Internal Revenue Service

Number: **201540015**
Release Date: 10/2/2015

Index Number: 404A.00-00

Department of the Treasury
Washington, DC 20224

Third Party Communication: None
Date of Communication: Not Applicable

Person To Contact:
, ID No.
Telephone Number:

Refer Reply To:
CC:TEGE:EB:QP2
PLR-T-103529-15
Date:
June 29, 2015

Legend

Plan X =
Company A =
Company B =
Company C =
Company D =
Company E =
State =
Country =
Amount Y =

Dear :

This letter is in response to your ruling request, dated January 25, 2011, as supplemented by correspondence dated May 1, 2015, submitted by your authorized representative, concerning the treatment of Plan X under section 404A of the Internal Revenue Code (the Code).

The following facts and representations are submitted under penalties of perjury in support of your request:

Company A is a State corporation. Company B is indirectly wholly owned by Company A. Company B is organized under the laws of Country and is classified as a partnership for U.S. federal tax purposes.

During 2000, Company A and Company C (an entity otherwise unrelated to Company A) formed Company D. Company A and Company C each owned 50 percent of Company D. Also during 2000, Company D acquired all of the outstanding shares of

Company E and assumed approximately Amount Y of liabilities. Company E was a Country entity classified as a corporation for U.S. tax purposes. Pursuant to a section 338(g) election, the acquisition was treated as if Company E transferred all of its assets to a new corporation unrelated to Company E in exchange for consideration that included the assumption of the liabilities of Company E. Among the liabilities assumed were any liabilities related to Plan X. Prior to the acquisition, Company E maintained Plan X and had made all contributions required under Country law.

After the acquisition of Company E, various internal restructurings were undertaken. In 2002, a partnership, 50% of which was owned by Company A and 50% of which was owned by Company C, purchased certain assets and assumed certain liabilities of Company E (including liabilities under Plan X) in a taxable asset sale. Later in 2002, Company A acquired Company C's interests in that partnership. In 2003, the partnership transferred its assets and liabilities (including liabilities under Plan X) to Company B.

Plan X was established by Company E in 1998. The plan is written and maintained to provide deferred compensation. When Plan X was established, individuals that participated in two predecessor retirement plans of Company E were eligible to participate. Prior to April 1, 2002, permanent employees were eligible to participate. As of April 1, 2002, Plan X was closed to new participants. Currently, no participants continue to accrue benefits under Plan X. Upon retirement at normal retirement age, a participant is entitled to an immediate pension. The assets of Plan X are held in an irrevocable trust established by the employer to fund compensation obligations to its employees. The assets are held for the exclusive benefit of the employer's employees and their beneficiaries, and are not subject to the claims of the employer's creditors. Plan X prohibits the assignment of benefits. Over 90% of the amounts taken into account for all taxable years under Plan X are attributable to services that were performed by nonresident aliens and the compensation for which was not subject to tax under Chapter 1 of the Code. An election under section 404A has been made with respect to Plan X under which Plan X is designated as a qualified funded plan.

You request the following rulings:

1. Plan X is a "qualified foreign plan" under section 404A.
2. Company B is not required to capitalize post-2002 contributions to Plan X as liabilities assumed in 2000 and 2002.

Ruling Request #1

For purposes of section 404A, section 404A(e) defines a "qualified foreign plan" as any written plan of an employer for deferring the receipt of compensation but only if—

- such plan is for the exclusive benefit of the employer's employees or their beneficiaries,
- 90 percent or more of the amounts taken into account for the taxable year under the plan are attributable to services—

    - Performed by nonresident aliens, and
    - the compensation for which is not subject to tax under chapter 1, (the "90% rule") and
- the employer elects to have section 404A apply to the plan pursuant to Treasury regulations.

Plan X meets the definition of a "qualified foreign plan" under section 404A. It is a written plan of an employer deferring the receipt of compensation in the form of a pension. Plan X is for the exclusive benefit of the employer's employees or their beneficiaries. Eligibility is reserved for employees, former employees and their beneficiaries. The plan prohibits assignment of benefits. Plan X meets the 90% rule. For all relevant taxable years, over 90% of the amounts taken into account under the plan are attributable to services performed by nonresident aliens and compensation that is not subject to tax under chapter 1. The employer has elected to have section 404A apply to Plan X pursuant to Prop. Treas. Reg. § 1.404A-1(a)(4).

We conclude that Plan X is a "qualified foreign plan" under 404A.

Ruling Request #2

Rev. Rul. 58-165, 1958-1 C.B. 209, holds that a parent corporation may, within the limits of section 404(a)(1) of the Code, deduct contributions to fund benefits for past service rendered by its employees, including benefits with respect to services previously rendered by such employees to a subsidiary corporation, provided that there is no duplication of benefits by both the present employer and the subsidiary. Also, if a subsidiary is liquidated and its assets, liabilities, and employees are transferred to the parent corporation, the parent corporation, as a complete successor to the subsidiary corporation, may, within the limitations of section 404(a)(1) of the Code, deduct contributions to fund benefits for the transferred employees with respect to all services rendered to either the parent or subsidiary, or both, on or before the plan's effective date.

Rev. Rul. 62-139, 1962-2 C.B. 123, holds that an employee's past service with a former employer may be taken into account in determining benefits under his present employer's plan, regardless of the degree of affiliation, if any, between the present and former employers. The contributions for such prior service benefits are deductible under section 404(a)(1), provided that there is no duplication of benefits by both the present employer and the former employer.

In F & D Rentals, Inc., 44 T.C. 335 (1965), aff'd, 365 F.2d 34 (7th Cir.1966), cert. denied, 385 U.S. 1004 (1967), the taxpayer corporation purchased all of the assets of another corporation and became obligated to continue the seller's pension plans and assume the burden of the seller's unpaid obligations to the pension plans. The taxpayer corporation failed to make a timely contribution to the plan in 1957 and was, therefore, unable to claim a deduction for any amount under section 404(a)(1) of the Code for 1957. The taxpayer corporation contended that it should be allowed to include the cost

basis of the assets it acquired from the seller by adding to such cost basis the amount of its unpaid obligations to the pension plans. The Tax Court stated that the effect of this procedure would be to allow the taxpayer corporation to deduct, by way of depreciation deductions, the very amounts which it failed to deduct under the only statutory authority for the deduction of contributions to pension plans, i.e., section 404(a)(1).

Section 338 of the Code permits a purchasing corporation, in the case of a qualified stock purchase, to make an election to treat an acquired target corporation as if it sold all of its assets in a complete liquidation on the stock acquisition date. The target corporation is then treated as a new corporation that purchased its assets on the day after such date.

Although the above revenue rulings allow a successor employer to deduct contributions to fund benefits based on service for a prior employer under section 404(a)(1), the rationale of these revenue rulings applies also if the successor employer contributes to a qualified foreign plan under section 404A in order to fund liabilities transferred pursuant to a section 338 election. Accordingly, we conclude that the post-2002 contributions to Plan X are not required to be capitalized as liabilities assumed by Company B in 2000 and 2002.

The rulings contained in this letter are based upon information and representations submitted by the taxpayer and accompanied by a penalty of perjury statement executed by an appropriate party. While this office has not verified any of the material submitted in support of the request for rulings, it is subject to verification on examination.

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) of the Code provides that it may not be used or cited as precedent.

In accordance with the Power of Attorney on file with this office, a copy of this letter is being sent to your authorized representative.

Sincerely,

Linda S. F. Marshall
Senior Counsel, Qualified Plans Branch 1
(Employee Benefits)
(Tax Exempt & Government Entities)

cc: