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

200540024

TAX EXEMPT AND
GOVERNMENT ENTITIES
DIVISION

JUL 11 2005

U.I.L. 408.03-00

SE:T:EP:RA:T2

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Legend:

Taxpayer A	= **********************
Taxpayer B	= **********************
Annuity Contract X	= *********************
Company N	= *********************
Amount D	= *********************
Amount E	= *********************
Account J	= *********************
Bank K	= *********************

Dear ********************:

This is in response to your letter dated December 7, 2004, as supplemented by correspondence dated February 10, 2005, February 24, 2005, and April 15, 2005, submitted on your behalf by your authorized representative, 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 penalties of perjury in support of your request.

Taxpayer A's spouse, Taxpayer B, was a participant in Annuity Contract X, a Code section 403(b) Tax Deferred Arrangement offered by her former employer. Annuity Contract X was issued by Company N. Taxpayer B became disabled in May 2004. Taxpayer A states that he was informed that Taxpayer B could qualify for Medicaid assuming that certain net worth conditions were met. In an effort to meet the requirements for Medicaid, Taxpayer A began to liquidate certain assets. In an application dated July 5, 2004, Taxpayer A, under a Durable Power of Attorney, requested that Company N distribute the entire value of Annuity Contract X to Taxpayer B. On August 11, 2004, Company N issued a check to Taxpayer B in the amount of Amount E (Amount D less Federal withholding). Documentation submitted with this request indicates that on August 17, 2004, Amount E was deposited into Account J, Taxpayer A's savings account, at Bank K. Taxpayer A states that the money was taken from Annuity Contract X to pay Taxpayer B's medical expenses. Taxpayer B died on October 23, 2004.

Taxpayer A states that after Taxpayer B's death, he discovered that if a distribution of the proceeds from Annuity Contract X had not been made to Taxpayer B prior to her death, that he, upon Taxpayer B's death as Taxpayer B's surviving spouse, would have been eligible to make a rollover of the proceeds from Annuity Contract X to an individual retirement arrangement (IRA) in his own name. Taxpayer A states that since the intended use of the money is no longer available, he should be allowed to put the proceeds into an IRA even though the 60-day rollover period has expired.

Based upon the foregoing, Taxpayer A requests that the Service waive the 60-day rollover requirement with respect to the distribution of Amount E from Annuity Contract X so that he can contribute the proceeds from such contract to an IRA in his own name.

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 employee's 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.

Section 402(c)(1) provides, generally, that if any portion of an eligible rollover distribution from a qualified employees 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, such distribution (to the extent so transferred) shall not be includible in gross income for 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)).

Section 402(c)(4) of the Code defined "eligible rollover distribution" as any distribution to an employee of all or a portion of the balance to the credit of an 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 of 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 the distribution is required under section 401(a)(9), and
>
> (B) any distribution which is made upon 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); 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).

Section 402(c)(3)(A) provides, generally, 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 distribute received the property distributed.

Section 402(c)(9) of the Code provides that 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 l.402(c)-2 of the Income Tax 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. Q&A-12 further provides that only IRAs described in sections 408(a) and (b) of the Code are treated as eligible retirement plans for purposes of spousal rollovers. Thus, a distribution to the surviving spouse of an employee is an eligible rollover distribution if it meets the applicable requirements of Code sections 402(c)(2) and (4) and the associated regulations.

Section 403(b)(8)(A) of the Code provides, in relevant part, that if any portion of the balance to the credit of an employee in an annuity contract described in section 403(b)(1) of the Code is paid to him in an eligible rollover distribution (within the meaning of section 402(c)(4)), the employee transfers any portion of the property he receives in such distribution to an individual retirement plan or to an annuity contract described in section 403(b)(1) of the Code, then such distribution (to the extent so transferred) will not be includible in the gross income of the employee in the taxable year that the distribution is paid,

Section 403(b)(8)B) of the Code provides, that rules similar to rules of paragraphs (2) through (7) of section 402(c) shall apply for purposes of section 403(b)(8)(A).

Section 402(c)(3)(B) of the Code provides that the Secretary may waive the 60-day rollover requirement under section 402(c)(3)(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 distributions that occur after December 31, 2001, are eligible for the waiver of under section 402(c)(3)(B).

Rev. Proc. 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), 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, or hospitalization, incarceration, restrictions imposed by a foreign country or postal error; (3) the use of 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.

Documentation submitted in this case shows that in August 2004, Company N issued a check to Taxpayer B in the amount of Amount E representing her entire interest in Annuity Contact X. Documentation submitted with this request also shows that Amount E was deposited into Account J, Taxpayer A's savings account, on August 17, 2004. Taxpayer A states that he intended to use Amount E to pay Taxpayer B's medical expenses; however, Taxpayer B died on October 23, 2004, before the proceeds of Annuity Contract X were used for such purpose. Amount E remains in Account J. Taxpayer A is Taxpayer B's surviving spouse and wants to roll over Amount E into an IRA in his own name.

In August 2004 when Company N distributed the entire proceeds of Annuity Contract X to Taxpayer B, Taxpayer A was not Taxpayer B's surviving spouse or Taxpayer B's beneficiary because Taxpayer A was still alive. Taxpayer A did not become Taxpayer B's surviving spouse and her beneficiary until October 23, 2004, a date which is subsequent to the date Company N distributed the proceeds of Annuity Contract X to her. Taxpayer A asks the Service to waive the 60-day rollover requirement under Code section 402(c)(3)(A) so that he can roll over the proceeds from Annuity Contract X into an IRA in his own name which he could have done if he had received a distribution of the proceeds from Annuity Contract X as Taxpayer B's surviving spouse.

Annuity Contract X was closed in August 2004 when Company N made a distribution of the entire proceeds of Annuity Contact X to Taxpayer B. When Taxpayer B died, Amount E was in Taxpayer A's savings account, which is not an eligible retirement plan as defined in Code section 402(c)(8). Under Code section 402(c)(9), section 402(c), including the rollover rules, applies to a distribution made from a retirement plan to the surviving spouse of an employee after the employee's death in the same manner as if the surviving spouse were the employee. Amount E was not received by Taxpayer A as Taxpayer B's surviving spouse and as such is not a qualifying distribution eligible for rollover treatment under Code section 402(c)(3). There is nothing in the Code or the Income Tax Regulations that would permit the Service to restore in Taxpayer A any options he may have been entitled to under Code section 402(c) as Taxpayer B's surviving spouse.

Under the circumstances presented in this case, the failure to waive the 60-day rollover requirement would not be against equity or good conscience. Therefore, the request to waive to 60-day rollover period is denied with respect to the distribution of Amount E from Annuity Contract X, and Amount E will not be considered a rollover contribution under Code section 402(c)(3)(A).

No opinion is expressed as to the tax treatment of the transactions described herein under the provisions of any other section of either the Code or regulations, which may be applicable thereto.

This ruling assumes that Annuity Contract X met the requirements of Code section 403(b) at all times relevant to this transaction.

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.

A copy of this ruling is being sent to your authorized representative in accordance with a power of attorney on file in this office.

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

Sincerely yours,

(signed) JOYCE E. FLOYD

Joyce E. Floyd, Manager
Employee Plans Technical Group 2

Enclosures:
Deleted copy of letter ruling
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