Internal Revenue Service

Department of the Treasury

Significant Index Nos. 401.28-00 & 415.01-00

Washington, DC 20224

200151056

Person to Contact:

Telephone Number:

Refer Reply to:

T:EP:RA:T:A1

Date:

SEP 2 5 2001

Re:

Plan A =

Plan B =

Employer Association C =

Employer Association D =

Employer E =

This is in reply to a ruling request made on your behalf by your authorized representative, with respect to the creation of Plan B and its effect on Plan A. You have requested the following rulings under the Internal Revenue Code (the "Code"):

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

(2) That the allocation of contributions to Plan B will not cause Plan A to lose its qualified status under section 401 (a).

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

251

(4) That payment of Plan B benefits before all contributing employers to Plan A have signed a collective bargaining agreement agreeing to allocation of contributions to Plan B, will not affect the tax deductibility of the contributions to Plan A or Plan B, or the qualified status of Plan A under section 401 (a), if the Plan B benefits are paid to an employee who worked for an employer that is signatory to a collective bargaining agreement or consent agreement authorizing allocation of contributions to Plan B.

(5) That payment of Plan B benefits before all contributing employers to Plan A have signed a collective bargaining agreement agreeing to allocation of contributions to Plan B, will not affect the tax deductibility of the contributions to Plan A or Plan B, or the qualified status of Plan A under section 401(a), if the Plan B benefits are paid to an employee who worked for an employer that is not signatory to a collective bargaining agreement or consent agreement authorizing allocation of contributions to Plan B.

Plan A is a qualified multiemployer defined benefit plan. The date of its most recent determination letter is July 27, 1995.

Plan A is established pursuant to numerous collective bargaining agreements. Approximately 690 employers contribute to Plan A. Of those, approximately 372 participate under a consent agreement to the master labor agreement negotiated between Employer Association C and the sponsoring local unions; approximately 76 participate under a consent agreement to the master labor agreement between Employer Association D and one of the sponsoring local unions; and approximately 242 participate under a collective bargaining agreement negotiated by the individual employer with one of the sponsoring local unions.

The contributions required to Plan A vary by collective bargaining agreement. Employer contributions to Plan A are made monthly, based upon the hours of service during the preceding month by employees covered by the collective bargaining agreement.

An employee's monthly accrued benefit under Plan A is based on a percentage of the amount their employer was required to contribute under the applicable collective bargaining agreement. Employees who become entitled to benefits receive the benefits regardless of whether the employee's employer has made the required contributions.

252

Plan B is a non-qualified employee benefit plan, established pursuant to section 3(36) of the Employment Retirement Income Security Act of 1974 ("ERISA"), which provides participants with a supplemental benefit intended to offset any restriction on benefits caused by section 415 of the Code. Participants in Plan B shall include all participants in Plan A who are qualified for and are receiving benefits under Plan A and whose benefits under Plan A are limited by Code section 415. Separate bookkeeping accounts will be maintained for all participants in Plan B. A Board of Trustees, consisting of the same trustees who administer Plan A, will administer Plan B.

Contributions paid to Plan B will be made pursuant to amended master labor agreements for Employer Associations C and D and pursuant to the amended independent collective bargaining agreement of Employer E. The amendments will provide that a portion of the contributions previously intended solely for Plan A will be utilized to fund and administer Plan B. Such portion shall be the amount necessary to provide each Plan B participant with the amount by which such participants benefit under Plan A, without taking into account the Code section 415 limits, exceeds the benefit under Plan A considering section 415 limits, plus employment taxes and administrative expenses. Benefits are payable from Plan B only to retirees who are receiving benefits from Plan A, not to active employees. Furthermore, the benefits payable from Plan B are based upon all periods of service taken into account by Plan A.

The Plan B trustees will have the discretion to authorize make-up benefits for prior periods in which the Plan A benefits were reduced because of the Code section 415 limits. In no event shall these make-up benefits be paid from reallocations of amounts previously contributed to Plan A. The trustees will also have authority to reduce Plan B benefits if continuing benefits under Plan B will impair the funding status of Plan A.

It is anticipated that the approximately 241 remaining independent collective bargaining agreements will eventually be amended to providing for the funding of Plan B. However, it is possible that not all employers will sign independent agreements agreeing to fund Plan B. In any event, no portion of the pension contributions made by a particular employer will be utilized to fund Plan B prior to the date such employer signs a revised bargaining agreement that provides for funding of Plan B by pension contributions of that employer.

Under the provisions of Plan A, the assets of Plan A cannot be used to provide the benefits of Plan B. Similarly, under the provisions of Plan B, the assets of Plan B cannot be used to provide the benefits of Plan A.

253

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 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 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 that section.

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.

254

Section 1.404(a)-12(b)(l) of the Income Tax Regulations (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)(1) 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 employer's taxable year in which the services creating the right to such compensation or benefits is performed.

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

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

If the establishment of Plan B was not accompanied by an increase in the pension fund contribution rate under the collective bargaining agreements, the method of funding of Plan B may cause Plan A to fail to meet the funding requirements of section 412 of the Code. However, a plan does not lose its tax-qualified status or its tax-exempt status merely because it fails to meet the minimum funding requirements of section 412. Thus, the method of funding of Plan B does not affect the tax-qualified status of Plan A or the tax deductibility of employer contributions to Plan A.

255

Because Plan B is a plan deferring the receipt of compensation under 1.404(b)-IT Q&A-2 of the (temporary) regulations, contributions to Plan B are deductible only under the rules of section 404 of the Code. Because Plan B is a nonqualified plan, the provisions of section 404(a)(5) of the Code are applicable. Because Plan B provides for the maintenance of separate accounts for each employee, contributions to Plan B made by contributing 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.

Therefore we hold that:

(1) The establishment of Plan B does not cause Plan A to lose its qualified status under Code section 401 (a).

(2) The allocation of contributions to Plan B will not cause Plan A to lose its qualified status under Code section 401 (a).

(3) Assuming the requirements for deductibility are met, employer contributions to Plan B 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.

(4) Payment of Plan B benefits before all contributing employers to Plan A have signed a collective bargaining agreement agreeing to the allocation of contributions to Plan B, will not affect the tax deductibility of the contributions to Plan A or Plan B, or the qualified status of Plan A under section 401 (a), if the Plan B benefits are paid to an employee who worked for an employer that is signatory to a collective bargaining agreement or consent agreement authorizing allocation of contributions to Plan B.

(5) Payment of Plan B benefits before all contributing employers to Plan A have signed a collective bargaining agreement agreeing to the allocation of contributions to Plan B, will not affect the tax deductibility of the contributions to Plan A or Plan B, or the qualified status of Plan A under section 401(a), if the Plan B benefits are paid to an employee who did not work for an employer that is signatory to a collective bargaining agreement or consent agreement authorizing allocation of contributions to Plan B.

256

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

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.

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257