

Part I

Section 401.— Qualified Pension, Profit-Sharing, and Stock Bonus Plans

(Also, §§ 402, 403, 408, 457.)

Rev. Rul. 2004-12

ISSUE

If an eligible retirement plan separately accounts for amounts attributable to rollover contributions to the plan, are distributions of those amounts subject to the restrictions on permissible timing that apply, under the applicable requirements of the Internal Revenue Code, to distributions of other amounts from the plan?

LAW AND ANALYSIS

Portability

Prior to the enactment of the Economic Growth and Tax Relief Reconciliation Act of 2001 ("EGTRRA"), Pub. L. 107-16, certain restrictions applied to rollovers by individuals of funds accumulated in retirement plans maintained by their employers or in IRAs maintained by the individuals. Sections 641 through 643 of EGTRRA (as amended by § 411 of the Job Creation and Worker Assistance Act of 2002, Pub. L. 107-147) substantially increased the rollover opportunities available to individuals, by expanding both the types of plans eligible to accept rollovers and the types of funds that can be rolled over. Rules applicable to rollovers (including the new portability rules) are contained in the following sections of the Code:

(1) Section 402(c) provides that if any amount paid from a qualified trust in an eligible rollover distribution is transferred to an eligible retirement plan in a rollover that meets the requirements of that section, the amount transferred is not includible in gross income for the taxable year in which paid. Similar rules apply to § 403(a) annuity plans, § 403(b) tax-sheltered annuities, IRAs and § 457 eligible governmental plans.

(2) Section 402(c)(2) provides that the portion of an eligible rollover distribution that would otherwise not be includible in gross income cannot be rolled over unless such previously taxed amounts are transferred either (i) in a direct trustee-to-trustee transfer to a defined contribution plan qualified under § 401(a) that agrees to separately account for such amounts or (ii) to an IRA.

(3) Section 401(a)(31) requires that a qualified trust provide for the direct trustee-to-trustee transfer (a "direct rollover") of eligible rollover distributions. In the case of

previously taxed amounts, the limitations described in the preceding paragraph apply. Similar rules apply to § 403(a) annuity plans, § 403(b) tax-sheltered annuities and § 457 eligible governmental plans. (See §§ 403(a)(5), 403(b)(10) and 457(d)(1)(C).)

(4) Section 408(d)(3)(A) provides that previously taxed amounts distributed from an IRA may only be rolled over to another IRA.

(5) Section 402(c)(10) provides that a § 457 eligible governmental plan may not accept a rollover from another type of eligible retirement plan unless it separately accounts for such rollover. Section 72(t)(9) provides that a distribution from such separate account is subject to the 10-percent additional tax under § 72(t) as if the distribution were from a plan described in § 401(a).

(6) Section 402(f) requires that the recipient of an eligible rollover distribution be apprised of the fact that, if the distribution is rolled over to an eligible retirement plan, distributions from such eligible retirement plan may be subject to restrictions and tax consequences that are different from those applicable to distributions from the plan making the eligible rollover distribution. (See § 402(f)(1)(E).)

Distribution Rules Applicable to Rollovers

In many instances, the Code, or Income Tax Regulations or other guidance issued by the Service, provides explicitly for the treatment of rollover contributions. For example, the survivor annuity requirements of §§ 401(a)(11) and 417 apply to all "benefits provided under a plan, including benefits attributable to rollover contributions" (§ 1.401(a)-20, Q&A-11). Similarly, pursuant to § 411(a)(11)(D), in determining whether an employee's accrued benefit exceeds \$5,000 (and thus may not be immediately distributed without the consent of the employee), a plan may provide that rollover contributions (and attributable earnings) are disregarded.

In other instances, rollovers are implicitly included. For example, § 72(t) imposes a 10-percent additional tax on a taxpayer who receives "any amount" from a qualified retirement plan (within the meaning of § 4974(c)) except as otherwise provided in § 72(t); the reference to "any amount" and the lack of an exception for amounts attributable to rollover contributions indicate that § 72(t) is applied without regard to whether the amounts distributed are attributable to rollover contributions.

The rules restricting the timing of distributions, other than those relating to required minimum distributions under § 401(a)(9), generally apply to employer contributions made to the plan or annuity. For example, §§ 401(k)(2)(B) and 403(b)(11) prohibit the distribution of employer contributions that are elective deferrals (within the meaning of § 402(g)(3)) prior to the occurrence of certain events. Section 403(b)(7)(A)(ii) provides that employer contributions to custodial accounts treated as § 403(b) tax-sheltered annuities may not be distributed prior to the occurrence of certain events. Section 457(d)(1)(A) provides generally that an eligible plan meets the distribution requirements of § 457(d) if under the plan amounts will not be made available to participants or

beneficiaries earlier than the calendar year in which the participant attains age 70 1/2 or when the participant has a severance from employment. Similarly, regulations under § 401 provide general rules regarding the timing of distributions of employer contributions to pension, profit-sharing and stock bonus plans (see § 1.401-1(b)(1)(i), (ii) and (iii)). Thus, § 1.401-1(b)(1)(i) provides that a pension plan is a plan established and maintained by an employer primarily to provide systematically for the payment of definitely determinable benefits to employees over a period of years, usually for life, after retirement. The Service has interpreted this to mean that employer contributions to a pension plan may not be distributed prior to retirement, death, disability or other severance from employment, or termination of the plan.

Rev. Rul. 69-277, 1969-1 C.B. 116, and Rev. Rul. 94-76, 1994-2 C.B. 46, address distributions of other types of contributions. Rev. Rul. 69-277 provides that a pension plan may permit distribution to an employee of amounts attributable to the employee's after-tax contributions prior to the employee's termination of employment. Rev. Rul. 94-76 provides that a profit-sharing plan may permit the immediate distribution of amounts attributable to a rollover.

Based on the foregoing, eligible retirement plans that separately account for amounts attributable to rollover contributions may permit the distribution of amounts attributable to an individual's rollover, at any time, pursuant to the individual's request (with spousal consent, if applicable to the plan).

In contrast to rollovers, Rev. Rul. 94-76 and Rev. Rul. 2002-42, 2002-2 C.B. 76, provide that, in the case of a § 414(l) transfer between dissimilar § 401(a) plans (or a plan amendment treated as such a transfer), the characteristics of the transferor plan continue to apply to the transferred assets held in the transferee plan. Thus, when employees' accounts in an employer's money purchase pension plan are transferred to the employer's profit-sharing plan, the transferred assets remain subject to the rules applicable to distributions from a money purchase pension plan: for example, they may not be distributed prior to retirement, death, disability or other severance from employment, or termination of the plan, even though other assets in the plan may be distributed earlier. Similarly, pursuant to § 401(a)(11)(B), a defined contribution plan not otherwise subject to the survivor annuity requirements of §§ 401(a)(11) and 417 is subject to such requirements if the plan is a transferee of a plan subject to such requirements. However, if the transferee plan separately accounts for the transferred assets and any income thereon, the survivor annuity requirements only apply with respect to the transferred assets (and income thereon).

In the case of § 403(b) tax-sheltered annuities, Rev. Rul. 90-24, 1990-1 C.B. 97, provides that an amount directly transferred from an annuity subject to the early distribution restrictions of § 403(b)(7) or (11) to an annuity not otherwise subject to such restrictions is not treated as a distribution if the transferred amount continues to be subject to the early distribution restrictions of § 403(b)(7) or (11), respectively. In the case of plan-to-plan transfers between § 457 eligible governmental plans, § 1.457-10(b)(6) provides that an amount transferred is subject to the distribution restrictions of the receiving plan in

the same manner as if the transferred amount had originally been deferred under the receiving plan if the participant is performing services for the entity maintaining the receiving plan.

HOLDING

If an eligible retirement plan separately accounts for amounts attributable to rollover contributions to the plan, distributions of those amounts are not subject to the restrictions on permissible timing that apply, under the applicable requirements of the Internal Revenue Code, to distributions of other amounts from the plan. Accordingly, the plan may permit the distribution of amounts attributable to rollover contributions at any time pursuant to an individual's request.

Thus, for example, if the receiving plan is a money purchase pension plan and the plan separately accounts for amounts attributable to rollover contributions, a plan provision permitting the in-service distribution of those amounts will not cause the plan to fail to satisfy the requirements of § 1.401-1(b)(1)(i). Similarly, if the receiving plan is a § 457 eligible governmental plan or a tax-sheltered annuity described in § 403(b)(7) or (11), amounts attributable to rollovers that are maintained in separate accounts are permitted to be distributed at any time even though distribution of other amounts under the plan or contract is restricted pursuant to § 457(d)(1)(A) and § 403(b)(7) or (11), respectively.

However, a distribution of amounts attributable to a rollover contribution is subject to the survivor annuity requirements of §§ 401(a)(11) and 417, the minimum distribution requirements of § 401(a)(9), and the additional income tax on premature distributions under § 72(t), as applicable to the receiving plan. Thus, for example, if a distribution from an IRA is rolled over into a plan described in § 401(a), any distribution from the § 401(a) plan of amounts attributable to the rollover would be subject to the exceptions from the § 72(t) tax that apply to § 401(a) plans and not the exceptions that apply to IRAs.

This holding does not apply to amounts received by a plan as a result of a merger, consolidation or transfer of plan assets under § 414(l), nor to plan-to-plan transfers otherwise permitted between § 403(b) tax-sheltered annuities and between § 457 eligible governmental plans.

DRAFTING INFORMATION

The principal author of this revenue ruling is Roger Kuehnle of the Employee Plans, Tax Exempt and Government Entities Division. For further information regarding this revenue ruling, please contact Employee Plans' taxpayer assistance telephone service at 1-877-829-5500 (a toll-free number), between the hours of 8:00 a.m. and 6:30 p.m. Eastern Time, Monday through Friday. Mr. Kuehnle may be reached at 202-283-9888 (not a toll-free number).