



TAX EXEMPT AND
GOVERNMENT ENTITIES
DIVISION

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

APR 02 2004

Uniform Issue List Numbers: 402.08-00; 402.00-00

Legend:

- Taxpayer A = *****

- Taxpayer B = *****

- Employer = *****

- Amount D1 = *****
- Amount D2 = *****
- Amount D3 = *****
- Amount D4 = *****
- Amount D5 = *****
- Company E = *****
- Company F = *****
- Custodian = *****
- Plan X = *****
- IRA Y = *****

Dear *****:

This is in response to a letter dated ***** , as supplemented by additional correspondence and communications dated ***** , in which Taxpayer A requests, through her authorized representative, a waiver of the 60-day rollover requirement contained in section 402(c)(1)(B) of the Internal Revenue Code ("the Code").

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

On *****, Taxpayer A retired after ** years of service with the Employer, including ** years of participation in Plan X, the Employer's qualified retirement plan. On *****, Company E, the Employer's third-party plan administrator provided a "Benefit Election Form" to assist Taxpayer A in initiating the process of taking a distribution of her benefits from Plan X. Included with the Benefit Election Form was a letter from Company E, advising Taxpayer A that her distribution from the Plan would be delayed if it was not "processed" before *****.

On *****, Taxpayer A, with assistance from a representative of the Custodian (a local federal credit union), signed the Benefit Election Form, directing the Administrator of Plan X to transfer all of her Plan X assets (Amount D1), in a lump-sum direct rollover, into an individual retirement account ("IRA") established with the Custodian. At the same time Taxpayer A's spouse, Taxpayer B, executed a spousal consent for the benefits to be paid in a lump sum, rather than as a joint and survivor annuity. However, because the Employer was in the process of changing plan administrators, Taxpayer A received neither a direct distribution nor a rollover distribution from Plan X during the _____ calendar year.

Almost one year later, on _____, Taxpayer A received a new set of forms entitled "*****" from her former Employer, on behalf of its new third-party Administrator, Company F. Once again, Taxpayer A indicated that she wanted the entire amount of her Plan X benefits paid as a direct rollover into the IRA she had established with the Custodian. Also, Taxpayer A completed another portion of the Company F distribution form indicating that she wanted the "direct deposit" of the "cash portion of your distribution." Taxpayer A thought that she was requesting a direct deposit into her IRA account; in fact, the direct deposit election in the Form was intended for a participant taking a Plan X distribution in cash. And when, in _____, a representative of her former Employer contacted Taxpayer A about her elections, she once again indicated that she wanted "direct deposit."

Based on Taxpayer A's oral instructions, her Plan X assets were transferred into her savings account with the Custodian, rather than into her IRA. Taxpayer A recalls that she had a five-minute telephone call with the Company F representative, but that that individual never explained to her the tax consequences that would result if she elected the IRA Rollover versus the Direct Deposit options on Company F's forms. Because Taxpayer A believed that her retirement benefits could be deposited directly into the IRA that she had already established with the Custodian, she agreed to the direct deposit option. On _____, Company F direct deposited Amount D5 into Taxpayer A's personal savings account, after withholding amount D4 and sending it to the IRS. Taxpayer A learned that her Plan X distribution had been transferred into her savings account rather than into her IRA on or about _____. Company F

refused to alter the distribution on the grounds that Amount D4 already had been submitted to the IRS. Taxpayer A also withdrew Amount D2 from the savings account, an amount representing approximately 10 percent of the total distribution from Plan X, during the taxable year of the distribution. It is noted that, at no time did Company F or Taxpayer A's former Employer solicit and receive from Taxpayer B a waiver of his joint and survivor annuity rights in relation to the direct deposit of Taxpayer A's lump sum distribution into her personal savings account. However, Taxpayer B, with this request, has waived his joint and survivor annuity rights with respect to any funds, previously distributed from Plan X and rolled into the IRA Y established by his spouse.

Based on the facts and representations recited above, you request that the Service waive the 60-day rollover requirement with respect to the distribution of Amount D1 from Plan X and authorize its deposit into IRA Y, because failure to waive such requirement would be against equity or good conscience.

Code § 402(a) provides that any amount actually distributed to any distributee by an employees' trust described in § 401(a), which is exempt from tax under § 501(a), shall be taxable to the distributee, in the taxable year in which distributed, under Code § 72 (relating to annuities).

Code §§ 401(a)(31) and 402(c) define and provide the rules applicable to rollovers of distributions from plans qualified under § 401(a) to other eligible retirement plans.

Code § 401(a)(31) generally provides that a plan is not a qualified plan unless it provides that if a distributee of any eligible rollover distribution elects to have such distribution paid directly into an eligible retirement plan and specifies the plan to which such distribution is to be paid, then such distribution shall be made in the form of a direct trustee-to-trustee transfer to the eligible retirement plan so specified.

Code § 402(c)(1) provides that § 402(a) shall not apply to a distribution from a qualified plan, if—

(A) all or 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 to an eligible retirement plan, and

(C) in the case of a distribution of property other than money, the transfer consists of the property distributed.

Code § 402(c)(4) defines an "eligible rollover distribution" as a distribution to an employee of all or any portion of the balance to the credit of the employee in a qualified trust; except that such term does not include any distribution that is: (i) one

of a series of substantially equal periodic payments, (ii) required under Code § 401(a)(9), or (iii) made upon the hardship of the employee.

In pertinent part, Code § 402(c)(8)(B) includes in its definition of an "eligible retirement plan" an individual retirement account described in § 408(a), and an individual retirement annuity described in § 408(b).

Code § 402(c)(3)(A) provides that § 402(c)(1) shall only apply to an amount actually distributed from a qualified trust if all or a portion of the distribution is transferred into an eligible retirement plan no later than the 60th day following the day on which the distributee received the property distributed.

Code § 402(c)(3)(B) provides that the Secretary of the Treasury may waive the 60-day requirement of § 402(c)(3)(A) in "hardship" situations where 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.

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 Code § 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, 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 presented in this case demonstrates that Taxpayer A clearly and repeatedly expressed in writing her intention to have the eligible rollover distribution from Plan X rolled over into IRA Y, an eligible retirement plan. However, the administrator of Plan X failed to follow Taxpayer A's written instructions based on a brief oral conversation about "direct deposit," after which the distribution from Plan X was transferred to A's personal savings account rather than into IRA Y. Moreover, Taxpayer A was only apprised of this failure to roll over the assets from Plan X into IRA Y by a representative of the Custodian, after the expiration of the 60-day time period mandated by statute for completion of such transactions. Accordingly, it is concluded that the failure, by the administrator of Plan X, to deposit Taxpayer A's eligible distribution (Amount D1) into IRA Y was beyond the reasonable control of Taxpayer A; the failure to waive the 60-day requirement would, therefore, be against equity and good conscience.

However, it is further noted that, subsequent to her receiving her Plan X distribution by "direct deposit" into her personal savings account, Taxpayer A chose to withdraw and make use of a portion (Amount D2) of that eligible distribution during the

calendar year. By so doing, Taxpayer A elected to treat Amount D2 as a distribution within the meaning of Code § 402(a). Amount D2 is, therefore, taxable to the distributee, in the taxable year in which distributed, under Code § 72.

Therefore, pursuant to Code § 402(c)(3)(B), the Service hereby waives the 60-day rollover requirement with respect to Amount D3 (Amount D1 reduced by Amount D2) erroneously distributed from Plan X into Taxpayer A's personal savings account. Taxpayer A is granted a period of 60 days from the issuance of this ruling letter to contribute Amount D3 into IRA Y with the Custodian, or into another rollover IRA established for the purpose of receiving the distribution. Provided all other requirements of Code § 402(c), except the 60-day requirement, are met with respect to such contributions, these amounts will be considered rollover contributions within the meaning of Code § 402(c)(1).

No opinion is expressed as to the tax treatment of the transaction described herein under the provisions of any section of either the Code or regulations which may be applicable thereto, other than the provisions directly cited in this ruling.

This letter is directed only to the taxpayer who requested it. Code § 6110(k)(3) provides that it may not be used or cited as precedent.

If you wish to inquire about this ruling, please *****
***** address all correspondence to
SE:T:EP:RA:T1.

A copy of this letter and other documents pertinent to this private letter ruling have been sent to your authorized representative in accordance with a power of attorney on file in this office.

Sincerely,

Carlton A. Watkins, Manager
Employee Plans Rulings & Agreements
Technical Group 1

Enclosures:

- ▶ Deleted copy of this letter
- ▶ Notice of Intention to Disclose
- ▶ Copy of Notification Letter to Authorized Representative