199947037

Internal Revenue Service

Department of the Treasury

Washington, DC 20224

Uniform Issue List: 401.0000

Person to Contact:

Telephone Number:

Refer Reply to:

OP:E:EP:T:3

Date: AUG 30 1999

Att'n:

Legend:

Corporation A =

Corporation B =

Unit C =

Unit D =

Unit E =

Plan X =

Dear

This is in response to your request for a ruling, dated December 7, 1998, supplemented by letters dated January 20, 1999, and February 16, 1999, submitted by your authorized representative concerning distributions from a plan described in section 401(k) of the Internal Revenue Code. Your authorized representative submitted the following facts and representations in support of the requested ruling.

Corporation A maintains Plan X, a profit-sharing plan which includes a cash or deferred arrangement ("CODA") as described in section 401(k) of the Code. Plan X is qualified under section 401(a) of the Code.

Until November 6, 1998, Corporation A conducted its business operations through three business divisions: Unit C, Unit D, and Unit E. Unit C, historically, was a separate profit center. It employed its own accountant and maintained separate accounting, financial, and billing functions. Unit C conducted its own purchasing, customer service, and payroll functions. Separate income statements were prepared for Unit C, and Unit C had a separate capital budget. The assets and liabilities attributable to Unit C were specifically identified. Unit C maintained its own sales staff. Unit C conducted and was responsible for its own marketing expense. Unit C was managed by its own full time manager, who made all personnel and staffing decisions.

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Under an Asset Purchase Agreement dated October 28, 1998, as amended, Corporation A sold more than 85 percent of the assets of Unit C to Corporation B, an unrelated corporation. These assets included Unit C's real estate leasehold interests, all equipment, inventory, equipment leases, all prepaid items, intangible personal property, good will, books and records, and accounts receivable. Plan X will make lump sum distributions soon thereafter to the former Unit C employees who have been hired by Corporation B. Plan X will make no distributions to the employees who have continued employment with Corporation A.

Corporation A agreed not to compete in the business formerly engaged in by Unit C. This noncompete agreement in no way restricts Corporation A from continuing to conduct its Unit D and Unit E operations. Corporation A will continue to maintain Plan X for the benefit of its employees in Unit D and Unit E.

Plan X has been amended to provide, generally, for the distribution of a participant's vested account balance under the Plan upon the sale by Corporation A, of substantially all of the assets used by such corporation in a trade or business of the corporation, to an unrelated corporation which does not maintain the Plan, but only with respect to a participant who continues employment with the corporation acquiring such assets. Plan X, as amended, will also provide that such distributions shall be made in the form of a lump sum to the affected participants no later than the end of the second calendar year after the calendar year in which the sale occurred.

Based on the foregoing facts and representations, you have requested the following rulings:

(1) That the disposition of the assets of Unit C by Corporation A is the disposition of substantially all of the assets used by Corporation A in a trade or business within the meaning of section 401(k)(10)(A)(ii) of the Code.

(2) That the proposed distributions by Plan X attributable to employer contributions to former employees of Corporation A who continue employment with Corporation B are made in accordance with section 401(k)(2)(B) of the Code.

Section 401(k)(2)(B)(i) of the Code provides, in relevant part, that distributions from a qualified cash or deferred arrangement may not be made earlier than the occurrence of certain stated events. Section 401(k)(2)(B)(i)(II) of the Code, when read together with section 401(k)(10)(A)(ii), further provides that one of these distributable events is the disposition by a corporation of substantially all its assets (within the meaning of section 409(d)(2)) used by such corporation in a trade or business of such corporation to an unrelated corporation, but only with respect to an employee who continues employment with the corporation acquiring such assets.

Section 1.401(k)-l(d)(4) of the Income Tax Regulations provides rules applicable to distributions upon the sale of assets. Section 1.401(k)-1(d)(4) of the regulations provides, in relevant part, that (i) the seller must maintain the plan, and the purchaser may not maintain the plan after the disposition; (ii) the employee receiving the distribution must continue employment with the purchaser of the assets; (iii) the distribution must be in connection with the disposition of the assets; and (iv) the sale of substantially all the assets used in a trade or business means the sale of at least 85 percent of the assets, and an unrelated entity is one that is not required to be aggregated with the seller under Code sections 414(b), (c), (m), or (o) after the sale or other disposition. Section 1.401(k)-1(d)(5) of the regulations provides, in part, that a distribution may be made only if it is a lump sum distribution within the meaning of section 402(d)(4) of the Code.

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In the present case, Corporation A will dispose of Unit C, which, based on all the facts and circumstances presented herein, has been determined to be a trade or business as that term is used in section 401(k)(10)(A)(ii) of the Code. At least 85 percent of Unit C's assets will be sold to Corporation B. You have represented that Corporation A will continue to maintain Plan X after the sale and that Plan X will make the proposed distributions to the participants who are employed by Corporation B. You have represented that these amounts are being distributed as a lump sum distribution to former employees who continue employment with Corporation B in accordance with the terms of Plan X.

Accordingly, with respect to rulings one and two, we conclude that (1) the sale of Unit C by Corporation A, will result in a disposition by Corporation A of substantially all the assets used by it in a trade or business within the meaning of section 401(k)(10)(A)(ii) of the Code, and (2) that distributions by Plan X to former employees of Unit C who continue employment with Corporation B are made in accordance with section 401(k)(2)(B) of the Code.

This ruling is directed only to the taxpayer who requested it. Section 6110(k)(3) of the Internal Revenue Code provides that it may not be used or cited by others as precedent. This ruling is based on the assumption that Plan X continues to be qualified under section 401(a) of the Code at all relevant times.

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

Sincerely yours,

Frances V Sloan

Frances V. Sloan
Chief, Employee Plans
Technical Branch 3

Enclosures:
Deleted copy of letter
Notice of Intention to Disclose
Copy of Letter to Authorized Representative

cc:

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