

INTERNAL REVENUE SERVICE
Index Nos. 0355.01-00

Number: **199915028**
Release Date: 4/16/1999

PLR-112236-98

January 12, 1999

X=

Plan =

Dear

This is in response to your letter of May 29, 1998, and subsequent correspondence requesting a ruling on behalf of X regarding the tax consequences of the Plan.

The Plan was effective . The plan year of the Plan is the calendar year. The Plan covers certain self-employed key agents who provide services to X who have earnings of at least for two of the preceding plan years. The participants elect before the beginning of a plan year, to have a certain percentage of their commissions credited to a bookkeeping account under the Plan. In addition, X also credits to this account a matching amount based upon the amount of a participant's deferrals.

Benefits under the Plan are payable upon a participant's retirement, disability or death. Upon retirement , benefits may be paid in a lump sum or ten annual installments as elected by the participant at the time of deferral. Upon death or disability, benefits are paid within thirty days following receipt of proof of the death or disability of the participant.

The Plan also permits payments to a participant before the normal payment date if the participant suffers an unforeseeable emergency.

The Plan constitutes a mere promise of X to make benefit payments in the future and participants are general unsecured creditors of X with respect to benefits payable pursuant to the Plan.

Under the Plan, a participant's' rights to benefit payments are not subject in any manner to anticipation, alienation, sale, transfer, assignment, pledge, encumbrance,

attachment, or garnishment by creditors of the participant or the participant's beneficiary.

Section 83(a) of the Code provides that the excess (if any) of the fair market value of property transferred in connection with the performance of services over the amount paid (if any) for the property is includible in the gross income of the person who performed the services for the first taxable year in which the property becomes transferable or is not subject to a substantial risk of forfeiture.

Treas. Reg. sec. 1.83-3(e) provides that for purposes of section 83, the term "property" includes real and personal property other than money or an unfunded and unsecured promise to pay money or property in the future. Property also includes a beneficial interest in assets (including money) transferred or set aside from claims of the transferor's creditors, for example, in a trust or escrow account.

Section 451(a) of the Code and Treas. Reg. sec. 1.451-1(a) provide that an item of gross income is includible in gross income for the taxable year in which actually or constructively received by a taxpayer using the cash receipts and disbursements method of accounting. Under Treas. Reg. sec. 1.451-2(a), income is constructively received in the taxable year during which it is credited to the taxpayer's account, set apart for him, or otherwise made available so that the taxpayer may draw on it at any time. However, income is not constructively received if the taxpayer's control of its receipt is subject to substantial limitations or restrictions.

Various revenue rulings have considered the tax consequences of nonqualified deferred compensation arrangements. Rev. Rul. 60-31, Situations 1-3, 1960-1 C.B. 174, holds that a mere promise to pay, not represented by notes or secured in any way, does not constitute receipt of income within the meaning of the cash receipts and disbursements method of accounting. See also, Rev. Rul. 69-650, 1969-2 C.B. 106, and Rev. Rul. 69-649, 1969-2 C.B. 106.

Under the economic benefit doctrine, an employee has currently includible income from an economic or financial benefit received as compensation, though not in cash form. Economic benefit applies when assets are unconditionally and irrevocably paid into a fund or trust to be used for the employee's sole benefit. Sproull v. Commissioner, 16 T.C. 244 (1951), aff'd. per curiam, 194 F. 2d 541 (6th Cir. 1952); Rev. Rul. 60-31, Situation 4. In Rev. Rul. 68-99, 1968-1 C.B. 193, an employee does not receive income as a result of the employer's purchase of an insurance contract to provide a source of funds for deferred compensation because the insurance contract is the employer's asset. See also Rev. Rul. 72-25, 1972-1 C.B. 127.

Section 1402(a) of the Code defines net earnings from self-employment as gross income derived from any trade or business less allowable deductions. Section 1.1402(a)-1(c) of the regulations indicates that gross income derived from a trade or business includes gross income received (in the case of an individual reporting income on the cash receipts and disbursements method) in the taxable year from a trade or business even though such income may be attributable in whole or in part to services rendered in a prior taxable year.

Based upon your submissions and the authorities as stated above, we conclude as follows:

1. Neither the creation of the plan nor the crediting of contributions or earnings under the Plan will constitute the transfer of property to participants for purposes of section 83 of the Internal Revenue Code or Treas. Reg. sec. 1.83-3(e) of the regulations.
2. A participant will not be required to include in gross income amounts credited to his accounts under the Plan, nor any interest credited, nor appreciation in the value of such account until such amounts are actually paid or made available to such participant or such participant's beneficiaries in accordance with the terms of the Plan.
3. X will be entitled to deduct the amounts paid or made available pursuant to the Plan under section 404(d) of the Code in the taxable year in which such amounts are includible in the gross income of the recipient, provided such amounts otherwise meet the requirements for deductibility under section 162.
4. All amounts distributed under the Plan will be earnings for purposes of the tax on self-employment income in the year such amounts are actually paid or otherwise made available.

This ruling is directed only to the taxpayer who requested it and applies only to the Plan submitted on May 29, 1998, as revised in a submission dated December 10, 1998. Section 6110(j)(3) of the Code provides that it may not be used or cited as

precedent. Except as specifically ruled upon above, no opinion is expressed as to the federal tax consequences of the transaction described above under any other provision of the Code. Moreover, if the Plan is substantially amended, this ruling may not remain in effect.

Sincerely,

ROBERT D . PATCHELL
Assistant Chief, Branch One
Office of the Associate
Chief Counsel
(Employee Benefits and
Exempt Organizations)

Enclosure:

Copy of letter

Copy for section 6110 purposes