UIC: 414.00-00 Definitions and Special Rules

JUN - 1 2005

Attn:

LEGEND:

Company A =

Plan X =

Consulting Firm F =

State O =

Date 1:

Date 2:

Date 3:

Division A:

Division B:

Dear [redacted]

This is in response to the October 8, 2004, letter submitted on your behalf by your authorized representative, in which you request an extension of time pursuant to section 301.9100-1 of the Procedure and Administration Regulations to file the notice of election described in section 3 of Revenue Procedure 93-40, 1993-2 C.B. 535 to be treated as operating qualified separate lines of business ("QSLOBs") under section 414(r) (2) of the Internal Revenue Code of 1986, as amended (the "Code") and sections 1.414(r)-l(b) and 1.414(r)- 4 of the Treasury Regulations.

The following facts and representations support your ruling request.

Company A sponsors Plan X, which is a profit sharing plan that contains a Code section 401(k) arrangement. Plan X covers all employees of Company A and its subsidiaries. Company A is a diversified agribusiness and retailing company. Company A buys and sells grain, stores grain, processes grain, and makes and produces certain granular products for the United States professional turf industry and consumer lawn and garden market. Company A also operates six large stores in State O that provide products for maintaining and improving the home and landscape, and sells products from house wares and automotive supplies to various food items.

It has been represented that Company A was having difficulty with Plan X's passing the average deferred percentage ("ADP") test described in Code section 401(k)(3). The difficulty related to a lower level of participation by employees of Company A's retailing group. Because it was evident that Company A' s agribusiness and retail employee populations had different retirement savings characteristics and tendencies, Consulting Firm F, an employee benefit, compensation, and human resource, consulting firm, suggested to Company A that Company A might be able to make a qualified separate line of business ("QSLOB") election under Code section 414(r). During 2001, Consulting Firm F conducted an analysis to determine if Company A could meet the conditions found in the Income Tax Regulation promulgated under Code section 414(r). The analysis demonstrated that Company A could meet the necessary QSLOB conditions and Consulting Firm F so advised Company A. Consulting Firm F also advised Company A, through written correspondence, regarding the need for Company A to file Internal Revenue Service Form 5310-A, Notice of Qualified Separate Lines of Business, with the Internal Revenue Service (IRS) which would serve to notify the IRS of its QSLOB election, no later than October 15, 2003.

Plan X's plan year is the calendar year. Plan X satisfied the ADP test for plan year 2001 without a need to make a QSLOB election by limiting the deferrals made by highly compensated employees. Beginning with the [redacted] plan year, the ADP test was performed on a QSLOB basis, splitting apart the retailing group from the rest of Company A's businesses.

Consulting Firm F had a long, ongoing relationship, which involved providing employee benefit and actuarial consulting and administrative services, with Company A. In 2004, responsibility for filing Forms 5500, Annual Return/Report of Employee Benefit Plan, with respect to Company A's various qualified retirement plans transferred to Consulting Firm F from an independent accounting firm. During the transfer process, it was noted that the Form 5500 filed with respect to Plan X's [redacted] plan year did not indicate that the QSLOB election had been made. After noticing the Form 5500 did not indicate a QSLOB election, Consulting Firm F inquired of Company A's human resource department whether the election had, in fact, been filed with the IRS. It was then discovered that no such election had been filed.

Company A is a large corporation that had 2003 total sales revenue of more than 1 billion dollars. Company A's human resource function is responsible for administration of Plan X, including running the ADP test and taking appropriate corrective action if Plan X fails to satisfy the ADP test. However, the human resource area is not responsible for such matters as investing amounts deferred by affected Plan X participants pursuant to Plan X's Code section 401(k) feature, or filing tax notices and forms with the IRS. Company A has an in-house tax department that has responsibility for all tax matters including all tax filings with the IRS. Under Company A's internal policies and procedures, a Form 5310-A relating to Plan X with respect to its [redacted] plan year would have been filed by Company A' tax department.

In 2003, during the time that the Form 5310-A should have been filed, there was significant turnover in Company A' tax department. The tax manager for the department was promoted, and moved to another function within Company A, effective Date 1, 2003. Further, Company A's senior tax analyst resigned on Date 2, 2003.

Although Consulting Firm F has had a long consulting relationship with Company A, Consulting Firm F did not prepare the Form 5500 associated with Plan X for the 2002 plan year, the first year to which the QSLOB election was to have applied. Although Consulting Firm F did advise Company A, at the conclusion of its QSLOB analysis, that Company A would need to file Form 5310-A, Consulting Firm F did not subsequently follow-up and further advise Company A to file such election form when Consulting Firm F ran the ADP test with respect to Plan X for the [redacted] plan year. Because Consulting Firm F was not preparing Company A's Form 5500s at the time, it was not in a position to mark the appropriate questions on Form 5500 or to further remind or advise Company A to file Form 5310-A with respect to Plan X.

This ruling request contains a Form 5310-A dated Date 3, 2004. The Form 5310-A indicates that it was to apply to Plan X, and lists Division A and Division B as the separate lines of business. The request also includes a Form 5500 with respect to Plan X's 2002 plan year, dated Date 3, 2004, which indicated that Company A intended to maintain two qualified separate lines of business during said year.

Based on the above, you, through your authorized representative, request the following ruling:

Company A requests a ruling that under section 301.9100-3 of the Procedure and Administration Regulations the filing of Form 5310-A as described above will be deemed as a timely filing for purposes of operating qualified separate lines of business under IRC section 414 (r) with respect to Plan X's [redacted] plan year and subsequent plan years.

In general, for purposes of sections 129(d) (8) and 410(b) of the Code an employer shall be treated as operating separate lines of business during any year if the employer for bona fide business reasons operates separate lines of business. An employer operating QSLOBs will be permitted to apply those Code provisions separately with respect to the employees in each qualified separate business line. Code section 414(r) (2) (B) (Subtitle A) requires that an employer notify the Secretary of the Treasury that a line of business is being treated as separate for purposes of Code sections 129(d) (8) and 410(b).

Section 3 of Rev. Proc. 93-40 sets forth the exclusive rules for satisfying the notice requirement of section 414(r) (2) (B) of the Code. Section 3.03 of Rev. Proc. 93-40, provides that notice must be given by filing Form 5310-A. Section 3.05 of Rev. Proc. 93-40 provides that notice for a testing year must be given on or before the Notification Date for the testing year. The Notification Date for a testing year is the later of October 15 of the year following the testing year or the 15th day of the 10th month after the close of the plan year of the plan of the employer that begins earliest in the testing year. Section 3.06 of Rev. Proc. 93-40 provides, in pertinent part, that after the Notification Date, notice cannot be modified, withdrawn or revoked, and will be treated as applying to subsequent testing years unless the employer takes timely action to provide a new notice.

Under section 301.9100-1(c) of the regulations, the Commissioner of Internal Revenue may grant a reasonable extension of time to make a regulatory election or certain statutory elections under Subtitle A of the Code if the taxpayer demonstrates to the satisfaction of the Commissioner that the taxpayer acted reasonably and in good faith, and that granting the relief will not prejudice the interests of the government. Section 301.9100-1(b) defines the term "regulatory election" as an election whose due date is prescribed by a regulation published the Federal Register, or a revenue ruling, revenue procedure, notice, or announcement published in the Internal Revenue Bulletin. Notice that an employer has elected to be treated as operating qualified separate lines of business pursuant to sections 414(r) of the Code and section 3 of Rev. Proc. 93-40 is a regulatory election.

The Commissioner has authority under sections 301.9100-1 and 301.9100-3 to grant an extension of time if a taxpayer fails to file a timely notice of election under section 3 of Rev. Proc 93-40. Section 301.9100-3 provides that the Commissioner will grant an extension of time when the taxpayer has acted reasonably and in good faith, and the grant of relief will not prejudice the interests of the government.

Section 301.9100-3 of the regulations provides that applications for relief that fall within

section 301.9100-3 of the regulations will be granted when the taxpayer provides the evidence (including affidavits described in section 301.9100-3(e) (2)) of the regulations to establish that (1) the taxpayer acted reasonably and in good faith, and (2) granting relief would not prejudice the interests of the government.

Section 301.9100-3(b) (1) of the regulations provides that a taxpayer will be deemed to have acted reasonably and in good faith if the taxpayer:

(i) Requests relief under this section before the failure to make the regulatory election is discovered by the Service;

(ii) Failed to make the election because of intervening events beyond the taxpayer's control;

(iii) Failed to make the election because, after exercising reasonable diligence (taking into account the taxpayer's experience and the complexity of the return or issue), the taxpayer was unaware of the necessity for the election;

(iv) Reasonably relied on the written advice of the Service; or

(v) Reasonably relied on a qualified tax professional, including a tax professional employed by the taxpayer, and the tax professional failed to make, or advise the taxpayer to make, the election.

Section 301-9100-3(c) of the regulations provides that ordinarily the interests of the Government will be treated as prejudiced and that ordinarily the Internal Revenue Service will not grant relief when tax years that would have been affected by the election had it been timely made are closed by the statute of limitations before the taxpayer's receipt of a ruling granting relief under this section or if granting relief would result in a taxpayer having a lower tax liability.

Company A's ruling request contains an affidavit describing the events that resulted in Company A's failing to give the IRS timely notice of its intended plan year 2002 QSLOB election, and of the discovery of its failure. Company A's failure was, at least in part, due to its having experienced unusual turnover in its tax department. In addition, there was a split in tax-related responsibilities between Company A's departments and between outside firms that assisted Company A in dealing with the IRS which led to the mistaken belief that Consulting Firm F was responsible for the preparation of all paperwork necessary for Company A to elect QSLOB treatment. Although Consulting Firm F was not preparing the Form 5500 for the 2002 plan year, Consulting Firm F had advised Company A of the advisability of its making a QSLOB election with respect to Plan X for said plan year. Consulting Firm F then failed to remind Company A that it had to file

Form 5310-A by a certain date. When Company A discovered that the requisite Form 5310-A had not been timely filed, it immediately filed Form 5310-A and also promptly filed this request for relief under section 301.9100-3 of the regulations.

Thus, with respect to your request for relief we believe that, based on the information submitted and the representations contained herein, there has been compliance with clauses (iii), and (v) of section 301.9100-3(b) (1) of the regulations. As a result, we conclude that good cause has been shown for the failure to timely make the election provided for in section 3 of Rev. Proc. 93-40, and further, that the other requirements of section 301.9100-1 have been satisfied. Accordingly, the filing of Form 5310-A, as described above, will be deemed to be a timely filing with respect to Plan X's 2002 plan year and subsequent plan years. As a result, Company A will be treated as operating qualified separate lines of business under Code section 414(r) in section 3 of Revenue Procedure 93-40, with respect to said plan years.

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, which 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.

If you wish to inquire about this ruling, please contact [redacted] 01400 at [redacted] Please' address all correspondence to [redacted]

Copies of this letter have been sent to your authorized representatives in accordance with a Power of Attorney on file in this office.

Sincerely yours,

Frances V. Sloan

Frances V. Sloan, Manager
Employee Plans Technical Group 3

Enclosures:
Deleted copy of ruling letter
Notice of Intention to Disclose