



TAX EXEMPT AND  
GOVERNMENT ENTITIES  
DIVISION

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

NVR 15 2005

SE.T:EP:RA:T:A1

Plan A =

Plan B =

Plan C =

Plan D =

Date 1 =

Date 2 =

Amount 1 =

This is in response to the request dated January 14, 2005, for rulings under section 404(a)(6) of the Internal Revenue Code (the "Code").

Facts

The Company is a calendar year taxpayer that maintains its books and records under the accrual method of accounting. Plan A, Plan B, Plan C, and Plan D, (collectively, the "Plans") are defined benefit plans intended to be qualified under section 401(a) of the Code. The Plans each have calendar plan years.

The Taxpayer intends to make approximately Amount 1 in contributions ("Proposed Contributions") to the Plans. On or about Date 1, a significant portion of the Proposed Contributions (the "2004 Contributions") will be made to the Plans. The remaining portion of the Proposed Contributions (the "2005 Contributions") will be made on or about Date 2 (but in no event earlier than the date of the 2004 Contributions and in no event later than the date on which the Taxpayer files the 2004 federal income tax return).

Each of the 2004 Contributions will be accompanied by a letter from the Taxpayer to the respective Plans' trustees to the effect that the contribution is on account of the 2004 plan and tax years. The Taxpayer has been advised by its actuary that the portion of the 2004 Contributions attributable to each Plan is less than the unfunded liability described in section 404(a)(1)(D) of the Code with respect to each Plan.

Each of the 2005 Contributions will be accompanied by a letter from the Taxpayer to the respective Plans' trustees to the effect that the contribution is on account of the 2005 plan and tax years. The Taxpayer has been advised by its actuary that the portion of the 2005 Contributions attributable to each Plan is less than the projected unfunded liability described in section 404(a)(1)(D) of the Code with respect to each Plan.

Subject to the uniform capitalization rules of section 263A of the Code, the Taxpayer will deduct the 2004 Contributions on its 2004 consolidated income tax return and will report the 2004 Contributions as contributions for the 2004 plan years on the Schedules B of the 2004 Forms 5500 filed by the Plans.

Subject to the uniform capitalization rules of section 263A of the Code, the Taxpayer will deduct the 2005 Contributions on its 2005 consolidated income tax return and will report the 2005 Contributions as contributions for the 2005 plan year on the Schedules B of the 2005 Forms 5500 filed by the Plans.

The credit balance in the funding standard account for each of the relevant Plans as of December 31, 2004, will reflect the 2004 Contributions but will not reflect the 2005 Contributions. In addition, none of the Plans will record any amounts on line 9k of Schedule B of the Form 5500 filed for the 2004 plan year for interest earned on the 2004 Contributions.

The credit balance in the funding standard account for each of the relevant Plans as of December 31, 2005, will reflect the 2005 Contributions. The relevant Plans will record an amount on line 9k of Schedule B of the Form 5500 filed for the 2005 plan year for interest earned on the 2005 Contributions from the date of such contributions through the end of the plan year.

In accordance with the foregoing, you have requested rulings that:

- (1) For purposes of section 404(a)(6) of the Code, the 2004 Contributions will be on account of the 2004 tax year, and accordingly, because the 2004 Contributions will be made not later than the time prescribed by law for filing the 2004 return (including extensions thereof), the Taxpayer will be deemed under section 404(a)(6) to have made a payment on the last day of 2004 and, subject to the uniform capitalization rules in section 263A of the Code, will be entitled to take a deduction in the amount of the 2004 Contributions.
- (2) Pursuant to section 404(a) of the Code, the 2005 Contributions will be on account of the 2005 tax year, and subject to the uniform capitalization rules in section 263A of the Code, the Taxpayer will be entitled to take a deduction on its 2005 tax return in the amount of the 2005 contributions.

#### Law

Section 263A(a)(1) of the Code provides that, in the case of any property to which that section applies, any cost described in paragraph (2) -----

- (A) in the case of property which is inventory in the hands of the taxpayer, shall be included in inventory costs, and
- (B) in the case of any other property, shall be capitalized.

Section 263A(a)(2) of the Code provides that the costs described in that paragraph with respect to any property are ----

- (A) the direct costs of such property, and
- (B) such property's proper share of those indirect costs (including taxes) part or all of which are allocable to such property.

Any costs which (but for that subsection) could not be taken into account in computing taxable income for any taxable year shall not be treated as a cost described in that paragraph.

Section 404(a) of the Code provides if contributions are paid by an employer to or under a stock bonus, pension, profit-sharing, or annuity plan, or if compensation is paid or accrued by an employer on account of any employee under a plan deferring the receipt of such compensation, such contributions or compensation is not deductible under Chapter 1 of the Code, but, if it would otherwise be deductible, is deductible under section 404, subject to the limitations of that section.

Section 404(a)(6) of the Code provides that for purposes of paragraphs (1), (2), and (3) of section 404(a), a taxpayer shall be deemed to have made a payment on the last day of the preceding taxable year, if the payment is on account of such taxable year and is made not later than the time prescribed by law for filing the return for such taxable year (or extensions thereof)

Rev. Rul. 76-28, 1976-1 CB 106, provides that a payment made after the close of an employer's taxable year to which section 404(a)(6) applies shall be considered to be on account of the preceding taxable year if:

- (a) the payment is treated by the plan in the same manner that the plan would treat a payment actually received on the last day of such preceding taxable year of the employer, and
- (b) either of the following conditions are satisfied
  - (1) The employer designates the payment in writing to the plan administrator or trustee as a payment on account of the employer's preceding taxable year, or
  - (2) The employer claims such payment as a deduction on his tax return for such preceding taxable year

Rev. Rul. 76-28 further provides that for purposes of the above requirements, a payment may be designated on account of the preceding taxable year in the manner provided above at any time on or before the due date of the employer's tax return for such year (including extensions thereof). In addition, Rev. Rul. 76-28 provides that once a payment has been designated or claimed on a return in the manner provided above as being on account of a preceding taxable year, the choice made shall be irrevocable and an employer may not retract or change such designation or claim.

Analysis

In the instant case, the preceding taxable year is the taxable year beginning January 1, 2004, and ending December 31, 2004. Thus, the last day of the preceding taxable year was December 31, 2004. The Taxpayer intends to make the 2004 Contributions on or about Date 1, a date after the close of the 2004 taxable year and not later than the time prescribed by law for filing the return for such taxable year (or extensions thereof)

Rev. Rul. 76-28 provides two conditions that must be satisfied in order for a payment made after the close of an employer's taxable year to which section 404(a)(6) applies to be considered to be on account of such preceding taxable year. The first condition is that the payment is treated by the plan in the same manner that the plan would treat a payment actually received on the last day of such preceding taxable year of the employer.

In the instant case the Taxpayer intends to record, on the respective Schedules B of Forms 5500, the 2004 Contributions as contributions to the Plans for the 2004 plan years. The credit balances in the respective funding standard accounts as of December 31, 2004, will include the 2004 Contribution. In addition, no amounts will be recorded on line 9k of the Schedules B of Forms 5500 for the 2004 plan year for interest earned on the 2004 Contributions. Thus, the 2004 Contributions will be treated in the same manner as if they had been actually received on December 31, 2004. Therefore the first condition of Rev. Rul. 76-28 will be satisfied.

The second condition of Rev. Rul. 76-28 is satisfied if either the employer designates the payment in writing to the plan administrator or trustee as a payment on account of the employer's preceding taxable year or the employer claims such payment as a deduction on his tax return for such preceding taxable year. In the instant case, the Taxpayer intends to both claim the 2004 Contribution as a deduction on its tax return for the taxable year ending December 31, 2004, and designate the 2004 Contributions as payments on account of such year. Therefore, the second condition of Rev. Rul. 76-28 will also be satisfied.

Thus, the two conditions that must be satisfied under Rev. Rul. 76-28, in order for a payment that is made after the close of an employer's taxable year to which section 404(a)(6) applies, to be considered to be on account of the preceding taxable year, will be satisfied. Accordingly, it is ruled that for purposes of section 404(a)(6) of the Code, the 2004 Contributions will be on account of the 2004 tax year, and thus, because the Contributions will be made not later than the time prescribed by law for filing the 2004 return (including extensions thereof), the Company will be deemed under section 404(a)(6) to have made a payment on the last day of 2004 and will be entitled to take a deduction on its 2004 tax return in the amount of the 2004 Contributions subject to the uniform capitalization rules under section 263A of the Code and the applicable deduction limitations of section 404(a)(1) of the Code.

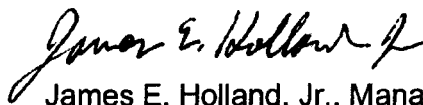
In the instant case, the Taxpayer intends to make the 2005 Contributions on or about Date 2, a date within the 2005 taxable and Plans' years. The Taxpayer also intends to instruct the respective Plans' trustees to the effect that the contribution is on account of the 2005 plan and tax years. The Taxpayer also intends to record, on the respective Schedules B of Forms 5500, the 2005 Contributions as contributions to the Plans for the 2005 plan years. Thus, the 2005 Contributions will be on account of the 2005 tax year. Accordingly, the Company will be entitled to take a deduction on its 2005 tax return in the amount of the 2005 Contributions, subject to the uniform capitalization rules under section 263A of the Code and the applicable deduction limitations of section 404(a)(1) of the Code.

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

A copy of this letter is being furnished to your authorized representative pursuant to a power of attorney (Form 2848) on file.

If you have any questions on this ruling letter, please contact

Sincerely,



James E. Holland, Jr., Manager  
Employee Plans Technical