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

TAX EXEMPT AND
GOVERNMENT ENTITIES
DIVISION

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402.06-00
402.06-01

LEGEND:

Taxpayer A:

Company A:

Company B:

Company C:

Plan X:

Plan Y:

Plan Section U:

Trust T:

Country W:

Agency Z:

Treaty:

Exchange of Notes

Date 1:

Dear [redacted] :

This letter is in response to your request for letter rulings with respect to issues arising under the Treaty.

Facts:

Taxpayer A, a Country W citizen and national, and United States resident alien who is not a lawful permanent resident ("Green Card" holder), is currently an employee of Company A, a United States corporation. From 1991-2003, Taxpayer A was employed by Company B (a Country W Employer"), which is a member of the same controlled group of corporations as Company A. On January 1, 2004, Company B seconded Taxpayer A to the United States to work for Company A for a period expected to last five years.

Since 2001, Taxpayer A has been a participant in Plan X sponsored by Company B. Plan X, as amended, is currently embodied in Plan Section U of Plan Y which is sponsored by Company C. Plan X is funded through Trust T, and together Plan X and Trust T comprise what is collectively referred to herein as "Country W Scheme".

Plan X is a defined benefit plan that is an approved retirement benefits scheme for the purposes of Chapter I of part XIV of the Income and Corporation Taxes Act 1988 of Country W. The Country W Scheme requires both employer contributions and employee contributions, which are deductible (or excludable) for Country W income tax purposes by Company B and participating employees, respectively. In addition, participants are permitted to make additional voluntary contributions subject to limits imposed by Agency Z and the plan's trustees ("Trustees").

Company A sponsors a qualified defined benefit plan and a qualified defined contribution plan that includes a cash-or-deferred arrangement qualified under Internal Revenue Code section 401(k), but Taxpayer A does not participate in either plan.

Taxpayer A wishes to continue his active participation in the Country W Scheme for as long as he continues to be employed by Company A or any other U.S. affiliate of Company B. Such participation would require Taxpayer A to make employee contributions to the Country W Scheme. Company A and Company B intend that Company A would make related employer contributions to the Country W Scheme on behalf of Taxpayer A.

Taxpayer A's required contributions to the Country W Scheme would be 6 percent of his compensation in excess of 1.5 times the "Lower Earnings Limit" defined in Plan X. For 2005 and subsequent years, Taxpayer A represents that this would result in a

contribution of an amount expected to be less than the applicable limitation on the exclusion for elective deferrals prescribed by Code section 402(g).

Taxpayer A has requested the following rulings:

1. For purposes of Article 18 of the Treaty, the Country W Scheme generally corresponds to a pension scheme established in the United States.

2. For as long as Taxpayer A is resident in the United States but is not a United States citizen or permanent resident, employee contributions made by Taxpayer A under the provisions of the Country W Scheme will be deductible or excludable from Taxpayer A's income for U.S. income tax purposes.

3. Contributions made by Company A in satisfaction of the funding requirements relating to Taxpayer A's benefit accruals under the Country W Scheme will not create taxable income in the United States for Taxpayer A prior to the time Taxpayer A receives a distribution of his benefit from the Country W Scheme.

4. Income earned by Trust T will not constitute taxable income to Taxpayer A prior to the date such income is either paid to Taxpayer A or for Taxpayer A's benefit.

Law and Analysis

Code section 402(g)(1), in summary, sets forth the limits on the amount of elective deferrals an individual taxpayer may make for a taxable year.

Code section 404(a), in pertinent part, sets forth the rules governing deductions for contributions of an employer made to retirement plans qualified within the meaning of Code section 401(a).

Code section 415, in pertinent part, sets forth the limitations on contributions and other additions that may be made with respect to a participant to defined contribution plans qualified within the meaning of Code section 401(a), and on benefits that may be provided to a participant by defined benefit plans qualified within the meaning of Code section 401(a).

Paragraph 1(o) of Article 3 (General Definitions) of the Treaty provides that the term "pension scheme" means any plan, scheme, fund, trust or other arrangement established in a Contracting State which is both generally exempt from income taxation in that State and operated principally to administer or provide pension or retirement benefits or to earn income for the benefit of one or more such arrangements.

Paragraph 1 of Article 18 (Pension Schemes) of the Treaty provides that where an individual who is a resident of a Contracting State is a participant in a pension scheme established in the other Contracting State, income earned by the pension scheme may be taxed as income of that individual only when, and, subject to paragraphs 1 and 2 of Article 17 (Pensions, Social Security, Annuities, Alimony, and Child Support) of the Treaty, to the extent that, it is paid to, or for the benefit of, that individual from the pension scheme (and not transferred to another pension scheme).

Paragraph 2 of Article 18 of the Treaty provides that where an individual who is a participant in a pension scheme established in a Contracting State exercises an employment or self-employment in the other Contracting State:

a) contributions paid by or on behalf of that individual to the pension scheme during the period that he exercises an employment or self-employment in the other State shall be deductible (or excludible) in computing his taxable income in that other State; and

b) any benefits accrued under the pension scheme, or contributions made to the pension scheme by or on behalf of the individual's employer, during that period shall not be treated as part of the employee's taxable income and any such contributions shall be allowed as a deduction in computing the business profits of his employer in that other State.

The reliefs available under this paragraph shall not exceed the reliefs that would be allowed by the other State to residents of that State for contributions to, or benefits accrued under, a pension scheme established in that State.

[Emphasis added]

Paragraph 3 of Article 18 of the Treaty provides that the provisions of Article 18(2) shall not apply unless:

a) contributions by or on behalf of the individual, or by or on behalf of the individual's employer, to the pension scheme (or to another similar pension scheme for which the first-mentioned pension scheme was substituted) were made *before the individual began to exercise an employment or self-employment in the other State*; and

b) the competent authority of the other State has agreed that the pension scheme generally corresponds to a pension scheme established in that other State.

[Emphasis added]

The Exchange of Notes to the Treaty provides that, with reference to Article 18(3)(b) and 18(5)(d) of the Treaty, the pension schemes listed with respect to a Contracting State in the Exchange of Notes in connection with Article 3(1)(o) shall generally correspond to the pension schemes listed in the Exchange of Notes with respect to the other Contracting State.

The Exchange of Notes provides that, with reference to Article 3(1)(o) of the Treaty, it is understood that pension schemes *shall include the following* and any identical or substantially similar schemes which are established pursuant to legislation introduced after the date of signature of the Convention:

a) under the law of Country W, *employment-related arrangements* (other than a social security scheme) *approved as retirement benefit schemes for the purposes of Chapter I of Part XIV of the Income and Corporation Taxes Act 1988*, and personal pension schemes approved under Chapter IV of Part XIV of that Act; and

b) under the law of the United States, qualified plans under section 401(a) of the Internal Revenue Code, individual retirement plans (including individual retirement plans that are part of a simplified employee pension plan that satisfies section 408(k), individual retirement accounts, individual retirement annuities, section 408(p) accounts, and Roth IRAs under section 408A), section 403(a) qualified annuity plans, and section 403(b) plans.

[Emphasis added]

With respect to ruling request one, pursuant to the Exchange of Notes with reference to Articles 3(1)(o) and 18(3)(b), Country W pension schemes eligible for the benefits of Article 18(2) of the Treaty include employment-related arrangements approved as retirement benefit schemes for the purposes of Chapter I of Part XIV of the Income and Corporation Taxes Act 1988. Taxpayer A has submitted an approval letter dated Date 1, 2002 from Agency Z, which indicates that Plan X has been approved as a retirement benefits scheme for the purposes of Chapter I of Part XIV Income and Corporation Taxes Act 1988. Accordingly, Plan X generally corresponds to a pension scheme established in the United States.

With respect to ruling request two, contributions were made to the Country W Scheme by Taxpayer A and Company A prior to the time Taxpayer A began to exercise employment in the United States, and, as discussed above, the Country W Scheme

generally corresponds to a pension scheme established in the United States. Therefore, both of the requirements of Article 18(3) are met.

Accordingly, Article 18(2)(a) applies, with the result that contributions paid by or on behalf of Taxpayer A to the Country W Scheme during the period that he exercises an employment in the United States will be deductible (or excludable) in computing his U.S. taxable income. However, the amount of the deduction or exclusion allowed to Taxpayer A may not exceed the deduction or exclusion that would be allowed under U.S. law to U.S. residents for contributions to, or benefits accrued under, a pension scheme established in the United States.

Thus, the Service's response to ruling request two applies only to the extent Taxpayer A's contributions to Plan X do not exceed the limits found in Code section 402(g)(1)(B) as has been represented by Taxpayer A's authorized representative will be the case and only "so long as Taxpayer A is a United States resident but not a United States citizen or lawful permanent resident".

With respect to ruling request three, as outlined in the discussion of ruling request two, above, both of the requirements of Article 18(3) are met. Therefore, Article 18(2)(b) applies, with the result that any benefits accrued under the Country W Scheme, or contributions made to the Country W Scheme by or on behalf of Company A during the period that Taxpayer A exercises an employment in the United States will not be treated as part of Taxpayer A's taxable income.

However, as provided in ruling request two, the reliefs allowed to Taxpayer A under Article 18(2)(b) may not exceed the reliefs that would be allowed under U.S. law to U.S. residents for contributions to, or benefits accrued under, a pension scheme established in the United States. Thus, the limitations of Code sections 404, 415, and 402(g) apply.

In addition, the Service's response to ruling request 3 applies "so long as Taxpayer A is a U.S. resident but not a U.S. citizen or lawful permanent resident" because, as was the case with Article 18(2)(a), Taxpayer A cannot claim the benefits of Article 18(2)(b) unless he is a resident of one of the Contracting States and not a U.S. citizen or lawful permanent resident. This caveat is based upon and tied to the limiting language at the end of Article 18(2) of the Treaty.

With respect to ruling request four, Article 18(1) provides that because Taxpayer A is a United States resident who is a participant in a pension scheme established in Country W, income earned by the Country W Scheme may be taxed as income of Taxpayer A only when, and subject to Article 17(1) and (2) of the Treaty, to the extent that it is paid to, or for the benefit of, Taxpayer A from the Country W Scheme (and not transferred to another pension scheme). Accordingly, the income earned by Trust T will not be

taxable to Taxpayer A prior to a distribution event.

Accordingly, based on the facts submitted by Taxpayer A's representative, and the Treaty analysis set forth previously, we conclude with respect to Taxpayer A's letter ruling requests as follows:

1. For purposes of Article 18 of the Treaty, the Country W Scheme generally corresponds to a pension scheme established in the United States.

2. For as long as Taxpayer A is resident in the United States but is not a United States citizen or permanent resident, employee contributions made by Taxpayer A under the provisions of the Country W Scheme will be deductible or excludable from Taxpayer A's income for United States income tax purposes to the extent Taxpayer A's contributions to Plan X do not exceed the limits found in Code Section 402(g).

3. For as long as Taxpayer A is resident in the United States but is not a United States citizen or permanent resident, contributions made by Company A in satisfaction of the funding requirements relating to Taxpayer A's benefit accruals under the Country W Scheme will not create taxable income in the United States for Taxpayer A prior to the time Taxpayer A receives a distribution of his benefit from the Country W Scheme to the extent that the limitations of Code Sections 404, 415 and 402(g) are not exceeded.

4. Income earned by Trust T will not constitute taxable income to Taxpayer A prior to the date such income is either paid to Taxpayer A or for Taxpayer A's benefit.

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 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 , Esquire, (I.D. [redacted] at [redacted] (phone-not a toll-free number), or [redacted] (FAX) . Please address any correspondence to SE:T:EP:RA:T3.

Sincerely yours,

Frances V. Sloan

Frances V. Sloan, Manager
Employee Plans Technical Group 3

Enclosures:
Deleted copy of letter ruling
Notice of Intention to Disclose