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

TAX EXEMPT AND
GOVERNMENT ENTITIES
DIVISION

200617039

FEB - 1 2006

Uniform Issue List: 402.00-00

T:EP:RA:T3

Legend:

Taxpayer A =

Taxpayer B =

Individual C =

Attorney D =

Amount D =

Amount E =

Amount F =

Amount G =

Amount H =

Amount I =

Amount J =

Company W =

Plan X =

Plan Y =

Plan Z =

Month 1 =

Month 2 =

Date 1 =

Date 2 =

Date 3 =

Date 4 =

Date 5 =

Date 6 =

Sum 1 =

Sum 2 =

Sum 3 =

Sum 4 =

Dear :

This is in response to your letter dated , as supplemented by correspondence dated , in which your authorized representative on your behalf requests a waiver of the 60-day rollover requirement contained in section 402(c)(3)(A) 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 is married to Taxpayer B. Taxpayer A has not attained age 70 ½. Taxpayer A had been an employee of Company W for approximately 40 years prior to his retirement during calendar year . Company W sponsors Plan X, Plan Y and Plan Z which, it is represented, are qualified within the meaning of section 401(a) of the Code. Additionally, it is represented that Company W aggregates Plans X, Y, and Z for purposes of applying the net unrealized appreciation ("NUA") rules of Code section 402(e).

On Date 1, , Taxpayer A rolled over his entire account balance under Plan X totaling Amount D into a individual retirement account ("IRA") described in Code section 408(a) set up and maintained in his name. On Date 2, , Taxpayer A rolled over into an IRA Sum 1 shares of Company W stock valued at Amount E which stock had been distributed from Plan Y.

In Month 1, , Taxpayer A contacted his financial consultant, Individual C, a Certified Financial Manager, who was employed as a retirement planner by Company W, for advice and guidance. In a letter dated Date 5, , Individual C advised Taxpayer A that, with respect to the Company W stock held in Plan Z, "my opinion is that NUA may make sense for you". The Date 5, letter also discussed Taxpayer A's option of rolling over the Company W stock held in Plan Z into an IRA.

On Date 3, , Taxpayer A rolled over into an IRA the non-Company W stock portion of his account under Plan Z valued at Amount F and received a distribution from Plan Z of Sum 2 shares of Company W stock with a fair market value of Amount G and a cost basis of Amount H. A Date 4, , Company W Distribution Statement relating to amounts distributed from Plan Z to Taxpayer A indicates NUA totaling Amount I (Amount G less Amount H) which NUA related to the Company W stock distributed from Plan Z to Taxpayer A.

It has been represented that Taxpayer A lacked the financial knowledge or experience to know the tax consequences associated with the distribution he received from Plan Z, and, for that reason, relied upon Individual C.

Based on his belief that the Company W stock distributed from Plan Z to him qualified for NUA treatment, on Date 6, , Taxpayer A sold Sum 3 shares of Company W for Amount J. Date 6, is 14 days after Date 3, (the date of the Plan Z distribution). Taxpayer A retains Sum 4 (Sum 2 less Sum 3) shares of Company W stock.

In early , Taxpayer A received a calendar year Form 1099-R, Distributions From Pensions, Annuities, Retirement or Profit-Sharing Plans, IRAs, Insurance Contracts, etc, which reported the fair market value of the stock distributed from Plan Z (Amount G) instead of the cost basis of said stock (Amount H).

Taxpayer A subsequently discovered that, contrary to the information previously provided him, he did not qualify for NUA treatment because the distributions he received during calendar year from Plans X and Y disqualified him from said treatment.

In Month 2, , Taxpayer A contacted Attorney D to discuss the tax ramifications surrounding his receipt of Company W stock from Plan Z. This request for letter ruling was filed with the Internal Revenue Service shortly thereafter.

Based on the facts and representations, you request:

(1) That the Service waive the 60-day rollover requirement with respect to the Plan Z distribution of Sum 2 shares of Company W stock valued at Amount G because the failure to waive such requirement would be a hardship and against equity or good conscience.

(2) That Taxpayer A be granted a period a time not to exceed 60 days as measured from the date of this ruling letter to contribute the Sum 4 unsold shares of Company W stock distributed from Plan Z and the proceeds of the sale of Sum 3 shares of Company W stock (not to exceed Amount J) into a IRA set up and maintained in his name.

(3) That, provided all other requirements of section 402(c)(3) of the Code, except the 60-day requirement, are met with respect to such contribution, the contribution of the Sum 4 unsold shares of Company W stock and of the proceeds of the sale of Sum 3 shares of Company W stock (not to exceed Amount J) referred to herein into a IRA set up and maintained in his name will be considered a rollover contribution(s) within the meaning of section 402(c)(3) of the Code. And

(4) That Taxpayer A (and Taxpayer B) (filing a joint Federal Form 1040) will recognize no calendar year gain or loss on Taxpayer A's sale of Sum 3 shares of Company W stock for Amount J (referenced herein) as long as said Amount J is rolled into an IRA set up and maintained in Taxpayer A's name within 60 days as measured from the date of this ruling letter.

With respect to your ruling requests, section 402(a)(1) of the Code provides that, except as otherwise provided in section 402, any amount distributed out of an employees' trust described in section 401(a) that is exempt from tax under section 501(a) shall be taxable to the distributee, in the taxable year of the distributee in which distributed, in the manner provided under section 72 of the Code (relating to annuities).

Section 402(c) of the Code provides rules governing rollovers of amounts from exempt trusts to eligible retirement plans including IRAs.

Code section 402(c)(3)(A) provides that, except as provided in subparagraph (B), paragraph (1) (whioch excludes rolled over amounts from gross income) shall not apply to any transfer of a distribution made after the 60th day following the day on which the distributee received the property distributed.

Code section 402(c)(6)(A) provides that the transfer of an amount equal to any portion of the proceeds from the sale of property received in the distribution shall be treated as the transfer of property received in the distribution.

Code section 402(c)(6)(B) provides that the excess of the fair market value of property on sale over its fair market value on distribution shall be treated as property received in the distribution.

Code section 402(c)(6)(D) provides that no gain or loss shall be recognized on any sale described in subparagraph (A) to the extent that an amount equal to the proceeds is transferred pursuant to paragraph (1).

Section 402(c)(3)(B) of the Code provides that the Secretary may waive the 60-day requirement under section 402(c)(3)(A) of the Code 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 402(c)(4) of the Code provides that an eligible rollover distribution shall not include any distribution to the extent such distribution is required under section 401(a)(9).

Section 401(a)(31)(A) of the Code provides that a trust shall not constitute a qualified trust under this section unless the plan of which such trust is a part provides that if the distributee of any eligible rollover distribution-

(i) elects to have such distribution paid directly to an eligible retirement plan, and

(ii) specifies the eligible retirement plan to which such distribution is to be paid (in such form and at such time as the plan administrator may prescribe), such distribution shall be made in the form of a direct trustee-to-trustee transfer to the eligible retirement plan so specified.

Section 401(a)(31)(E) of the Code provides that, for purposes of Code section 401 (a)(31), the term "eligible retirement plan" has the meaning given such term by section 402(c)(8)(B) with an exception not pertinent to this ruling request. Thus, a direct transfer defined in Code section 401(a)(31), may be made into an IRA.

Section 1.401(a)(31)-1 of the Income Tax Regulations, Question and Answer-5, provides, in relevant part, that a direct rollover described in Code section 401(a)(31) is a distribution and rollover of the eligible rollover distribution and not a transfer of assets and liabilities. Thus, for example, the consent and requirements of Code sections 401(a)(11), 411(a)(11), and 417 apply to transactions described in Code section 401(a)(31).

Revenue Procedure 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)(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.

Taxpayer A submits that his failure to accomplish a timely rollover was caused by his reliance on advice given him by Individual C, an employee of Company W, to the effect the Company W stock he received from Plan Z was eligible for NUA tax treatment. However, in this case, there was no intent to rollover nor was the erroneous advice given regarding the rollover transaction itself. Rather, Taxpayer A deliberately chose not to roll over his the portion of his Plan Z distribution which consisted of Sum 2 shares of Company W stock valued at Amount G on the mistaken belief that net unrealized appreciation was available. We do not believe that Congress intended to permit the Service to retroactively correct tax treatment choices which do not produce the expected benefits even though, in this case, these choices were the result of erroneous advice provided to Taxpayer A by his financial consultant, Individual C.

Thus, based on the above, pursuant to Code section 402(c)(3)(B), the Service hereby declines to waive the 60-day rollover period found in Code section 402(c)(3)(A) with respect to the Sum 2 shares of Company W stock distributed on or about Date 3, 2004 from Plan Z. Furthermore, the Service concludes as follows with respect to your additional ruling requests.

(2) That Taxpayer A is not granted any period of time to contribute the Sum 4 unsold shares of Company W stock distributed from Plan Z and the proceeds of the sale of Sum 3 shares of Company W stock (not to exceed Amount J) into a IRA set up and maintained in his name.

Based on our responses to your first and second letter ruling requests, the third and fourth requests are moot.

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.

Pursuant to a power of attorney on file with the Service, the original of this letter ruling is being sent to you and a copy to your authorized representative.

If you wish to inquire about this ruling, please contact , Esq. (I.D. # -), at (202) 283- Please address all correspondence to SE:T:EP:RA:T3.

Sincerely yours,

Frances V. Sloan, Manager
Employee Plans Technical Group 3

Enclosures:
Deleted copy of letter ruling
Notice of Intention to Disclose