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Internal Revenue Service

Department of the Treasury

Washington, DC 20224

S.I.N.: 401.29-02

Contact Person:

Telephone Number:

In Reference to:
OP:E:EP:T:2

Date:
DEC 0 3 1999

Legend:

Agreement N =

Corporation A =
Corporation B =
Corporation C =
Plan X =

Dear:

This is in response to a ruling request dated June 24, 1999, as supplemented by correspondence dated October 5, 1999, submitted by your authorized representative, regarding the federal income tax consequences of certain distributions from Plan X. Your authorized representative submitted the following facts and representations:

Corporation A and 13 of its subsidiaries entered into Agreement N, an asset purchase agreement, with Corporation B for the sale of its sash and door business. Corporation A's 13 subsidiaries involved in Agreement N were exclusively involved in the sash and door business. Corporation A's additional 15 subsidiaries are not involved in the sash and door business and are not affected by Agreement N.

Agreement N was signed by Corporation A and 13 of its subsidiaries in which they agreed to sell all assets associated with the sash and door business including: machinery, equipment, fixtures, inventory, rights under lease agreements, sale orders, designs, plans, trade secrets, books, records, manuals, as well as all rights to the corporation's name "Corporation A."

The only assets not sold by Corporation A and its 13 subsidiaries involved in Agreement N were any real estate owned by Corporation A, cash and any accounts receivable.

Corporation A's audited financial statements for 1997 show that the total assets of the

228

sash and door business as of December 31, 1997 were%*********, while the total assets of Corporation A, including the subsidiaries not involved in the sash and door business, were approximately $*********. The audited financial statements for 1998 showed total sash and door assets of $*********, and total assets comparable to 1997. The sash and door business included accounts receivable which, as of December 31, 1997, equaled $*********and as of December 31, 1998, equaled $*********. The total sash and door assets less the outstanding accounts receivable using the December 31, 1998, financial information totaled $*********. The purchase price paid by Corporation B, according to the terms of Agreement N, was $********* less $******** allocated to the good will of the business. The net purchase price paid by Corporation B exceeded the book value of the assets of the sash and door business, excluding cash and accounts receivable.

Corporation B is an entity entirely unrelated to Corporation A and was, prior to closing of Agreement N, a direct competitor of Corporation A. Corporation A, as required by Agreement N, executed a non-compete Agreement N which prohibits Corporation A and subsidiaries from competing with Corporation B in the sash and door business for a period of five years. The only assets related to the sash and door business which Corporation A retained from its operation of the sash and door business were cash and accounts receivable. Corporation A also owns various real estate as an investment and leased the real estate to its sash and door subsidiaries. The subsidiaries assigned their leasehold interests to Corporation B as part of Agreement N.

Corporation A remains an active organization which, since the date of the asset acquisition, has changed its name in compliance with Agreement N, and is now known as Corporation C. Corporation A has retained, under the name Corporation C, its building supply and hardware business, as well as the ownership of the various parcels of real estate previously used in the sash and door operation.

Corporation A established Plan X, a plan qualified under section 401(a) of the internal Revenue Code with a cash or deferred arrangement described in section 401(k) for its-employees. Corporation A continues to maintain Plan X for the benefit of its remaining employees while all employees who were associated with the sash and door business are now employees of Corporation B and have become eligible to participate in Corporation B’s retirement plan as of the effect date of Agreement N.

It is proposed that Plan X will make lump sum distributions of the 401(k) assets contained in the account of the former employees of Corporation A who became the employees of Corporation B as a result of Agreement N between Corporation A and Corporation B.

Based on the foregoing facts and representations, you request a ruling that the sale of

Corporation A's sash and door business to Corporation B constitutes a "disposition" as defined in section 401(k)(10)(A)(ii) of the Code and under section 1.401(k)-l(d)(4) of the Income Tax Regulations and that as a result, a lump sum distribution to its former employees, now employed by Corporation B, from the 401(k) accounts of Plan X is a permitted distribution.

Section 401 (k)(Z)(B)(i) of the Code provides, in pertinent part, that distributions from a cash or deferred arrangement of amounts attributable to elective deferrals may not be made earlier than the occurrence of certain stated events. Section 401(k)(2)(B)(i)(II) of the Code, when read together with section 401(k)(10)(A)(ii) of the Code, and section 1.401(k)-l(d)(l)(iv) of the Income Tax Regulations, further provides that one of these distributable events is the disposition by a corporation of substantially all of the assets (within the meaning of section 409(d)(2)) used by such corporation in a trade or business of such corporation, but only with respect to an employee who continues employment with the corporation acquiring such assets.

Section 1.401(k)-1 (d)(4)(iv) of the regulations states that for purposes of section 1.401(k)-1(d)(1)(iv), the sale of "substantially all" used by the corporation in a trade or business means the sale of at least 85 percent of the assets. For this purpose, we think it is proper to exclude cash and accounts receivable from the seller's asset prior to applying the 85 percent.

Section 1.401(k)-1(d)(4) of the regulations provides additional rules applicable to distributions upon the sale of assets. Section 1.401 (k)-l(d)(4) of the regulations provides, in part, that (i) the seller must maintain the plan, and the purchaser may not maintain the plan after the disposition, (ii) the employee must continue employment with the purchaser of the assets, and (iii) distribution must be in connection with the disposition of assets. Section 1.401(k)-l(d)(5) of the regulations provides that a distribution may be made only if it is a lump sum distribution within the meaning of section 402(d)(4) of the Code.

The facts indicate (1) that Corporation A sold at least 85 percent of the assets, after subtracting cash and accounts receivable, used in the business of Corporation A's sash and door business to an unrelated corporation, (2) that employees who become employees of Corporation B as a result of Agreement N were hired to perform the same services they provided to Corporation A, (3) that Corporation A continues to maintain Plan X, (4) that lump sum distributions from Plan X will be made in connection with the disposition that results in the employees' transfer to the purchaser from purposes of section 1.40 1 (k)- 1 (d)(4)(iii) of the regulations provided that such distributions are made within the time limitation specified in section 402(d)(4) of the Code and section 1.401(k)-(1)(d)(4)(iii) of the regulations,

Accordingly, with respect to your ruling request, we conclude that the sale of Corporation A's sash and door business to Corporation B constitutes a "disposition" as defined in section

230

401(k)(10)(A)(ii) of the Code and under section 1.401(k)-l(d)(4) of the Income Tax Regulations and that as a result, a lump sum distribution to its former employees, now employed by Corporation B, from the 401(k) accounts of Plan X is a permitted distribution.

This ruling is based on the assumption that Plan X was qualified under sections 401(a) and 401(k) of the Code at the time of the transaction and that distributions to employees are made in connection with the disposition of assets as described in section 1.401(k)-1(d)(4)(iii) of the regulations.

This ruling 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 by others as precedent.

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

Sincerely yours,

Joyce E. Floyd

Joyce E. Floyd
Chief, Employee Plans
Technical Branch 2

Enclosures:
Deleted Copy of this Letter
Notice of Intention to Disclose

231