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

TAX EXEMPT AND
GOVERNMENT ENTITIES
DIVISION

SEP 1 3 2004

UIL: 402.08-00, 72.20-01

LEGEND:

Taxpayer A:

Taxpayer B:

Plan X:

Amount 1:

This is in response to the May 25, 2004, request for a private letter ruling submitted by your authorized representative on your behalf, in which you request rulings under sections 72(t) and 402(c)(9) of the Internal Revenue Code. The following facts and representations have been submitted in support of your ruling request.

Taxpayer A died on at the age of . He was survived by his wife, Taxpayer B, who was at the date of Taxpayer A's death. At the time of his death, Taxpayer A was a participant in Plan X, a profit-sharing plan which your authorized representative has asserted is qualified under section 401(a) of the Code, and the trust of which is tax-exempt under § 501(a). At the time of his death, Taxpayer A's account balance in Plan X was approximately Amount 1. Taxpayer A named Taxpayer B as the sole beneficiary of his Plan X account balance. Plan X requires that Taxpayer B, as a surviving spouse, receive a distribution of Taxpayer A's entire account no later than five years after Taxpayer A's death

It has been represented that Taxpayer B will set up an individual retirement account (IRA) in Taxpayer A's name and designate herself as beneficiary. The new IRA to be set up by Taxpayer B will be referred to as IRA Y. Taxpayer B intends to direct Plan X to transfer the full amount due her as sole beneficiary (the entire account) to IRA Y in a transfer described in and meeting the requirements of section 401(a)(31) of the Code. Plan X permits a single lump sum distribution of a participant's account balance.

Taxpayer B intends to begin receiving distributions from IRA Y prior to attaining age 59 ½. Both the transfer of the Plan X account balance to IRA Y and the commencement of distributions from IRA Y are expected to occur prior to December 31, 2004.

Based on the above facts and representations, you request the following letter rulings:

1. That the amounts directly transferred from Plan X to IRA Y may be excluded from Taxpayer B's income as a rollover contribution from a qualified retirement plan to an IRA pursuant to sections 402(c)(9) and 401(a)(31) of the Code; and

2. That distributions from IRA Y to Taxpayer B made prior to Taxpayer B's attaining age 59 1/2 will not be subject to the 10 percent additional income tax imposed by section 72(t)(1) of the Code because of section 72(t)(2)(A)(ii) of the Code.

With respect to your first ruling request, section 402(a) of the Code provides that, except as otherwise provided in this section, any amount actually distributed to any distributee by any employees' trust described in section 401(a) which is exempt from tax under section 501(a) shall be taxable to the distributee, in the taxable year of the distributee in which distributed, under section 72 (relating to annuities).

Section 402(c)(1) of the Code provides, generally, that if any portion of an eligible rollover distribution from a qualified trust is transferred into an eligible retirement plan, the portion of the distribution so transferred shall not be includible in gross income in the taxable year in which paid.

Section 402(c)(4) of the Code defines "eligible rollover distribution" as any distribution to an employee of all or any portion of the balance to the credit of an employee in a qualified trust except the following distributions:

(A) any distribution which is one of a series of substantially equal periodic payments (not less frequently than annually) made--

(i) for the life (or life expectancy) of the employee or the joint lives (or joint life expectancies) of the employee and the employee's designated beneficiary, or

(ii) for a period of 10 years or more,

(B) any distribution to the extent the distribution is required under section 401(a)(9) and

(C) any distribution which is made upon the hardship of the employee

Section 402(c)(8)(B) of the Code defines an eligible retirement plan. An IRA described in section 408(a) of the Code is included in the definition.

Section 402(c)(3) of the Code provides, generally, that section 402(c)(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)(9) of the Code provides, generally, if a distribution attributable to an employee is paid to the spouse of the employee after the employee's death, section 402(c) of the Code will apply to such distribution in the same manner as if the spouse were the employee.

Section 401(a)(31)(A) of the Code provides that a trust shall constitute a section 401(a) qualified trust only if 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 such 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 in the form of a direct trustee-to-trustee transfer to the eligible retirement plan so specified.

The term "eligible rollover distribution" when used in section 401(a)(31) of the Code has the same meaning as when used in section 402(c) of the Code.

The term "eligible retirement plan" when used in section 401(a)(31) of the Code includes IRAs defined in sections 408(a) and 408(b) of the Code.

Generally, a direct trustee-to-trustee transfer described in section 401(a)(31) of the Code constitutes a "direct rollover" of an "eligible rollover distribution" and is entitled to tax-deferred treatment pursuant to section 402(c) of the Code.

Section 1.401(a)(31)-1 of the Income Tax Regulations, Question and Answer 15, provides, in summary, that for purposes of the Code section 401(a) requirements, 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.

A surviving spouse of an employee who rolls over a distribution from a section 401(a) qualified plan into an IRA may elect to treat the IRA as the spouse's own IRA. However, such an election is not mandatory.

A surviving spouse is the only individual who may elect to treat a beneficiary interest in an IRA as the beneficiary's own account. An election will be considered to have been made by a surviving spouse if either of the following occurs: (1) any required amounts in the account (including any amounts that have been rolled over or transferred, in accordance with the requirements of section 408(d)(3)(A)(i), into an IRA for the benefit of such surviving spouse) have not been distributed within the appropriate time period applicable to the decedent under section 401(a)(9)(B), or (2) any additional amounts are contributed to the account (or to the account or annuity to which the surviving spouse has rolled such amounts over, as described in (1) above) which are subject, or deemed to be subject, to the distribution requirements of section 401(a)(9)(A). The result of such an election is that the surviving spouse shall then be considered the individual for whose benefit the trust is maintained.

In this case, Taxpayer B will receive, or be treated as having received, a distribution of the full amount due her from Plan X. She will then roll over, by means of a direct rollover within the meaning of section 401(a)(31) of the Code, the Plan X distribution into IRA Y. She does not intend to make an election to treat IRA Y as her own. A surviving spouse's rolling over a distribution from a deceased's employee's qualified retirement plan into an IRA of the deceased spouse in and of itself need not constitute an election to treat the IRA as her own.

In this case, Taxpayer B will accomplish a direct rollover of the amount due her from Plan X into IRA Y. After the rollover is accomplished, IRA Y will continue to be maintained in the name of Taxpayer A as Taxpayer B will not affirmatively elect to treat IRA Y as her own IRA. Furthermore, Taxpayer B will then begin to receive distributions from IRA Y as a beneficiary thereof no later than . We believe that such a transaction falls within section 402(c)(9) and falls within the purview of Code § 401(a)(31).

Therefore, with respect to your first ruling request, we conclude as follows:

1. That the distribution from Plan X to IRA Y may be excluded from Taxpayer B's income as a rollover contribution from a qualified retirement plan to an IRA pursuant to sections 402(c)(9) and 401(a)(31) of the Code.

With respect to your second ruling request, section 72(t)(1) of the Code provides that if any taxpayer receives an amount from a qualified retirement plan (as defined in section 4974(c)), the taxpayer's tax under this chapter for the taxable year in which such amount is received shall be increased by an amount equal to 10 percent of the portion of such amount which is includible in gross income.

Section 4974(c) of the Code defines "qualified retirement plan" to include individual retirement accounts described in section 408(a) and individual retirement annuities described in section 408(b).

Section 72(t)(2)(A) of the Code lists several types of distributions which are not subject to the section 72(t)(1) tax. Section 72(t)(2)(A)(ii) provides that distributions made to a beneficiary (or estate of the employee) on or after the death of the employee constitute one type of distribution on which the section 72(t)(1) tax will not be imposed.

In this case, as noted above, Taxpayer B will receive a distribution from Plan X. Taxpayer B proposes to contribute, by means of a direct rollover described in Code § 401(a)(31), said distribution to IRA Y, and then begin receiving distributions from said IRA Y. As noted with respect to your first ruling request, Taxpayer B's contributing the Plan X distribution to IRA Y and her decision to continue to treat IRA Y as the IRA of Taxpayer A falls within the scope of section 402(c)(9). As a result of her actions, even after Taxpayer B accomplishes the rollover, she does not become the owner of the IRA but remains the beneficiary thereof for purposes of sections 402 and 72 of the Code.

Thus, with respect to your second ruling request, we conclude:

2. That distributions from IRA Y to Taxpayer B made prior to Taxpayer B's attaining age 59 1/2 will qualify for the section 72(t)(2)(A)(ii) of the Code exception to the 10 percent additional income tax imposed by section 72(t)(1) of the Code since they will be treated as having been made to a beneficiary as that term is defined in section 72(t)(2)(A)(ii) on or after the death of an employee.

These letter rulings are based on the assumption that Plan X is qualified under section 401(a) of the Code and its trust tax-exempt under section 501(a) at the time distributions from it are made to Taxpayer B. Furthermore, the rulings are based on the assumption that IRA Y will meet the applicable requirements of section 408 at all times relevant thereto. The letter rulings are also based on the assumption that the direct rollover of amounts from Plan X to IRA Y meets all of the rules applicable to direct rollovers found in sections 402 and 401(a)(31) of the Code.

Please note that, in accordance with the factual representations made herein, the letter rulings also assume that IRA Y will be maintained in Taxpayer A's name at the time Taxpayer B receives her initial distribution therefrom, and that her receipt of distributions from IRA Y will be as a beneficiary thereof.

Pursuant to a power of attorney on file in this office, a copy of this ruling letter is being sent to your authorized representative.

The author of this ruling is who may be reached at.

Sincerely yours,

Frances V Sloan

Frances V. Sloan, Manager
Employee Plans Technical Group 3

Enclosures:

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Form 437