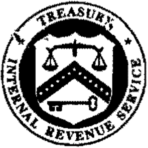

TAX EXEMPT AND
GOVERNMENT ENTITIES
DIVISION

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

201424032

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SE:T:EP:RA:T:A2

UIL: 4980.00-00

Re:

Legend:

Plan =

Prior Plan =

Company =

Prior Company =

Date 1 =

Date 2 =

Date 3 =

Date 4 =

Date 5=

Date 6 =

Date 7 =

Amount 1 =

Amount 2 =

Amount 3 =

Amount 4 =

Dear :

This letter is in response to your request for a ruling dated , 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 Company violates 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:

The Company is engaged in the mining business. On Date 1, the Company purchased certain assets and assumed certain liabilities from the Prior Company. In connection with this transaction, assets and liabilities of the Prior Plan were spun-off and transferred to the Plan. The Company is not related to the Prior Company.

The Plan is a single-employer, defined benefit pension plan. Benefit accruals to the Plan ceased effective Date 2.

The Company terminated the Plan effective Date 3. On Date 4, the Company filed Form 5310, Application for Determination for Terminating Plan, with the Internal Revenue Service ("Service"), requesting a determination letter regarding the qualification of the Plan on its termination. The Service issued a favorable determination letter to the Plan on Date 6.

On Date 5, the Company filed Form 500, Standard Termination Notice Single Employer Plan Termination, with the Pension Benefit Guaranty Corporation ("PBGC"). During the 60-day period following the filing of the notice, the PBGC did not object to the notice for a standard termination.

It was the Company's intention to contribute up to the amount necessary to ensure that there were sufficient assets in the Plan to effect a standard termination. The Company measured the assets and liabilities in the Plan and decided that Amount 1 was needed to fully fund the Plan. On Date 7, the Company contributed Amount 2, which was slightly less than Amount 1, to the Plan. The Company intended to make additional contributions to the extent required following receipt of the outstanding investment proceeds.

The Company later discovered that when measuring the Plan assets, it inadvertently failed to include a money market account in its analysis. The balance of this money market account was Amount 3. If this account had been included in the Plan assets, the Company would have contributed Amount 3 less on Date 7. As a result, not only did the Company not have to make any additional contribution, but the Plan now has a surplus in assets. After all the benefit liabilities in the Plan were satisfied, Amount 4 remained in the Plan trust.

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

1. That the return to the Company of Amount 4 will not violate section 401(a)(2) of the Code; and

2. That the return to the Company of Amount 4 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.

Plan Provisions

Section 4.3 of the Plan document, Return of Contributions, provides that under the following circumstances the contribution may be returned to the Company:

(a) Mistake of Fact. The Trustee shall return to the Company any contribution made under a mistake of fact. The amount that may be returned shall not exceed the excess of the amount contributed (reduced to reflect any loss or depreciation attributable thereto) over the amount that would have been contributed had a mistake of fact not occurred. Any contribution made under a mistake of fact shall be returned within one year after the date of payment.

(b) Condition of Deductibility. The Trustee shall return to the Company any contribution that is not deductible for federal income tax purposes. The amount that shall be returned shall be the excess of the amount contributed (reduced to reflect any loss or depreciation attributable thereto) over the amount that would have been contributed had there not occurred a mistake in determining the deduction. Any contribution conditioned on its deductibility shall be returned within one year after it is disallowed as a deduction.

Section 11.1 of the Plan document, Termination of Plan, provides that the Plan sponsor may terminate the Plan at any time by action of its governing body. Upon termination or partial termination of the Plan by the Plan sponsor, the accrued benefit of all affected participants in the trust fund shall become fully vested and shall be distributed among them and their beneficiaries.

Section 11.2 of the Plan document, Distribution on Termination, provides that the benefit to be provided by the allocations required by the Employee Retirement Income Security Act of 1974 ("ERISA") section 4044 shall be fully vested and nonforfeitable as of the date of such termination of the Plan for distribution to the persons entitled thereto. If any assets remain after such distribution, they shall revert to the Company.

Law

Section 401(a)(2) of the Code generally prohibits, prior to the satisfaction of all liabilities with respect to employees and beneficiaries under the trust, the diversion of trust assets for purposes other than for the exclusive benefit of the employees or beneficiaries for whom an employer maintains a qualified pension plan.

Section 1.401(a)-2 of the Income Tax regulations ("regulations") provides that section 1.401-2, a regulation promulgated prior to 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. Regulation 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 though 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 ERISA, as amended, for which there is no parallel provision of 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.

Rev. Rul. 91-4, 1991-1 C.B. 57, provides that a pension plan qualified within the meaning of section 401(a) of the Code 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.

Section 4980(a) of the Code provides for a tax of 20 percent on the amount of any reversion of plan assets to the employer from a qualified plan. Section 4980(b) of the Code provides that the tax imposed by section 4980(a) shall be paid by the employer maintaining the plan.

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 of the Code, or (ii) any distribution to the employer allowable under section 401(a)(2) of the Code in the case of a plan other than a multiemployer plan, by reason of mistake of fact, or 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.

Analysis

The Company made a contribution of Amount 2 to the Plan in order to effect the standard termination of the Plan. In determining Amount 2, the Company inadvertently failed to take into account a money market account in measuring the Plan assets. That is, the Company used an incorrect asset value in calculating the contribution. As a result, the Company contributed more than needed to the Plan. Therefore, the Company's error in determining the amount of Plan assets was the cause of the Company's contributing Amount 2 to the Plan, and also was the cause of the Plan having a surplus asset of Amount 4 after satisfaction of all liabilities with respect to employees and their beneficiaries under the trust. Such a mistake constitutes a "mistake of fact" as contemplated in section 403(c)(2)(A) of ERISA and section 4980(C)(2)(B)(ii)(II) of Code.

Revenue Ruling 91-4, 1991-1 C.B 57, provides that a plan qualified within the meaning of section 401(a) of the Code 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.

Ruling

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

1. That the "excess" contribution made to the Plan based on the incorrect asset value was made because of a "mistake of fact." Therefore, amount 4 would be considered the result of a "mistake of fact" and accordingly may be returned to the Company in accordance with section 4.3 of the Plan and section 403(c)(2)(A) of ERISA within one year the "excess" contribution was made; and

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 Company does not constitute an employer reversion under section 4980 of the Code.

This letter ruling is based on the assumption that the Plan was and is qualified within the meaning of section 401(a) of the Code at all times relevant thereto. It also assumes

the correctness of all representations made with respect thereto.

This ruling is directed only to the Company 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 have any questions regarding this matter, please contact
(ID#) at .

Sincerely yours,

David M. Ziegler, Manager
Employee Plans Actuarial Group 2

Cc: