



TAX EXEMPT AND  
GOVERNMENT ENTITIES  
DIVISION

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

200541049

Uniform Issue List: 402.08-00

JUL 18 2005

*T. E. P. R. A. T. I*

Legend:

Taxpayer =

Company E =

Company F =

Company M =

Plan G =

Amount H =

Amount I =

Amount J =

Amount K =

Amount L =

Dear :

This letter is in response to a request for a letter ruling dated December 18, 2004, as supplemented by additional correspondence dated February 1, 2005, March 17, 2005, and May 25, 2005, in which you have applied for a waiver of the 60-day rollover requirement contained in section 402(c)(3)(B) of the Internal Revenue Code ("Code").

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

The Taxpayer worked for Company E during the years 1996-1998 and participated in Plan G. The Taxpayer left Company E to pursue other employment opportunities. In 2002, Company E closed all inactive accounts in Plan G with account balances of less than \$5,000, including the Taxpayer's account. Company E hired Company F to prepare these distributions. A check totaling Amount H was processed for the Taxpayer and mailed to an address supplied by Company E in September 2002. Amount H equaled Amount I reduced by federal and state tax withholding (Amount J and Amount K, respectively). The Taxpayer never received the check nor was the check ever cashed. The address provided by Company E to Company F was not the Taxpayer's current address. Company F made no attempt to determine the whereabouts of the check once it was mailed.

Company F sent the Internal Revenue Service (the "Service") a Form 1099-R showing that a gross distribution equal to Amount I was made to the Taxpayer for the [REDACTED] tax year. In August [REDACTED] the Service notified the Taxpayer that he failed to include the distribution on his [REDACTED] tax return and would also be assessed a penalty for taking a premature distribution. The Taxpayer never received a Form 1099-R showing a distribution from Plan G for the [REDACTED] tax year. Company E reissued Taxpayer a second check dated September 22, 2004, totaling Amount H. The check which was received by the Taxpayer on October 1, 2004, has not been cashed or deposited.

The Taxpayer desires to deposit the check dated September 22, 2004, into a 401(k) plan maintained by Company M, his current employer. In October and November, 2004, the Taxpayer communicated with the Service numerous times in writing and by telephone in order to better understand the events leading up to the proposed adjustments to his [REDACTED] tax return and how he should proceed to deposit the reissued check into Company M's 401(k) plan. The Taxpayer also contacted Company E, Company F, and Company M to determine how to complete the rollover, and, during this period, the information received by the Taxpayer from all the various parties was both confusing and conflicting. The Taxpayer was unaware of the 60-day rollover rule and found out from Company M and confirmed by Company F on December 6, 2004, that the 60-day period had expired with respect to completing the rollover of the reissued check into Company M's 401(k) plan.

Based on the above facts and representations, you request that the Service waive the 60-day rollover requirement contained in Code section 402(c)(3)(B), with respect to the net distribution of Amount L in 2004 because the failure to waive such requirement would be against equity or good conscience. Amount L represents the total gross distribution of Amount I less state withholding of Amount K.

Code section 402(c)(3)(A) generally provides that any amount distributed from a qualified trust must be transferred to an eligible retirement plan no later than the 60<sup>th</sup> day following the day of receipt in order to avoid inclusion in the distributee's gross income.

Under Code section 402(c)(8)(B), the term eligible retirement plan means (i) an individual retirement account described in section 408(a), (ii) an individual retirement annuity described in section 408(b), (iii) a qualified trust, and (iv) an annuity plan described in section 403(a), (v) an eligible deferred compensation plan described in section 457(b) which is maintained by an eligible employer described in section 457(e)(1)(A), and (vi) an annuity contract described in section 403(b).

Code section 402(c)(3)(B) provides that the Secretary may waive the 60-day requirement under section 402(c)(3)(A) in "hardship" situations 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.

Under Code section 72(t), certain early distributions from a qualified retirement plan (including an IRA) are subject to an additional income tax equal to ten percent of the amount includible in gross income. Exceptions include distributions made on account of death, disability, separation from service after age 55, attainment of age 59½, and as part of a series of substantially equal periodic payments made for the life or life expectancy of the employee or the joint lives or joint life expectancies of the employee and his or her designated beneficiary.

Section 1.402(c)-2, Q&A-11 of the Income Tax Regulations states that the amount contributed is not currently includible in gross income, provided that it is contributed to the eligible retirement plan no later than the 60<sup>th</sup> day following the day on which the employee received the distribution. If more than one distribution is received by an employee from a qualified plan during a taxable year, the 60-day rule applies separately to each distribution. Because the amount withheld as income tax under section 3405(c) is considered an amount distributed under section 402(c), an amount equal to all or any portion of the amount withheld can be contributed as a rollover to an eligible retirement plan within the 60-day period, in addition to the net amount of the eligible rollover distribution actually received by the employee. However, if all or any portion of an amount equal to the amount withheld is not contributed as a rollover, it is included in the employee's gross income to the extent required under section 402(a), and also may be subject to the 10-percent additional income tax under section 72(t).

Revenue Procedure 2003-16, 2003-4 I.R.B. 359, provides that in determining whether to grant a waiver of the 60-day rollover requirement pursuant to Code 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 presented by the Taxpayer indicates that after the Taxpayer received a check from Plan G of Amount H dated September 22, 2004, he received conflicting and confusing information from the various parties he was required to deal with in order to deposit such check into Company M's 401(k) plan and to respond to the Service's proposed adjustments to his [REDACTED] tax return regarding the initial distribution from Plan G in 2002, a distribution that he was unaware had occurred because he never received the distribution check. As a result, the Taxpayer failed to satisfy the requirement that the check dated September 22, 2004, in Amount H, be deposited in an eligible retirement plan under section 402(c)(8)(B) within 60 days of the distribution from Plan G.

Therefore, pursuant to Code section 402(c)(3)(B), the Service hereby waives the 60-day rollover requirement contained in section 402(c)(3), with respect to Amount L (the sum of Amount H and Amount J), for transferring distributed qualified employee retirement funds to an eligible retirement plan. The Taxpayer is granted a period of 60 days from the date of this ruling letter to contribute Amount H and Amount J to an eligible retirement plan described in section 402(c)(8)(B). Provided all other requirements of section 402(c), except the 60-day requirement, are met with respect to such contributions, these amounts will be considered rollover contributions within the meaning of section 402(c)(1). Since the amount of such rollover contributions is not includible in the Taxpayer's gross income, these amounts will not be subject to the early distribution tax under section 72(t).

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 [REDACTED], SE:T:EP:RA:T1, I.D.  
[REDACTED] at [REDACTED]

Sincerely yours,

*Carlton A. Watkins*

Manager

Employee Plans Technical Group 1

Enclosures:

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