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

TAX EXEMPT AND
GOVERNMENT ENTITIES
DIVISION

UIL No: 401.00-00

AUG. 28, 2002

T:EP:RA:T4

LEGEND:
Partnership A
Plan X
State Y

Dear :

This letter is in response to your ruling request dated May 31, 2002, concerning whether partners in Partnership A can make elective contributions to Plan X from periodic advances received during the year.

The following facts and representations have been submitted:

Partnership A is engaged in the practice of law with principal operations located in State Y. Partnership A sponsors Plan X for the benefit of its common-law employees and partners. Plan X is qualified under section 401(a) of the Code and the related trust is exempt from tax under section 501(a) of the Code. Plan X contains a "cash or deferred arrangement" in accordance with Treasury regulations promulgated under section 401(k) of the Code. Partnership A and Plan X operate on a fiscal year ending .

Plan X provides that a partner may elect to reduce his/her distributive share of profits from Partnership A by contributing all or a portion of such share to Plan X. Such contributions of each partner are limited by section 402(g) of the Code.

Plan X defines "earnings" with respect to a partner as the partner's distributive share of the net income of Partnership A determined after deducting contributions under Plan X for common-law employees, but before deducting contributions under the plan for each partner.

Partnership A makes periodic advances of earnings to each partner throughout the plan year. These advances are designed to be equivalent to periodic payments of compensation to each partner as if such partner were a common-law employee. Partnership A intends to withhold an amount from each partner's periodic advances, where such partner has made a "deferral election," and contribute such amount to Plan X.

Based on the foregoing facts and representations, you request a ruling that contributions made from periodic advances of each partner throughout the year, pursuant to an election of the partner, are "elective contributions" under section 401(k) of the Code.

Treasury Regulation section 1.401(k)-1(a)(4) defines a "qualified cash or deferred arrangement" as an arrangement that satisfies the requirements of section 401(k) and is part of a plan that satisfies the requirements of section 401(a) of the Code.

Treasury Regulation section 1.401(k)-1(a)(6)(i) provides that a partnership may maintain a cash or deferred arrangement and individual partners may make cash or deferred elections with respect to compensation attributable to services rendered to the partnership.

Treasury Regulation section 1.401(k)-1(a)(6)(ii) provides that the term "cash or deferred arrangement" includes "any arrangement that directly or indirectly permits individual partners to vary the amount of contributions made on their behalf."

Section 401(c)(4) provides that a partnership is treated as an employer of any partner treated as an employee under section 401(c)(1).

Section 401(c)(1)(A) provides that the term "employee" includes an individual who is a "self-employed individual" for any taxable year.

Section 401(c)(1)(B) provides that a "self-employed individual" means an individual who has "earned income" for such taxable year.

Section 401(c)(2) provides generally that "earned income" means the "net earnings from self-employment" (as defined in section 1402(a)).

Section 1402(a) provides generally that the "net earnings from self-employment" means the gross income derived by an individual from any trade or business carried on by such individual, less the deductions which are attributable to such trade or business, plus his distributive share (whether or not distributed) of income or loss from any trade or business carried on by a partnership of which he is a member.

Treasury Regulation section 1.401(k)-1(a)(3)(ii) provides that a cash or deferred election can only be made with respect to an amount that is not currently available to an employee on the date of the election.

Treasury Regulation section 1.401(k)-1(a)(6)(ii) (B) provides that for purposes of section 1.401(k)-1(a)(3)(ii), a partner's compensation is deemed currently available on the last day of the partnership's taxable year. Accordingly, an individual partner may not make a cash or deferred election with respect to compensation for a partnership taxable year after the last day of that year.

Treasury Regulation section 1.401(k)-1(a)(3)(i) provides generally that a cash or deferred election is any election by an employee to have an employer either (i) contribute an amount to a trust under a plan deferring the receipt of compensation, or (ii) provide an amount to the employee in the form of cash or other taxable benefit that is not currently available.

Treasury Regulation section 1.401(k)–1(g)(3) provides generally that an "elective contribution" is an employer contribution that is subject to a cash or deferred election, was made under a cash or deferred arrangement, and was not currently available to the employee.

In this case, a partner can elect to have the partnership contribute an amount to Plan X (rather than receive an amount in cash) and such amount is not currently available.

Accordingly, we rule that contributions to Plan X made from periodic advances of each partner throughout the year, pursuant to an election of the partner, are "elective contributions" under section 401(k) of the Code, assuming the cash or deferred arrangement otherwise satisfies the applicable qualification requirements of section 401(k) of the Code.

This letter expresses no opinion as to whether Plan X in form or operation satisfies the requirements for qualification under section 401(a) of the Code. The determination as to whether a plan is qualified under section 401(a) is within the jurisdiction of the Manager, EP Determinations.

If you have any questions, please contact at .

Sincerely yours,

Alan Pipkin
Manager, Technical Group 4

Enclosures:

Deleted Copy of this Letter
Notice of Intention to Disclose