



TAX EXEMPT AND
GOVERNMENT ENTITIES
DIVISION

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

200516020

JAN 27 2005

Uniform Issue List: 402.08-00; 402.00-00

SE: T. EP: RA: TI

Legend:

- Taxpayer A.....
- Custodian E.....
- Company G.....
- Company H.....
- Annuity M.....
- Sum O.....
- Sum P.....
- Plan S.....

Dear [REDACTED] :

This is in response to a letter dated June 30, 2004, as supplemented by correspondence dated September 24, 2004, in which your authorized representative requests, on your behalf, a waiver of the 60-day rollover requirement pursuant to section 402(c)(3)(B) of the Internal Revenue Code (the "Code"). The following facts and representations were submitted in support of your request.

Taxpayer A is the sole participant in retirement plan S (the "Plan"). The Plan is sponsored by Custodian E. Taxpayer A serves as plan administrator of the Plan and Company G is trustee. Since the establishment of the Plan, Taxpayer A has looked to Custodian E for guidance in the administration and operation of the Plan, including with respect to investment allocation. In 2002, Taxpayer A discussed with Custodian E her options concerning transitioning the Plan's investments from riskier equity-based investment options to more predictable,

less risky fixed-income investment options. Custodian E suggested that plan assets be sold out of various mutual funds and transferred to retirement annuity contracts with Company H.

On [REDACTED] Sum O was transferred from Plan S and used to purchase Annuity M for Taxpayer A.

At all times while making this transfer to Annuity M, Custodian E representatives treated the transfer as a transfer between investment options available under the Plan. Taxpayer A completed no withdrawal or distribution request related to her Plan and received no Form 1099-R with respect to the transfer. In fact, when Taxpayer A completed the transfer, she signed a document, provided by Company H, on which she specifically stated that it was her "intention that this redemption and payment shall not constitute either actual or constructive receipt of income for federal income tax purposes and would therefore qualify as a transfer of assets".

Since Taxpayer A presumed that Annuity M was an investment of Plan S, her [REDACTED] plan contribution of Sum P was paid into Annuity M on [REDACTED]

Consistent with the paperwork Taxpayer A completed and the later absence of reporting of a distribution, Taxpayer A presumed that these assets were being held as Plan assets. However, in late [REDACTED], Taxpayer A was informed by Custodian E that the Plan did not offer Company H annuities as an investment option, and that the transfer was treated as a distribution from the Plan.

Based on the above facts and representations, Taxpayer A's authorized representative has filed a request that the Internal Revenue Service (the "Service") waive the 60-day rollover requirement with respect to Sum O and Sum P because the failure to waive such requirement would be against equity or good conscience.

Code section 402(a) provides that any amount actually distributed to any distributee by an employees' trust described in section 401(a), which is exempt from tax under section 501(a), shall be taxable to the distributee, in the taxable year in which distributed, under section 72 (relating to annuities).

Code section 402(c) provides the rules applicable to rollovers of distributions from plans qualified under section 401(a) to other eligible retirement plans.

Code section 402(c)(1) provides that a distribution from a qualified plan shall not be includible in gross income if—

(A) all or any portion of the balance to the credit of an employee in a qualified trust is paid to the employee in an eligible rollover distribution,

(B) the distributee transfers any portion of the property received to an eligible retirement plan, and

(C) in the case of a distribution of property other than money, the transfer consists of the property distributed.

Code section 402(c)(4) defines an "eligible rollover distribution" as a distribution to an employee of all or any portion of the balance to the credit of the employee in a qualified trust; except that such term does not include any distribution that is: (i) one of a series of substantially equal periodic payments made for the life or life expectancy of the employee or for the joint lives or joint life expectancies of the employee and the employee's designated beneficiary, or for a specified period of ten years or more, (ii) required under Code section 401(a)(9), or (iii) made upon the hardship of the employee.

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, (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).

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

Code section 402(c)(3)(B) provides that the Secretary may waive the 60-day requirement of section 402(c)(3)(A) in "hardship" situations 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.

Revenue Procedure 2003-16, 2003-4 I.R.B. 359, provides that in determining whether to grant a waiver of the 60-day rollover requirement pursuant to Code section 402(c)(3)(B), the Service will consider all relevant facts and circumstances, including: (1) errors committed by a financial institution; (2) 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 (for example, in the case of payment by check, whether the check was cashed); and (4) the time elapsed since the distribution occurred.

The information presented in this case indicates that Taxpayer A relied on the advice of Custodian E to change her investments within Plan S and to make her plan contribution. Taxpayer A intended, at all times, that these investments be held as plan assets. Since Taxpayer A was under the misapprehension that Annuity M was an asset of Plan S, she could not satisfy the 60-day rollover requirement. Taxpayer A was not informed that the transfers were being treated as plan distributions until after the 60-day period had elapsed. Therefore, pursuant to Code section 402(c)(3)(B), the Service waives the 60-day rollover requirement with respect to Sum O and Sum P. Taxpayer A is granted a period of 60 days from the date of this ruling letter to contribute Sum O and Sum P to an eligible retirement plan described in section 402(c)(8)(B). Provided all other requirements of section 402(c), except the 60-day requirement, are met with respect to such rollover contribution, Sum O and Sum P will be considered a rollover contribution within the meaning of section 402(c)(1).

No opinion is expressed as to the tax treatment of the transaction described herein under the provisions of any other Code section which may be applicable thereto.

This letter is directed only to the taxpayer who requested it. Code section 6110(k)(3) provides that it may not be used or cited as precedent.

Pursuant to a Power of Attorney on file with this office, a copy of this letter ruling has been sent to your authorized representative.

If you wish to inquire about this ruling, please contact ****

Sincerely yours,

Carlton A. Watkins

Carlton A. Watkins, Manager
Employee Plans Technical Group 1

Enclosures:

Deleted copy of letter ruling
Notice 437

cc: