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

TAX EXEMPT AND
GOVERNMENT ENTITIES
DIVISION

AUG 6 2003

0402.08-05

T:EP:RA:T3

LEGEND:

Taxpayer A =

Taxpayer B =

Plan X =

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This is in response to the May 30, 2003, letter, submitted by your authorized representative, in which you (Taxpayer A) request letter rulings concerning the application of section 402(c) of the Internal Revenue Code. The following facts and representations support your ruling request.

Taxpayer A's date of birth is July 18, 1952. Taxpayer A is the surviving spouse of Taxpayer B, whose date of birth was May 23, 1953. Taxpayer B was a participant in Plan X, which is qualified under section 401(a) of the Code. Taxpayer B designated his estate as the sole beneficiary of any pre-retirement death benefit payable under Plan X.

On October 23, 2002, Taxpayer B executed a will naming Taxpayer A the sole executrix and sole beneficiary of Taxpayer B's estate. Taxpayer B died on November 4, 2002, before he reached his "required beginning date," as defined in section 401(a)(9)(C) of the Code.

On February 14, 2003, Plan X issued a check payable to Taxpayer A, as executrix of the estate, representing the pre-retirement death benefit. However, ten percent of the pre-retirement death benefit was withheld as federal income tax. No other pension benefit distributions have been made or are payable from Plan X. Taxpayer A, as executrix of the estate, caused the pre-retirement death benefit to be distributed to her by depositing the check from Plan X into her personal bank

account. On April 11, 2003, Taxpayer A contributed the amount of the check, plus an amount equal to the portion of the pre-retirement death benefit withheld as federal income tax, into an individual retirement arrangement (IRA), which was established and is maintained in the name of Taxpayer A. Thus, Taxpayer A rolled over an amount equal to the entire pre-retirement death benefit, including an amount equal to the withheld amount.

Based on the above facts and representations, you request the following letter rulings:

1. That Taxpayer A, as Taxpayer B's surviving spouse, will be treated as having received the entire distribution from Plan X directly from Taxpayer B, and not from the estate.

2. That pursuant to section 402(c)(9) of the Code, the contribution of the rollover amount to the IRA by Taxpayer A (including the amount equal to the ten percent withheld from the Plan X distribution as federal income tax) qualifies as a tax deferred rollover transaction.

3. That Taxpayer A will not be required to include in gross income for federal income tax purposes any portion of the Plan X distribution in the year it was distributed from Plan X.

With respect to your ruling request, section 402(c)(1) of the Code provides, generally, that if any portion of an eligible rollover distribution from a section 401(a) of the Code 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)) but states that this maximum limitation does not apply to a distribution transferred to an eligible retirement plan described in clause (i) or (ii) of section 402(c)(8)(B).

Section 402(c)(4) of the Code defines "eligible rollover distribution" as any distribution to an employee of all or any portion of the balance to the credit of an employee in a qualified trust except the following distributions:

(A) any distribution which is one of a series of substantially equal periodic payments (not less frequently than annually) made --
  (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)
(c) any distribution which is made upon hardship of the employee.

Section 402(c)(8) 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, (iv) an annuity plan described in section 403(a) (v) an eligible deferred compensation plan described in section 457(b) which is maintained by an eligible employer described in section 457(e)(1)(A) and (vi) an annuity contract described in section 403(b).

Section 402(c)(3) of the Code provides, generally, that section 402(c)(1) 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.

Similarly, section 1.402(c)-2, Question and Answer 11, of the Income Tax Regulations states that if an eligible rollover distribution is paid to an employee and the employee contributes all or part of the eligible rollover distribution to an eligible retirement plan no later than the 60th day following the date the employee received the distribution, the amount contributed is not currently includible in gross income.

Section 1.402(c)-2, Q& A 11, of the regulations further states that, because the amount withheld as income tax under section 3405(c) of the Code is considered an amount distributed under section 402(c), an amount equal to all or any portion of the amount withheld can be contributed as a rollover to an eligible retirement plan within the sixty day period, in addition to the net amount of the eligible rollover distribution actually received by the employee.

Section 402(c)(9) of the Code provides, generally, 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.

Section 1.402(c)-2 of the regulations, Q&A 12, 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. Thus, a distribution to the surviving spouse of an employee is an eligible rollover distribution if it meets the applicable requirements of section 402(c)(2) and (4) and the associated regulations.

Section 1.402(c)-2 of the regulations, Q&A-7(b), provides that any amount that is paid 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.

With respect to your ruling request, generally, 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, generally, said surviving spouse will not be eligible to roll over the qualified plan proceeds into her own IRA.

However, in this case, Taxpayer A, as the sole beneficiary and sole excutrix of Taxpayer B's estate, caused Plan X to issue a check representing the pre retirement death benefit payable to Taxpayer A as executrix of the estate. Taxpayer A then caused the pre retirement death benefit to be distributed to her by depositing the check from Plan X to her personal account. Taxpayer A then contributed the amount of the check, plus an amount equal to the portion of the pre retirement death benefit withheld as federal income tax, into an IRA which was established and is maintained in the name of Taxpayer A. Said contribution occurred within 60 days of the date the Plan X distribution was made to the executrix of Taxpayer B's estate. Thus, all actions necessary to accomplish the rollover have been carried out by, and at the behest, of Taxpayer A. Under the circumstances presented in this ruling request, the Service will treat Taxpayer A, Taxpayer B's surviving spouse, as having acquired the Plan X proceeds directly from Taxpayer B and not from Taxpayer B's estate. Therefore, Taxpayer A qualifies as a spouse under section 402(c)(9) of the Code and is eligible to rollover the pre retirement death benefit to her IRA, assuming the distribution otherwise qualifies. As provided in section 1.402(c)-2 Q&A 11, Taxpayer A may rollover an amount equal to the entire amount withheld as income tax in addition to the amount actually received from Plan X. Further, inasmuch as the entire pre retirement death benefit, including an amount equal to the amount withheld, has been timely contributed an IRA, no portion of the pre retirement death benefit will be taxable in the year it was distributed from Plan X.

Thus, with respect to your ruling requests, we conclude as follows:

1. That Taxpayer A, as Taxpayer B's surviving spouse, will be treated as having received the entire Plan X distribution directly from Taxpayer B, and not from his estate.

2. That pursuant to section 402(c)(9) of the Code, the contribution of the rollover amount to the IRA by Taxpayer A (including the amount equal to the ten percent withheld from the Plan X distribution as federal income tax) qualifies as a tax deferred rollover transaction.

3. That Taxpayer A will not be required to include in gross income for federal income tax purposes any portion of the distribution in the year it was distributed from Plan X.

This ruling assumes that Plan X is qualified within the meaning of Code section 401(a), and its trust tax-exempt under Code section 501(a) at all times relevant thereto. It assumes that the IRA set up and maintained in the name of Taxpayer A to receive the rollover contribution of the pre retirement death benefit from Plan X meets the requirements of Code section 408(a).

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

The author of this ruling is who may be reached at .

Sincerely yours,

Frances V. Sloan, Manager
Employee Plans Technical Group 3

Enclosures:
Deleted copy of letter ruling
Form 437