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

TAX EXEMPT AND
GOVERNMENT ENTITIES
DIVISION

200445039

AUG 09 2004

Uniform Issue List: 402.08-00; 402.00-00

SE:T:EP:RA:T1

Legend:

Taxpayer A..

Employer M...

Sum O... ....

Sum P..

Sum Q..

Sum R..

Sum S..

Plan T..

Plan U..

Dear :

This is in response to a letter dated March 20, 2004, as supplemented by correspondence dated July 19, 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 was an employee of Employer M for years before retiring on November 21, . At the time of his retirement, Taxpayer A understood that he would receive a large severance payment equal to over five years' salary, Sum P, which would enable him to care for his disabled spouse and son with special needs. In early , Taxpayer A contacted an enrolled agent ("Agent") with whom he established a long-distance professional relationship. On February 10, his Agent established a rollover account on Taxpayer A's behalf and on February 25, , Sum O was directly rolled over from Employer M's 401(k) plan, Plan T, into the rollover account.

In January of , Taxpayer A received a check for Sum Q, an amount equal to Sum P less withholding for federal income taxes, which he believed represented severance pay. He used a portion of Sum Q to pay off a car loan and mortgage on his home and, on the advice of his Agent, set aside an amount (in addition to the amounts withheld) for payment of federal income taxes. On February 26, , the remaining balance, Sum R, was deposited into a non-retirement brokerage account established by his Agent. Taxpayer A established an automatic withdrawal of Sum S from this account to cover monthly living expenses. This automatic monthly withdrawal commenced in April of and continues through the present.

In preparing Taxpayer A's federal Income Tax Return in early , Agent realized that Sum Q was in fact a pension plan distribution (net of amounts withheld for federal income taxes) when Taxpayer A supplied her with a Form 1099-R reflecting a gross distribution of Sum P from Plan U. Sum P represents a total distribution of Taxpayer A's accrued pension benefits under Plan U. Had Agent realized that Sum P was a pension plan distribution rather than severance pay, she would have advised Taxpayer A to roll over the entire Sum P into an Individual Retirement Arrangement ("IRA") described in Code section 408 and set up monthly payments from the IRA. Taxpayer A had always intended that all of his retirement funds be rolled over into an IRA; however, he was not aware that he had a pension with Employer M beyond his savings in Plan T.

Soon after discovery of this mistake, Taxpayer A's Agent filed a request that, based on the above facts and representations, the Internal Revenue Service (the "Service") waive the 60-day rollover requirement with respect to Sum R 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.

Code section 402(c)(8)(B) includes in its definition of an "eligible retirement plan" an IRA described in section 408.

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.

Under Code section 72(t), certain early distributions from a qualified retirement plan (including an IRA) are subject to an additional income tax equal to ten percent of the amount includible in gross income. Exceptions include distributions made on account of death, disability, separation from service after age 55, attainment of age 59 and ½, and as part of a series of substantially equal periodic payments made for the life or life expectancy of the employee or the joint lives or joint life expectancies of the employee and his designated beneficiary.

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, based on his interactions with Employer M, Taxpayer A was under the misapprehension that Sum P constituted a severance payment and thus it could not be rolled over. However, Taxpayer A intended to roll over his retirement funds, as indicated by his rollover of Sum O. Sum R (less any amounts withdrawn for monthly expenses) remains in a non-retirement account. Therefore, pursuant to Code section 402(c)(3)(B), the Service waives the 60-day rollover requirement with respect to Sum R (less any amounts withdrawn for monthly expenses) distributed from Plan U to Taxpayer A. Taxpayer A is granted a period of 60 days from the date of this ruling letter to contribute Sum R (less any amounts withdrawn for monthly expenses) to an IRA described in section 408. Provided all other requirements of section 402(c), except the 60-day requirement, are met with respect to such rollover contribution, Sum R (less any amounts withdrawn for monthly expenses) will be considered a rollover contribution within the meaning of section 402(c)(1). Since the amount of such rollover is not includible in Taxpayer A's gross income, it will not be subject to the early distribution tax under section 72(t).

This ruling does not authorize the rollover of amounts that are required to be distributed pursuant to Code section 401(a)(9).

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 is 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: