DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

TAX EXEMPT AND
GOVERNMENT ENTITIES
DIVISION

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Attn:

Legend:

Company A.....

Company B.....

State D.....

Country C.....

Plan X.....

Dear:

This is in response to a letter dated August 22, 2000, as supplemented by additional correspondence dated January 17, 2001, filed on your behalf by your authorized representative regarding a ruling under sections 401(a) and 4975(e)(7) of the Internal Revenue Code (the "Code"). The following facts and representations were submitted in support of your request.

Company A is a domestic closely held C corporation incorporated under the laws of State D. Company A wholly owns several subsidiaries, including Company B, a foreign corporation organized under the laws of Country C. Company B has two employees ("Employees") who are US citizens working for Company B and who receive compensation that is considered "foreign earned income" under section 911 of the Internal Revenue Code (the "Code"). Company A maintains Plan X, an ESOP qualified under sections 401(a) and 4975(e)(7) for eligible employees of Company A and its subsidiaries. These Employees may participate in Plan X pursuant to the plan's eligibility provisions. Plan X invests primarily in employer securities as defined under section 409(l)(2).

Section 2 of Plan X defines "Employer" as Company A and any Affiliate which elects to cover its employees under the plan. "Affiliate" is defined as Company A and any other corporation which is a member of a controlled group of corporations within the meaning of Code section 414(b) of which Company A is also a member, and other entities required to be aggregated under sections 414(c), 414(m), and 414(o). This section of Plan X also defines "participant" generally to mean a common law employee of an Employer who has met certain eligibility requirements as provided in the plan. Section 2 defines "compensation" as the total cash compensation paid to an Employee by Company A or an Affiliate during the Plan year excluding any amount in excess of $160,000 (as adjusted for COLAs under section 401(a)(17)).

Based on the above facts and representations, you request a ruling that during the time that the Employees are employed by Company B and receiving "foreign earned income" as defined under Code section 911, the Employees may participate in Plan X without adversely affecting the qualified status of the plan and its underlying trust under sections 401(a), 501(a) and 4975(e)(7).

The Employee Plans Technical office does not ordinarily issue rulings on matters involving plan qualification. However, since we have determined that the taxpayer has met the criteria set forth in Section 6.03 of Rev. Proc. 2001-4, 2001-1 I.R.B. 121, our office has decided to provide a ruling in response to the taxpayer's request.

Code section 414(b) provides that for purposes of sections 401, 408(k), 408(p), 410, 411, 415 and 416, all employees of all corporations which are members of a controlled group of corporations (within the meaning section 1563(a), determined without regard to section 1563(a)(4) and (e)(3)(C)) are treated as employed by a single employer.

Section 1.414(b) of the federal Income Tax Regulations (the "regulations") provides that for purposes of Code section 414(b), the term "members of a controlled group" means two or more corporations connected through stock ownership described in section 1563(a)(1), (2), or (3), whether or not such corporations are "component members of a controlled group" within the meaning of section 1563(b).

Code section 1563(a) defines a parent-subsidiary controlled group as any group of one or more chains of corporations connected through stock ownership with a common parent corporation if certain stock ownership tests involving at least 80 percent of the total value of shares of all classes, in relation to the parent and other corporations, are satisfied.

Code section 1563(b)(2)(C) excludes from the definition of a "component member of a controlled group" a foreign corporation subject to tax under section 881 for such taxable year.

Section 1.415-2(d)(2) of the regulations provides that for purposes of paragraph (d)(2)(i), which describes compensation for testing purposes under Code section 415 as including wages and salary, foreign earned income under section 911(b) (whether or not excludable under section

911) is also included.

As indicated above, under Code section 1563(b), a foreign corporation subject to tax under section 881 is not treated as a member of a controlled group for purposes of section 1563. This exclusion, however, does not apply for purposes of section 414(b). Under section 414(b), any corporation that is a member of a parent-subsidiary group is aggregated, whether or not the corporation is considered a component member of a controlled group under section 1563(b). Applying these principles, Company A and Company B are considered to be members of a controlled group for purposes of 414(b). We further note that there exists a controlled group of corporations for purposes of section 409(l). See 1.46-8(b)(4)(i) of the regulations. Accordingly, we rule that the Employees' mere participation in Plan X and receipt of foreign earned income under section 911 while employed with Company B will not adversely affect the qualified status of Plan X under sections 401(a), 501(a), and 4975(e)(7). This ruling is based on the assumption that Plan X remains otherwise qualified under Code sections 401(a), 409 and 4975(e)(7) and its related trust is tax exempt under section 501(a) at all relevant times.

This ruling is directed only to the taxpayer who requested it. Code section 6110(k)(3) provides that it may not be used or cited by others as precedent.

A copy of this ruling has been sent to your authorized representative in accordance with a power of attorney on file with this office. Should you have any concerns regarding this letter, please contact .

Sincerely yours,

John Swieca, Manager
Employee Plans Technical Group 1
Tax Exempt and Government Entities Division

cc:

Enclosures:
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Notice 437