Uniform Issue List 414.07.00

Internal Revenue Service

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Department of the Treasury

Washington, DC 20224

Person to Contact:

Telephone Number:

Refer Reply to:
OP:E:EP:T:1

Date:
APR 21 1999

▷ XXXXXX
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XXXXXX

LEGEND:

District A =

Company B =

State C =

City D =

Agreement G =

Ordinance E =

Plan X =

Dear Sir or Madam:

This is in response to your request submitted by your authorized representative on February 18, 1998, on behalf of Plan X, for a private letter ruling concerning whether Plan X will continue to maintain its status as a governmental plan within the meaning of section 414(d) of the Internal Revenue Code (the "Code").

In support of the ruling request the following facts and representations have been submitted.

Plan X is a defined benefit retirement plan that qualifies as a governmental plan under section 414(d) of the Code. Plan X was created by specific legislative enactment of State C to provide retirement and other benefits to persons employed by State C and its political subdivisions and instrumentalities.

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Plan X was placed under legislative control of City D and is governed by certain provisions of a City D Charter. Plan X currently covers approximately 25,221 participants. District A, which is a special purpose district existing under the laws of State C, operates and maintains the wastewater system for City D. District A is a governmental entity whose employees participate in Plan X.

On January 5, 1998, District A and Company B entered into Agreement G, with a commencement date of March 1, 1998. Company B is a limited liability company formed under the laws of State C. All of Company B's revenue is derived from its contract with District A.

Pursuant to Agreement G, Company B will operate and maintain certain portions of District A's wastewater system for collection, conveyance, treatment and disposal of wastewater for a period of ten years. District A will retain ownership and title to all of its assets, including the wastewater facility. Under Agreement G, approximately 300 of District A's employees who are currently participating in Plan X and who are working at District A's wastewater facilities will become employees of Company B. These transferred workers will continue to provide the same services at the same locations and with the same equipment as they provided before Agreement G was signed. Company B cannot terminate or layoff the transferred workers during the term of the agreement. Further, Agreement G designates the person who is to act as the project manager for the project. The individual so designated to act as the project manager cannot be removed by Company B without good cause, however, District A has the unilateral authority to remove the project manager. Agreement G will expire after ten years at which time full responsibility for operating and maintaining the wastewater system will revert to District A, and the transferred workers will be transferred back District A.

In accordance with Agreement G, District A will maintain a close ongoing relationship with Company B. Company B is required to provide District A's compliance officers with unlimited access to the wastewater facilities to ensure Company B is fulfilling its obligations under Agreement G. Company B must provide District A with periodic audited project financial reports and receive approval from District A for all capital expenditures. District A has established detailed standards that Company B must follow in operating and maintaining the facilities. Company B must seek written approval from District A before adopting any operating or maintenance procedures that deviate from District A's Operations and Maintenance Manuals.

City D, District A, and the relevant unions who represent the 300 transferred workers desire to have those workers who were covered under Plan X to continue to accrue benefits under Plan X based on their service and compensation earned as employees of Company B. City D adopted Ordinance E which would allow the 300 transferred workers to continue to participate in Plan X. The implementation of Ordinance E is contingent upon receiving a favorable ruling from the Service that it will not negatively affect Plan X's status as a governmental plan under section 414(d) of the Code.

Pursuant to Ordinance E, only individuals who were District A employees immediately prior to the commencement date of Agreement G and who participated in Plan X will continue to accrue benefits under Plan X based on their service and compensation with Company B. Also under Agreement G, District A is responsible for making employer and employee contributions to Plan X on behalf of the transferred workers. The amounts contributed to Plan X on behalf of the transferred workers will be offset against the amount District A must pay Company B under the terms of Agreement G.

Based on the foregoing, you request a ruling that Plan X will continue to be treated as governmental plan under section 414(d) of the Code if the transferred workers are permitted to accrue benefits under Plan X based on their service and compensation with Company B.

Section 414(d) of the Code provides that "governmental plan" means a plan established and maintained for its employees by the Government of the United States, by the government of any state or political subdivision thereof, or by any agency or instrumentality of any of the foregoing.

Revenue Ruling 89-49, 1989-1 C.B. 117, provides that a plan will not be considered a governmental plan merely because the sponsoring organization has a relationship with a governmental unit or some quasi-governmental power. One of the most important factors to be considered in determining whether an organization is an agency or instrumentality of the United States or any state or political subdivision is the degree of control that a governmental entity or entities exercise over the organization's everyday operations. Other factors include: (1) whether there is specific legislation creating the organization, (2) the source of funds for the organization, (3) the manner in which the

organization's trustees or operating board are selected, and (4) whether the applicable governmental unit considers the employees of the organization to be employees of the applicable governmental unit. Although all of the above factors are considered in determining whether an organization is an agency or instrumentality of a government, the mere satisfaction of one or all of the factors is not necessarily determinative.

In Revenue Ruling 89-49 the Service ruled that the retirement plan discussed in the ruling was not a governmental plan within the meaning of section 414(d) of the Code because, among others, the degree of control which the municipalities exert over the entity in its everyday operations is minimal.

In this case, although there is no specific legislation which created Company B, all of Company B's revenue will be derived from its contract with District A. Moreover, District A will remain responsible for contributions to Plan X on behalf of the transferred workers who will continue to accrue retirement benefits under the same plan in which they previously accrued benefits as government employees of District A.

District A (a governmental entity), has significant oversight authority over Company B's operations, the right to inspect the facilities at any time, receive periodic audited project financial reports from Company B and approve all capital expenditures. Company B must follow District A's detailed standards for operating and maintaining the facilities and seek written approval from District A before adopting any operating or maintenance procedures that deviate from District A's Operations and Maintenance Manuals.

District A has significant control over Company B's personnel policy, as it relates to the transferred workers. Company B cannot terminate or layoff the transferred workers during the term of the agreement. Further, Agreement G designates the person who is to act as the project manager for the project and District A has the unilateral authority to remove the designated project manager.

In addition, the transferred workers will generally be providing the same services for Company B, at the same locations and using the same equipment after the commencement of Agreement G that they provided for District A before the commencement of Agreement G. Agreement G will expire after ten years at which time full responsibility for operating and maintaining the wastewater system will revert to District A, and the transferred workers will be transferred back to District A.

Company B is distinguishable from the entity described in Revenue Ruling 89-49 with respect to the degree of control exercised by the governmental unit over the operation of the wastewater facilities, and over Company B's personnel and funding arrangement. The degree of control which District A exercises over Company B is substantial, not minimal as in the case of the entities described in Revenue Ruling 89-49.

In view of the foregoing, we conclude that Company B is an agency or instrumentality of State C for purposes of section 414(d) of the Code and therefore the 300 transferred workers are governmental employees. Consequently, the continued participation of these employees in Plan X will not adversely affect the Plan's status as a governmental plan under section 414(d) of the Code. No opinion is expressed as to the federal tax consequences of the transaction described above under any other provisions of the Code.

This letter expresses no opinion as to whether Plan X is a qualified plan under section 401(a) of the Code. The determination as to whether a plan is qualified under section 401(a) of the Code is within the jurisdiction of the appropriate key District Director's Office of the Internal Revenue Service.

A copy of this letter is being sent to your authorized representative in accordance with a power of attorney on file in this office.

Sincerely yours,

(Signed) John Swieca

John Swieca
Chief, Employee Plans
Technical Branch 1

Enclosure:
Copy of this letter
Deleted Copy of this letter
Notice 437
cc: