



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

TAX EXEMPT AND
GOVERNMENT ENTITIES
DIVISION

Uniform Issue List: 402.08-00

MAR 18 2004

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Legend:

- Taxpayer A = ***
- Amount C = ***
- Plan X = ***
- Financial Advisor B = ***
- Account F = ***
- Company E = ***
- Company G = ***

Dear ***:

This is in response to your letter dated November 9, 2003 and supplemented with correspondence dated March 12, 2004 and March 17, 2004, in which you request a waiver of the 60-day rollover requirement contained in section 402(c)(3)(A) of the Internal Revenue Code (the Code).

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

On April 12, , Taxpayer A received a check in the amount of Amount C from Plan X, a Code section 401(k) arrangement maintained by Taxpayer A's former employer. On May 23, , Taxpayer A, with the assistance of Financial Advisor B, attempted to roll over Amount C into an individual retirement arrangement (IRA). Documentation submitted with your request indicates that Financial Advisor B, on May 23, , deposited Amount C into Account F.

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During early _____, Taxpayer A received a Form 1099-R from Company G that showed that a distribution in the amount of Amount C was made to Taxpayer A during calendar year _____. Taxpayer A's accountant explained to him that the Form 1099-R represented a taxable distribution in the amount of Amount C from Plan X. Taxpayer A contacted Financial Advisor B about the distribution and Account F. Financial Advisor B then discovered that the application form used by him to establish Account F was an application to open a regular brokerage account and not a rollover traditional IRA as Taxpayer A requested. Financial Advisor B contacted Company E to correct the mistake, but Company E refused to correct the error or withdraw the Form 1099-R.

Taxpayer A and Financial Advisor B were not aware that Amount C had not been contributed to an IRA until Taxpayer A's accountant informed Taxpayer A that Amount C represents a taxable distribution. Taxpayer A relied on Financial Advisor B to establish his rollover IRA. Financial Advisor B asserts that he was the person responsible for making the "rollover" of Amount C and that he mistakenly thought that Account F was a qualified account. Taxpayer A has asserted that no funds have been withdrawn from Account F since this account was established and that Amount C continues to be held in Account F.

Based on the foregoing facts and representations, the following ruling has been requested:

That the Internal Revenue Service waive the 60-day rollover requirement with respect to the distribution of Amount C from Plan X.

Section 402(a)(1) of the Code provides that except as otherwise provided in this section, any amount actually distributed to any distributee by any employees' trust described in section 401(a) of the Code which is exempt from tax under section 501(a) shall be taxable to the distributee, in the taxable year of the distributee in which distributed, in the manner provided under section 72 (relating to annuities).

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

Code section 402(c)(1) provides, generally, that if any portion of an eligible rollover distribution from a qualified trust is paid to the employee in an eligible rollover distribution and the employee transfers any portion of the property received in such distribution to an eligible retirement plan, and in the case of a distribution of property other than money, the amount so transferred consists of the property distributed, then such distribution (to the extent so transferred) shall not be includible in gross income for the taxable year in which paid.

Code section 402(c)(2) provides that the maximum amount of an eligible rollover distribution to which paragraph (1) applies shall not exceed the portion of such distribution which is includible in gross income (determined without regard to paragraph (1)).

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Code section 402(c)(4) defines "eligible rollover distribution" as any distribution to the employee of all or a portion of the balance to the credit of the employee in a qualified trust, except that such term shall not include

- (A) any distribution which is one of a series of substantially equal periodic payments (not less frequently than annually) made –
 - (i) for the life (or life expectancy) of the employee or the joint lives (or joint life expectancies) of the employee and the employee's designated beneficiary, or
 - (ii) for a specified period of 10 years or more,
- (B) any distribution to the extent such distribution is required under section 401(a)(9), and
- (C) any distribution which is made upon hardship of the employee.

Code section 402(c)(8) defines "eligible retirement plan" as (i) an individual retirement account described in section 408(a); (ii) an individual retirement annuity described in section 408(b) (other than an endowment contract); (iii) a qualified trust; (iv) an annuity plan described in section 403(a); (v) an eligible deferred compensation plan described in section 457(b) maintained by an eligible employer as described in section 457(e)(1)(A); and (vi) an annuity contract described in section 403(b).

Code section 402(c)(3)(A) provides that section 402(c)(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.

Code section 402(c)(3)(B) provides that the Secretary may waive the 60-day requirement under subparagraph (A) where the failure to waive such requirement would be against equity and 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).

Rev. Proc. 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) of the Code, 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.

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The information presented by the Taxpayer A demonstrates that an error was made by Financial Advisor B when he used the wrong application form which resulted in Amount C being deposited into Account F, a regular brokerage account, and not a rollover IRA as Taxpayer A intended. The error committed by Financial Advisor B resulted in the failure of Taxpayer A to satisfy the requirement that Amount C be rolled over to an IRA within 60 days of the date Taxpayer A received the distribution from Plan X. Further, you have asserted that no withdrawals have been made from Account F since it was established and that Amount C continues to be held in Account F.

Therefore, pursuant to section 402(c)(3)(B), the Service hereby waives the 60-day rollover requirement with respect to the distribution of Amount C from Plan X. Taxpayer A is granted a period of 60 days from the date of this ruling to contribute Amount C to an IRA. Provided all other requirements of section 402(c)(1) of the Code, except the 60-day requirement, are met with respect to this contribution, we conclude that 60-day rollover requirement is waived and that Amount C will be considered a valid rollover contribution within the meaning of section 402(c)(1) of the Code.

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

This ruling assumes that Plan X meets the qualification requirement of Code section 401(a) at all times relevant to this transaction.

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 ruling is directed only to the taxpayer that requested it. Section 6110(k)(3) of the Code provides that it may not be used or cited by others as precedent.

If you have any questions regarding this ruling, please contact ***, SE:T:EP:RA:T2 at ***.

Sincerely,

(signed) **JOYCE E. FLOYD**

Joyce E. Floyd, Manager
Employee Plans Technical Group 2

Enclosures:

Deleted copy of ruling letter
Notice of Intention to Disclose Form 437