Internal Revenue Service

403.00-00, 403.05-00

Department of the Treasury

200124030

Washington, DC 20224

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Person to Contact:
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Telephone Number:
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Refer Reply to:
T:EP:RA:T:2/5002313

Date:
MAR 22 2001

Legend:
Taxpayer A = **********
Taxpayer B = **********
Taxpayer C = **********
Taxpayer D = **********
Fund N = **********
Fund O = **********
Insurance Company M = **********
****
Amount 1 = **********
State E = **********

Dear **********

This letter is in response to a ruling request dated July 13, 2000, submitted on your behalf by your authorized representative, as supplemented by correspondence dated February 9, and February 28, 2001, in which you request rulings under sections 403(b), 401(a), and 2518(b) of the Internal Revenue Code.

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

Taxpayer A, a resident of State E, whose date of birth was November 16, 1931, died testate on April 3, 2000. Taxpayer A, was survived by her husband, Taxpayer B, and two children, Taxpayer C and Taxpayer D. At the time of her death Taxpayer A had not attained the age of 70 1/2. Pursuant to Taxpayer A's Last Will and Testament ("Will"), Taxpayer B was appointed the sole executor of Taxpayer A's estate. Under the terms of Taxpayer A's will, after the payment of debts, expenses, and taxes, the residue of her estate passed to Taxpayer B.

At the time of her death, Taxpayer A owned four retirement annuity accounts issued by Insurance Company M, and she was named as the beneficiary of each account during her life. On Taxpayer A's death, Taxpayer B was named as beneficiary of three of the annuity accounts. However, one of the accounts (hereafter collectively Fund N/ Fund O Account) named Taxpayer C and Taxpayer D as the primary beneficiaries after the death of Taxpayer A. Fund N was issued in accordance with section 401(a) of the Code; and Fund O was issued in accordance with section 403(b)(1) of the Code. There are no contingent beneficiaries named to the account holding the Fund N and Fund O annuities. The Fund N/ Fund O Account annuity agreements provide that if no beneficiary is designated, then the estate of Taxpayer A is treated as the beneficiary. At the

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time of Taxpayer A's death, the approximate value of the Fund N/Fund O Account annuities was Amount 1.

Within nine months of Taxpayer A's death, Taxpayer C and Taxpayer D executed written disclaimers of their entire interest in the Fund N/Fund O Account annuities. The disclaimers were notarized and delivered by certified mail to the custodian of the Fund N/Fund O Account annuities. Your authorized representative asserts that the disclaimers constitute valid disclaimers under the laws of State E.

Insurance Company M currently holds the Fund N/Fund O Account annuities in Taxpayer A's name. Insurance Company M will pay the amounts in the Fund N/Fund O Account to Taxpayer A's estate upon the direction of Taxpayer B, as executor of Taxpayer A's estate. Taxpayer B proposes to instruct Insurance Company M to pay the amounts in the Fund N/Fund O Account annuities to him as executor of Taxpayer A's estate and then will pay said proceeds to himself as beneficiary of said estate. Finally, he will transfer the proceeds into an Individual Retirement Arrangement (IRA) established and maintained in Taxpayer B's name within sixty days of the date the proceeds are distributed to him.

Based on the above facts and representations, Taxpayer B requests the following rulings:

1. That the disclaimers executed by Taxpayer C and Taxpayer D, Taxpayer A's Children, are qualified disclaimers within the meaning of section 2518(b) of the Code.

2. That Taxpayer B is eligible to roll over the distribution of the proceeds of Taxpayer A's Fund N Account annuity into an IRA set up and maintained in his own name pursuant to section 402(c)(1) as long as the rollover of such distribution occurs no later than the 60th day from the date said distribution is received by Taxpayer B, as executor of Taxpayer A's estate;

3. That Taxpayer B is eligible to roll over the distribution of the proceeds of Taxpayer A's Fund O Account annuity into an IRA set up and maintained in his own name pursuant to section 403(b) as long as the rollover of such distribution occurs no later than the 60th day from the date said distribution is received by Taxpayer B as executor of Taxpayer A's estate; and

4. That Taxpayer B will not be required to include in gross income for federal income tax purposes for the year in which the distribution of the Fund N and Fund O amounts and subsequent rollovers are made pursuant to the second and third rulings (above) any portion of the amounts transferred from the Fund N/Fund O Account annuities to the IRA set up and maintained in Taxpayer B's name.

With respect to your first ruling request, section 46:2E-2 of the Code of State E provides that any person who is a grantee, donee, surviving joint tenant, surviving tenant by the entirety, surviving party to a joint deposit account, a P.O.D. account or a trust deposit account, person succeeding to a disclaimed interest, beneficiary under a nontestamentary instrument or contract,

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appointee under a power of appointment exercised by a nontestamentary instrument, or a beneficiary under an insurance policy, may disclaim in whole or in part the right of transfer to him of any property or interest therein by delivering or filing a written disclaimer.

Section 46:2E-4 of the Code of State E provides that the instrument disclaiming shall be in writing, signed and acknowledged by the person disclaiming, and shall (1) describe the property or interest disclaimed, and if real property, the municipality and county wherein the real property is situated (2) declare the disclaimer and extent thereof.

Section 46:2E-1 of the Code of State E defines a present interest as one to take effect in immediate possession, use or enjoyment without the intervention of a preceding estate or interest or without being dependent upon the happening of any event or thing.

Section 46:2E-6(a) of the Code of State E provides that an instrument disclaiming a present interest shall be delivered or filed no later than 9 months after the effective date of the nontestamentary instrument or contract, and section 46:2E-6(d) provides that the effective date of a revocable instrument or contract is the date on which the maker no longer has power to revoke it or to transfer to himself or another the entire legal and equitable ownership of the interest.

Section 46:2E-8 provides that unless the nontestamentary instrument or contract provides for another disposition, the property or interest disclaimed shall devolve as to a present interest, as if the disclaimant had died before the effective date of the instrument or contract.

Section 2046 of the Internal Revenue Code provides that, for estate tax purposes, disclaimers of property interests passing upon death are treated as provided in § 2518.

Section 2518(a) of the Internal Revenue Code ("Code") provides that, if a person makes a qualified disclaimer of an interest in property, the estate, gift, and generation-skipping transfer tax provisions will apply to that interest as if it had never been transferred to such person.

Under § 2518(b) of the Code, the term "qualified disclaimer" means an irrevocable and unqualified refusal by a person to accept an interest in property, provided: (1) the disclaimer is in writing; (2) the disclaimer is received by the transferor of the interest, his legal representative, or the holder of legal title to the property to which the transfer relates, not later than the date which is 9 months after the later of the date on which the transfer creating the interest in such person is made or the date on which the person refusing the interest attains age 21; (3) the person disclaiming the interest has not accepted the interest or any of its benefits; and (4) as a result of the disclaimer, the interest passes without any direction by the person making the disclaimer and passes either to the spouse of the decedent or to a person other than the person making the disclaimer.

Under § 25.2518-1(b) of the Gift Tax Regulations, if a qualified disclaimer is made, the property is treated, for federal gift, estate, and generation-skipping transfer tax purposes, as passing directly from the transferor, and not from the disclaimant, to the person entitled to receive the property as a result of the disclaimer. Thus, the disclaimant is not treated as making a gift.

Section 25.2518-2(c)(3) provides that, with respect to transfers made by a decedent at death or transfers that become irrevocable at death, the transfer creating the interest occurs on the date of the decedent's death, even if an estate tax is not imposed on the transfer.

In the present case, based on the facts presented and the representations made, we conclude with respect to ruling request number one that the disclaimers were made in accordance with State E's law. As a result, the Fund N/Fund O Account passed without any direction on the part of Taxpayer C or Taxpayer D to Taxpayer A's estate, and, under the terms of Taxpayer A's will, to Taxpayer B. We also conclude that the disclaimers satisfy the requirements of § 2518(b). The first requirement was satisfied because the disclaimers were in writing. The second requirement was satisfied because the disclaimers were delivered, within nine months of Taxpayer A's death, to a fiduciary who holds legal title to the interests to be disclaimed. The third requirement was satisfied because the disclaimants did not and will not accept any of the disclaimed interests or benefits. The fourth requirement was satisfied because the disclaimed property passed to recipients other than the disclaimants and did not pass to any recipient at the direction of the disclaimants. Thus, with respect to your first ruling request we conclude that the disclaimers executed by Taxpayer C and Taxpayer D, Taxpayer A's Children, are qualified disclaimers within the meaning of section 2518(b) of the Code.

With respect to your remaining ruling requests, section 402(a)(1) of the Code provides, in general, that any amount actually distributed to any distributee by any employee's trust described in Code section 401(a) which is exempt from tax under Code section 501(a) shall be taxable to the distributee, in the taxable year of the distributee in which distributed, under Code section 72 (relating to annuities).

Section 402(c)(1) of the Code provides, generally, that if any portion of an eligible rollover distribution from a section 401(a) qualified retirement plan is transferred into an eligible retirement plan, the portion of the distribution so transferred shall not be includible in gross income in the taxable year in which paid.

Section 402(c)(2) of the Code provides that the maximum amount of an eligible rollover distribution to which paragraph (1) applies shall not exceed the portion of such distribution which is includible in gross income (determined without regard to paragraph (1)).

Section 402(c)(3) of the Code provides that section 402(c)(1) shall not apply to any transfer of a distribution made after the 60th day following the day of which the distributee received the property distributed.

Section 402(c)(4) of the Code defines "eligible rollover distribution" as any distribution to an employee of all or a portion of the balance to the credit of an employee in a qualified trust; except that such term shall not include--

(A) any distribution which is one of a series of substantially equal periodic payments (not less frequently than annually) made --

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(i) for the life (or life expectancy) of the employee or the joint lives (or joint life expectancies) of the employee and the employee's designated beneficiary, or

(ii) for a period of 10 years or more, and

(B) any distribution to the extent the distribution is required under section 401(a)(9).

Section 402(c)(8)(B) of the Code defines eligible retirement plan as (i) an individual retirement account described in section 408(a), (ii) an individual retirement annuity described in section 408(b) (other than an endowment contract), (iii) a section 401(a) of the Code qualified retirement plan, and (iv) an annuity plan described in section 403(a).

Section 1.402(c)-2 of the Income Tax Regulations, Question and Answer 7(b), provides, generally, that any amount that is paid from a qualified plan before January 1 of the year in which the employee attains (or would have attained) age 70-1/2 will not be treated as required under section 401(a)(9) and, thus, is an eligible rollover distribution if it otherwise qualifies.

Section 402(c)(9) of the Code provides that if a distribution attributable to an employee is paid to the spouse of the employee after the employee's death, section 402(c) of the Code will apply to such distribution in the same manner as if the spouse were the employee except that the spouse shall transfer such distribution only to a section 408(a) individual retirement account or a section 403(b) individual retirement annuity.

Section 1.402(c)-2, Question and Answer 12 of the Income Tax Regulations, provides, generally, that if a distribution attributable to an employee is paid to the employee's surviving spouse, section 402(c) applies to the distribution in the same manner as if the spouse were the employee. Q&A-12 provides further that only IRAs described in sections 408(a)and (b) of the Code are treated as eligible retirement plans for purposes of spousal rollovers. Thus, a distribution to the surviving spouse of an employee is an eligible rollover distribution if it meets the applicable requirements of sections 402(c)(2) and (4) and the associated regulations.

Section 403(b)(8)(A) of the Code provides, in relevant part, that if any portion of the balance to the credit of an employee in an annuity contract described in section 403(b)(1) of the Code is paid to him in an eligible rollover distribution (within the meaning of section 402(c)(4)), the employee transfers any portion of the property he receives in such distribution to an individual retirement plan or to an annuity contract described in section 403(b)(1) of the Code, then such distribution (to the extent so transferred) will not be includible in the gross income of the employee in the taxable year that the distribution is paid.

Section 403(b)(8)(B) of the Code provides, that rules similar to rules of paragraphs (2) through (7) of section 402(c) shall apply for purposes of 403(b)(8)(A).

Section 403(b)(10) provides, in relevant part, that rules similar to rules of Code sections 401(a)(9) and 401(a)(31) apply to annuities described in Code section 403(b).

Section 1.403(b)-2 of the regulations, Q&A-1, provides, in summary, that an eligible rollover distribution received from a Code section 403(b) annuity may be rolled over into an IRA . Section 1.403(b)-2 of the regulations, Q&A-1, further provides, in part, that the rules with respect to rollovers in sections 402(c)(1), (c)(3) and (c)(9) also apply to eligible rollover distributions from section 403(b) annuities.

As a general rule, if a decedent's qualified plan assets pass through a third party, e.g. an estate or a trust, and then are distributed to the decedent's surviving spouse, said spouse will be treated as acquiring them from the third party and not from the decedent. Thus, the surviving spouse will not be eligible to roll over the qualified plan proceeds into his/her own IRA.

However, in this case, subsequent to the disclaimers referenced above, Taxpayer A's estate became the beneficiary of Taxpayer A's interest in the Fund N/Fund O Account annuities. Taxpayer A's interest in the Fund N/Fund O Account annuities was paid to Taxpayer B as the executor of Taxpayer A's estate. As executor of Taxpayer A's estate and surviving spouse, Taxpayer B has authority under the provisions of Taxpayer A's will and the laws of State E to dispose of the assets of Taxpayer A's estate. Additionally, because Taxpayer C and Taxpayer D, the named beneficiaries of the Fund N/Fund O Account annuities have disclaimed their interests in the Fund N/Fund O Account annuities, under the terms of the will, all of the rest and residue of Taxpayer A's estate is to pass to Taxpayer B as the residuary beneficiary of Taxpayer A's estate. Therefore, in view of Taxpayer B's authorized control under the provisions of Taxpayer A's will, and in view of his status of sole residual beneficiary of Taxpayer A's estate, the general rule will not apply.

Based on the facts given above, the Service will not apply the general rule referenced herein and will treat Taxpayer B, Taxpayer A's surviving spouse, as having received Taxpayer A's Fund N/Fund O Account annuities, to the extent of Amount 1, from Taxpayer A and not from Taxpayer A's estate.

In addition, Taxpayer B intends to exercise his right as beneficiary of the Fund N/Fund O Account annuities to withdraw their proceeds and thereafter take such actions sufficient to have the proceeds paid to him. Then Taxpayer B intends to roll over the proceeds to an IRA set up and maintained in his own name. Said rollover will occur within 60 days of receipt of the proceeds by Taxpayer B as executor of Taxpayer A's estate from the Fund N/Fund O Account annuities.

Since the general rule does not apply in this case, we believe Taxpayer B is eligible to roll over the Fund N/Fund O Account annuities into an IRA set up and maintained in his own name provided that the rollover occurs no later than the 60th day from the day of Taxpayer B's receipt of the proceeds from the Fund N/Fund O Account annuities.

Regarding ruling request number two, Fund N was issued in accordance with section 401(a) of the Code. Section 1.402(c)-2, Q& A-12 of the Income Tax Regulations, provides, that if

a distribution attributable to an employee is paid to the employee's surviving spouse, section 402(c) of the Code applies to the distribution in the same manner as if the spouse were the employee. Thus, a distribution to the surviving spouse of an employee is an eligible rollover distribution if it meets the applicable requirements of sections 402(c)(2) and (4) and the associated regulations. Section 402(c)(2) of the Code provides that the maximum amount of an eligible rollover distribution to which paragraph (1) applies shall not exceed the portion of such distribution which is includible in gross income (determined without regard to paragraph (1)). Section 402(c)(4) of the Code generally provides that any distribution of all or a portion of the balance to the credit of an employee in a qualified plan is an eligible rollover distribution. Section 402(c)(3) provides that eligible rollover distributions must take place within 60 days of receipt. The foregoing references would permit Taxpayer B, a surviving spouse, to treat a distribution from the Fund N Account annuity as an eligible rollover distribution. The annuity distribution referenced herein is the only distribution made from Taxpayer A's Fund N annuity account. Further, Taxpayer A had not attained age 70 ½ at the time of death and would not have attained age 70 ½ by the end of calendar year 2001. Thus, said distribution is not ineligible to be treated as an "eligible rollover distribution" under Code section 402(c)(4)(A). Therefore, we conclude with respect to ruling request two that Taxpayer B is eligible to roll over the distribution of the proceeds of Taxpayer A's Fund N Account into an IRA set up and maintained in his own name as long as the rollover of such distribution occurs no later than the 60th day from the date said retirement proceeds are received by Taxpayer B as executor of Taxpayer A's estate.

Regarding ruling request number three, Fund O was issued in accordance with the provisions of section 403(b)(1) of the Code. Section 1.403(b)-2 of the regulations, Q&A-1, provides that an eligible rollover distribution received from a Code section 403(b) annuity may be rolled over into an IRA . Section 1.403(b)-2 of the regulations, Q&A-1, provides further, that the rules with respect to rollovers in sections 402(c)(1), (c)(3) and (c)(9) also apply to eligible rollover distributions from section 403(b) annuities. According to section 402(c)(1) of the Code, if any portion of an eligible rollover distribution from a section 401(a) qualified retirement plan is transferred into an eligible retirement plan, the portion of the distribution so transferred shall not be includible in gross income in the taxable year in which paid. Section 402(c)(3) of the Code provides that section 402(c)(1) shall not apply to any transfer of a distribution made after the 60th day following the day of which the distributee received the property distributed. Section 402(c)(9) provides that if a distribution attributable to an employee is paid to the spouse of the employee after the employee's death, section 402(c) of the Code will apply to such distribution in the same manner as if the spouse were the employee except that the spouse shall transfer such distribution only to a section 408(a) individual retirement account or a section 403(b) individual retirement annuity. Therefore in view of the foregoing sections, we conclude with respect to ruling request number three that Taxpayer B is eligible to roll over the distribution of the proceeds of Taxpayer A's Fund O Account annuity into an IRA set up and maintained in his own name as long as the rollover of such distribution occurs no later than the 60th day from the date said distribution is received by Taxpayer B as executor of Taxpayer A's estate.

Regarding ruling request number four, based on the above analysis and holdings, we conclude that Taxpayer B will not be required to include in gross income for federal income tax purposes for the year in which the distribution of the Fund N and Fund O amounts and subsequent

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rollovers are made pursuant to the second and third rulings (above) any portion of the amounts transferred from the Fund N/Fund O Account annuities to the IRA set up and maintained in Taxpayer B's name.

This ruling letter assumes that Taxpayer A's Fund N Account annuity satisfies the requirements of section 401(a) of the Code and that the Fund O Account annuity satisfies the requirements of section 403(b) at all relevant times. In addition, it also assumes that the rollovers of the distributions from Taxpayer A's Fund N/Fund O Account annuities to Taxpayer B's IRA will take place in a timely fashion. Further, it assumes that the IRA set up and maintained in the name of Taxpayer B, will meet the requirements of section 408(a) of the Code at all times relevant to the proposed transactions.

These rulings are directed only to the taxpayer who requested them. Section 6110(k)(3) of the Code provides that they may not be used or cited by others as precedent.

In accordance with a power of attorney on file in this office, a copy of this ruling is being sent to your authorized representative.

Sincerely yours,

(signed) JOYCE E. FLOYD

Joyce E. Floyd, Manager,
Employee Plans Technical Group 2
Tax Exempt and Government Entities Division

Enclosures:
Deleted Copy & Notice of Intention to Disclose