

Deduction for Contributions of an Employer to an Employees' Trust or Annuity Plan and Compensation Under a Deferred-Payment Plan

Notice 2002-48

Questions have arisen about certain variations on the fact pattern described in Rev. Rul. 90-105, 1990-2 C.B. 69, and their effect on the timing of an employer's deduction for contributions to a cash or deferred arrangement within the meaning of § 401(k) or to a defined contribution plan as matching contributions within the meaning of § 401(m). Rev. Rul. 2002-46, page 118 of this Bulletin, addresses a fact pattern that is substantially similar to the fact pattern in Rev. Rul. 90-105. This notice addresses two other variations on this fact pattern. The facts in Rev. Rul. 90-105 involve contributions that are attributable to compensation earned after the end of an employer's taxable year and are made after the end of that year but during the § 404(a)(6) grace period. Rev. Rul. 90-105 holds that such contributions are not deductible for the taxable year.

In Rev. Rul. 2002-46, the plan is amended to provide for a board resolution setting a minimum contribution for a plan year (to be allocated first toward elective deferrals and matching contributions, with any excess to be allocated to participants as of the end of the plan year in proportion to compensation earned during the plan year), and a board resolution is adopted before the end of the taxable year pursuant to that amendment. Rev. Rul. 2002-46 reaches the same result as Rev. Rul. 90-105.

This notice addresses two other variations on the Rev. Rul. 90-105 fact pattern, neither of which involves grace period contributions. One variation involves an actual payment to the plan before the end of the taxable year, in anticipation of § 401(k) deferrals and § 401(m) matches to occur after the end of the tax year (but before the end of the

overlapping plan year). The other variation involves such a prepayment, combined with a guaranteed minimum contribution as described in Rev. Rul. 2002-46. Because these variations involve actual payments before the end of the taxable year, § 404(a)(6) and Rev. Rul. 90-105, 1990-2 C.B. 69, do not affect the deductibility of the contributions.

Rev. Rul. 90-105 based its holding in part upon § 1.404(a)-1(b) of the Income Tax Regulations. Specifically, Rev. Rul. 90-105 relied upon language in the regulation requiring that contributions be compensation for services actually rendered. Upon further consideration, the Service has concluded that this language is relevant only where the reasonableness of an employee's compensation is in question, and thus is not an appropriate basis upon which to determine the timing of deductions for the contributions described in Rev. Rul. 90-105, Rev. Rul. 2002-46, and this notice.

The Service is reviewing other issues that may be raised by the two factual patterns addressed in this notice. Any additional guidance concerning the matters addressed in this notice will be prospective in application. Pending such additional guidance, the Service will not challenge the deductibility of contributions described in this notice, provided actual payment is made during the taxable year and the amount deducted does not exceed the applicable limitation under § 404(a)(3)(A)(i).

The transactions described in this notice are not "reportable transactions" for purposes of § 1.6011-4T(b)(1) of the Temporary Income Tax Regulations and are not "listed transactions" for purposes of § 301.6111-2T(b)(2) of the Temporary Procedure and Administration Regulations.

The principal author of this notice is John Richards of the Office of the Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities). For further information regarding this notice, contact Mr. Richards at (202) 622-6090 (not a toll-free call).