Internal Revenue Service

Department of the Treasury

Washington, DC 20224

Significant Index Nos. 401.28-00 & 415.01-00

Contact Person:

Telephone Number:

In Reference to:

T:EP:RA:T:A1

Date:

MAY 17 2001

In re:

Excess Plan =

Pension Plan =

Excess Trust =

Pension Trust =

Dear

This is in response to your request for a ruling with respect to the creation of the Excess Plan and its effect on the Pension Plan. You have requested the following rulings:

(1) that the establishment and operation of the Excess Plan will not cause the Pension Trust to lose its tax qualified and tax-exempt status.

(2) that the method of funding of the Excess Trust will not cause the Pension Trust to lose its tax-qualified and tax-exempt status.

(3) that contributions to the Excess Plan's participants and beneficiaries, including the gross amounts made on their behalf to the Excess Trust, are taxable to such participants and beneficiaries at the time the contributions to the Excess Trust are made.

(4) that, assuming the requirements for deductibility are met, employer contributions are fully deductible in the taxable year in which or with which ends the taxable year of the employees in which the amounts are includible in the employees' gross income.

259

The Pension Plan is a qualified multiemployer defined benefit plan that received its most recent determination letter on September 29, 1995.

The Excess Plan is intended to be a defined contribution excess benefit plan, established pursuant to section 3(36) of the Employment Retirement Income Security Act of 1974 ("ERISA"), that will provide supplemental retirement benefits to selected employees of employers ("Employers") who participate in the Pension Plan. The Excess Trust, which has been established for the exclusive benefit of employees participating in the Excess Plan and their beneficiaries, is not a trust described in section 401 (a) of the Internal Revenue Code (the Code"), nor is it exempt from tax under section 501(a) of the Code.

The only participants in the Excess Plan are employees who are already receiving retirement benefits under the Pension Plan. All participants in the Excess Plan are fully vested in the benefits payable to them under the Excess Plan.

Two types of benefits are payable annually from the Excess Trust. First, a participant will receive a "Section 415 Reduction" benefit ("Excess Benefit"), which is the amount by which the participants retirement benefit otherwise payable to him under the Pension Plan for the prior calendar year was restricted to satisfy the requirements of section 415 of the Code. Second, the participant will be paid an amount equal to his share of the FICA taxes due with respect to his Excess Benefit. Separate accounts are maintained for each participant. All benefits payable for an Excess Plan year will be paid in January of that year or as soon thereafter as is administratively feasible.

The Employers' contributions to the Excess Trust will be irrevocable, except to the extent that they were made as a result of a mistake of law or fact. No part of the Excess Trusts principal or income may revert to any of the Employers or be used for any purpose other than providing the benefits specified in the Excess Plan. Amounts held in the Excess Trust are not subject to the Employers' creditors, and it is explicitly provided that all right, title, and interest in and to the assets of the Excess Trust are at all times vested exclusively in the trustees of the Excess Trust.

The Employers' contributions to the Pension Trust can only be used to pay or provide for the payment of benefits to Pension Plan participants in accordance with provisions of the Pension Plan. No part of the corpus or income of the Pension Trust may be used for or diverted for purposes other than to pay or provide for the payment of benefits to employees, retired employees, or their beneficiaries.

Thus, the assets of the Excess Trust can not be used to pay the benefits under the Pension Plan. Similarly the assets of the Pension Trust can not be used to pay the benefits under the Excess Plan.

Contributions will be made to the Excess Trust pursuant to a collectively bargaining agreement in amounts equal to the amounts to be paid from the Excess Trust. Under the terms of the agreement, Employers' pension fund contributions will be allocated first to the Excess Trust with the remainder of the pension fund contribution, if any, allocated to the Pension Trust.

Section 3(36) of ERISA defines an "excess benefit plan" as one maintained solely for the purpose of providing benefits for certain plan participants in excess of the limitations imposed by section 415 of the Code, without regard to whether the plan is funded.

Section 83(a) of the Code provides that if, in connection with the performance of services, property is transferred to any person other than the person for whom such services are performed, the excess of the fair market value of the property over the amount paid for the property is included in the service provider's gross income for the first taxable year in which the rights to the property are either transferable or not subject to substantial risk of forfeiture.

Section 401(a) of the Code provides the requirements for qualification of a trust created or organized in the United States and forming part of a stock bonus, pension, or profit sharing plan of an employer for the exclusive benefit of his employees or their beneficiaries.

Section 401 (a)(16) of the Code provides that a trust shall not constitute a qualified trust if the plan of which such trust is a part provides for benefits or contributions which exceed the limitations of section 415 of the Code.

Section 402(b)(l) of the Code provides that contributions to an employees' trust made by an employer during a taxable year of the employer which ends with or within a taxable year of the trust for which the trust is not exempt under section 501 (a) shall be included in the gross income of the employee in accordance with section 83 (relating to property transferred in connection with the performance of services), except that the value of the employee's interest in the trust shall be substituted for the fair market value of the property for purposes of applying such section.

261

Section 402(b)(4)(A) of the Code provides that if one of the reasons that a trust is not exempt from tax under section 501 (a) of the Code is the failure of the plan of which it is a part to meet the requirements of section 401(a)(26) or section 410(b), then instead of including in gross income the amount computed under section 402(b)(l), a highly compensated employee includes in gross income for his or her taxable year with or within which the trusts' taxable year ends an amount equal to the employee's vested accrued benefit (less the employee's investment in the contract) as of the close of the trusts taxable year.

Section 402(b)(4)(C) of the Code provides that for the purposes of that paragraph, the term "highly compensated employee" has the meaning given such term by section 414(q) of the Code.

Section 404(a) of the Code provides if contributions are paid by an employer to or under a stock bonus, pension, profit-sharing, or annuity plan, or if compensation is paid or accrued by an employer on account of any employee under a plan deferring the receipt of such compensation, such contributions or compensation is not deductible under Chapter 1 of the Code, but, if it would otherwise be deductible, is deductible under section 404, subject to that limitations of this subject.

Section 404(a)(5) of the Code provides that contributions or compensation paid under a nonqualified plan or arrangement deferring the receipt of compensation, if otherwise deductible are deductible in the taxable year in which an amount attributable to the contribution are includible in the gross income of the employees participating in the plan, but, in the case of a plan in which more than one employee participates, only if separate accounts are maintained for each employee.

Section 412 of the Code provides minimum funding requirements that must be satisfied in pension plans.

Section 415 of the Code provides limitations on benefits and contributions that may be provided under a qualified trust.

Section 501 (a) of the Code provides that an organization described in section 401 (a) is exempt from taxation.

Section 1.83-3(e) of the Income Tax Regulations (the "regulations") provides that the term "property" includes a beneficial interest in assets (including money) transferred or set aside from the claims of the transferor's creditors, for example, in a trust or escrow account.

Section 1.83-8(a)(4) of the regulations provides that if a transfer of property is subject to the rules of section 402(b) of the Code, section 83 applies to the transfer only as provided in section 402(b).

Section 1.402(b)-l(a)(l) of the regulations provides that contributions made on the behalf of an employee by an employer to an employees' trust that is not exempt under section 501(a) during a taxable year of the employer which ends within or with a taxable year of the trust for which it is not so exempt shall be included as compensation in the gross income of the employee for his taxable year during which the contribution is made, but only to the extent that the employee's interest in such contribution is substantially vested at the time the contribution is made.

Section 1.404(a)-12(b)(l) of the regulations provides that a deduction is allowable for a contribution under section 404(a)(5) only in the taxable year of the employer in which or with which ends the taxable year of an employee in which an amount attributable to such contribution in includible in his gross income as compensation, and then only to the extent allowable under section 404(a).

Section 1.414(l)-1 (b)(l) of the regulations provides that a plan is a "single plan" if and only if, on an ongoing basis, all of the plan assets are available to pay benefits to employees who are covered by the plan and their beneficiaries.

Section 1.404(b)-IT Q&A-2 of the (temporary) regulations provides that a plan, or method or arrangement, defers the receipt of compensation to the extent it is one under which an employee receives compensation or benefits more than a brief period of time after the end of the employers taxable year in which the services creating the right to such compensation or benefits is performed.

Because the assets of the Excess Trust are not available to pay benefits under the Pension Plan and the assets of the Pension Trust are not available to pay benefits under the Excess Plan, the Pension Plan and the Excess Plan do not constitute a single plan. Furthermore, the benefits and provisions of the Excess Plan do not affect the Pension Plan or the amounts of benefits payable from the Pension Trust. Thus, the existence of the Excess Plan does not affect the tax-qualified status of the Pension Trust.

Because the existence of the Excess Plan does not affect whether the Pension Trust meets the requirements for qualification of section 401(a) of the Code, the existence of the Excess Plan does not affect whether the Pension Trust meets the requirements for exemption from taxation of section 501 (a) of the Code. Thus, the existence of the Excess Plan does not affect the tax-exempt status of the Pension Trust.

If the establishment, adoption, and operation of the Excess Plan is not accompanied by an increase in the pension fund contribution rate under the collective bargaining agreement, the method of funding of the Excess Plan may cause the Pension Plan to fail to meet the funding requirements of section 412 of the Code. However, a trust does not lose its tax-qualified status merely because the plan of which it is a part fails to meet the minimum funding requirements of section 412. Thus the method of funding of the Excess Trust does not affect the tax-qualified or tax-exempt status of the Pension Plan.

Under the terms of the Excess Plan and Excess Trust, the Employers will make irrevocable contributions to the Trust for the exclusive purpose of providing benefits under the Plan to participating employees and their beneficiaries. The Excess Trusts assets are not subject to the claims of the Employers creditors, and the Excess Trust is not exempt from tax under section 501(a) of the Code. Accordingly, the rules of section 402(b) govern the taxation of the Employer contributions to the Excess Trust to the employees.

Under section 402(b)(l) of the Code, an employer's contributions to an employees' trust that is not exempt from tax under section 501(a) are included in the employee's gross income in accordance with section 83. However, the value of the employee's interest in the trust is substituted for the fair market value of the property when applying section 83. Such contributions are included as compensation in the employee's gross income for the taxable year of contribution to the extent that the employee's interest therein is substantially vested.

However, if one of the reasons that a trust is not exempt from tax under section 501 (a) of the Code is the failure of the plan of which it is a part to meet the requirements of section 401 (a)(26) or section 410(b) of the Code, then instead of including in gross income the amount computed under section 402(b)(l), a highly compensated employee includes in gross income for his or her taxable year with or within which the trusts taxable year ends an amount equal to the employee's vested accrued benefit (less the employee's investment in the contract) as of the close of the trusts taxable year.

264

Accordingly, if the Excess Plan fails to meet the requirements of sections 401 (a)(26) or 410(b) of the Code, section 402(b)(4)(A) will apply to highly compensated employees participating in the Excess Plan, and section 402(b)(l) will apply to all other participants.

Therefore, a highly compensated employee participating in the Excess Plan will include in gross income, for each taxable year with or within which a taxable year of the Excess Trust ends, an amount equal to the employee's vested accrued benefit (less their investment in the contract) under the Excess Trust as of the close of the Excess Trusts taxable year. For this purpose, a highly compensated employee's vested accrued benefit equals the lesser of their Excess trust account balance and the present value of their vested accrued benefit under the Excess Plan. The employee's vested accrued benefit under the Excess Plan includes both the employee's vested accrued Excess Benefit and their right to receive payment of the employee portion of the FICA tax due with respect to that benefit.

Because the Excess Plan is a plan deferring the receipt of compensation under 1.404(b)-1T Q&A-Z of the (temporary) regulations, contributions to the Excess Plan are deductible only under the rules of section 404 of the Code. Because the Excess Plan is a nonqualified plan the provisions of section 404(a)(5) of the Code are applicable. Because the Excess Plan provides for the maintenance of separate accounts for each employee, contributions to the Excess Trust made by Employers for the benefit of employees are deductible for the contributing Employers taxable year in which or with which ends the employee's taxable year in which an amount attributable to the contributions is includible in such employee's gross income.

265

Therefore we hold that:

(1) the establishment, adoption, and operation of the Excess Plan does not cause the Pension Trust to lose its tax-qualification or tax-exemption.

(2) the method of funding of the Excess Trust does not jeopardize the tax-exempt status of the Pension Trust.

(3) contributions to the Excess Plan's participants and beneficiaries, including any gross up amounts made on their behalf to the Excess Trust, are taxable to such participants and beneficiaries at the time the contributions to the Excess Trust are made.

(4) if the Excess Plan fails to meet the requirements of either section 401 (a)(26) or section 410(b) of the Code, highly compensated participants in the Excess Plan include in their gross income with or within which the Excess Trusts taxable year ends an amount equal to the employee's vested accrued benefit (less their investment in the contract) under the Excess Trust as of the close of the Excess Trusts taxable year.

(5) assuming the requirements for deductibility are met, employer contributions are fully deductible by the contributing employers in the taxable year in which or with which ends the employee's taxable year in which an amount attributable to the contributions is includible in such employee's gross income.

266

This ruling is conditional on the adoption of language revising the collective bargaining agreements that govern Employers' pension fund contributions such'that Employers' contributions will be made to the Excess Trust in amounts equal to the amounts to be paid from the Excess Trust and that Employers' pension fund contributions will be allocated first to the Excess Trust with the remainder of the pension fund contribution, if any, allocated to the Pension Trust.

This ruling does not consider the more general issue of the Pension Trusts qualified status, specifically, whether the Pension Trust complies with all the Code requirements for qualification. This letter addresses only the impact (if any) of the adoption and funding of the Excess Plan and the Excess Trust on the purportedly otherwise qualified status of the Pension Trust.

This ruling is directed only to the taxpayer that requested it. Section 6110(k)(3) of the Internal Revenue Code provides that it may not be used or cited by others as precedent.

Sincerely,

James E. Holland, Jr.

James E. Holland, Jr., Manager
Employee Plans Actuarial Group 1
Tax Exempt and Government
Entities Division

267