TAX EXEMPT AND
GOVERNMENT ENTITIES
DIVISION

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

200211050

UIL No.: 4972.04-00

DEC 19 2001

OP:E:EP:T1

Legend:

Company A .....

Company B .....

Country M . .....

Dear :

This is in response to correspondence received through November 27, 2001, submitted by your authorized representative on your behalf requesting a ruling under section 4972 of the Internal Revenue Code (the "Code"). The following facts and representations were submitted in connection with your request.

Company A is a wholly owned subsidiary of Company B, a Country M corporation. Company A and Company B and their subsidiaries form a controlled group of corporations under Code section 414(b).

In order to facilitate international business operations, Company B has developed a transfer policy in which employees of Company A and Company A's US subsidiaries ("US Companies") are transferred on a temporary basis to Company B or Country M subsidiaries of Company B ("Country M Companies). These assignments range from three to five years in length, after which the employees return to the US Company. You represent, for purposes of this letter ruling, that an employee transferred pursuant to this policy becomes a common law employee of the Country M Company to which the employee is transferred and ceases to be a common law employee of the US Company at the time of transfer.

Many of the transferred employees participate in qualified plans of Company A prior to their transfer. Because these employees will not participate in a savings or retirement plan of the foreign company, Company A would like to amend its plans ("US Qualified Plans") to provide that transferred employees will continue to participate in the plans during the period of transfer. None of the Country M Companies will adopt the US Qualified Plans with respect to the transferred employees.

220

Based on the above facts and representations, you request a ruling that even assuming the contributions described above are not deductible under section 404, the excise tax under Code section 4972 is not applicable with respect to these nondeductible contributions.

Regarding your ruling request, Code section 4972(a) imposes an excise tax equal to ten percent of the nondeductible contributions made to any qualified employer plan.

Code section 4972(c)(l) generally defines the term "nondeductible contributions" as the excess of the amount contributed for the taxable year by the employer to the plan over the amount allowable as a deduction under section 404 for such contributions.

As indicated above, Code section 4972 imposes an excise tax on the excess of the amount contributed over the amount allowable as a deduction under section 404. The focus of section 4972 is on the "amount" allowable as a deduction and not the amount "deductible." In other words, if the amount of the contribution does not exceed the deductible limit, the excise tax does not apply. In this case, if the amount of the contributions for the transferred employees does not exceed the deductible limit (assuming deductibility), then the contributions do not exceed the amount allowable as a deduction and the section 4972 excise tax does not apply. Accordingly, we rule with respect to your ruling request that no excise tax under section 4972 is applicable with respect to the nondeductible contributions to the extent that the contributions do not exceed the deductible limit under section 404(a).

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

Pursuant to a power of attorney on file with this office, the original ruling letter is being sent to your authorized representative. Should you have any concerns regarding this letter, please contact

Sincerely yours,

John Swieca, Manager
Employee Plans Technical Group 1
Tax Exempt and Government Entities Division

cc:

Enclosures:
Deleted copy of letter
Notice 437

221