



TAX EXEMPT AND
GOVERNMENT ENTITIES
DIVISION

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

200431019

MAY - 7 2004

Uniform Issue List: 408.03-00

SE: T: EP RA: T3

Legend:

Taxpayer A =

Amount D =

Amount E =

Amount F =

Investment Firm F =

Company H =

Plan X =

Company L =

Dear

In a letter dated February 25, 2004, as supplemented by correspondence dated March 26, 2004, your authorized representative requested a waiver of the 60-day rollover requirement contained in section 402(c)(3)(A) of the Internal Revenue Code (the Code).

The following facts and representations have been submitted under penalty of perjury in support of the ruling requested:

Taxpayers A's employer was Company H. For many years prior to taxpayer's layoff from the employ of Company H, Taxpayer A was a participant in Plan X, which is

represented to be qualified within the meaning of Code section 401(a).

At the time of Taxpayer A's layoff in taxpayer had both pre-tax and after-tax accounts in Plan X, and both of those accounts included accrued earnings. Taxpayer A's after-tax accounts, with respect to which the errors occurred, had a gross value at layoff date, including all earnings, of Amount D. Of that amount, Amount E represented the accrued earnings over the life of those accounts, and the balance of Amount F represented the post-tax contributions by the taxpayer. The gross after-tax contribution amount was broken down between two line items, "pre-87 after-tax amount" and "employee after-tax amount."

In connection with Taxpayer A's layoff, he completed and signed and delivered two separate payout request forms, one titled "100% 401(k) pre-tax only" and the other titled "employee post-tax contribution only 100%".

The preprinted payout request forms, which were supplied by Company H, did not explicitly distinguish between the principal sum of employee contributions, on the one hand, and earnings on the employee contributions, on the other hand. In designating 100% of "employee post-tax contribution only" (in taxpayer's handwriting on the form,) to be distributed to taxpayer's personal trust account by direct deposit to Investment Firm F, taxpayer intended to direct distribution on that payout request form of only the actual amount of employee contributions he had made, Amount F, and not of the amount of the earnings on those contributions. The form titled "for post tax only" also states "Rest will be rolled over. See other form". The form titled "for pretax only" also provides that the pretax amounts were to be directly rolled over to an IRA set up and maintained with Investment Firm F. The form also contains the IRA account number.

Taxpayer intended, by the second payout request form on which he designated "100% 401(k) pre-tax only," to direct the transfer, by direct rollover to his individual retirement account of all amounts that would be taxable upon distribution from Plan X, which would include (1) his pre-tax contributions, (2) all earnings on those pre-tax contributions, as well as (3) all earnings on his after-tax contributions

Taxpayer was unaware until that a portion of this taxable sum, Amount E, had in fact been distributed to his personal trust account, instead of to his rollover IRA at Investment Firm F, as he had directed.

Based on the facts and representations, you request that the Service waive the 60-day rollover requirement with respect to the distribution of Amount E because the failure to waive such requirement would be a hardship and against equity or good conscience.

With respect to your request to waive to 60 day rollover requirement, section 402(a)(1) of the Code provides that, except as otherwise provided in section 402, any amount

distributed out of an employees' trust described in section 401(a) that is exempt from tax under section 501(a) shall be taxable to the distributee, in the taxable year of the distributee in which distributed, in the manner provided under section 72 of the Code (relating to annuities).

Section 402(c) of the Code provides rules governing rollovers of amounts from exempt trusts to eligible retirement plans including IRAs.

Section 401(a)(31)(A) of the Code provides that a trust shall not constitute a qualified trust under this section unless the plan of which such trust is a part provides that if the distributee of any eligible rollover distribution-

- (i) elects to have such distribution paid directly to an eligible retirement plan, and
- (ii) specifies the eligible retirement plan to which such distribution is to be paid (in such form and at such time as the plan administrator may prescribe), such distribution shall be made in the form of a direct trustee-to-trustee transfer to the eligible retirement plan so specified.

Section 401(a)(31)(E) of the Code provides that, for purposes of Code section 401(a)(31), the term "eligible retirement plan" has the meaning given such term by section 402(c)(8)(B) with an exception not pertinent to this ruling request. Thus, a direct transfer defined in Code section 401(a)(31), may be made into an IRA.

Section 1.401(a)(31)-1 of the Income Tax Regulations, Question and Answer-5, provides, in relevant part, that a direct rollover described in Code section 401(a)(31) is a distribution and rollover of the eligible rollover distribution and not a transfer of assets and liabilities. Thus, for example, the consent and requirements of Code sections 401(a)(11), 411(a)(11), and 417 apply to transactions described in Code section 401(a)(31).

Code section 402(c)(3)(A) provides that, except as provided in subparagraph (B), paragraph (1) shall not apply to any transfer of a distribution made after the 60th day following the day on which the distributee received the property distributed.

Section 402(c)(3)(B) of the Code provides that the Secretary may waive the 60-day requirement under section 402(c)(3)(A) of the Code where the failure to waive such requirement would be against equity or good conscience, including casualty, disaster, or other events beyond the reasonable control of the individual subject to such requirement. Only distributions that occurred after December 31, 2001, are eligible for the waiver under section 402(c)(3)(B) of the Code.

Revenue Procedure 2003-16, 2003-4 I.R.B. 359, (January 27, 2003), provides that in determining whether to grant a waiver of the 60-day rollover requirement pursuant to

section 402(c)(3)(B), the Service will consider all relevant facts and circumstances, including: (1) errors committed by a financial institution; (2) inability to complete a rollover due to death, disability, hospitalization, incarceration, restrictions imposed by a foreign country or postal error, (3) the use of the amount distributed (for example, in the case of payment by check, whether the check was cashed); and (4) the time elapsed since the distribution occurred.

The information provided by Taxpayer A demonstrates a failure on his part to satisfy the requirements of Code section 402(c)(3)(A) which stemmed from his relying on either his employer, Company H, or the trustee of Plan X, Company L, to take all necessary steps to insure that all pretax amounts standing to his credit in Plan X were directly transferred to his IRA set up and maintained with Investment Firm F pursuant to his instructions. As noted above, Amount E was not directly transferred to Taxpayer A's IRA. Thus, there was no full compliance with Taxpayer A's instructions which resulted in Taxpayer A's failure to satisfy the Code section 402(c) rollover requirements.

Therefore, pursuant to section 402(c)(3)(B) of the Code, the Service hereby waives the 60-day rollover requirement with respect to the distribution of Amount E.

Thus, Taxpayer A is granted a period of 60 days from the issuance of this ruling letter to contribute Amount E, or any portion thereof, to an IRA. Provided all other requirements of section 402(c) of the Code, except the 60-day requirement, are met with respect to such contributions, the contributed amounts will be considered rollover contributions within the meaning of section 402(c) of the Code.

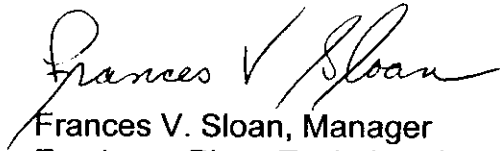
No opinion is expressed as to the tax treatment of the transaction described herein under the provisions of any other section of either the Code or regulations which may be applicable thereto.

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

If you wish to inquire about this ruling, please contact I.D. #
at Please address all correspondence to SE:T:EP:RA:T3.

A copy of this letter has been sent to your authorized representative in accordance with a Power of Attorney on file in this office.

Sincerely yours,

A handwritten signature in cursive script that reads "Frances V. Sloan". The signature is written in dark ink and is positioned above the printed name and title.

Frances V. Sloan, Manager
Employee Plans Technical Group 3

Enclosures:

Deleted copy of letter ruling
Notice of Intention to Disclose