Internal Revenue Service Department of the Treasury

Washington, DC 20224

Significant Index No: 402.01-02

199908061

Person to Contact:
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Refer Reply to:
OP:E:EP:T:2

Date:
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Attention: *******************
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Legend:

Corporation A = *************************
Corporation B = *********************
Corporation C = ************************
Corporation D = ************************
Corporation E = ********************
Corporation F = *****************************
Corporation G = **************
Corporation H = ********************
Corporation I = ********************
Unit I = ********************************
Transaction A = **********************************
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Plan X = *************************************
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Dear M********************

This is in response to a ruling request dated August 10, 1998, as supplemented by correspondence dated November 18, 1998, which was submitted on your behalf by your authorized representative, concerning distributions from a plan described in section 401(k) of the Internal Revenue Code.

The following facts and representations have been submitted on your behalf:

Corporation A, formerly known as Corporation B, manufactures heads for tape recorders. Corporation A maintains Plan X, a profit-sharing plan which includes a cash or deferred arrangement as described in section 401(k) of the Code and provides for employer matching contributions for the benefit of its employees, including employees who worked in Unit I. Plan X received a favorable determination letter from the Internal Revenue Service, dated November 1, 1995 as a plan qualified under section 401(a) of the Code.

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Corporation A is a wholly-owned subsidiary of Corporation C, a company owned by one individual. Corporation A was purchased in the form of a stock acquisition by Corporation C from Corporation I in 1994. Corporation A historically engaged in three different businesses-- manufacturing data tape recorders, manufacturing heads for tape recorders and developing software for high-performance network computing storage purposes. Unit I manufactured data tape recorders. Corporation E manufactures heads for tape recorders and in September, 1997 was incorporated as a wholly-owned subsidiary of Corporation B. Corporation D was established in 1996 as a wholly-owned subsidiary of Corporation B to develop software as described herein.

At the time of Transaction A, dated November 15, 1997, Corporation B maintained the three businesses described above--Unit I, which operated as a division, and Corporations D and E, which operated as separately incorporated businesses.

Corporation E and Unit I were operated as separate business divisions and profit centers, payroll and accounting systems were separate and assets and liabilities of each were separately identified. Each had its own employees and did its own hiring. A General Manager was responsible for the performance of each. Corporation E and Unit I each had its own sales force and its own customers.

Pursuant to Transaction A, Unit I was sold to Corporation F, an unrelated corporation. The sale consisted of 100 per cent of the assets and ongoing business of Unit I, including but not limited to, the real property, personal property and intangible property of Unit I, subject to certain liabilities. Corporation F purchased the right to use the name of Corporation B. Subsequent to Transaction A, Unit I was merged with Corporation G, a wholly-owned subsidiary of Corporation F, which subsidiary is now known as Corporation H.

Corporation A now owns no assets related to the manufacture of data tape recorders. Subsequent to Transaction A, Corporation A retains as its only assets, Corporation D and Corporation E, two separately-incorporated subsidiaries.

At the time of Transaction A, Corporation A employed 301 persons, Each of the 234 individuals employed by Unit I was terminated on the date of Transaction A. Of the 234, 160 persons were offered positions with Corporation H, the purchaser of Unit I, at the same jobs at the same locations and at the same wages.

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Plan X has not been terminated, has not been adopted nor assumed by Corporations F or H, and there was no merger nor transfer of assets between Plan X and any plan maintained by Corporations F or H. In accordance with the terms of Plan X as amended, Corporation A proposes to offer former Unit I employees hired by Corporation H the opportunity to elect to receive distributions of their entire account balances under Plan X, which were fully vested as of the date of Transaction A, in 1998. At the recipient's request, these distributions may be made in the form of direct rollovers, as described in section 401(a)(31) of the Code, including a direct rollover to a qualified plan maintained by Corporation H.

Based upon the aforementioned facts, your authorized representative has requested the following rulings:

1. That each of the employees of Unit I who was hired by Corporation H will be "an employee who continues employment with the corporation acquiring such assets" for purposes of section 401(k)(10)(A)(ii) of the Code and "an employee who continues employment with the purchaser of assets" for purposes of section 1.401(k)-1(d)(4)(ii) of the Income Tax Regulations;

2. That the distributions from Plan X to employees of Corporation H who were formerly Unit I employees will be deemed to be "in connection with the disposition that results in the employee's transfer to the purchaser" for purposes of section 1.401(k)-1(d)(4)(iii) of the regulations, provided the distributions are made by December 31, 1998; and,

3. That the sale by Corporation A of Unit I resulted in a disposition by Corporation A of substantially all of the assets used by it in a trade or business within the meaning of section 401(k)(10)(A)(ii) of the Code, and therefore, distributions to the employees of Corporation H of their account balances under Plan X will not adversely affect the tax treatment of contributions to Plan X under section 402(e)(3).

Section 402(e)(3) of the Code provides generally that contributions made by an employer on behalf of an employee to a trust which is a part of a qualified cash or deferred arrangement shall not be treated as distributed or made available to the employee nor as contributions made to the trust by the employee merely because the employee may elect whether the contribution will be made to the trust or received by the employee in cash.

Section 401(k)(2)(B)(i)(II) of the Code, when read together with section 401(k)(10)(A)(ii) of the Code and

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section 1.401(k)-1(d)(1)(iv) of the Income Tax Regulations, provides that amounts attributable to elective deferrals may not be distributed from a cash or deferred arrangement before the date of the sale or other disposition by a corporation of substantially all of its assets (within the meaning of section 409(d)(2)) used by the corporation in a trade or business of the corporation to an unrelated corporation.

Section 1.401(k)-1(d)(4)(iv) of the regulations provides that for purposes of section 1.401(k)-1(d)(1)(iv), the sale of "substantially all" the assets used in a trade or business means the sale of at least 85 percent of the assets.

Section 1.401(k)-1(d)(4)(i), (ii) and (iii) of the regulations also provides, generally, with respect to distributions upon the sale of assets or a subsidiary, that the seller must maintain the plan after the disposition, the distribution may be made only to an employee who continues employment with the purchaser of assets or with the subsidiary and the distribution must be in connection with the disposition of the assets or subsidiary (i.e., in connection with the disposition that results in the employee's transfer to the purchaser). Whether a distribution is made in connection with the disposition of assets or a subsidiary depends on all of the facts and circumstances; however, except in unusual circumstances a distribution will not be treated as having been made in connection with a disposition unless it was made by the end of the second calendar year after the calendar year in which the disposition occurred.

With respect to ruling request one, it has been represented that pursuant to Transaction A described above, 160 persons formerly employed by Corporation A in Unit I were offered positions with Corporation H, the purchaser of all of the assets of Unit I at the same jobs and at the same locations and wages as was true previously at Corporation A. Therefore, the requirements of section 401(k)(10)(A)(ii) of the Code and section 1.401(k)-1(d)(4)(ii) of the regulations are satisfied with respect to employees of Unit I hired by Corporation H in that the corporation and purchaser acquiring Unit I is Corporation H.

Accordingly, with respect to your first ruling request, we conclude that each of the employees of Unit I who was hired by Corporation H will be "an employee who continues employment with the corporation acquiring such assets" for purposes of section 401(k)(10)(A)(ii) of the Code and "an employee who continues employment with the purchaser of assets" for purposes of section 1.401(k)-1(d)(4)(ii) of the regulations.

With respect to ruling request two, under Plan X as amended, former Unit I employees hired by Corporation H pursuant to Transaction A (dated November 15, 1997) will be offered the opportunity to elect to receive distributions of their entire Plan X account balances in 1998. Under the regulations, such distributions, to be deemed distributions in connection with the disposition that results in the employee's transfer to the purchaser, must be made by the end of the second calendar year after the calendar year in which the disposition occurred, except in unusual circumstances. Accordingly, with respect to your second ruling request, we conclude that the distribution from Plan X to employees of Corporation H who were formerly Unit I employees will be deemed to be "in connection with the disposition that results in the employee's transfer to the purchaser" for purposes of section 1.401(k)-1(d)(4)(iii) of the regulations, provided the distributions are made by December 31, 1998.

With respect to ruling request three, Corporation A operated a data tape recorder manufacturing division, Unit I, as a separate business division and profit center, with separate payroll and accounting systems, and separate identification of assets and liabilities. Unit I had its own employees, its own General Manager, responsible for Unit I's performance, and its own sales force and customers. Pursuant to Transaction A, 100 percent of Unit I was sold to Corporation H. In order to be considered a "disposition of substantially all of the assets" under section 401(k)(10)(A)(ii) of the Code and section 1.401(k)-1(d)(4)(iv) of the regulations, at least 85 percent of the assets used in a trade or business must be sold. Accordingly, with respect to your third ruling request, we conclude that the sale by Corporation A of Unit I resulted in a disposition by Corporation A of substantially all of the assets used by it in a trade or business within the meaning of section 401(k)(10)(A)(ii) of the Code, and therefore, distributions to the employees of Corporation H of their account balances under Plan X will not adversely affect the tax treatment of contributions to Plan X under section 402(e)(3).

The conclusions reached in this ruling letter are based

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upon the assumption that at all relevant times Plan X is qualified under sections 401(a) and 401(k) of the Code.

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

Sincerely yours,

(signed) JOYCE E. FLOYD

Joyce E. Floyd
Chief, Employee Plans
Technical Branch 2

Enclosures:
Deleted Copy of this Letter
Notice of Intention to Disclose

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