Internal Revenue Service

Department of the Treasury

200132043

Uniform Issue List No: 401.29-00

Washington, DC 20224

Person to Contact:

Telephone Number:

Refer Reply to:

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Date:

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Atten:

Legend:

Company A	=
Company B	=
Company C	=
Company D	=
Company E	=
Partnership F	=
Partnership G	=
Controlled Group H	=
Company I	=
Company J	=
Hotel K	=
Hotel L	=
Plan X	=

Dear

This is in response to a request for a private letter ruling submitted by your authorized representative on May 24, 1999 and supplemented by additional correspondence dated January 5, 2000 and May 4, 2001 concerning distributions from a plan described in section 401(k) of the Internal Revenue Code ("Code") and qualified under section 401(a) of the Code. Your authorized representative submitted the following facts and representations in support of the requested rulings.

Company A, Company B, Company C, Company D, Company E and Partnership F are members of Controlled Group H. Company B, Company C, Company D and Company E are wholly-owned subsidiaries of Company A. Partnership F is comprised of Company A as general partner (92% interest) and Company D (8% interest). Partnership

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G is comprised of Company A (12.5% interest) with the remaining interests held by unrelated companies. Partnership G is not a member of Controlled Group H.

Company B sponsors Plan X, a profit sharing plan with a cash or deferred arrangement. Plan X is qualified under section 401(a) of the Code. Plan X was established to provide retirement benefits to employees of the members of Controlled Group H. Employees of Company C and Company D participated in Plan X. Plan X prohibits the distribution of a participant's account balance (including elective deferrals) until the occurrence of certain events including separation from service, attainment of age 59 ½, hardship and the sale of substantially all of the assets the employer used in a trade or business to another corporation that continues to employ the participant after the sale.

Company C and Company D provided management services and operated certain hotels owned by Partnership F and Partnership G. Company C provided management services and operated Hotel K on behalf of its owner, Partnership F. Company D provided management services and operated Hotel L on behalf of its owner, Partnership G. Company C and Company D provided services exclusively for the respective hotels pursuant to management agreements with the hotel owners, and did not perform services for other subsidiary management companies of Company A, or for any other property of Company A.

On December 24, 1996, Partnership F transferred Hotel K to Company I. Company I was established by the primary lender of Partnership F to hold Hotel K on behalf of the primary lender in lieu of foreclosure. It is represented that the value of the assets transferred in the transaction was less than 85% of the assets of Partnership F. Upon the transfer of Hotel K to Company I, the management contract between Company C and Partnership F terminated. As a result, Company C ceased operating Hotel K and terminated all its employees as of the date Hotel K was transferred.

Company I began operating Hotel K after the date of transfer. Company I hired 91% of Company C's employees following the transfer. Neither Company I nor the primary lender is an entity that is or was related (within the meaning of sections 414(b), (c), (m), or (o)) to Partnership F, Company C or Company A.

On February 7, 1997, Partnership G sold Hotel L to Company J, an unrelated buyer. The management contract between Company D and Partnership G terminated upon the sale of Hotel L to Company J. As a result, Company D ceased operating Hotel L and terminated all of its employees as of the date of sale.

Company J began operating Hotel L immediately after the sale. Company J hired 87% of Company D's employees following its purchase of Hotel L. Company J is not a corporation that is or was related (within the meaning of sections 414(b), (c), (m), or (o)) to Partnership G, Company D or Company A.

Company B wishes to distribute Plan X assets to the former employees of Company C and Company D who ceased to participate in Plan X following the transactions involving Hotel K and Hotel L, as described above.

Based on the foregoing, the following rulings are requested:

(A) That distributions to Company C's former employees who performed services with respect to Hotel K and who were subsequently employed by Company I will 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 Code and, therefore, will not adversely affect the qualified status of the cash or deferred arrangement of Plan X.

(B) That distributions to Company D's former employees who performed services with respect to Hotel L and who were subsequently employed by Company J will 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 Code and, therefore, will not adversely affect the qualified status of the cash or deferred arrangement of Plan X.

Section 401(k)(2)(B)(i) of the Code provides, in relevant part, that distributions from a qualified cash or deferred arrangement may not be made earlier than (I) separation from service, death, or disability, (II) and event described in section 401(k)(10), (III) attainment of age 59 ½, or (IV) upon hardship of the employee. Events described in section 401(k)(10) include (i) termination of the plan, (ii) disposition by a corporation to another corporation of substantially all the assets used by the corporation in a trade or business, and (iii) disposition of a corporation's interest in a subsidiary.

Section 1.401(k)-1(d)(1)(iv) of the Income Tax Regulations generally provides that amounts in a plan attributable to elective contributions may be distributed on or after the date of the sale or other disposition by a corporation of substantially all the assets used by the corporation in a trade or business of the corporation to an unrelated corporation. Section 1.401(k)-1(d)(4) further provides that (i) after the sale, the purchaser must not maintain the plan; (ii) the employee receiving the distributions must continue employment with the purchaser of the assets; and (iii) the distribution must be made in connection with the disposition of assets. Finally, section 1.401(k)-1(d)(4) provides that the sale of substantially all the assets used in a trade or business means the sale of at least 85% of the assets, and an unrelated entity is one that is not required to be aggregated with the seller under sections 414(b), (c), (m) or (o) after the sale or other disposition.

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(d)(4)(A)

of the Code (formerly section 402(e)(4)(A)) 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. 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.

Revenue Ruling 2000-27, 2000-1 C.B. 1016, provides that the change in status of employees following the sale of less than substantially all of the assets of a trade or business from one employer to another employer constitutes a "separation from service" within the meaning of section 401(k)(2)(B)(i)(I), as of the date of the sale of assets (when their employment terminated) Accordingly, a plan will not fail to meet the requirements of section 401(k)(2)(B) merely because the employees are permitted to receive distributions of their account balances, including amounts attributable to elective contributions. This is the same regardless of (i) whether the employers involved are corporations, or (ii) whether the employees are hired by the buyer pursuant to a contractual obligation.

Regarding the first requested ruling, based on the facts and circumstances presented and the representation that the transfer of Hotel K by Partnership F to Company I was a transfer of less than 85% of the assets of Partnership F, we conclude that that transaction resulted in a disposition of less than substantially all of the assets used in a trade or business.

Regarding the second requested ruling, the issue is whether the employees of Company D (part of Controlled Group H) that provided services to Partnership G (not part of Controlled Group H) incurred a separation from service when Partnership G sold Hotel L to Company J and the employees were then employed by Company J. The fact that employees of Company D provided services to Partnership G is not sufficient to apply the same desk rule to their employment with Company J, the buyer in the transaction with Partnership G.

Accordingly, based on the facts presented, we conclude, with respect to ruling requests one and two that distributions from Plan X to former employees of Company C and Company D who were reemployed by Company I and Company J will 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 Code.

The above rulings are 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) of the Code 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,

Richard Wickersham, Manager
Employee Plans Technical Guidance
Tax Exempt and Government Entities Division

Enclosures:
Deleted copy of Letter
Notice of Intention to Disclose

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