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Person To Contact:
, ID No.
Telephone Number:

Refer Reply To:
CC:EEE:EB:QP1
PLR-108457-22

Date:
October 11, 2022

Legend

Plan =

Employer =

Country A =

Dear

This letter is in response to a request dated April 25, 2022, as supplemented by correspondence dated August 10, 2022, August 14, 2022, August 22, 2022, September 14, 2022, and September 19, 2022, submitted on your behalf by your authorized representative, regarding whether a Plan participant's qualified Roth contributions should be determined without regard to an election of the foreign earned income exclusion under section 911 of the Internal Revenue Code (Code) with respect to the participant's wages from the Employer.

FACTS

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

The Employer sponsors the Plan, a defined contribution plan qualified under section 401(a) with a qualified cash or deferred arrangement, which covers U.S. citizens who are employees of the Employer in Country A and operates under a pre-approved plan document.

The Plan defines an Elective Deferral as an “Employee contribution made to the Plan as a Pre-tax Elective Deferral or a Roth Elective Deferral pursuant to Article 4 of the Plan.” It also defines a Roth Elective Deferral as an “Elective Deferral that is: (a) designated irrevocably at the time of the cash or deferred election as a Roth Elective Deferral that is being made in lieu of all or a portion of the Pre-Tax Elective Deferrals the Participant is otherwise eligible to make under the Plan; and (b) treated by the Company as includible in the Participant's income at the time the Participant would have received that amount in cash if the Participant had not made a cash or deferred election.”

The Plan permits participants to elect to defer into the Plan a percentage of their compensation paid to them by the Employer and provides, that elective deferrals may only be made with respect to amounts that are compensation under section 415(c)(3). The Plan also provides, that to the extent provided in the adoption agreement, participants are eligible to irrevocably designate some, or all, of their elective deferrals as either pre-tax elective deferrals or Roth elective deferrals. Since the Plan’s inception, the Employer has elected under the Plan document to provide the opportunity to participants to make elective deferrals under the Plan, or to choose to treat those deferrals as Roth elective deferrals.

To the extent that participants elect to make Roth elective deferrals, the Employer treats them as includible in gross income for all plan administration purposes at the time the contribution is made. This includes the financial accounting of the Plan's and participants' accounts; the enforcement of certain participant rights with regard to those contributions; the taxation treatment of distributions from the Plan, including corrective distributions as well as loans and their defaults; and other withdrawals.

RULING REQUESTED

The Plan requests the following ruling:

> With respect to compensation that is paid by the Employer to its employees as wages, is it permissible under the Code for the Plan to permit Plan participants to make qualified Roth contributions into the Plan from their wages under a qualified Roth contribution program, without regard to whether participants may subsequently elect the foreign earned income exclusion under section 911 on all or part of their wages payable to them by the Employer?

LAW AND ANALYSIS

Section 402A(a)(1) provides, as a general rule, that if an applicable retirement plan includes a qualified Roth contribution program, any designated Roth contribution made by an employee pursuant to the program is treated as an elective deferral for purposes of Chapter 1 of the Code, except that the contribution is not excludable from gross income.

Under section 402A(b)(1), the term “qualified Roth contribution program” means a program under which an employee may elect to make designated Roth contributions in lieu of all or a portion of elective deferrals the employee is otherwise eligible to make under the applicable retirement plan.

Under section 402A(c)(1), the term “designated Roth contribution” means any elective deferral that is excludable from the employee’s gross income without regard to this section and that the employee designates (at such time and in such manner as the Secretary prescribes) as not being so excludable.

The regulations on qualified cash or deferred arrangements under section 401(k) include guidance on designated Roth contributions under section 402A. Treas. Reg. § .401(k)-1(f)(1) provides, as a general rule:

> The term designated Roth contribution means an elective contribution under a qualified cash or deferred arrangement that, to the extent permitted under the plan, is--
>
> > (i) Designated irrevocably by the employee at the time of the cash or deferred election as a designated Roth contribution that is being made in lieu of all or a portion of the pre-tax elective contributions the employee is otherwise eligible to make under the plan;
> >
> > (ii) Treated by the employer as not excludible from the employee's gross income (in accordance with paragraph (f)(2) of this section);
> >
> > (iii) Maintained by the plan in a separate account (in accordance with paragraph (f)(3) of this section).

Section 1.401(k)-1(f)(2) provides, in relevant part, that an elective contribution is generally treated as not excludible from gross income if it is treated as includible in gross income by the employer (for example, by treating the contribution as wages subject to applicable income tax withholding).

Section 1.401(k)-1(f)(4)(i) provides that designated Roth contributions must satisfy the other requirements that apply to elective contributions. Thus, the same definition of “compensation” applies to both elective deferrals and to designated Roth contributions. Section 1.401(k)-1(e)(8) provides that cash or deferred elections can only be made with respect to amounts that are compensation within the meaning of section 415(c)(3) and § 1.415(c)-2. Section 415(c)(3) defines “participant’s compensation” as the participant’s compensation from the employer for the year. Section 1.415(c)-2(b)(1) defines compensation to mean remuneration for services including an employee's wages, salaries, fees for professional services, and other amounts received for personal services actually rendered in the course of employment with the employer maintaining the plan, to the extent that the amounts are includible in gross income. In contrast, § 1.415(c)-2(c)(1) provides that contributions are not treated as compensation to the

extent that the contributions are not includible in the gross income of the employee for the taxable year in which contributed. However, under § 1.415(c)-2(g)(5)(i), the determination of whether amounts are treated as compensation is made without regard to the exclusion from gross income under section 911 (special income exclusion for citizens or residents of the United States living abroad).

The designation of elective contributions as Roth contributions must satisfy the timing requirement under § 1.401(k)-1(a)(3)(iii) and may only be made prospectively - that is, with respect to an amount that is not currently available (within the meaning of § 1.401(k)-1(a)(3)(iv)) to the employee on the date of the election. Thus, a participant in a section 401(k) plan with a qualified Roth contribution program may elect to make Roth contributions for a taxable year only if the Roth designation is irrevocable, the election precedes the date the contribution is made to the plan, and the employer treats the contribution as includible in the participant’s gross income for the taxable year.

As represented by the Plan, the Employer treats the Roth contribution as includible in gross income for all Plan administration purposes at the time the contribution is made, including the financial accounting of the Plan's and participants' accounts. This treatment is consistent with the requirement under § 1.401(k)-1(f) with respect to designated Roth contributions that the Employer treat the elective contributions as includible in the participant’s gross income.

CONCLUSION

Based on the foregoing facts and representations, we conclude that, with respect to compensation that is paid by the Employer to its employees as wages, the Plan may permit participants to make qualified Roth contributions into the Plan from their wages under a qualified Roth contribution program, without regard to whether participants may subsequently elect the foreign earned income exclusion under section 911 on all or part of the wages payable to them by the Employer.

This letter expresses no opinion as to whether the Plan satisfies the requirements of section 401(a).

Except as expressly provided herein, no opinion is expressed or implied concerning the tax consequences of any aspect of any transaction or item discussed or referenced in this letter.

This ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) provides that it may not be used or cited as precedent.

The ruling contained in this letter is based upon information and representations submitted by the Plan and accompanied by a penalties of perjury statement executed by an appropriate party, as specified in Rev. Proc. 2022-1, 2020-1 IRB 1, § 7.01(16)(b). This office has not verified any of the material submitted in support of the request for a ruling, and such material is subject to verification on examination. The Associate office will revoke or modify a letter ruling and apply the revocation retroactively if there has been a misstatement or omission of controlling facts; the facts at the time of the transaction are materially different from the controlling facts on which the ruling was based; or, in the case of a transaction involving a continuing action or series of actions, the controlling facts change during the course of the transaction. See Rev. Proc. 2022-1, § 11.05.

Sincerely,

Keith R. Kost
Senior Technician Reviewer, Qualified Plans Branch 2
Office of Associate Chief Counsel
(Employee Benefits, Exempt Organizations, and Employment Taxes)

cc: