Part I – Rulings and Decisions Under the Internal Revenue Code of 1986

Section 401. -– Qualified Pension, Profit-sharing, and Stock Bonus Plans

26 CFR 1.401-1: Qualified pension, profit-sharing, and stock bonus plans.

(Also, § 414.)

Rev. Rul. 2008-45

ISSUE

Is the exclusive benefit rule of § 401(a) of the Internal Revenue Code (“Code”) violated if the sponsorship of a qualified retirement plan is transferred from an employer to an unrelated taxpayer and the transfer of the sponsorship of the plan is not in connection with a transfer of business assets, operations, or employees from the employer to the unrelated taxpayer?

FACTS

Corporation A maintains an underfunded defined benefit plan with no ongoing accrual of benefits. Corporation A transfers sponsorship of the plan to Subsidiary B, a wholly-owned subsidiary of Corporation A. Subsidiary B does not maintain any trade or business, has no employees, and has nominal assets. As part of the transfer, the plan document is amended to substitute Subsidiary B as the plan sponsor and to provide for Subsidiary B to assume Corporation A’s responsibilities under the plan.

In connection with the transfer of the plan sponsorship, Corporation A also transfers cash and marketable securities to Subsidiary B. The amount of the transferred assets is equal to the amount of the plan’s underfunding, as determined with reference to specified actuarial assumptions, plus an additional margin.

Shortly after the sponsorship of the plan and these assets are transferred to Subsidiary B, ownership of at least 80% of Subsidiary B’s stock is transferred to

Corporation C, an unrelated corporation. After this transaction, Subsidiary B is no longer a member of the Corporation A controlled group, within the meaning of § 414(b) of the Code, but instead is a member of the Corporation C controlled group. The transaction is not in connection with the transfer of business assets (other than cash or marketable securities transferred to Subsidiary B), operations, or employees from Corporation A's controlled group to Corporation C's controlled group. The only business risk or opportunity in the transaction for Corporation C is to profit from the acquisition and operation of the plan.

LAW

Section 401(a) provides that, in order to be qualified under that section, a stock bonus, pension, or profit-sharing plan of an employer must be for the exclusive benefit of its employees or their beneficiaries. Consistent with this exclusive benefit rule of § 401(a), § 1.401-1(a)(2)(i) of the Income Tax Regulations provides, in part, that a qualified pension plan is a definite written program and arrangement which is established and maintained by an employer to provide for the livelihood of employees or their beneficiaries after the retirement of the employees. Similarly, § 1.401-1(a)(3)(ii) requires that a qualified plan be established by an employer for the exclusive benefit of its employees or their beneficiaries in order to be qualified.

Section 414(a) provides that, in the case in which the employer maintains a plan of a predecessor employer, service for such predecessor is treated as service for the employer.

Section 414(b) provides that, for specified purposes, including § 401, all employees of all corporations which are members of a controlled group of corporations are treated as employed by a single employer.

ANALYSIS

Unlike other situations where the sponsorship of a plan is transferred in connection with the acquisition of business assets or operations, Subsidiary B does not maintain a business and its assets only compensate Corporation C for assuming Corporation A's responsibility under the plan to make contributions to the plan. Therefore, any profit or loss to Corporation C resulting from the transaction would be solely from the use of the assets that are transferred to its controlled group in connection with the acquisition and operation of the plan.

In accordance with § 414(b), all employees of all corporations which are members of a controlled group of corporations are treated as employed by a single employer. Accordingly, even though Subsidiary B has no employees of its own, it is treated as an employer with respect to the employees of the Corporation A controlled group while it is part of that controlled group. For purposes of the exclusive benefit rule of § 401(a), however, Subsidiary B will no longer be treated as an employer with respect to the employees of the Corporation A controlled group when it is no longer a member of that controlled group.

This result is not affected by § 414(a). Section 414(a) provides that if an employer maintains a plan of a predecessor employer, then service for such predecessor is treated as service for the employer. By its terms, § 414(a) applies only to an "employer" and does not create employer status for a taxpayer that is not otherwise an employer.

Accordingly, when Subsidiary B is no longer a member of the Corporation A controlled group, the plan does not satisfy the exclusive benefit rule of § 401(a) because it is not maintained by an employer to provide retirement benefits for its employees and their beneficiaries. This conclusion would be the same even if the new controlled group has some employees covered by the plan after the transaction, or some business assets or operations are transferred, where substantially all the business risks and opportunities under the transaction are those associated with the transfer of the sponsorship of the plan.

HOLDING

The exclusive benefit rule of § 401(a) is violated if the sponsorship of a qualified retirement plan is transferred from an employer to an unrelated taxpayer and the transfer of the sponsorship of the plan is not in connection with a transfer of business assets, operations, or employees from the employer to the unrelated taxpayer.

This ruling does not address any federal income tax consequences other than those specifically addressed herein.

DRAFTING INFORMATION

The principal author of this revenue ruling is Robert M. Walsh of the Employee Plans, Tax Exempt and Government Entities Division. For further information regarding this revenue ruling, please call the Employee Plans taxpayer assistance number between 8:30 a.m. and 4:30 p.m. Eastern time, Monday through Friday at (877) 829-5500 (a toll-free number) or email Mr. Walsh at RetirementPlanQuestions@irs.gov.