Internal Revenue Service

Department of the Treasury

Washington, DC 20224

200030031

Uniform Issue List: 401.29-02

Contact Person:

Telephone Number:

In Reference to: T:EP:RA:T4

Date: MAY 1 - 2000

Attn:

LEGEND:

Company A =

Company B =

Company C =

Partnership M=

Trust N =

Plan X =

Ladies and Gentlemen:

This letter will revoke a private letter ruling which was issued to Company A on September 17, 1997, in response to a letter ruling request dated January 3, 1997.

In the prior letter ruling, we concluded that any distribution from Plan X by reason of Company A's discharge of certain employees in connection with the sale of various hotels which had been managed by Company A, which distributions include amounts attributable to employee elective deferrals, will not be considered to be made on account of the employees' separation from service within the meaning of section 401(k)(2)(B)(i)(I) of the Internal Revenue Code ("Code").

174

Upon reconsidering and analyzing the facts and representations made in your request for a letter ruling dated January 3, 1997, as supplemented by correspondence dated April 22, 1997, and August 29, 1997, we believe that the position taken in the letter ruling issued September 17, 1997, is not in accord with the current views of the Service and that letter ruling is revoked.

Section 7805(b) of the Code provides that the Secretary of the Treasury may prescribe the extent, if any, to which any ruling or regulation relating to the internal revenue laws may be applied without retroactive effect.

Section 13.04 of Revenue Procedure 2000-4, 2000-1 I.R.B. 115 (January 3, 2000), provides, in part, that if a letter ruling is revoked or modified, the revocation or modification applies to all years open under the statute of limitations unless the Service uses its discretionary authority under section 7805(b) of the Code to limit the retroactive effect of the revocation or modification.

Pursuant to section 13.05 of Rev. Proc. 2000-4, generally, where there is good faith reliance on a letter ruling by the taxpayer, the revocation or modification of a letter ruling will not be applied retroactively to the taxpayer for whom the letter ruling was issued or to a taxpayer whose tax liability was directly involved in the letter ruling where revoking or modifying the letter ruling retroactively would be to the taxpayer's detriment. The tax liability of each employee covered by a ruling relating to a qualified plan of an employer is directly involved in such ruling.

In this case, however, there is no basis for the Service to exercise its discretionary authority to limit the retroactive effect of the revocation of the September 17, 1997 letter ruling because such revocation will not result in any adverse tax consequences to the affected Plan X participants. A good faith reliance on that letter ruling would simply mean that Company A was precluded from distributing benefits to the affected participants because the ruling concluded that the affected participants had not separated from service. These participants have incurred no tax liability in reliance on the ruling as distributions from Plan X have not been made to them on account of

separation from service. Thus, there is no need for retroactive relief.

In support of your request for a private letter ruling dated January 3, 1997, your authorized representative submitted the following facts and representations.

Company A maintains Plan X, a defined contribution plan. Since July 1, 1991, Plan X has provided for only two types of contributions: (1) employee elective deferrals under Code section 401(k) and (2) employer matching contributions. Plan X received its most recent determination letter on October 24, 1996.

Section 6.4(a) of Plan X provides for the distribution of a participant's vested account balance to an electing participant upon his or her termination of employment. Section 10.4 of Plan X provides, however, that termination of employment for purposes of eligibility to receive a distribution shall not be deemed to occur until the earliest date therefor permitted by law.

Company A is a hotel management company. The bulk of its operations consist of managing hotel properties on behalf of, and as agent for, hotel owners. Under a typical hotel management arrangement, the owner of the hotel property enters into an agreement with Company A or one of its controlled group members, which acts as the hotel manager. As compensation for its services, Company A receives a management fee, usually a percentage of hotel gross revenues. The management agreement specifies a term at the end of which either party has the right to terminate the relationship. The agreement generally also provides a right in favor of the hotel owner to terminate the agreement prior to the end of the stated period for reasons such as the sale of the hotel facility by the owner to a third party. Upon termination of the agreement before the end of its stated term, the hotel owner is typically obligated to make a termination payment to the manager.

Under its standard form of management agreement, Company A does not generally own, acquire or create any tangible or intangible assets in connection with its management activities. Virtually all of the assets Company A needs in order to perform its duties are either leased or made available to it as part of the management arrangement.

Generally, Company A or one of its affiliates acts as the employer of the workers employed at the hotels.

June 1996 Takeovers

Pursuant to three separate management agreements, Company B, an indirect wholly-owned subsidiary of Company A, was the manager of three hotel properties owned by Partnership M. On November 27, 1995, Partnership M entered into an agreement to sell these three hotel properties to an affiliate of Trust N. Trust N is a large real estate investment trust that owns a substantial number of hotel properties. Prior to the transaction, Company B was the employer of the employees at one hotel location, and Company C, a sister entity of Company A, was the employer of the employees at the other two locations. No operating assets of any kind were transferred by Company A to either Partnership M or Trust N as part of the sale transaction. All of the affiliates of Trust N are collectively referred to herein as Trust N.

Trust N originally intended to terminate the management arrangements with Company A and its related entities after the acquisition, but because a substantial termination payment was due to Company A upon termination of the agreements and Trust N was not ready to manage the hotels itself, Trust N agreed to permit Company A to continue to manage the hotels for a brief period of time. In accordance with new agreements between Company A and Trust N entered into on April 26, 1996, Company A continued to manage the three hotels until June 19, 1996.

As of June 19, 1996, an affiliate of Trust N took over the management of the three hotels but, effective June 20, 1996, Trust N entered into a licensing agreement with Company A which allowed Trust N to continue to operate the hotels under the Company A trade name. It was anticipated that the licensing agreements would all end by March, 1997, and Trust N would enter into a licensing agreement with another unrelated entity.

As a result of the takeovers, substantially all of the employees working at the three hotels were unconditionally discharged from their employment by Company A. A few on-site managers (such as the hotel general managers, sales managers, and food and beverage managers) were not fired

but were transferred by Company A to other Company A locations. Trust N replaced this personnel with its own managers. Trust N did not undertake an enforceable obligation to rehire any of the discharged employees but, as anticipated by the parties, Trust N rehired substantially all of these employees.

Following the takeovers Trust N installed its own accounting and payroll systems at the hotels, as well as its own computer systems, training manuals and procedures, personnel policies, promotion practices, pay levels, and employee benefits. There is no indication, however, that the nature of the work of the terminated employees has changed by their termination and subsequent rehiring. Further, it also appears that the employees will continue to work at the same hotel facility as before.

October 1996 Takeovers

A second series of related transactions occurred later in 1996. On or about August 12, 1996, Trust N acquired certain hotels from various owners. Of the hotels purchased, four were being managed by Company A. At the time of acquisition by Trust N, Company A held no equity interest in three of the four hotels so acquired and it indirectly held a less than 5% interest in the fourth. Prior to the transaction, Company B was the employer of the employees at two of the hotels and Company C was the employer at the other two.

Also, on August 12, 1996, the former owners of the hotels, Company A, and Trust N entered into an amendment to the management agreement for each of the hotels. Company A continued to manage the four hotels pursuant to the new agreements until October 1, 1996. At that time Trust N took over as the new manager of the four hotels.

Also, as of October 1, 1996, Trust N and Company A entered into a licensing agreement for each of the four hotels. The licensing agreements as to three of the hotels terminated in November, 1996, and the termination payments became due. The licensing agreement as to the fourth hotel is expected to be terminated in October 1997 and the termination payment will become payable.

As a result of the October 1996 takeovers, approximately 1160 employees at the four hotels were

unconditionally discharged by Company A. The remaining facts relating to the discharged employees are substantially the same as for those recited with respect to the June 1996 takeovers.

With respect to the June 1996 and October 1996 takeovers, it has been represented that: (1)there was not, and is not, any overlap in the ownership of Company A and Trust N; (2) Company A has not liquidated or terminated its business-- that business will continue to be carried on at numerous other locations; (3) no assets or property of any kind have been transferred by or to Company A in connection with these takeovers; and (4) there was no pre-existing contractual or other relationship between Company A and Trust N prior to these takeovers.

Based upon the foregoing facts and representations, your authorized representative has requested the following ruling:

That distributions from Plan X by reason of Company A's discharge of certain employees in connection with the 1996 takeovers by Trust N, which distributions include amounts attributable to employee elective deferrals, will be considered to be made on account of the employees' separation from service within the meaning of Code section 401(k)(2)(B)(i)(I).

Section 401(k)(2)(B)(i) of the Code provides, in relevant part, that distributions of employee elective deferrals under a qualified cash or deferred arrangement may not be made earlier than the occurrence of certain stated events. Section 401(k)(2)(B)(i)(I) further provides that one of these distributable events is "separation from service."

Revenue Ruling 79-336, 1979-2 C.B. 187, provides that an employee will be considered separated from service within the meaning of section 402(e)(4)(A) of the Code only upon the employee's death, retirement, resignation, or discharge, and not when the employee continues on the same job for a different employer as a result of the liquidation, merger or consolidation, etc. of the former employer (i.e. the same desk rule). Revenue Ruling 80-129, 1980-1 C.B. 86, extended this rationale to situations where an employee of a partnership or corporation, the business

of which is terminated, continues on the same job for a successor employer formed to continue the business.

In the instant case, the issue is whether the terminated employees incurred a separation from service on account of their discharge by Company A, notwithstanding the fact that they were subsequently rehired by Trust N to perform substantially the same job at the same location. In this case, unlike in Revenue Ruling 79-336, there is no liquidation, merger, consolidation, transfer of corporate assets or similar corporate event associated with the discharge of these employees. There is no overlap in the ownership of Company A and Trust N. Also, Trust N is not a "successor employer" to Company A within the meaning of Revenue Ruling 80-129. Moreover, prior to the 1996 takeovers, the terminated employees had no legal or working relationship with Trust N. Further, after the 1996 takeovers and the end of the related transition agreements, Company A had no legal or working relationship with any of the terminated employees. Also, there was no agreement that Trust N would hire the terminated employees after they were unconditionally discharged by Company A. Lastly, Trust N instituted its own payroll and training systems and its own compensation and benefits packages.

Accordingly, we conclude that distributions from Plan X by reason of Company A's discharge of the terminated employees in connection with the Trust N takeovers, which distributions include amounts attributable to employee elective deferrals, will be considered to be made on account of the employees' separation from service within the meaning of Code section 401(k)(2)(B)(i)(I).

The above ruling is based on the assumption that Plan X is qualified under sections 401(a) and 401(k) of the Code, and the related trust is tax exempt under section 501(a) at all times.

This ruling is directed only to the taxpayer that requested it and applies only with respect to Plan X as submitted with this request. Section 6110(k)(3) of the Code provides that this private letter ruling may not be used or cited as precedent.

In accordance with a power of attorney on file with this office, a copy of this ruling is being sent to your authorized representative.

Sincerely yours,

John G. Riddle, Jr.

John G. Riddle, Jr., Manager
Employee Plans Technical Group 4

Enclosures:

Notice of Intention to Disclose
Deleted copy of the letter

cc: