

200434022

Uniform Issue List: 402.07-00

MAY 27 2004

Legend:

Company A =

Company B =

Company C =

Company D =

Plan X =

Dear :

This is in response to correspondence dated April 10, 2003, as supplemented by correspondence and communications dated September 25 and October 8, 2003, as well as several undated letters, in which you requested a letter ruling regarding the taxability of certain distributions from Plan X. A conference was held on September 8, 2003.

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

You were an employee of Company A from . until .
Company A is a wholly-owned subsidiary of Company B. You participated in Plan X, which is a combined employee stock ownership plan (ESOP) and cash or deferred arrangement plan described in section 401(k) of the Internal Revenue Code. Plan X satisfies the ESOP requirements of sections 409 and 4975(e), the cash or deferred arrangement provisions of section 401(k), and the matching contribution requirements of section 401(m) of the Code. Plan X is a qualified plan under section 401(a) of the Code.

Your interest in the ESOP component of Plan X included a "Company Stock Account" and an "ESOP Investment Account". The Company Stock Account was composed solely of shares of Company B stock. The ESOP Investment Account included the proceeds from Company B shares previously sold inside Plan X and reinvested in a diversified portfolio of mutual funds made available to all Plan X participants.

Your interest in the cash or deferred component of Plan X included a "401(k) Account" and a "Matching Contribution Account". Both of these accounts were invested in a diversified portfolio of mutual funds made available to all Plan X participants.

Company A is the administrator of Plan X and Company C serves as the third-party recordkeeper. Company A and Company C provided the participants of Plan X, including you, a quarterly statement of all of the accounts invested in the diversified portfolio of mutual funds, and once a year provided a statement of the number of shares of Company B stock held by you in your Company Stock Account.

In _____, you retired from Company A. At the time of your retirement you were over the age of 59 ½. In the plan year of your retirement, you were eligible for a final allocation of shares of Company B stock pursuant to the ESOP portion of Plan X. Those shares were to be allocated in the normal course of Plan X's administration after the end of the plan year, which was _____. You knew that you were required to receive a lump sum distribution of the balance of your account in Plan X within one taxable year in order to take advantage of the net unrealized appreciation rules of section 402(e)(4)(B) of the Code. Because of this, you delayed receiving a total distribution from Plan X until after the final allocation of shares of Company B was completed, after the end of the plan year.

In _____, after the final allocation of the Company B stock in your Company Stock Account was completed, you requested and initiated what you thought was a lump sum distribution of the entire balance of your account in Plan X. You had both an Individual Retirement Arrangement (IRA) and a brokerage account with Company D. You intended to directly transfer the amounts in your ESOP Investment Account, 401(k) Account and Matching Contribution Account during _____ to the IRA which you set up with Company D. In addition, you intended to take a complete, taxable distribution of the Company B stock allocated to your Company Stock Account in the ESOP portion of Plan X by transferring those share to your brokerage account at Company D.

You received from and filed with Company A and Company C a form entitled "Company A Employee Stock Ownership and 401(k) Plan, Benefit Payment Request Form, ESOP Shares" on _____. In completing this form, you checked the option to request a distribution to you of your vested account balance. By completing the form in this manner, you believed that in calendar year _____ you had 1) elected a direct transfer of all Plan X assets invested in mutual funds into your IRA with Company D and 2) requested a taxable, lump sum distribution of 100 percent of your Company B stock to be delivered to your Company D brokerage account.

During _____, you received statements from Company C with respect to your mutual fund investments. Based on these statements, you assumed that the filing of the above-described request form actually caused the mutual fund investments in your Plan X account to be directly transferred to an IRA held by Company C for your benefit. You did not receive any IRA statements during _____.

In early _____, you learned that the request form that you had completed on _____ only pertained to the Company Stock Account portion of Plan X and therefore, only resulted in a distribution of the Company B stock to your brokerage account with Company D. The diversified selection of mutual funds that comprised your ESOP Investment Account, 401(k) Account and Matching Contribution Account had remained in Plan X and could only be directly transferred to your IRA by completing and filing a separate, distribution/direct rollover request form. You filed that form in February _____.

2003, at which time your assets in the mutual funds held in Plan X were liquidated, and the proceeds were directly transferred from Plan X to your Company D IRA.

Based on these facts and representations, you request a ruling that:

1. The requirements of section 301.9100-3 of the Income Tax Regulations have been satisfied, and as a result:
2. You are entitled to have section 402(e)(4)(B) of the Code apply to the 2002 complete distribution of the Company B stock to you from Plan X pursuant to the request form;
3. Your gross income for _____ will not include the net unrealized appreciation with respect to the distributed Company B stock; and
4. You shall be regarded as having elected a section 401(a)(31) direct transfer of your ESOP Investment Account, 401(k) Account and Matching Contribution Account in

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.

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 1.402(a)-1(b)(1)(ii) of the regulations provides that securities of the employer corporation include securities of a parent or subsidiary corporation of the employer corporation.

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.

The regulations under sections 301.9100-1 through 301.9100-3 provide the standards the Commissioner of Internal Revenue will use to determine whether to grant an extension of time to make a regulatory election. These regulations also provide an automatic extension of time to make certain statutory elections. An extension of time is available for elections that a taxpayer is otherwise eligible to make.

Section 301.9100-1(b) of the regulations provides that the term "regulatory election" means an election whose due date is prescribed by a regulation published in the Federal Register, or a revenue ruling, revenue procedure, notice, or announcement published in the Internal Revenue Bulletin. A statutory election means an election whose due date is prescribed by statute.

Section 301.9100-2 of the regulations provides for an automatic extension of 12 months from the due date for making a regulatory election. Section 301.9100-2(a)(2) lists the specific regulatory elections which are eligible for the automatic extension.

Section 301.9100-3 of the regulations provides the requirements for requests for extensions of time for regulatory elections that do not meet the requirements of section 301.9100-2.

The rules of sections 301.9100-1 through 301.9100-3 apply to extensions of time to make regulatory or statutory elections. There is no election period regarding the determination of whether gross income from a qualified plan distribution would exclude the net unrealized appreciation attributable to that part of the distribution which consists of employer securities.

Accordingly we conclude, with regard to your first ruling request that:

1. The requirements of section 301.9100-3 of the regulations have not been satisfied.

In regard to your second and third ruling request, the request form which you completed on [redacted] only applied to a distribution in [redacted] of your shares in the Company Stock Account portion of Plan X. Since you did not receive the balance to your credit from Plan X within one taxable year, you did not receive a lump sum distribution as described in section 402(e)(4)(D) of the Code. Since you did not receive a lump sum distribution, the rules of section 402(e)(4)(B) of the Code, which provide 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, do not apply.

Accordingly we conclude, with respect to ruling requests two and three that:

2. You are not entitled to have section 402(e)(4)(B) of the Code apply to the 2002 complete distribution of the Company B stock to you from Plan X pursuant to the request form, and

3. Your gross income for [redacted] will include the net unrealized appreciation with respect to the distributed Company B stock.

Section 401(a)(31) of the Code provides that a trust shall not constitute a qualified trust under this section unless the plan of which such trust is a part provides, that if the distributee of any eligible rollover distribution elects to have such distribution paid directly to an eligible retirement plan and specifies the eligible retirement plan to which such distribution is to be paid (in such form and at such time as the plan administrator may prescribe), such distribution shall be made in the form of a direct trustee-to-trustee transfer to the eligible retirement plan so specified.

Section 402(c) of the Code provides that if 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, and the distributee transfers any portion of the property received in such distribution to an eligible retirement plan, then such distribution (to the extent so transferred) shall not be includible in gross income for the taxable year in which paid.

With regard to ruling request four, you have represented that your Plan X assets held in the ESOP Investment Account, 401(k) Account and Matching Contribution Account were liquidated, and the proceeds were directly transferred from Plan X to your Company D IRA. Therefore, with respect to ruling request four, we conclude that:

4. You shall not be regarded as having elected a section 401(a)(31) direct transfer of your ESOP Investment Account, 401(k) Account and Matching Contribution Account in

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 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.

If you wish to inquire about this ruling, please contact
Please address all correspondence to

Sincerely yours,



, Manager
Employee Plans Technical Group 3

Enclosures:

Deleted copy of ruling letter
Notice of Intention to Disclose