

*INTERNAL REVENUE SERVICE*

Uniform Issue List: 402.03-00

**200433020**

**MAY 21 2004**

Legend:

*SE: T: EP: RA: T3*

Company A =

Plan X =

Company B =

Company C =

Amount N =

Amount M =

Amount O =

Amount P =

Amount Q =

Amount R =

Amount S =

Amount T =

Dear :

This is in response to correspondence dated March 19, 2004, as supplemented by correspondence dated April 23, 2004, submitted on your behalf by your authorized representatives, in which you requested a waiver of the 60-day rollover requirement contained in section 402(c)(3) 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:

You worked for Company A and were a participant in Plan X, which was maintained by Company A. Plan X was a qualified plan as described in section 401(a) of the Code. You separated from service with Company A in                      In                      you became disabled.

In \_\_\_\_\_, you contacted your financial advisors at Company B about receiving a lump sum distribution from Plan X. You spoke with two financial advisors at Company B; one advisor was a certified financial planner and a chartered financial analyst, and the other advisor was a certified financial planner. The financial advisors from Company B recommended that you roll over the non-Company A stock portion of your account in Plan X into an Individual Retirement Arrangement (IRA) and take a distribution of the Company A stock portion of your account in Plan X in order to take advantage of the taxability rules regarding the exclusion of the net unrealized appreciation you had accumulated in the Company A stock.

On \_\_\_\_\_ after you had attained age 55, you instructed Company A to make a distribution of your entire balance from Plan X by first withdrawing the non-Company A stock from your account in Plan X and then immediately withdrawing the Company A stock. You specifically stated in your instructions that your understanding was that the taxable amount of this distribution would be Amount N.

Company A carried out these distribution instructions and on \_\_\_\_\_ the non-Company A stock portion of your account in Plan X, which was valued at Amount M, was deposited into your IRA, which meets the requirements of section 408 of the Code. Also on \_\_\_\_\_ the Company A stock portion of your account in Plan X, which was valued at Amount O, was deposited into your personal account at Company C.

Since \_\_\_\_\_ you have sold \_\_\_\_\_ shares of the Company A stock which were deposited into this personal account. On the date of distribution from Plan X, the \_\_\_\_\_ shares were valued at Amount Q. Of these \_\_\_\_\_ shares, \_\_\_\_\_ were sold on \_\_\_\_\_ for Amount R and the remaining \_\_\_\_\_ shares were sold on \_\_\_\_\_ for Amount S. Therefore, the total sales price for the \_\_\_\_\_ shares was Amount T.

In \_\_\_\_\_ you received two 2003 Form 1099s from Company A reflecting the distributions from Plan X. The Form 1099s indicated that the entire amount of the distribution of Company A stock (Amount P) was taxable, instead of only Amount N. Upon receipt of the Form 1099s, you immediately met with your financial advisors at Company B to determine why the net unrealized appreciation attributable to the Company A stock was taxable, contrary to the advice which they had given you.

On \_\_\_\_\_ Company A informed you and your financial advisors at Company B that the exclusion of net unrealized appreciation treatment was not available to you because you had taken a prior distribution from Plan X in \_\_\_\_\_. Because of this, the distribution which you received in \_\_\_\_\_ could not be considered to be a lump sum distribution, which is a requirement to take advantage of the taxability rules regarding the exclusion of the net unrealized appreciation you had accumulated in the Company A stock.

Your financial advisors at Company B have represented that you had informed them of the \_\_\_\_\_ distribution before the \_\_\_\_\_ lump sum distribution was requested. Despite this, the financial advisors did not advise you that such \_\_\_\_\_ distribution would disqualify the \_\_\_\_\_ distribution as a lump sum distribution. By the time that you were informed that the distribution did not qualify as a lump sum distribution, the 60-day period for performing a rollover to an IRA had lapsed. You did not possess the financial knowledge or experience to know that your \_\_\_\_\_ distribution would disqualify your \_\_\_\_\_ distribution

from being treated as a lump sum distribution. If you had been aware that the distribution from your account in Plan X did not qualify for net unrealized appreciation treatment under the lump sum distribution rules, you would have rolled over the entire Plan X distribution from your account into an IRA.

Based on these facts and representations, you request a ruling that under the hardship exception of Revenue Procedure 2003-16, you can complete the rollover of the remaining Company A stock and an amount equal to the proceeds from the sale of the Company A stock to an IRA set up and maintained in your name.

Section 402(a) 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) 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, under section 72 of the Code.

Section 402(c) of the Code defines and provides the rules applicable to rollovers from exempt trusts.

Section 402(c)(1) of the Code provides that if—

(A) 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 in such distribution to an eligible retirement plan, and

(C) 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.

Section 402(c)(3) of the Code provides that the transfer must be made within 60 days of receipt. In general, section 402(c)(3)(A) provides that section 402(c)(1) shall not apply to any transfer made after the 60<sup>th</sup> 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.

Section 402(c)(4) of the Code states that the term "eligible rollover distribution" means any distribution to an employee of all or any portion of the balance to the credit of the employee in a qualified trust (with certain exceptions that do not apply in this case).

Section 402(c)(6)(A) of the Code provides that the transfer of an amount equal to any portion of the proceeds from the sale of property received in the distribution shall be treated as the transfer of property received in the distribution.

Section 402(c)(6)(B) of the Code provides that the excess of the fair market value of property on sale over its fair market value on distribution shall be treated as property received in the distribution.

Section 402(e)(4)(A) of the Code provides that in the case of a distribution other than a lump sum distribution, the amount actually distributed to any distributee from a trust described in section 401(a) shall not include any net unrealized appreciation in employer securities attributable to amounts contributed by the employee.

Section 402(e)(4)(B) of the Code provides that in the case of any lump sum distribution which includes employer securities, there shall be excluded from gross income the net unrealized appreciation attributable to that part of the distribution which consists of employer securities.

Section 402(e)(4)(D) of the Code defines the term "lump sum distribution", in part, as a distribution or payment within one taxable year of the recipient of the balance to the credit of an employee which becomes payable to the recipient on account of the employee's death, after the employee attains age 59 ½, on account of the employee's separation from service, or after the employee has become disabled, from a trust which forms a part of a plan described in section 401(a) and which is exempt from tax under section 501.

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), 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 you presented demonstrates that you relied upon the advice of your financial advisors who provided you with incomplete and erroneous information regarding the tax effects of your distribution from Plan X. These financial advisors have represented that you had, in fact, informed them of your prior Plan X distribution. You have represented that you did not possess the financial knowledge or experience to know that your Plan X distribution would disqualify your Plan X distribution from being treated as a lump sum distribution, thereby losing the ability to use the favorable net unrealized appreciation rules. If you had been aware of this, you would have rolled over the entire Plan X distribution into an IRA. Since you discovered the advantages of such a rollover in you could not satisfy the requirement that Amount O be deposited into an IRA within 60 days of the distribution from Plan X.

Therefore, based on these facts and representations, the Service hereby waives the 60-day rollover requirement with respect to the distribution of Company A stock which you received in You are granted a period of 60 days from the issuance of this ruling letter to contribute the unsold shares of Company A stock and the proceeds from the

sale of the 801 shares of Company A stock into a Rollover IRA. Provided all other requirements of section 402(c) of the Code, except the 60-day requirement, are met with respect to such contributions, these amounts will be considered rollover contributions within the meaning of section 402(c) of the Code.

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 expresses no opinion as to whether Plan X satisfies the requirements for qualification under section 401(a) of the Code.

This letter expresses no opinion as to whether the IRA described herein satisfies the requirements of section 408 of the Code.

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.

Pursuant to a power of attorney on file with this office, the original of this letter ruling is being sent to your authorized representative. Should you have any concerns regarding this letter, please contact

Sincerely yours,



, Manager  
Technical Group 3  
Employee Plans

Enclosures:

Deleted copy of ruling letter  
Notice of Intention to Disclose