was calculated by the Insurer based upon the participant data provided in the bid specification and its internal actuarial assumptions with respect to mortality and estimated rates of return.

The assets held in the Plan were insufficient to pay the single-sum premium and, therefore, the Taxpayer made an additional contribution of Amount 2 to the Plan on Date 8, in order to enable the Plan to pay such premium. The single-sum premium of Amount 1 was paid by the Plan's trustee to the Insurer on Date 7. On Date 9, an additional Amount 3 premium was paid to The Insurer in order to provide for the payment of the benefits of two Plan participants whose accrued benefits were adjusted due to an increase in their credited service under the Plan.

Subsequent to Date 9 and in connection with the finalization of the group annuity contract, the Insurer discovered certain errors in, and changes to, the participant census data originally submitted by the Plan which have generated premium refunds from the Insurer to the Plan totaling Amount 4.

As a result of the issuance of the group annuity contract by the Insurer, all of the liabilities of the Plan have been satisfied. The sole asset remaining in the Plan's trust is Amount 4 in premium refunds received from the Insurer, plus earnings thereon, and the Plan's trustee desires to return such amount to the Taxpayer pursuant to the provisions of Section 14.3 of the Plan.

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

1. That the return to the Taxpayer of the Plan's surplus assets will not violate section 401(a)(2) of the Code to the extent that such surplus is attributable to the

premium refund in the total amount of Amount 4 received by the Plan from The Insurer and the earnings thereon; and

2. That the return to the Taxpayer of the Plan's surplus assets will not constitute an employer reversion that is subject to the excise tax on reversions of qualified plan assets to an employer under section 4980 of the Code to the extent that such surplus is attributable to the aggregate premium refund in the amount of Amount 4 received by the Plan from the Insurer and the earnings thereon.

Plan Provisions

Section 2.11 provides: The word "Company" shall mean Company 1 or any successor corporation or business organization which shall assume the obligations of Company 1 under this Trust and Plan.

Section 10.3 of the Plan provides: All contributions made by the Company may be in cash or other property determined by the Company in its sole discretion. All such contributions shall be based on the facts then understood by the Company, shall be conditioned upon the Trust and Plan constituting a qualified plan under Section 401 of the Code, and, unless otherwise specified by the Company, shall be conditioned upon deductibility of the contributions under Section 404 of the Code in the years for which each such contributions was made. All such contributions shall be irrevocable and shall never inure to the benefit of the Company except that:

(a) any contributions which are made under a mistake of fact may be returned to the Company within one (1) year after the contributions were made;

(b) any contributions made for years during which the Trust and Plan does not qualify under said Section 401 may be returned to the Company within one (1) year after the date of denial of qualification; and

(c) any contributions, which are not in whole or in part, deductible under said section 404 for the year for which they were made may, to the extent such contributions were not so deductible, be returned to the Company within one (1) year after the disallowance of the deduction.

Section 14.3 of the Plan provides: Upon termination of the Trust and Plan, the assets then held in the trust fund shall be allocated and distributed to Participants in accordance with the terms and provisions of Section 4044 of ERISA, to provide the benefits accrued by Participants as of the date of termination.

The assets so allocated to each such Participant shall be distributed in the form of a retirement benefit commencing on such date on or after the date of termination of the Trust and Plan, but in any event not later than his Normal Retirement Date, as the

Administrator shall select. Such distribution shall be accomplished through either (i) continuance of the trust fund or a new trust fund or (ii) purchase of annuity contracts; provided, however, that the Administrator may direct that the trust fund be continued with respect to some of the Participants and that annuity contracts be purchased with respect to other Participants. If any allocation produces a retirement benefit which has a lump sum Actuarial Equivalent of Three Thousand Five Hundred Dollars ($3,500.00) (or Five Thousand Dollars ($5,000.00) on and after January 1, 1998) or less, the Administrator shall pay in lieu of such retirement benefit the lump sum Actuarial Equivalent value.

Any sums held by the Trustee in the trust fund after satisfaction of, or provision for, all liabilities with respect to all persons entitled to benefits accrued under this Trust and Plan as of the date of termination shall be returned to the Company."

Law

Section 401(a)(2) of the 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 under the trust use or divert any part of the plan's assets for purposes other than the exclusive benefit of the employees and their beneficiaries. However this paragraph shall not be construed, in the case of a multiemployer plan, to prohibit the return of a contribution within 6 months after the plan administrator determines that the contribution was made as a mistake of fact.

Section 1.401(a)-2 of the Income Tax regulations ("regulations") provides that section 1.401-2, a regulation promulgated prior to the Employee Retirement Income Security Act of 1974 ("ERISA"), provides rules under section 401(a)(2) of the Code and that regulation is applicable unless otherwise provided.

Section 1.401-2 of the regulations provides rules under section 401(a)(2) of the Code for the impossibility of diversion under the trust instrument. Section 1.401-2(b)(1) provides that the intent and purpose in section 401(a)(2) of the Code of the phrase "prior to the satisfaction of all liabilities with respect to employees and their beneficiaries under the trust" is to permit the employer to reserve the right to recover at the termination of the trust, and only at such termination, any balance remaining in the trust which is due to erroneous actuarial computations during the previous life of the trust. A balance due to an "erroneous actuarial computation" is the surplus arising because actual requirements differ from the expected requirements even thought the latter were based upon previous actuarial valuations of liabilities or determinations of costs of providing pension benefits under the plan and were made by a person competent to make such determinations in accordance with reasonable assumptions and correct procedures related to the method of funding.

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.

Section 4980(c)(2)(A) of the Code defines the term "employer reversion" to mean the amount of cash and the fair market value of other property received (directly or indirectly) by an employer from the qualified plan.

Section 4980(c)(2)(B) of the Code provides in pertinent part that the term "employer reversion" shall not include (i) except as provided in regulations, any amount distributed to or on behalf of any employee (or his beneficiaries) if such amount could have been so distributed before termination of such plan without violating section 401, or (ii) any distribution to the employer allowable under section 401(a)(2) in the case of a plan other than a multiemployer plan, by reason of mistake of fact, or (iii) in the case of any plan, by reason of the failure of the plan to initially qualify or the failure of the contributions to be deductible.

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.

Analysis

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 and Amount 3 were contributed to the Plan in order to effect the standard termination of the Plan. These amounts were determined by the Insurer based upon the participant data provided in the bid specification and the Insurer's internal actuarial assumptions with respect to mortality and estimated rates of return so that annuity contacts could be purchased for participants under the Plan.

After satisfaction of all liabilities with respect to employees and beneficiaries of the trust, The Taxpayer has been told by the Insurer that it is entitled to a refund of premiums in the total amount of Amount 4. According to the Insurer, the reductions in premiums totaling Amount 4 are the result of changes in the plans participant data that was originally included in the bid specifications provided to the Insurer. Therefore, in short, the Insurer's initial reliance on participant data that was later revised was the cause of the Taxpayer contributing more to the Plan than was required to satisfy all of the Plan's liabilities with respect to employees and their beneficiaries upon termination of the Plan. Consequently the revisions in calculations by the Insurer were due to a "mistake of fact" as contemplated in section 403(c)(2)(A) of ERISA and in this case such revisions in calculations by the Insurer were made due to a mistake of fact as provided under

section 4980(c)(2)(B)(ii)(II) of the Code.

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, the Plan contains such a provision.

Rulings

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

1. That although Amount 4 exists because of a "mistake of fact", Amount 4 arose as the result of two contributions made on two separate occasions Date 8 and Date 9, each of which are more than one year prior to the date of this ruling letter. Consequently Amount 4 may not be returned to the Taxpayer in accordance with section 10.3(a) of the Plan and section 403(c)(2)(A) of ERISA

   However Amount 4 is the result of an "erroneous actuarial computation" as described in section 1.401-2 of the regulations (which arose due to a mistake of fact) and accordingly may be returned to the Taxpayer subsequent to the satisfaction of all liabilities with respect to employees and their beneficiaries under the trust in accordance with section 1.401-2 of the regulations and section 14.3 of the Plan.

2. Section 4980(c)(2)(B)(ii)(II) of the Code provides that the term "employer reversion" does not include, in the case of a plan other than a multiemployer plan, an amount distributed to the employer by reason of mistake of fact. Accordingly Amount 4 is described in section 4980(c)(2)(B)(ii)(II) of the Code and thus the return of Amount 4 to the Taxpayer does not constitute an employer reversion under section 4980 of the Code.

This ruling only addresses the two issues that we have ruled upon. In particular, we are not expressing any opinion as to deductibility of any particular contribution to the Plan under section 404(a) of the Code nor whether the termination of the Plan will affect the Plan's qualification.

This letter ruling is based on the assumption that the Plan 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.

This ruling is directed only to the taxpayer that requested it. Section 6110(k)(3) of the Code provides that it may not be used or cited by others as precedent.

We have sent a copy of this letter to your authorized representative pursuant to a power of attorney on file in this office.

If you require further assistance in this matter, please contact at This ruling is directed only to the taxpayer that requested it.

Sincerely yours,

David M. Ziegler, Manager
Employee Plans Actuarial Group 2