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

TAX EXEMPT AND
GOVERNMENT ENTITIES
DIVISION

OCT 29 2002

Uniform Issue List: 408.06-00

T:EP:RA:T4

Legend:

Taxpayer A =

Taxpayer B =

Trust D =

IRA X =

IRA Y =

Dear

This is in response to a ruling request dated July 9, 2002, submitted on your behalf by your authorized representative, as supplemented by correspondence dated September 23, 2002, in which you request rulings under section 408(d) of the Internal Revenue Code (the "Code"). By virtue of the correspondence dated September 23, 2002, our office is not considering the third ruling request contained in your original submission related to section 72(s)(3) of the Code. The Office of Chief Counsel will handle that ruling request independently.

The following facts and representations have been submitted in support of the rulings requested:

Taxpayers A and B were married. On May 5, 1995, Taxpayers A and B created Trust D, a revocable, inter vivos trust. Taxpayers A and B were the grantors, co-trustees, and beneficiaries of Trust D. The trust agreement provided that the survivor of Taxpayer A and Taxpayer B would be the surviving grantor/trustee and sole beneficiary of Trust D. Subsequently, Taxpayer A named Trust D the beneficiary of her IRA X. Taxpayer A

died on .

Trust D is an A/B type trust which, upon the first death of a grantor is to be divided into two subtrusts, "Subtrust E", a survivor's trust, and "Subtrust F", a credit shelter trust. Taxpayer B, as surviving grantor/trustee, has the power of allocation between subtrusts of Trust D and is the trustee and beneficiary of both subtrusts. With respect to Subtrust F, Taxpayer B is entitled to all net income to that trust and can invade the principal on an unascertainable standard. Further, Taxpayer B has the right to withdraw the entire or any amount of income and/or principal from Subtrust E, and this right cannot be limited by trustee discretion.

Taxpayer B, as surviving spouse, proposes to take the following steps with respect to the proceeds of IRA X: accept receipt of the proceeds of IRA X as surviving trustee of Trust D; allocate said proceeds to Subtrust E; withdraw from Subtrust E the proceeds of IRA X, and, within 60 days of the receipt of the proceeds of IRA X, roll over the funds into IRA Y.

Based upon the foregoing, your authorized representative has requested rulings that:

1. The proceeds of IRA X to be distributed from Subtrust E to Taxpayer B do not represent an inherited IRA within the meaning of section 408(d)(3)(C) of the Code and that, for purposes of section 408(d)(3) of the Code, Taxpayer B will be treated as having acquired the IRA X proceeds from Taxpayer A and not from Trust D; and

2. Pursuant to section 408(d) of the Code, none of the proceeds of IRA X will be includable in the gross income of Taxpayer B for Federal income tax purposes for the year in which such proceeds are distributed to him when those amounts are contributed (rolled over) to IRA Y.

With respect to your ruling requests, section 408(d)(1) of the Code provides that, except as otherwise provided in this subsection, any amount paid or distributed out of an individual retirement plan shall be included in gross income by the payee or distributee, as the case may be, in the manner provided under section 72.

Section 408(d)(3) of the Code provides that section 408(d)(1) does not apply to a rollover contribution if such contribution satisfies the requirements of sections 408(d)(3)(A) and (d)(3)(B).

Section 408(d)(3)(A)(i) provides that section 408(d)(1) does not apply to any amount paid or distributed out of an IRA to the individual for whose benefit the account is maintained if the entire amount received (including money and any other property) is paid into an IRA (other than an endowment contract) for the benefit of such individual

not later than the 60th day after the day on which he receives payment or distribution.

Section 408(d)(3)(C)(i) of the Code provides, in pertinent part, that, in the case of an inherited IRA, section 408(d)(3) shall not apply to any amount received by an individual from such account (and no amount transferred from such account to another individual retirement account shall be excluded from income by reason of such transfer), and such inherited account shall not be treated as an IRA for purposes of determining whether any other amount is a rollover contribution.

Section 408(d)(3)(C)(ii) of the Code provides that an IRA shall be treated as inherited if the individual for whose benefit the account is maintained acquired such account by reason of the death of another individual, and such individual was not the surviving spouse of such other individual. Thus, pursuant to section 408(d)(3)(C)(ii), a surviving spouse who acquires individual retirement account proceeds from and by reason of the death of her husband, may elect to treat those individual retirement account proceeds as her own and roll them over into her own individual retirement account.

On April 17, 2002, "Final" regulations were published under Code sections 401(a)(9) and 408(a)(6) in the Federal Register at 67 Federal Register 18987-19028. The Preamble to the "Final" regulations provides, in relevant part, that the "Final" regulations apply for determining required distributions for calendar years beginning on or after January 1, 2003. For determining required distributions for calendar year 2002, taxpayers may rely upon the 1987 proposed regulations, the 2001 proposed regulations, or the "Final" regulations. The Service is issuing this letter ruling pursuant to the 1987 proposed regulations.

Q&A-4 of section 1.408-8 of the 1987 Proposed Income Tax Regulations ("regulations") provides that a surviving spouse is the only individual who may elect to treat a beneficiary's interest in an individual retirement account as the beneficiary's own account. If a surviving spouse makes such an election, the spouse's interest in the account would then be subject to the distribution requirements of section 401(a)(9)(A), rather than those of section 401(a)(9)(B) of the Code. Q&A-4 further provides, in pertinent part, that an election will be considered to have been made by a surviving spouse if either of the following occurs: (1) any required amounts in the account (including any amounts that have been rolled over or transferred, in accordance with the requirements of section 408(d)(3)(A)(i), into an individual retirement account for the benefit of such surviving spouse) have not been distributed within the appropriate time period applicable to the decedent under section 401(a)(9)(B), or (2) any additional amounts are contributed to the account (or to the account or annuity to which the surviving spouse has rolled such amounts over, as described in (1) above) which are subject, or deemed to be subject, to the distribution requirements of section 401(a)(9)(A). The result of such an election is that the surviving spouse shall then be considered the individual for whose benefit the trust is maintained.

Q&A-4 of section 1.408-8 of the 1987 proposed regulations provides that a surviving spouse may elect to treat the entire IRA of his deceased spouse as his IRA. Q&A-4 lists actions by which a surviving spouse makes said actions. The actions listed in Q&A-4 are not the exclusive methods by which such an election is made.

In this case, Taxpayer B intends to exercise his right as beneficiary of Subtrust E to withdraw the proceeds of Taxpayer A's IRA X and thereafter take action sufficient to have the proceeds of IRA X paid to himself. Then, Taxpayer B intends to roll over the proceeds of IRA X to IRA Y. Said rollover will occur within 60 days of receipt of the IRA X proceeds by Trust D.

In this instance, although Trust D is the named beneficiary of Taxpayer A's IRA X, Taxpayer B has the right to allocate funds between Subtrust E and Subtrust F upon the division of Trust D at Taxpayer A's death, and to withdraw all of the principal of Trust D from Subtrust E.

As a general rule, when the assets of a deceased's IRA pass to a third party, e.g., a trust, and then are distributed to a surviving spouse, the spouse will be treated as having received the assets from the third party and not from the decedent. As a result, under the general rule, the spouse will not be able to take advantage of the provisions of section 408(d)(3) of the Code.

However, in this case, Taxpayer B, Taxpayer A's surviving spouse, has complete control and dominion over Trust D and Subtrust E and over the disposition of Trust D's and Subtrust E's assets. We believe that this control results in the inapplicability of the general rule.

Since the general rule above does not apply in this case, we believe that Taxpayer B is eligible to roll over said IRA X distribution into an IRA set up an maintained in his own name. Furthermore, we believe Taxpayer B's rolling over said IRA X distribution into an IRA set up and maintained in his own name constitutes an election to treat said IRA X as his own IRA.

Thus, we conclude with respect to your ruling requests, as follows:

1. That the proceeds of IRA X to be distributed from Subtrust E to Taxpayer B do not represent an inherited IRA within the meaning of section 408(d)(3)(C) of the Code and that, for purposes of section 408(d)(3) of the Code, Taxpayer B will be treated as having acquired the IRA X proceeds from Taxpayer A and not from Trust D; and

2. That pursuant to section 408(d) of the Code, none of the proceeds of IRA X will

be includible in the gross income of Taxpayer B for Federal income tax purposes for the year in which such proceeds are distributed to him when those amounts are contributed (rolled over) to IRA Y, an IRA maintained by Taxpayer B.

This ruling letter assumes that Taxpayer A's IRA X meets the requirements of section 408(a) of the Code. It also assumes that the rollover of the distribution from Taxpayer A's IRA X to Taxpayer B's IRA Y will take place in a timely fashion. Finally, it assumes that IRA Y, set up and maintained in the name of Taxpayer B, will meet the requirements of section 408(a) of the Code.

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 that 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.

This ruling letter was prepared by of this Group. He may be contacted at .

Pursuant to a power of attorney on file with this office, the original ruling letter is being sent to your authorized representative.

Sincerely yours,

Alan C. Pipkin
Manager, Technical Group 4
Employee Plans