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TAX EXEMPT AND
GOVERNMENT ENTITIES
DIVISION

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

APR 16 2004

Uniform Issue List: 408.03-00

LEGEND:

Taxpayer A: =

Taxpayer B: =

Amount D =

Trust T: =

Date 1: =

Date 2: =

Date 3: =

Date 4: =

Date 5: =

IRA X: =

IRA Y =

Company M =

Company N =

State N: =

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Dear Taxpayer B:

This is in response to the February 20, 2003, request for letter rulings under Section 408(d)(3) of the Internal Revenue Code as supplemented by correspondence dated March 23, 2004, requesting that we waive the 60-day rollover requirement of section 408(d)(3) of the Code in order to permit Taxpayer B to roll over amounts distributed from Individual Retirement Arrangement X (IRA X) to the trustee of Trust T, submitted on your behalf by your authorized representative. The request for letter rulings is based on the following facts and representations.

Taxpayer A, whose date of birth was Date 1, died on Date 2, at age 79. As of his date of death, Taxpayer A was the owner of IRA X maintained with Company M.

On Date 4, Taxpayer A signed and adopted Trust T for the benefit of his children and spouse, Taxpayer B. Taxpayer B is the Trustee of Trust T.

Taxpayer B was alive as of the date of this ruling request and had attained age 70 $\frac{1}{2}$ prior to 2002.

The provisions of Trust T provide, in relevant part, that upon Taxpayer A's death, Taxpayer B becomes the sole Trustee thereof. Trust T further provides for the division of the Trust into the subtrust B part, being a by-pass trust and the subtrust A part, being a marital trust. Stocks and cash in Trust T have been allocated by the trustee to the by-pass trust and the proceeds of IRA X (along with other assets) have been allocated by the trustee to the marital trust. The marital trust provides that Taxpayer B shall receive all the income therefrom no less frequently than quarterly and that the Trustee can invade the corpus for Taxpayer B only and during the lifetime of Taxpayer B. Taxpayer B has the power by written instrument, at any time, and from time to time, to appoint all or any part of subtrust A corpus to herself.

On Date 3, Company M issued a check for Amount D to Taxpayer B, as Trustee of Trust T, as a total distribution from IRA X. The check is still being held and has not been deposited or cashed.

An agent for Taxpayer B mailed the above check on Date 5 to Company N to be deposited into IRA Y, an IRA set up and maintained in the name of Taxpayer B. Later, the agent was notified of a refusal by Company N to accept the check for deposit to IRA Y. The agent began contacting Company N's IRA department manager and his superior in attempt to have check accepted. After various conversations with Company N, the agent was informed that Company N would check with legal counsel and respond. Company N legal department determined that Company N could not accept the funds back without a letter ruling from the Internal Revenue Service. Date 5 is less than 60 days from Date 3.

Your authorized representative has asserted that Trust T and the separate trusts created under its terms are valid under the laws of State N.

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Based on the above facts and representations, you, through your authorized representative, request the following letter rulings:

1. That Taxpayer B, as Taxpayer A's surviving spouse, will be treated as having been eligible to receive the entire distribution from IRA X directly from Taxpayer A's IRA X with Company M, and not from Trust T. Thus, Taxpayer B will be treated as having been eligible to roll over her IRA X interest into an IRA set up and maintained in her name.

2. The grant by the Internal Revenue Service of a waiver of the 60-day rollover requirement of section 408(d)(3) of the Code for Taxpayer B to roll over amounts distributed from IRA X to Trust T to an IRA.

With respect to your ruling requests, section 408(d)(1) of the Code provides that, except as otherwise provided in this subsection, any amount paid or distributed out of an individual retirement plan shall be included in gross income by the payee or distributee, as the case may be, in the manner provided under section 72.

Code section 408(d)(3) provides that section 408(d)(1) does not apply to a rollover contribution if such contribution satisfies the requirements of sections 408(d)(3)(A) and (d)(3)(B).

Code section 408(d)(3)(A)(i) provides that section 408(d)(1) does not apply to any amount paid or distributed out of an IRA to the individual for whose benefit the account is maintained if the entire amount received (including money and any other property) is paid into an IRA (other than an endowment contract) for the benefit of such individual not later than the 60th day after the day on which he receives the payment or distribution.

Code section 408(d)(3)(C)(i) provides, in pertinent part, that, in the case of an inherited IRA, section 408(d)(3) shall not apply to any amount received by an individual from such account (and no amount transferred from such account to another IRA shall be excluded from income by reason of such transfer), and such inherited account shall not be treated as an IRA for purposes of determining whether any other amount is a rollover contribution.

Code section 408(d)(3)(C)(ii) provides that an IRA shall be treated as inherited if the individual for whose benefit the account is maintained acquired such account by reason of the death of another individual, and such individual was not the surviving spouse of such other individual. Thus, pursuant to Code section 408(d)(3)(C)(ii), a surviving spouse who acquires IRA proceeds from and by reason of the death of her husband, may elect to treat those IRA proceeds as her own and roll them over into her own IRA.

Code section 408(a)(6) provides, in relevant part, that, under regulations prescribed by the Secretary, rules similar to the rules of section 401(a)(9) shall

apply to the distribution of the entire interest of an individual for whose benefit the trust is maintained.

Code section 408(d)(3)(E) provides that this paragraph shall not apply to any amount to the extent such amount is required to be distributed under subsection (a)(6).

On April 17, 2002, "Final" Income Tax Regulations were published in the Federal Register with respect to sections 401(a)(9) and 408(a)(6) of the Code. (See also, 2002-19 I.R.B. 852, May 13, 2002). Section 1.408-8 of the "Final" Regulations, Question and Answer 5, provides that a surviving spouse of an IRA owner may elect to treat the spouse's entire interest as a beneficiary in an individual's IRA as the spouse's own IRA. In order to make this election, the spouse must be the sole beneficiary of the IRA and have an unlimited right to withdraw amounts from the IRA. If a trust is named as beneficiary of the IRA, this requirement is not satisfied even if the spouse is the sole beneficiary of the trust.

Section 1.408-8 of the "Final" Regulations, Q&A-5(a), further provides, in relevant part, that an electing surviving spouse must first take the required distribution for the calendar year that contains the IRA holder's date of death determined with respect to the deceased IRA owner prior to making the election to treat the deceased's IRA as her own. This requirement also applies to a surviving spouse who elects to rollover an IRA of a decedent into her own IRA.

The Preamble to the "Final Regulations provides, in relevant part, that a surviving spouse who actually receives a distribution from an IRA is permitted to roll that distribution over into his/her own IRA even if the spouse is not the sole beneficiary of the deceased's IRA as long as the rollover is accomplished within the requisite 60 day period. A rollover may be accomplished even if IRA assets pass through either a trust or an estate.

With respect to your first 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.

The initial issue raised in this ruling request is whether the general rule, above, applies where IRA distributions are made directly to a subtrust created under the terms of a trust which subtrust contains the provisions referenced above.

In this case, Trust T was the sole named beneficiary of Taxpayer A's interest in IRA X. After Taxpayer A's death, Taxpayer B became the sole trustee of Trust T with the authority to allocate Trust T assets in any way in which she deemed appropriate. As trustee, Taxpayer B could have demanded that Trust W's interest in IRA X be distributed to Trust T in a lump sum. Then such amount could have been allocated under Trust T to Subtrust A. If she had done so, Taxpayer B could then have

demanded, in writing, that Trust T's interest in IRA X be paid to her as beneficiary of subtrust A. If she had done so, Taxpayer B, as the individual who would have made every decision leading up to Trust W's interest in IRA X being paid to her, would have been treated as having acquired said IRA X interest from Taxpayer A and not from Trust W.

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

1. That Taxpayer B, as Taxpayer A's surviving spouse, will be treated as having been eligible to receive the entire IRA X distribution directly from Taxpayer A's IRA X with Company M and not from trust T. Thus, Taxpayer B will be treated as having been eligible to roll over her IRA X interest (to the extent not required to be distributed pursuant to section 408(d)(3)(E) of the Code), into an IRA set up and maintained in her name.

With respect to your second ruling request, section 408(d)(3)(B) of the Code provides that section 408(d)(3) does not apply to any amount described in section 408(d)(3)(A)(i) received by an individual from an IRA if at any time during the 1-year period ending on the day of such receipt such individual received any other amount described in section 408(d)(3)(A)(i) from an IRA, which was not includible in gross income because of the application of section 408(d)(3).

Code section 408(d)(3)(D) provides a similar 60-day rollover period for partial rollovers.

Code section 408(d)(3)(I) provides that the Secretary may waive the 60-day requirement under sections 408(d)(3)(A) and 408(d)(3)(D) where 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 408(d)(3)(I).

Rev. Proc. 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 408(d)(3)(I), the Service will consider all relevant facts and circumstances, including: (1) errors committed by a financial institution; 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; and (4) the time elapsed since the distribution occurred.

With respect to your second ruling request, the information presented in support of this ruling request indicates that Taxpayer B and her agent attempted to roll over Amount D distributed from IRA X into IRA Y, an IRA set up and maintained in her name, within 60 days of the date Amount D had been distributed from IRA X. As noted above in our response to ruling request 1, Taxpayer B was eligible to accomplish such a rollover. However, because of a misunderstanding of the rollover rules of section 408(d)(3) of the Code on the part of Company N, the custodian of IRA Y, Company N refused to accept

the check for Amount D. As a result of Company N's action, Taxpayer B could not reasonably satisfy the requirement that Amount D be deposited in an IRA within 60 days of the distribution from IRA X. Thus, the failure to deposit Amount D into an IRA within the 60-day period was beyond the reasonable control of Individual A.

Based on the specific facts and representations surrounding this ruling request, we conclude as follows with respect to your second ruling request.

2. Pursuant to section 408(d)(3)(I) of the Code, the Service hereby waives the 60-day rollover requirement with respect to Amount D (less the required distributions for 2002 and 2003 described below). Taxpayer B granted a period of 60 days from the date of issuance of this ruling letter to contribute Amount D in cash (less the required distributions for 2002 and 2003 described below) to an IRA set up and maintained by Taxpayer B, provided all other requirements of section 408(d)(3) are otherwise satisfied (except the 60-day requirement). If these conditions are satisfied, Amount D (less the required distributions for 2002 and 2003 described below) will be considered a rollover with the meaning of section 408(d)(3) for the 2002 taxable year.

It has been represented that Taxpayer A had attained age 70 ½ prior to his death during calendar year 2002. Thus, Taxpayer A had a Code section 401(a)(9) required distribution for calendar year 2002. If said required distribution had not been taken prior to Taxpayer A's death, it must be taken and may not be rolled over into Taxpayer B's IRA.

With respect to calendar year 2003, Taxpayer B had attained age 70 ½ prior to that calendar year. Thus, she would have had a required distribution for said year if her attempt to roll over in 2002 had been successful. Said required distribution may not be rolled over and is not included within our response to your second ruling request. Also note that a required minimum distribution for the calendar year 2004 will be due on or before December 31, 2004.

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 ruling letter is based on the assumption that IRA X either has met, is meeting, or will meet the requirements of section 408 at all times relevant thereto. It also assumes that Trust T, and the subtrusts created thereunder, are valid under the laws of State N as represented.

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

This letter is directed only to the taxpayer that requested it and is based solely on the representations made with respect thereto. Section 6110(j)(3) of the Code provides that it may not be used or cited as precedent.

If you have any questions please contact.....

Sincerely yours,



Donzel H. Littlejohn, Manager
Employee Plans Technical Group 4

Enclosures:

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