

200424007



TAX EXEMPT AND
GOVERNMENT ENTITIES
DIVISION

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

MAR 16 2004

UICs: 402.08-00
402.08-05
402.08-01

LEGEND:

Taxpayer A:

Taxpayer B:

Company C:

Plan X:

Trust W:

Trust Y:

Subtrust A:

Subtrust B:

Date 1:

Year 1:

Date 2:

Year 2:

Date 3:

Date 4:

Year 3:

Date 5:

Year 4:

Dear _____ :

This is in response to the _____, letter, submitted by your authorized representative, as supplemented by correspondence dated _____, _____, _____, and _____, in which you (Taxpayer B) request letter rulings concerning the application of section 402(c) of the Internal Revenue Code to the following facts and representations that your authorized representative asserts support your ruling request.

Taxpayer B is the surviving spouse of Taxpayer A, whose date of birth was Date 1, Year 1. Taxpayer A was a participant in Plan X, which your authorized representative asserts is qualified under section 401(a) of the Code. Company C is the administrator of Plan X.

On Date 4, Year 3, Taxpayer A named Trust Y as the sole beneficiary of any death benefit payable under Plan X. Trust W is a restatement of Trust Y. Trust W was executed on Date 3, Year 2.

Taxpayer A died on Date 2, Year 2, having attained his "required beginning date," as that term is defined in section 401(a)(9)(C) of the Code.

Trust W provides, in relevant part, that Taxpayers A and B were the joint trustors and joint trustees thereof. Furthermore, Article VI, section 2, of Trust W provides, in relevant part, that "...In the event of the death or disability of Taxpayer A or Taxpayer B, the other shall act as sole Successor Trustee..."

Article V, section 2B, of Trust W provides, in relevant part, that "If benefits of qualified retirement plans are payable to the Trust, the Trustee may elect to receive such benefits in installments or in a lump sum".

Article V, section 2C, of Trust W provides, in relevant part, that "... upon the death of one Trustor, survived by the other Trustor, the Trustee shall divide the Trust Estate (including...employee benefit proceeds...) into two shares which shall be designated Subtrust A and Subtrust B..."

Article V, section 4(1), of Trust W provides, in relevant part, that the Trustee of Trust W shall pay to the Surviving Trustor the income of Subtrust A and as much of the principal of Subtrust A, up to the whole thereof, as the Surviving Trustor may demand in writing.

Article V, section 6, of Trust W provides, in relevant part, that Trustee of Trust W shall pay to the Surviving Trustor the income of Subtrust B and as much of the principal

as the Trustee, in the Trustee's discretion, deems necessary for the Surviving Trustor's proper support, care and maintenance.

Article VII of Trust W provides, in relevant part, that the Trustee(s) thereof shall have full discretion to allocate Trust W property between Subtrust A and Subtrust B.

On Date 5, Year 4, which date was after the date of Taxpayer A's death, Company C established a non tax qualified account (Account Q) in the name of and for the benefit of Taxpayer B, and transferred assets from Plan X payable to Taxpayer B to Account Q.

Shortly Before Date 5, Year 4, Taxpayer B had advised Company C of the manner in which she wished her survivor interest in Plan X to be invested. Company C advised her at that time that it would set up Account Q, would transfer her interest in Plan X to Account Q, and would invest her Account Q according to her investment preferences. Your authorized representative asserts that Company C did not advise Taxpayer B that she may have had the right to "roll over" her interest in Plan X to another qualified plan including an IRA described in Code § 408(a). Additionally, your authorized representative asserts that Company C did not advise Taxpayer B that transferring her Plan X interest to Account Q would result in a taxable distribution.

Based on the above facts and representations, you request the following letter rulings:

1. That Taxpayer B, as Taxpayer A's surviving spouse, will be treated as having been eligible to receive the entire distribution from Plan X directly from Taxpayer A, and not from Trust W. Thus, Taxpayer B will be treated as having been eligible to roll over her Plan X interest into an IRA set up and maintained in her name; and
2. That pursuant to section 402(c)(3)(B) of the Code and Revenue Procedure 2003-16, Taxpayer B is granted an extension of time, not to exceed 60 days measured from the date of this letter ruling, to roll over her Plan X distribution, or any portion thereof, into an IRA set up and maintained in her name.

With respect to your ruling requests, section 402(c)(1) of the Code provides, generally, that if any portion of an eligible rollover distribution from a section 401(a) of the Code qualified retirement plan is transferred into an eligible retirement plan, the portion of the distribution so transferred shall not be includible in gross income in the taxable year in which paid.

Section 402(c)(2) of the Code 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)) but states that this maximum limitation does not apply to a distribution transferred to an eligible retirement plan described in clause (i) or (ii) of section 402(c)(8)(B).

Section 402(c)(4) of the Code defines "eligible rollover distribution" as any distribution to an employee of all or any portion of the balance to the credit of an employee in a qualified trust except the following distributions:

(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 period of 10 years or more,

(B) any distribution to the extent the distribution is required under section 401(a)(9)(c), and

(C) any distribution which is made upon the hardship of the employee.

Section 402(c)(8) of the Code 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 section 401(a) of the Code qualified retirement plan, (iv) an annuity plan described in section 403(a), (v) an eligible deferred compensation plan described in section 457(b) which is maintained by an eligible employer described in section 457(e)(1)(A), and (vi) an annuity contract described in section 403(b).

Section 1.402(c)-2, Question and Answer 11, of the Income Tax Regulations states that if an eligible rollover distribution is paid to an employee and the employee contributes all or part of the eligible rollover distribution to an eligible retirement plan no later than the 60th day following the date the employee received the distribution, the amount contributed is not currently includible in gross income.

Section 402(c)(9) of the Code provides, generally, if a distribution attributable to an employee is paid to the spouse of the employee after the employee's death, section 402(c) of the Code will apply to such distribution in the same manner as if the spouse

were the employee.

Section 1.402(c)-2 of the regulations, Q&A 12, provides, generally, that if a distribution attributable to an employee is paid to the employee's surviving spouse, section 402(c) applies to the distribution in the same manner as if the spouse were the employee. Thus, a distribution to the surviving spouse of an employee is an eligible rollover distribution if it meets the applicable requirements of section 402(c)(2) and (4) and the associated regulations.

Section 402(c)(3)(A) of the Code provides, generally, that, except as provided in subparagraph (B), 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. Subparagraph (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 or good conscience, including casualty, disaster, or other events beyond the reasonable control of the individual subject to such requirement. Only eligible rollover 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, provides that in determining whether to grant a waiver of the 60-day rollover requirement pursuant to section 402(c)(3)(B) or 408(d)(3)(I), 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.

With respect to your first ruling request, generally, if a decedent's qualified plan assets pass through a third party, e.g. an estate or a trust, and then are distributed to the decedent's surviving spouse, said spouse will be treated as acquiring them from the third party and not from the decedent. Thus, generally, said surviving spouse will not be eligible to roll over the qualified plan proceeds into her own IRA.

However, in this case, Trust W was the sole named beneficiary of Taxpayer A's interest in Plan X. After Taxpayer A's death, Taxpayer B became the sole trustee of Trust W with the authority to allocate Trust W assets in any way in which she deemed appropriate. Taxpayer B could have demanded that Trust W's interest in Plan X be distributed to Trust W in a lump sum. Then Taxpayer B could have allocated Trust W's interest in Plan X to Subtrust A. If she had done so, Taxpayer B could then have demanded, in writing, that Trust W's interest in Plan X be paid to her as surviving Trust W Trustor. If she had done so, Taxpayer B, as the individual who would have made

every decision leading up to Trust W's interest in Plan X being paid to her, would have been treated as having acquired said Plan X interest from Taxpayer A and not from Trust W.

Based on the above, the Service will treat Taxpayer B, Taxpayer A's surviving spouse, as a spouse under section 402(c)(9) of the Code who would have been eligible to roll over the above described Plan X interest into an IRA set up and maintained in her name.

Thus, with respect to your first ruling request, we conclude as follows:

1. That Taxpayer B, as Taxpayer A's surviving spouse, will be treated as having been eligible to receive the entire distribution from Plan X directly from Taxpayer A and not from Trust W. Thus, Taxpayer B will be treated as having been eligible to roll over the above described Plan X interest into an IRA set up and maintained in her name.

With respect to your second ruling, as noted previously, a rollover, generally, must be accomplished no later than the 60th day following the date on which the payee or distributee received his/her qualified plan distribution. The 60 day requirement was not satisfied in this case. However, the facts of this case indicate that Company C created Account Q, a non qualified account, to hold Trust W's interest in Plan X without advising Taxpayer B either that (1) she may have been eligible to roll over said Plan X interest into an IRA set up and maintained in her name or (2) that placing the Plan X interest in Account Q resulted in a taxable distribution. In effect, Taxpayer B relied upon Company C for advice concerning the disposition of said Plan X interest to her detriment.

Based on the above, pursuant to section 402(c)(3)(B) of the Code, the Service hereby waives the 60-day rollover requirement with respect to the distribution from Plan X. You (Taxpayer B) are granted a period of 60 days from the issuance of this ruling letter to accomplish a rollover of the Plan X distribution (or any portion thereof (except as noted below)). Provided all other requirements of section 402(c) of the Code, except the 60-day requirement, are met with respect to such contributions, the amounts deposited into an IRA set up and maintained in the name of Taxpayer B will be considered rollover contributions within the meaning of section 402(c) of the Code.

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

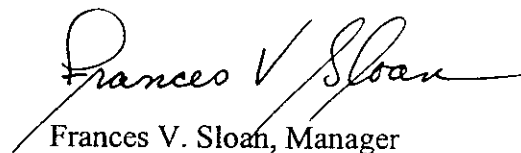
This ruling assumes that Plan X was or is qualified within the meaning of Code section 401(a), and its trust tax-exempt under Code section 501(a), at all times relevant thereto. It assumes that any IRA set up and maintained in the name of Taxpayer B to

receive the rollover contribution of the death benefit from Plan X will meet the requirements of Code section 408(a).

Pursuant to a power of attorney on file with this office, a copy of this letter ruling is being sent to your authorized representative.

The author of this ruling is () who may be reached
at (phone) or (FAX).

Sincerely yours,



Frances V. Sloan, Manager
Employee Plans Technical Group 3

Enclosures:

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Form 437