INTERNAL REVENUE SERVICE

200441032

Uniform Issue List: 408.03-00

JUL 15 2004

SE:T:EP:RA:T3

Legend:

Taxpayer A =

Decedent W =

Amount D =

Amount E =

Amount F =

Employer B =

Insurance Company K =

Company A =

Dear Mr. :

In a letter dated March 12, 2004, as supplemented by correspondence dated April 1, 2004, you requested a waiver of the 60-day rollover requirement contained in section 402(c)(3)(A) of the Internal Revenue Code (the Code), as applicable to an annuity described in Code section 403(b) pursuant to Code section 403(b)(8)(B).

The following facts and representations have been submitted under penalty of perjury in support of the ruling requested:

Decedent W was a participant in a Code section 403(b) plan through her employer, Employer B. Following her death, as the surviving spouse of Decedent W, Taxpayer A was entitled to a lump sum death benefit of 25% of his wife's account balance under the section 403(b) plan. Taxpayer A's entitlement under his wife's section 403(b) plan totaled Amount D.

In order to avoid immediate taxation of the lump sum distribution, Taxpayer A requested a direct rollover of the distribution of Amount D that was payable to him after her death. Company A provided recordkeeping services to Decedent W's section 403(b) plan. On May 9, , Taxpayer A signed a form supplied by Company A requesting that his lump sum death benefit be directly rolled over to an Individual Retirement Account ("IRA") in his name at Insurance Company K.

On June 5, Company A sent a check for 80% of Taxpayer A's lump sum distribution, Amount F, to Insurance Company K for Taxpayer A's benefit. As a result of an administrative error, the remaining 20%, Amount E, was withheld as if the distribution were taxable and Amount E was sent to the Internal Revenue Service ("the Service") as Federal income taxes withheld.

When the Taxpayer received his Form 1099-R from Company A showing his rollover distribution as a taxable distribution, he discovered that part of the lump sum had been withheld as Federal income tax on the distribution. Taxpayer A contacted Company A on February 10, about the error on the Form 1099-R. At that time, the clerical error was discovered by Company A. The Form 1099-R was corrected to show the distribution as a non-taxable distribution even though taxes have been withheld.

It has been represented that the withholding error was beyond the control of the Taxpayer A.

Based on the facts and representations, you request that the Service waive the 60-day rollover requirement with respect to the distribution of Amount E because the failure to waive such requirement would be a hardship and against equity or good conscience.

With respect to your request to waive to 60 day rollover requirement, section 403(b)(1)(E) of the Code provides, in relevant part, that any amount distributed out of an annuity contract described in section 403(b)(1) shall be taxable to the distributee, in the taxable year of the distributee in which distributed, in the manner provided under section 72 of the Code (relating to annuities).

Code section 403(b)(8)(A) provides that if any portion of the balance to the credit of an employee in a 403(b) annuity contract is paid to him in an eligible rollover distribution (within the meaning of section 402(c)(4)), and the employee transfers any portion of the distribution to an eligible retirement plan described in section 402(c)(8)(B), then the distribution to the extent transferred shall not be includible in gross income for the taxable year in which it was distributed.

Section 402(c)(8) defines an eligible retirement plan for purposes of subsection (c) as including an IRA described under section 408(a).

Section 403(b)(8)(B) provides that rules similar to the rules of paragraphs (2) through (7) and (9) of section 402(c) shall apply for purposes of section 403(b)(8)(A).

Section 403(b)(10) provides, in relevant part, that any amount transferred in a direct trustee-to-trustee transfer in accordance with section 401(a)(31) shall not be includible in gross income for the taxable year of the transfer.

Section 402(c) of the Code provides rules governing rollovers of amounts from exempt trusts to eligible retirement plans including IRAs.

Section 402(c)(9) of the Code provides, in general, that where a surviving spouse receives a distribution attributable to the deceased spouses' eligible retirement plan, the surviving spouse shall treat the distribution in the same manner as if the surviving spouse were the employee.

Section 401(a)(31)(A) of the Code provides that a trust shall not constitute a qualified trust under this section unless the plan of which such trust is a part provides that if the distributee of any eligible rollover distribution-

(i) elects to have such distribution paid directly to an eligible retirement plan, and

(ii) specifies the eligible retirement plan to which such distribution is to be paid (in such form and at such time as the plan administrator may prescribe),such distribution shall be made in the form of a direct trustee-to-trustee transfer to the eligible retirement plan so specified.

Section 401(a)(31)(E) of the Code provides that, for purposes of Code section 401 (a)(31), the term "eligible retirement plan" has the meaning given such term by section 402(c)(8)(B) with an exception not pertinent to this ruling request. Thus, a direct transfer defined in Code section 401(a)(31), may be made into an IRA.

Section 1.401(a)(31)-1 of the Income Tax Regulations, Question and Answer-5, provides, in relevant part, that an eligible rollover distribution that is paid to an eligible retirement plan in a direct rollover is not currently includible in the distributee's gross income under section 402(c) and is exempt fron the 20-percent withholding imposed under section 3405(c)(2) of the Code.

Section 1.401(a)(31)-1 of the Income Tax Regulations, Question and Answer-15, provides, in relevant part, that a direct rollover described in Code section 401(a)(31) is a distribution and rollover of the eligible rollover distribution and not a transfer of assets and liabilities. Thus, for example, the consent and requirements of Code sections 401 (a)(11), 411 (a)(11), and 417 apply to transactions described in Code section 401 (a)(31).

Code section 402(c)(3)(A) provides that, except as provided in subparagraph (B), paragraph (1) shall not apply to any transfer of a distribution made after the 60th day following the day on which the distributee received the property distributed.

Section 402(c)(3)(B) of the Code provides that the Secretary may waive the 60-day requirement under section 402(c)(3)(A) of the Code where the 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 402(c)(3)(B) of the Code.

Revenue Procedure 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 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 provided by Taxpayer A demonstrates a failure on his part to satisfy the requirements of Code section 402(c)(3)(A) which stemmed from his relying on Company A to execute a direct rollover of Amount D from the section 403(b) plan in which Decedent W participated at her death to an IRA set-up and maintained in his name with Insurance Company K. Company A neglected to follow Taxpayer A's instructions and rolled over only 80 percent of Amount D. The actions of Company A resulted in Taxpayer A's failure to satisfy the Code section 402(c) rollover requirements with respect to Amount E.

Therefore, pursuant to section 402(c)(3)(B) of the Code, the Service hereby waives the 60-day rollover requirement with respect to the distribution of Amount E.

Thus, Taxpayer A is granted a period of 60 days from the issuance of this ruling letter to contribute Amount E or any portion thereof, to an IRA. Provided all other requirements of section 402(c) of the Code, except the 60-day requirement, are met with respect to such contributions, the contributed amounts will be considered rollover contributions within the meaning of section 402(c) of the Code, as applicable to an annuity described in Code section 403(b) pursuant to Code section 403(b)(8)(B).

Please note that, pursuant to Code section 401(a)(9), this ruling letter does not authorize the roll over of any amounts required to be distributed.

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 letter 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 as precedent.

If you wish to inquire about this ruling, please contact . I.D. #
, Please address all correspondence to SE:T:EP:RA:T3.

Sincerely yours,

Frances V. Sloan

Frances V. Sloan, Manager
Employee Plans Technical Group 3

Enclosures:
Deleted copy of Letter Ruling
Notice of Intention to Disclose