201425026

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

TAX EXEMPT AND
GOVERNMENT ENTITIES
DIVISION

MAR 25 2014

Uniform Issue List: 414.00-00, 414.09-00

T:EP:RA:T3

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Attention: xxxxxxxxxxxxxxx

Legend:

Employer A	=	xxxxxxxxxxxxxxxxxx
Employer B	=	xxxxxxxxxxxxxxxxxx
Employer C	=	xxxxxxxxxxxxxxxxxx
Employer D	=	xxxxxxxxxxxxxxxxxx
County X	=	xxxxxxxxxxxxxxxxxx
State Y	=	xxxxxxxxxxxxxxxxxx
Plan	=	xxxxxxxxxxxxxxxxxx
Resolution N	=	xxxxxxxxxxxxxxxxxx
Resolution O	=	xxxxxxxxxxxxxxxxxx
Date 1	=	xxxxxxxxxxx
Date 2	=	xxxxxxxxxxx
Date 3	=	xxxxxxxxxxx
Date 4	=	xxxxxxxxxxx

Dear xxxxxxxxxxxx:

This letter is in response to your ruling request, dated June 17, 2013, submitted by your authorized representative, that contributions "picked up" by Employer A and other governmental employers who participate in the Plan on behalf of certain eligible employees will not be included in the gross income of the employees under section 414(h)(2) of the Internal Revenue Code of 1986, as amended (the "Code").

The following facts and representations are submitted under penalties of perjury in support of your request:

County X is a political subdivision of State Y. Employer A consists of elected officials with executive authority over County X, and have no business operations, per se.

Employer A adopted the Plan, effective Date 1, but the Plan did not permit or require employee contributions. On Date 2, Employer A adopted Resolution N, which provides, in part:

1. Employer A shall pick-up the employee contribution required to be made by the employees of Employer A to the Plan and shall consider this amount to be an employer contribution for federal tax purposes; therefore, no participant will have access to these funds.
2. The participant contribution, although designated as an employee contribution, shall be paid (picked-up) by the employer pursuant to section 414(h)(2) of the Code.
3. The participant will not be given the option of choosing to receive the contributed amounts directly instead of having them paid by the employer to the Plan.

Similar resolutions were approved by Employer B, Employer C, and Employer D with respect to their employees.

On Date 3, Employer A adopted Resolution O, which amends and restates the Plan, effective Date 4. Under the amended and restated Plan, employees of Employers A, B, C, and D must begin making contributions to the Plan on Date 4. Each employer has elected to treat the mandatory employee contributions under the Plan as being picked up by the employer under section 414(h)(2) of the Code.

The Plan generally requires eligible individuals to make mandatory contributions equal to specified percentages of compensation. For eligible individuals hired on or after Date 4, employee contributions are equal to 5% of per pay compensation. The employee contributions of eligible individuals hired prior to Date 4 are phased in over 10 years, at the rate of 0.5% per year. Certain specified eligible individuals participate in the Plan, but do not make or have the option to make employee contributions. The participants' contributions shall be picked up by their respective employers, as described in section

414(h)(2) of the Code, deducted from the pay of the contributing participants as salary reduction contributions, and shall be paid by Employer A to the trustees of the Plan.

Eligible individuals do not have the ability to opt in or out of the Plan. Furthermore, eligible individuals do not have the option of choosing to receive the contributions made to the Plan in cash instead of having them paid directly by the employer to the Plan. The participants' mandatory employee contributions to the Plan are separately accounted for, but are made a part of the accrued benefit of each participant.

The represented facts further provide that the Plan is a qualified plan within the meaning of section 401(a) of the Code, and Employer A has received a favorable determination letter with respect to the Plan as in effect prior to the Date 4 restatement. The represented facts also state that, because County X is a political subdivision of State Y, and all participating employers are agencies or instrumentalities of State Y, the Plan is a governmental plan within the meaning of section 414(d) of the Code.

You request the following rulings:

1. The mandatory contributions made by participants and picked up by Employer A and the participating employers will not be included in the current gross income of the employees for federal income tax purposes.
2. The mandatory contributions of participants picked up by Employer A and the participating employers will not constitute wages subject to federal income tax withholding.

Section 401(a) of the Code provides that a trust created or organized in the United States and forming a part of a qualified stock bonus, pension, or profit sharing plan of an employer constitutes a qualified trust only if the various requirements set out in section 401(a) of the Code are met.

Section 402(a) of the Code generally provides that any amount actually distributed to any recipient by any employees' trust described in section 401(a) of the Code, which is exempt from tax under section 501(a) of the Code, shall be taxable to the recipient, in the taxable year of the distribution, under section 72 of the Code (relating to annuities).

Section 1.402(a)-1(a)(i) of the Income Tax Regulations (the "Regulations") provides that if an employer makes a contribution for the benefit of an employee to a trust described in section 401(a) of the Code for the taxable year of the employer which ends within or with a taxable year of the trust for which the trust is exempt under section 501(a) of the Code, the employee is not required to include such contribution in his or her income except for the year or years in which such contribution is distributed or made available to him or her.

Section 414(h)(1) of the Code provides that any amount contributed to an employees' trust described in section 401(a) of the Code shall not be treated as having been made by the employer if it is designated as an employee contribution.

Section 414(h)(2) of the Code provides that, for purposes of section 414(h)(1), in the case of any plan established by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing, or a governmental plan described in the last sentence of section 414(d) (relating to plans of Indian tribal governments), where the contributions of employing units are designated as employee contributions but where any employing unit picks up the contributions, the contributions so picked up shall be treated as employer contributions.

The federal income tax treatment to be afforded contributions that are picked up by the employer within the meaning of section 414(h)(2) of the Code has been developed in a series of revenue rulings. In Revenue Ruling 77-462, 1977-2 C.B. 358, the employer school district agreed to assume and pay the amounts employees were required by state law to contribute to a state pension plan. Revenue Ruling 77-462 concluded that the school district's picked-up contributions to the plan were excluded from the employees' gross income until such time as they were distributed to the employees. The revenue ruling further held that, under the provisions of section 3401(a)(12)(A) of the Code, the school district's contributions to the plan were excluded from wages for purposes of the collection of income tax at the source on wages. Therefore, no withholding was required for federal income tax purposes from the employees' salaries with respect to such picked-up contributions.

Revenue Ruling 81-35, 1981-1 C.B. 255, and Revenue Ruling 81-36, 1981-1 C.B. 255, established that the following two criteria must be met: (1) the employer must specify that the contributions, although designated as employee contributions, are being paid by the employer in lieu of contributions by the employee; and (2) the employee must not be given the option of choosing to receive the contributed amounts directly instead of having them paid by the employer to the pension plan.

Revenue Ruling 87-10, 1987-1 C.B. 136, provides that the required specification of designated employee contributions must be completed before the period to which such contributions relate. If not, the designated employee contributions paid by the employer are actually employee contributions paid by the employee and recharacterized at a later date. The retroactive specification of designated employee contributions as paid by the employing unit (i.e., the retroactive pick-up of designated employee contributions by a governmental employer), is not permitted under section 414(h)(2) of the Code. Thus, employees may not exclude from current gross income designated employee contributions to a qualified plan that relate to compensation earned for services rendered prior to the date of the last governmental action necessary to effect the pick-up.

Revenue Ruling 2006-43, 2006-35 I.R.B. 329, amplifying and modifying Rev. Rul. 81-35, 1981-1 C.B. 255, Rev. Rul. 81-36, 1981-1 C.B. 255, and Rev. Rul. 87-10, 1987-1 C.B. 136, describes the actions required for a state or political subdivision of a state, or an agency or instrumentality of either, to pick-up employee contributions to a plan qualified under section 401(a) of the Code so that the contributions are treated as

employer contributions pursuant to section 414(h)(2). Specifically, Revenue Ruling 2006-43 provides that a contribution to a qualified plan established by an eligible employer (i.e., a governmental employer) will be treated as picked-up by the employing unit under section 414(h)(2) of the Code if two conditions are satisfied:

1. First, the employing unit must specify that the contributions, although designated as employee contributions, are being paid by the employer. For this purpose, the employing unit must take formal action to provide that the contributions on behalf of a specific class of employees of the employing unit, although designated as employee contributions, will be paid by the employing unit in lieu of employee contributions. A person duly authorized to take such action with respect to the employing unit must take such action. The action must apply only prospectively and be evidenced by a contemporaneous written document (e.g., minutes of a meeting, a resolution, or ordinance).
2. Second, the pick-up arrangement must not permit a participating employee from and after the effective date of the pick-up to have a cash or deferred election right within the meaning of section 1.401(k)-1(a)(3) of the Regulations with respect to designated employee contributions. Thus, for example, no participating employee may be given the right to opt out of the pick-up arrangement described in section 414(h)(2) of the Code, or to receive the contributed amounts directly instead of having them paid by the employing unit to the plan.

Revenue Ruling 2006-43 states that the pick-up rules expressed in Revenue Ruling 81-35 and Revenue Ruling 81-36 apply even if the employer picks up contributions through a reduction in salary or through an offset against future salary increases.

Based on the represented facts, we find that the arrangement under the Plan pursuant to which the mandatory employee contributions are picked up by Employer A and the participating employers meets the requirements of section 414(h)(2) of the Code. The pick-up arrangement satisfies the criteria set forth in Revenue Ruling 81-35, Revenue Ruling 81-36, Revenue Ruling 87-10, and Revenue Ruling 2006-43. The represented facts state that the Plan is a qualified plan under section 401(a) of the Code, and a governmental plan within the meaning of section 414(d) of the Code. All of the participating employers, including Employer A, Employer B, Employer C, and Employer D, have formally adopted a resolution, which prospectively provides that the mandatory participant contributions under the Plan, although designated as employee contributions, shall be paid (picked-up) by the employer pursuant to section 414(h)(2) of the Code. The resolutions adopted by Employers A B, C and D do not provide for a retroactive pick-up of designated employee contributions under the Plan by such employers. Eligible individuals do not have the ability to opt in or out of the Plan, and do not have the option of choosing to receive the contributions made to the Plan in cash instead of having them paid directly by the employer to the Plan. Furthermore, the pick-up arrangement under the Plan does not permit a participating employee from and after the effective date of the pick-up to have a cash or deferred election right within the

meaning of section 1.401(k)-1(a)(3) of the Regulations with respect to designated employee contributions.

Accordingly, with respect to ruling request one, we conclude that the mandatory employee contributions that are picked up by Employer A and the participating employers under section 414(h)(2) of the Code shall be treated as employer contributions for federal income tax purposes. Consequently, similar to the holding in Revenue Ruling 77-462, we further conclude that the mandatory contributions made by participants and that are picked up by Employer A and the participating employers will not be included in the employees' current gross income for federal income tax purposes until such time as such amounts are distributed.

With respect to ruling request two, because we determined that the mandatory employee contributions picked up by Employer A and the participating employers under the Plan are excluded from the employees' gross income until such time as such amounts are distributed, we further conclude, in accordance to Revenue Ruling 77-462, that under the provisions of section 3401(a)(12)(A) of the Code, the mandatory contributions of participants that are picked up by Employer A and the participating employers will not constitute wages subject to federal income tax withholding.

No opinion is expressed as to the federal tax consequences of the transactions described above under any other provisions of the Code.

This ruling is based on the assumption that the Plan is qualified under section 401(a) of the Code and is a governmental plan within the meaning of section 414(d) of the Code at all relevant times.

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

Pursuant to a power of attorney on file with this office, a copy of this letter ruling is being sent to your authorized representative. Should you have any questions regarding this ruling, please contact xxxxxxxxxxxx (I.D. Number xxxxxxxxx) at
Please address all correspondence to SE:T:EP:RA:T3.

Sincerely yours,

Laura B. Warshawsky, Manager
Employee Plans Technical Group 3

Enclosures:
Deleted copy of this letter
Notice of Intention to Disclose

cc:

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