200018061

Internal Revenue Service

Department of the Treasury

Washington, DC 20224

Significant Index No: 401.01-00

Contact Person:

Telephone Number:

In Reference to:

Date: T:EP:RA:T1

Attn:

FEB 1 . 200

Legend:

Plan A =

Plan B =

Local C =

Local D =

Employer =

Dear Mr. :

This is in response to a letter ruling request dated July 7, 1999, submitted on your behalf by your authorized representative. In your letter, you request rulings that the establishment and operation of a non-qualified excess benefit plan (Plan B) does not adversely affect the qualified status of a plan (Plan A) under section 401(a) of the Internal Revenue Code (the "Code").

You submitted the following facts and representations in support of your request:

Plan A is a multi-employer defined benefit pension plan established in 1968 for the benefit of members of two union locals. Plan A is qualified under section 401(a) of the Code and is funded through a trust exempt from federal income tax under section 501(a). Plan A had 547 active participants, 1,149 total participants, and assets exceeding $80,300,000 as of December 31, 1998. The current collective bargaining agreements require contributions to Plan A of $2.00 for each hour worked by members of Local C and $1.75 for each hour worked by members of Local D.

Pension benefits accrued by some participants under Plan A are reduced by section 415(b) of the Code, and the trustees of Plan A believe that other participants are likely to be affected by the section 415(b) limits in the future. In response to these projections, the trustees created an excess benefit plan, Plan B, which is designed to provide on a nonqualified basis the benefits that a participant in Plan A would receive under Plan A in the absence of the annual benefit limitations

384

under section 415.

Plan B provides that a participant will receive payments from Plan B each month equal to the amount by which the benefit under Plan A, without taking into account section 415 limits, exceeds the benefit under Plan A considering the 415 limits. This amount will be increased to reflect Plan B's share of FICA and FUTA taxes due on the contributions. The participant's share of FICA will be deducted from his or her benefit payments. FICA and FUTA taxes attributable to Plan B payments will be remitted to the Service as required by the Code.

Plan B is not expected to hold significant assets. Pursuant to the collective bargaining agreements, the amount of benefits to be paid by Plan B in a given month (plus FUTA, the Plan's share of FICA, and other expenses necessary to administer Plan B), will be remitted to the administrative manager of Plan B each month. The amount of benefits to be paid that month will be allocated to separate bookkeeping accounts for those participants who are entitled to receive benefits from Plan B. The trust associated with Plan B will merely act as a pass-through entity for the benefits in excess of the 415 limit and related expenses. All amounts received by Plan B, including any trust income, will be used to pay expenses and then benefits to participants each month. These amounts will be paid shortly after they are contributed to Plan B and will be paid before the end of each tax year. No principal amounts or interest income will be allowed to accumulate in Plan B.

To fund Plan B, the collective bargaining agreement will be amended to modify Plan A funding as follows. First, the collective bargaining agreement will be amended to require the administrative manager of Plan A, on a monthly basis, to calculate the amount necessary to pay Plan B benefits and related expenses for the following month. Second, under the amended collective bargaining agreement, the administrative manager of Plan A will deduct from funds received from employers (at the hourly contribution rate) the amount necessary to pay the excess plan benefits, FICA, FUTA and other related expenses of Plan B. The amount necessary to pay the excess benefits, taxes, and other expenses will then be forwarded to Plan B for payment to participants or payment of expenses, such as (but not limited to) FICA and FUTA taxes. Finally, all funds not remitted to Plan B will then be forwarded and contributed to Plan A.

Thus, employers of bargaining unit employees will continue to submit the required employer contributions for each hour worked by each bargaining unit member to the administrative manager of Plan A. However, pursuant to the amended collective bargaining agreement, a portion of the funds receive by the administrative manager of Plan A will be remitted to Plan B and the remainder of the funds will be remitted to Plan A. Plan A participants will continue to receive full credit for those hours for which contributions to Plan A are required by the collective bargaining agreement.

Once contributions are received by Plan A, they cannot be shifted to Plan B. Thus, only amounts that will be contributed to Plan B are those that are required to be contributed to Plan B by the terms of the collective bargaining agreement. The contribution to Plan B will always occur

385

before the remaining funds are deposited into the trust for Plan A. Based on actuarial computations performed during the previous year, the above-described adjustment to contributions to Plan A should not cause Plan A to fail to meet the minimum funding standards of section 412.

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

(1) the establishment and operation of Plan B will not cause Plan A to lose its qualified status under section 401(a) of the Code,

(2) the contributions to Plan B will not cause Plan A to lose its qualified status under section 401(a), and

(3) that any employer contributions made to Plan B under the terms of the collective bargaining agreements will continue to be deductible by the employers under section 404.

With regard to ruling requests (1) and (2), section 3(36) of the Employee Retirement Income Security Act of 1974 (ERISA), P. L. No. 93-406, defines an "excess benefit plan" as a plan 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. There is no corresponding Code section relating to excess benefit plans.

Section 415 of the Code limits annual contributions or benefits for plans qualified under section 401(a). Section 415(b) provides the limit for defined benefit plans.

Section 401(a) of the Code provides that in order for a trust to be qualified, it must be impossible for any part of the trust corpus or income to be used for, or diverted to purposes other than for the exclusive benefit of the employees and their beneficiaries.

Section 1.414(l)-l(b)(1) of the federal Income Tax Regulations (the "regulations") provides that a plan is a "single plan" only if all of the plan assets are available to pay benefits to participants on an ongoing basis.

In this case, all assets contributed to Plan A are in fact only used to fund benefits under Plan A for the participants in Plan A. Although part of the employers' contributions will be directed to Plan B, this will be done prior to actual contribution to Plan A under the terms of the collective bargaining agreements. No assets will be transferred from Plan A's trust to Plan B's. Further, Plan A has not right to the contributions that are used to fund the benefits under Plan B. Plan A and Plan B will not constitute a single plan under the regulations since assets from either one cannot be used to pay benefits of the other. Plan B will be a non-qualified, unfunded plan operating separately from Plan A, and will merely provide a supplement for certain benefits payable under Plan A.

Accordingly, in response to ruling requests (1) and (2), we rule that the establishment and operation of Plan B will not adversely affect the qualified status of Plan A under section 401(a) of the Code. Further, the contributions to Plan B will not adversely affect the status of Plan A under section 401(a).

With regard to ruling request (3), section 404(a) of the Code provides the general deduction timing rules applicable to a stock bonus plan, pension, profit sharing, or annuity plan, or if compensation is paid or accrued on account of any employee under a plan or arrangement for deferring the receipt of compensation, regardless of the Code section under which the amounts might otherwise be deductible. Pursuant to section 404(a)(5), contributions or compensation deferred under a nonqualified plan or arrangement, if otherwise deductible, are deductible in the taxable year in which an amount attributable to the contribution is 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. See also section 1.404(a)-12(b)(3) of the Income Tax Regulations (the "regulations").

Section 1.404(a)-12(b)(3) of the regulations provides that a deduction is allowable for contributions paid only in the taxable year in which or with which ends the taxable year of an employee in which an amount attributable to the contribution is includible in his or her income as compensation, and then only to the extent allowable under section 404(a).

Because employees who participate in Plan B are fully vested in their benefits when employer contributions are made and separate accounts are maintained for each employee, each employer who participates in Plan B is entitled to a deduction under section 404(a)(5) of the Code in an amount equal to the amount included in income by its respective employees, assuming all other requirements of deductibility are met. The deduction is allowable in the taxable year in which or with which ends the taxable year of the employee in which the amount is includible in the employee's income as compensation.

Accordingly, we rule with regard to ruling request (3) that any Employer contributions made to Plan B pursuant to the amended collective bargaining agreement, if otherwise deductible, will be deductible by the Employer under section 404 of the Code.

Except as specifically ruled above, no opinion is expressed regarding the subject transaction under any other provision of the Code, including the consequences to participants under section 83 and 402(b) of the Code and the status of the nonqualified trust that is part of Plan B. Moreover, we express no opinion regarding the federal employment tax aspects, including the application of section 3121(v) of the Code, of the above-described transaction.

This letter also does not consider whether Plan A complies with all the qualification requirements under section 401(a). The determination of whether Plan A is qualified under section 401(a) is within the jurisdiction of the Southeast Area of the Service. Finally, this ruling does not address the effects, if any, of the proposed action under Title I of ERISA.

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

Sincerely yours,

John Swieca

John Swieca, Manager
Employee Plans Technical Group 1
Tax Exempt and Government Entities Division

cc:

388