Significant Index Nos. 401.28-00 & 415.01-00

200430034

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

TAX EXEMPT AND GOVERNMENT ENTITIES DIVISION

APR 28 2004

In re:

Excess Benefit Plan =

Excess Benefit Trust =

Pension Plan =

Pension Trust =

Dear

This is in response to your request for a ruling with respect to the creation of the Excess Benefit Plan and its effect on the Pension Trust. You have requested the following rulings:

(1) That the establishment and operation of the Excess Benefit Plan will not cause the Pension Trust to lose its tax-qualified and tax-exempt status.

(2) That the method of funding of the Excess Benefit Trust will not cause the Pension Trust to lose its tax-qualified and tax-exempt status.

(3) That contributions and monies paid to participants and beneficiaries of the Excess Benefit Plan, including the gross payment amounts made on their behalf to the Excess Benefit Trust, are taxable to such participants and beneficiaries at the time the contributions to the Excess Benefit Trust are made.

(4) That any employer contributions paid and allocated to the Excess Benefit Plan, pursuant to collective bargaining agreement amendments, will be deductible by the employers under section 404 of the Code in the year in which such contributions are used to pay benefits to participants of the Excess Benefit Plan.

The Excess Benefit Plan is intended to be a defined contribution excess benefit plan, established pursuant to section 3(36) of the Employment Retirement Income Security Act of 1974 ("ERISA"). The Excess Benefit Plan will provide supplemental retirement benefits to selected employees of employers ("Employers") who participate in the Pension Plan. The Pension Plan is a qualified collectively bargained multiemployer defined benefit plan that received its most recent determination letter on May 29, 1996. The Excess Benefit Trust was established for the exclusive benefit of participants (and their beneficiaries) in the Excess Benefit Plan. The Excess Benefit Trust is not a trust described in section 401(a) of the Internal Revenue Code (the "Code"), nor is it exempt from tax under section 501(a) of the Code.

Under the Excess Benefit Plan, participants will receive an amount ("Excess Benefit Amount") equal to the amount that their benefit under the Pension Plan for the previous calendar month is reduced to satisfy the requirements of section 415 of the Code. In addition, the administrator of the Excess Benefit Plan will gross-up the Excess Benefit Amount by an amount equal to the amount of tax (employee share only) attributable to the Excess Benefit Amount under the Federal Insurance Contributions Act ("FICA"). Separate accounts will be maintained for each participant.

The Employers' contributions to the Excess Benefit Trust will be irrevocable, except to the extent that they were made as a result of a mistake of law or fact. No part of the Excess Benefit Trust's principal or income may revert to any of the Employers or be used for any purpose other than providing the benefits specified in the Excess Benefit Plan. Amounts held in the Excess Benefit Trust are not subject to the Employers' creditors, and it is explicitly provided that all right, title, and interest in and to the assets of the Excess Benefit Trust are at all times vested exclusively in the trustees of the Excess Benefit Trust.

Under the provisions of the Pension Trust, no assets of the Pension Trust can be used to provide benefits or monies to the Excess Benefit Trust. Similarly, under the provisions of the Excess Benefit Trust, no assets of the Excess Benefit Trust can be used to provide benefits or monies to the Pension Trust. Thus, the assets of the Excess Trust can not be used to pay the benefits under the Pension Plan. Similarly the assets of the Pension Trust can not be used to pay the benefits under the Excess Plan.

Contributions paid to the Excess Benefit Trust will be paid pursuant to amendments made to collectively bargaining agreements and will be irrevocable. Under the terms of the agreements, Employers' pension fund contributions will be allocated first to the Excess Benefit Trust with the remainder of the pension fund contribution, if any, allocated to the Pension Trust.

Benefits payable under the Excess Benefit Plan will be calculated and paid on a monthly basis (or as soon as administratively feasible thereafter). Benefits payable under the Excess Benefit Plan will vest as contributions are made to the Excess Benefit Trust. The Excess Benefit Trust is not expected to generate earnings.

Section 3(36) of ERISA defines an "excess benefit plan" as one maintained solely for the purpose of providing benefits for certain plan participants in excess of the limitations imposed by section 415 of the Code, without regard to whether the plan is funded.

Section 83(a) of the Code provides that if, in connection with the performance of services, property is transferred to any person other than the person for whom such services are performed, the excess of the fair market value of the property over the amount paid for the property is included in the service provider's gross income for the first taxable year in which the rights to the property are either transferable or not subject to substantial risk of forfeiture.

Section 401(a) of the Code provides the requirements for qualification of a trust created or organized in the United States and forming part of a stock bonus, pension, or profit sharing plan of an employer for the exclusive benefit of his employees or their beneficiaries.

Section 401(a)(16) of the Code provides that a trust shall not constitute a qualified trust if the plan of which such trust is a part provides for benefits or contributions which exceed the limitations of section 415 of the Code.

Section 402(b)(1) of the Code provides that contributions to an employees' trust made by an employer during a taxable year of the employer which ends with or within a taxable year of the trust for which the trust is not exempt under section 501(a) shall be included in the gross income of the employee in accordance with section 83 (relating to property transferred in connection with the performance of services), except that the value of the employee's interest in the trust shall be substituted for the fair market value of the property for purposes of applying such section.

Section 402(b)(2) of the Code provides that the amount actually distributed or made available to any distributee by any trust described in section 402(b)(1) shall be taxable to the distributee in the taxable year in which so distributed or made available, under section 72 (relating to annuities), except that distributions of income of such trust before the annuity starting date (as defined in section 72(c)(4)) shall be included in the gross income of the employee without regard to section 72(e)(5) (relating to amounts not received as annuities).

Section 402(b)(4)(A) of the Code provides that if one of the reasons that a trust is not exempt from tax under section 501(a) of the Code is the failure of the plan of which it is a part to meet the requirements of section 401(a)(26) or section 410(b), then instead of including in gross income the amount computed under section 402(b)(1), a highly compensated employee includes in gross income for his or her taxable year with or within which the trust's' taxable year ends an amount equal to the employee's vested accrued benefit (less the employee's investment in the contract) as of the close of the trust's taxable year.

Section 402(b)(4)B) of the Code provides that if a trust is not exempt from tax under section 501(a) for any taxable year solely because such trust is part of a plan which fails to meet the requirements of sections 401(a)(26) or 410(b), sections 402(b)(1) and 402(b)(2) shall not apply by reason of such failure to any employee who was not a highly compensated employee during (i) such taxable year or (ii) any preceding period for which service was creditable to such employee under the plan.

Section 402(b)(4)(C) of the Code provides that for the purposes of that paragraph, the term "highly compensated employee" has the meaning given such term by section 414(q) of the Code.

Section 404(a) of the Code provides if contributions are paid by an employer to or under a stock bonus, pension, profit-sharing, or annuity plan, or if compensation is paid or accrued by an employer on account of any employee under a plan deferring the receipt of such compensation, such contributions or compensation is not deductible under Chapter 1 of the Code, but, if it would otherwise be deductible, is deductible under section 404, subject to that limitations of this subject.

Section 404(a)(5) of the Code provides that contributions or compensation paid under a nonqualified plan or arrangement deferring the receipt of compensation, if otherwise deductible, are deductible in the taxable year in which an amount attributable to the contribution are includible in the gross income of the employees participating in the plan, but, in the case of a plan in which more than one employee participates, only if separate accounts are maintained for each employee.

Section 412 of the Code provides minimum funding requirements that must be satisfied in pension plans.

Section 415 of the Code provides limitations on benefits and contributions that may be provided under a qualified trust.

Section 501(a) of the Code provides that an organization described in section 401(a) is exempt from taxation.

Section 1.83-3(e) of the Income Tax Regulations (the "regulations") provides that the term "property" includes a beneficial interest in assets (including money) transferred or set aside from the claims of the transferor's creditors, for example, in a trust or escrow account.

Section 1.83-8(a)(4) of the regulations provides that if a transfer of property is subject to the rules of section 402(b) of the Code, section 83 applies to the transfer only as provided in section 402(b).

Section 1.402(b)-1(a)(1) of the regulations provides that contributions made on the behalf of an employee by an employer to an employees' trust that is not exempt under section 501(a) during a taxable year of the employer which ends within or with a taxable year of the trust for which it is not so exempt shall be included as compensation in the gross income of the employee for his taxable year during which the contribution is made, but only to the extent that the employee's interest in such contribution is substantially vested at the time the contribution is made.

Section 1.404(a)-12(b)(1) of the regulations provides that a deduction is allowable for a contribution under section 404(a)(5) only in the taxable year of the employer in which or with which ends the taxable year of an employee in which an amount attributable to such contribution in includible in his gross income as compensation, and then only to the extent allowable under section 404(a).

Section 1.414(l)-1(b)(1) of the regulations provides that a plan is a "single plan" if and only if, on an ongoing basis, all of the plan assets are available to pay benefits to employees who are covered by the plan and their beneficiaries.

Section 1.404(b)-1T Q&A-2 of the (temporary) regulations provides that a plan, or method or arrangement, defers the receipt of compensation to the extent it is one under which an employee receives compensation or benefits more than a brief period of time after the end of the employer's taxable year in which the services creating the right to such compensation or benefits is performed.

Because the assets of the Excess Benefit Trust are not available to pay benefits under the Pension Plan and the assets of the Pension Trust are not available to pay benefits under the Excess Benefit Plan, the Pension Plan and the Excess Benefit Plan do not constitute a single plan. Furthermore, the benefits and provisions of the Excess Benefit Plan do not affect the Pension Plan or the amounts of benefits payable from the Pension Trust. Thus, the existence of the Excess Benefit Plan does not affect the tax-qualified status of the Pension Trust.

Because the existence of the Excess Benefit Plan does not affect whether the Pension Trust meets the requirements for qualification of section 401(a) of the Code, the existence of the Excess Benefit Plan does not affect whether the Pension Trust meets the requirements for exemption from taxation of section 501(a) of the Code. Thus, the existence of the Excess Benefit Plan does not affect the tax-exempt status of the Pension Trust.

If the establishment, adoption, and operation of the Excess Benefit Plan is not accompanied by an increase in the pension fund contribution rate under the collective bargaining agreement, the method of funding of the Excess Benefit Plan may cause the Pension Plan to fail to meet the funding requirements of section 412 of the Code. However, a trust does not lose its tax-qualified status merely because the plan of which it is a part fails to meet the minimum funding requirements of section 412. Thus the method of funding of the Excess Benefit Trust does not affect the tax-qualified or tax-exempt status of the Pension Plan.

Under the terms of the Excess Benefit Plan and Excess Benefit Trust, the Employers will make irrevocable contributions to the Excess Benefit Trust for the exclusive purpose of providing benefits under the Plan to participating employees and their beneficiaries. The Excess Benefit Trust's assets are not subject to the claims of the Employer's creditors, and the Excess Benefit Trust is not exempt from tax under section 501(a) of the Code. Accordingly, the rules of section 402(b) govern the taxation of the Employer contributions to the Excess Benefit Trust to the employees.

Under section 402(b)(1) of the Code, an employer's contributions to an employees' trust that is not exempt from tax under section 501(a) are included in the employee's gross income in accordance with section 83. However, the value of the employee's interest in the trust is substituted for the fair market value of the property when applying section 83. Such contributions are included as compensation in the employee's gross income for the taxable year of contribution to the extent that the employee's interest therein is substantially vested.

Under section 402(b)(4)(A) of the Code, however, if one of the reasons a trust is not exempt from tax under section 501(a) is the failure of the plan of which it is a part to meet the requirements of section 401(a)(26) or section 410(b), then, instead of including in gross income the amount computed under sections 402(b)(1) and (2), a highly compensated employee includes in gross income for his taxable year with or within which the trust's taxable year ends an amount equal to the employee's vested accrued benefit (less the employee's investment in the contract) as of the close of the trust's taxable year.

In addition, under section 402(b)(4)(B) of the Code, if the only reason a trust is not exempt from tax under section 501(a) is the failure of the plan of which it is a part to meet the requirements of section 401(a)(26) or 410(b), sections 402(b)(1) and (2) do not apply to any employee who is not a highly compensated employee during the taxable year, or any preceding period for which service was creditable to such employee under the plan.

Therefore, if the Excess Benefit Plan fails to satisfy the requirements of section 401(a)(26) or section 410(b) of the Code, section 402(b)(4)(A) will apply to highly compensated employees who participate in the Excess Benefit Plan. Section 402(b)(1) will apply to all other participants unless the only reason the Excess Benefit Trust is not exempt under section 501(a) is because the Excess Benefit Plan fails to meet the requirements of section 401(a)(26) or section 410(b). In such a case, section 402(b)(1) will not apply to any participant who was not a highly compensated employee during the taxable year or any preceding period for which service was creditable to such participant under the plan.

Accordingly, contributions to the Excess Benefit Trust, including the FICA tax gross-up amounts, are taxable to Excess Benefit Plan participants (and beneficiaries) when the contributions are made unless the only reason the Excess Benefit Trust is not exempt from tax under section 501(a) is because the Excess Benefit Plan fails to meet the requirements of section 401(a)(26) or Section 410(b). If the only reason the Excess Benefit Trust is not exempt from section 501(a) is because the Excess Benefit Plan fails to meets the requirements of section 401(a)(26) or section 410(b), contributions to the Trust, including the FICA tax gross-up amounts, are taxable to the Excess Benefit Plan participants (and beneficiaries) when the contributions are made only with respect to participants who are highly compensated employees during the taxable year, or any preceding period for which service was creditable to such participants under the Excess Benefit Plan.

Trust earnings, if any, are taxable to participants (and beneficiaries) when they are creditable to participant accounts, made available, or paid, depending on whether the Excess Benefit Trust meets the requirements of section 401(a)(26) or section 410(b), and whether the participants are highly compensated employees during the taxable year, or any preceding period for which service was creditable to such participants under the Excess Benefit Plan.

Because the Excess Benefit Plan is a plan deferring the receipt of compensation under 1.404(b)-1T Q&A-2 of the (temporary) regulations, contributions to the Excess Benefit Plan are deductible only under the rules of section 404 of the Code. Because the Excess Benefit Plan is a nonqualified plan the provisions of section 404(a)(5) of the Code are applicable. Because the Excess Benefit Plan provides for the maintenance of separate accounts for each employee, contributions to the Excess Benefit Trust made by Employers for the benefit of employees are deductible for the contributing Employer's taxable year in which or with which ends the employee's taxable year in which an amount attributable to the contributions is includible in such employee's gross income.

Therefore we hold that:

(1) the establishment, adoption, and operation of the Excess Benefit Plan does not cause the Pension Trust to lose its tax-qualification or tax-exemption.

(2) the method of funding of the Excess Benefit Trust does not jeopardize the tax-exempt status of the Pension Trust.

(3) contributions to the Excess Benefit Plan's participants and beneficiaries, including any gross up amounts made on their behalf to the Excess Benefit Trust, are taxable to such participants and beneficiaries at the time the contributions to the Excess Benefit Trust are made unless the only reason the Excess Benefit Trust is not exempt under section 501(a) is because the Excess Benefit Plan fails to meet the requirements of section 401(a)(26) or 410(b).

(4) if the Excess Benefit Plan fails to meet the requirements of either section 401(a)(26) or section 410(b) of the Code, highly compensated participants in the Excess Benefit Plan include in their gross income with or within which the Excess Benefit Trust's taxable year ends an amount equal to the employee's vested accrued benefit (less their investment in the contract) under the Excess Benefit Trust as of the close of the Excess Benefit Trust's taxable year.

(5) assuming the requirements for deductibility are met, employer contributions are fully deductible by the contributing employers in the taxable year in which or with which ends the employee's taxable year in which an amount attributable to the contributions is includible in such employee's gross income.

This ruling is conditional on the adoption of language revising the collective bargaining agreements that govern Employers' pension fund contributions such that Employers' contributions will be made to the Excess Benefit Trust in amounts equal to the amounts to be paid from the Excess Benefit Trust and that Employers' pension fund contributions will be allocated first to the Excess Benefit Trust with the remainder of the pension fund contribution, if any, allocated to the Pension Trust.

This ruling does not consider the more general issue of the Pension Trust's qualified status, specifically, whether the Pension Trust complies with all the Code requirements for qualification. This letter addresses only the impact (if any) of the adoption and funding of the Excess Benefit Plan and the Excess Benefit Trust on the purportedly otherwise qualified status of the Pension Trust.

This ruling is directed only to the taxpayer that requested it. Section 6110(k)(3) of the Internal Revenue Code provides that it may not be used or cited by others as precedent.

Sincerely,

James E. Holland, Jr.

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