

200926041



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

APR 03 2009

TAX EXEMPT AND
GOVERNMENT ENTITIES
DIVISION

Uniform Issue List: 402.00-00

SET:EP:RA:TI

Legend:

Taxpayer A = *****
Amount 1 = *****
Amount 2 = *****
Amount 3 = *****
Amount 4 = *****
Amount 5 = *****
Employer A = *****
Employer B = *****
Financial Institution A = *****
Plan X = *****
Plan Y = *****

Dear *****:

This is in response to your request dated *****, as supplemented by correspondence dated *****, in which you request a waiver of the 60-day rollover requirement contained in section 402(c)(3) 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.

Taxpayer A asserts that his failure to accomplish a rollover of Amount 5 within the 60-day period prescribed by section 402(c)(3) of the Code was due to mistake made by Financial Institution A. Taxpayer A further represents that Amount 5 has not been used for any other purpose.

At the age of **, Taxpayer A left Employer A for Employer B. At the time of severance, Taxpayer A was entitled to take a distribution of the vested account balance in Plan X which totaled Amount 3. Taxpayer A elected to roll some of the funds from Plan X into Plan Y which was sponsored by Employer B. Taxpayer A elected a direct rollover of the entire account balance from Plan X into Plan Y, except the after-tax contributions of Plan X, which were to be distributed directly to Taxpayer A. Taxpayer A sought to avoid paying any state or federal income taxes on this distribution. Financial Institution A originally calculated the after-tax contributions of Plan X to be Amount 1. Financial Institution A distributed Amount 1 to Taxpayer A on *****, and transferred Amount 2 into Plan Y. No taxes were withheld from the distribution of Amount 1 because they were intended to represent after-tax contributions.

Financial Institution A later determined that Taxpayer A's after-tax contributions to Plan X totaled Amount 4, not Amount 1 as it previously reported. Financial Institution A issued a corrected Form 1099 R for 2006 reflecting a taxable distribution of Amount 5, which represented the difference between Amount 1 and Amount 4. Because of this reporting error, Taxpayer A received a taxable distribution of Amount 5, when Taxpayer A had only requested that after-tax contributions be distributed directly to him. Financial Institution A has acknowledged their error in writing.

Based on the above facts and representations, you request a ruling that the Internal Revenue Service ("Service") waive the 60-day rollover requirement contained in section 402(c)(3) of the Code with respect to the excess distribution of Amount 5 in this instance.

Section 402(c) of the Code provides that if any portion of the balance to the credit of an employee in a qualified trust is paid to the employee in an eligible rollover distribution, and the distributee transfers any portion of the property received in such distribution to an eligible retirement plan, and in the case of a distribution of property other than money, the amount so transferred consists of the property distributed, then such distribution (to the extent transferred) shall not be includible in gross income for the taxable year in which paid. Section 402(c)(3)(A) states that such rollover must be accomplished within 60 days following the day on which the distributee received the property. An individual retirement account (IRA) constitutes one form of eligible retirement plan.

Section 402(c)(3)(B) of the Code provides, in relevant part, that the Secretary may waive the 60-day requirement under section 402(c) 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.

Section 401(a)(31) of the Code provides the rules for governing "direct transfers of eligible rollover distributions".

Section 1.401(a)(31) of the Income Tax Regulations, Question and Answer-15, provides, in relevant part, that an eligible rollover distribution that is paid to an eligible retirement plan in a direct rollover is a distribution and rollover, and not a transfer of assets and liabilities.

Rev. Proc. 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) of the Code, 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 and documentation submitted by Taxpayer A is consistent with his assertion that his failure to accomplish a timely rollover was caused by an error on the part of Financial Institution A in distributing Amount 1 when it should have distributed Amount 4, resulting in a taxable distribution of Amount 5 and that this action did not comply with the instructions of Taxpayer A.

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 5 from Plan X. Taxpayer A is granted a period of 60 days from the issuance of this ruling letter to contribute Amount 5 into another qualified plan or rollover IRA. Provided all other requirements of section 402(c)(3) of the Code, except the 60-day requirement, are met with respect to such contribution, Amount 5 will be considered a rollover contribution within the meaning of section 402(c)(3) 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.

A copy of this letter ruling has been sent to your authorized representative pursuant to a power of attorney on file in this office.

If you wish to inquire about this ruling, please contact ***** (Identification Number *****) at (**) ***-****. Please address all correspondence to SE:T:EP:RA:T1.

Sincerely yours,

Carlton A. Watkins

Carlton A. Watkins, Manager
Employee Plans Technical Group 1