401.29-00

Internal Revenue Service

Department of the Treasury 200008043

Washington. DC 20224

contact Person:

Telephone Number:

In Reference to:

OP:E:EP:T:5

Date:

DEC - 2 1999

Legend:

Company A

Company B =

Company C =

Business D =

Business E =

Agreement G =

City H =

State K =

Plan X =

Plan Y

Dear

This is in response to your ruling request dated June 17, 1999, submitted by your authorized representative, concerning the federal income tax consequences of certain transactions under section 401(k) of the Internal Revenue Code. The following facts and representations have been submitted in support of the requested rulings.

Company A sponsors Plan X, a profit sharing plan that includes a cash or deferred arrangement (CODA) as described in section 401(k) of the Internal Revenue Code. Company A, headquartered in City H, State K, currently operates one retail business, Business D (a single truckstop comprised of multiple business operations) and, since July 16, 1998, a real estate business, which leases certain real estate to Company B. Prior to July 16, 1998, Company A operated two retail trades or businesses, Business D and Business E (which consisted of a chain of convenience stores and a fuel distribution business). Company A historically treated Business E as a separate and distinct trade or business from Business D. Business E, doing business under its own name, was operated separately from Business D. Business E had its own separate workforce, including store managers, field managers, clerical employees, and a vice president of operations and a president who were responsible for the performance of Business E. Both the president and the vice

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president of operations of Business E also had limited responsibilities with regard to Business D.

The store managers were solely responsible for the daily operation of Business E's individual stores, including decisions as to the hiring and firing of store personnel. Business E had a separate and distinct customer base from Business D's customer base. An individual based in Company A's corporate headquarters was responsible for Business E's marketing and advertising. Payroll, human resources, credit and accounting functions were centralized in Company A's corporate headquarters, although the cost of those functions attributable to Business E's stores was charged back to Business E.

Business E had a separate budget and a separate profit and loss statement, but did not have a separate balance sheet. The assets and liabilities of Business E were identified separately on Company A's balance sheet, with the exception of its accounts payable, which were combined with those of Business D.

Business D is a franchise of Company C. Business D's business operations include a fast food facility, a full service restaurant, a full service trucker's shop, a travel store, a convenience store, and fuel operations. Prior to December 31, 1998, Business D's operations also included a motel facility. Company A sold the motel facility in 1998. All operations of Business D, including the truckstop convenience store, were accounted for on the expense and loss statements of Company A separate from Business E. If the assets used in Business D's convenience store were combined with those of the other convenience stores on Company A's balance sheet, such assets would have comprised less than 2% of Business E's assets, and if combined with Business E's sales figures, would have comprised less than 3% of Business E's sales. None of the assets utilized in Business D's operations were sold to Company B.

Pursuant to Agreement G dated July 16, 1998, Company A sold Business E to Company B, an unrelated corporation. Excluding the real estate assets, the sale to Company B constituted a sale of approximately 98% of the assets used by Company A in Business E's convenience store business and 100% of the assets used in Business E's fuel distribution business. These assets included, without limitation, equipment, inventory, supplies, contracts, computer hardware and computer software documentation, licenses, and goodwill. Company A retained equipment representing 2% of the assets used in Business E's convenience store business. Company A did not sell its cash or Business E's accounts receivable, and Company A reserved the right to use the brand name of Business E's stores for the convenience store located at the truckstop. To purchase Business E, Company B paid cash to Company A, and also assumed responsibility for the business risks, leases, and other contractual obligations transferred by Company A pursuant to Agreement G.

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Currently, only 4 employees remain in Company A's corporate headquarters. Company A had 26 headquarters employees immediately before the sale. Neither the president nor the vice president of operations, the persons primarily responsible for Business E's performance, remain employed by Company A. In addition, Company A no longer employs a Human Resources director.

In connection with the sale, Company A terminated Business E's employees, and substantially all of these former Company A employees were offered employment by Company B in the same jobs, at the same locations and at approximately the same wages. While Company A continues to maintain Plan X, Company B has neither adopted nor assumed Plan X, and there was no merger or transfer of assets between Plan X and any plan maintained by Company B. Company A has concluded that the termination of the former Company A employees on July 16, 1998, in connection with the sale and under the circumstances described above cannot be construed as a "separation from service" within the meaning of section 401(k)(2)(B)(i)(I) of the Internal Revenue Code.

Section 5.13 of Plan X generally permits the lump sum distribution of an employee's account balance attributable to elective deferrals upon the sale or other disposition of substantially all of the assets used in a trade or business, but only with respect to an employee who continues employment with the corporation acquiring such assets. In accordance with this provision, Company A proposes to make lump sum distributions from Plan X, subject to applicable consent requirements, to the former Company A employees on or before December 31, 1999.

Board resolutions adopted in August 1998, authorized the establishment of Plan Y, a new Company A defined contribution plan containing a cash or deferred arrangement feature. On February 3, 1999, all of Plan X's accounts belonging to current Company A employees were transferred to Plan Y. On February 16, 1999, current Company A employees began making elective deferral contributions to Plan Y. No current Company A employees made any deferrals to Plan X or received or became entitled to receive any allocations under Plan X between February 3, 1999, and June 30, 1999. The Fifth Amendment to Plan X provides that effective June 30, 1999, no current Company A employees may participate in Plan X.

Based upon the above information, your authorized representative has requested the following rulings:

1. That the sale by Company A of Business E to Company B constituted a disposition of substantially all of the assets used in a trade or business within the meaning of section 401(k)(10)(A)(ii) of the Internal Revenue Code; and

2. That distributions of Plan X account balances attributable to elective deferrals made to the former Company A employees now employed by Company B will not violate the

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distribution restrictions set forth in section 401(k) (2) (B) (i) of the Code.

Section 401(a) of the Internal Revenue Code provides that 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 shall constitute a qualified trust under this section if certain requirements are met.

Section 401(k) (1) of the Code states in part that a profit-sharing plan shall not be considered as not satisfying the requirements of subsection (a) merely because the plan includes a qualified cash or deferred arrangement.

Section 401(k) (2) of the Code sets forth the requirements to be a qualified cash or deferred arrangement, one of which is that distributions may not be made earlier than the occurence of certain stated events, including those stated in section 401(k) (10). Section 401(k) (2) (B) (i) (II), when read together with section 401(k) (10) (A) (ii), further provides that one of these distributable events is the disposition by a corporation of substantially all of its assets (within the meaning of section 409(d) (2)) used by the corporation in a trade or business of such corporation to an unrelated corporation, but only with respect to an employee who continues employment with the corporation acquiring such assets.

Section 1.401(k)-l(d) (4) of the Income Tax Regulations provides rules applicable to distributions upon the sale of assets. This regulation provides, in relevant part, that (i) the seller must maintain the plan, and the purchaser may not maintain the plan after the disposition; (ii) the employee receiving the distribution must continue employment with the purchaser of the assets; (iii) the distribution must be in connection with the disposition of the assets, and must generally occur by the end of the second calendar year after the year in which the disposition occurred; and (iv) the sale of substantially all the assets used in a trade or business means the sale of at least 85% of the assets, and an unrelated entity is one that is not required to be aggregated with the seller under Code sections 414(b), (c), (m), or (o) after the sale or other disposition.

Section 1.401(k)-l(d) (5) of the regulations provides, in general, that a distribution may be made only if it is a lump sum distribution within the meaning of section 402(d)(4) of the Code.

In this case, you have represented that Business E was treated as a separate and distinct business from Business D, the other type of retail business conducted by Company A. Business E had its own distinct personnel, management, and customer base, and the results of its operations were illustrated separately on Company A's financial statements. Currently, Company A operates one retail trade or business, Business D, and a real estate business, leasing real estate. Based upon the facts and circumstances presented herein, we have determined that Business E is a trade or business as that term is used in section 401(k)(10)(A)(ii) of the Code. In accordance with Agreement G, dated July 16, 1998, Company A sold more than 85% of the assets used in Business E to Company B, an unrelated corporation. Company A continues to maintain Plan X and Company B does not maintain Plan X. Distributions from Plan X will be made in connection with the disposition of the assets, and such distributions will occur on or before December 31, 1999. The distributions will be made only to former Company A employees currently employed by Company B, and in the form of lump sum distributions as described in section 402(d)(4) of the Code (without regard to subparagraphs (A)(i) through (iv), (B), and (F) of that section).

Accordingly, with respect to your first ruling request, we conclude that the sale by Company A of Business E to Company B constituted a disposition of substantially all of the assets used in a trade or business within the meaning of section 401(k)(10)(A)(ii) of the Internal Revenue Code.

With respect to your second ruling request, we conclude that distributions of Plan X account balances attributable to elective deferrals made to the former Company A employees now employed by Company B will not violate the distribution restrictions set forth in section 401(k)(2)(B)(i) of the Code.

This ruling letter is based on the assumption that Plan X continues to be qualified under Code section 401(a) at all relevant times.

In accordance with a power of attorney on file in this office, a copy of this letter has been sent to your authorized representative.

Sincerely yours,

Alan Pipkin
Chief, Employee Plans
Technical Branch 5

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Enclosures:

Notice of Intention to Disclose
Deleted copy of letter

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