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

TAX EXEMPT AND
GOVERNMENT ENTITIES
DIVISION

Uniform Issue List: 414.09-00

JUL 15 2002

T:EP:RA:T1

Attn:

Legend:

Employer A =

State B =

Plan X =

Dear :

This is in response to a ruling request dated November 27, 2001, concerning the pick up of certain employee contributions to Plan X under section 414(h)(2) of the Internal Revenue Code ("Code").

The following facts and representations have been submitted:

Statute C of State B requires Employer A, a municipality of State B, to establish and maintain a pension plan for the benefit of certain of its employees which complies with the provisions set forth in Statute C. Pursuant to Statute C, Employer A adopted Plan X,

a defined benefit plan as prescribed in Statute C, for the benefit of certain of its employees. Plan X requires mandatory employee contributions and is qualified under Code section 401(a). Statute C provides that a municipality may pick up the mandatory employee contributions within the meaning of Code section 414(h)(2). If contributions are picked up, Statute C provides that they shall be treated as employer contributions for federal income tax purposes.

Pursuant to a resolution dated October 24, 2001, Employer A has agreed to pick up, i.e., assume and pay, the mandatory employee contributions in lieu of the employees paying such contributions. Employer A shall reduce electing employees' current salaries by the amount picked up by Employer A. Electing employees do not have the option to receive the picked-up contributions in cash in lieu of having such contributions paid to Plan X.

Based on the foregoing facts and representations, you have requested the following rulings:

1) The mandatory employee contributions picked up by Employer A shall be excluded from the current gross income of the employees until distributed or made available.

2) The picked-up contributions paid by Employer A are not considered wages for federal income tax withholding purposes, and, as such, federal income taxes need not be withheld on the picked-up contributions.

Code section 414(h)(2) provides that contributions, otherwise designated as employee contributions, shall be treated as employer contributions if such contributions are made to a plan described in Code section 401(a), established by a state government or a political subdivision thereof, or any agency or instrumentality of any one of the foregoing, and are picked up by the employing unit.

The federal income tax treatment to be accorded contributions which are picked up by the employer within the meaning of Code section 414(h)(2) is specified in Revenue Ruling 77-462, 1977-2 C.B. 358. In that revenue ruling, the employer school district agreed to assume and pay the amounts employees were required by state law to contribute to a state pension plan. Rev. Rul. 77-462 concluded that the school district's picked-up contributions to the plan are excluded from the employees' gross income until such time as they are distributed to the employees. The revenue ruling held further that under the provisions of Code section 3401(a)(12)(A), the school district's contributions to the plan are excluded from wages for purposes of the Collection of Income Tax at

Source on Wages; therefore, no withholding for federal income tax purposes is required from the employees' salaries with respect to such picked-up contributions.

The issue of whether contributions have been picked up by an employer within the meaning of Code section 414(h)(2) is addressed in Revenue Ruling 81-35, 1981-1 C.B. 255 and Revenue Ruling 81-36, 1981-1 C.B. 255. These revenue rulings established that the following two criteria must be met: (1) the employer must specify that the contributions, although designated as employee contributions, are being paid by the employer in lieu of contributions by the employee; and (2) the employee must not be given the option of choosing to receive the contributed amounts directly instead of having them paid by the employer to the pension plan. Furthermore, it is immaterial, for purposes of the applicability of Code section 414(h)(2), whether an employer picks up contributions through a reduction in salary, an offset against future salary increases, or a combination of both.

In Revenue Ruling 87-10, 1987-1 C.B. 136, the Internal Revenue Service considered whether contributions designated as employee contributions to a governmental plan are excludable from the gross income of the employee. The Service concluded that to satisfy the criteria set forth in Revenue Rulings 81-35 and 81-36 with respect to particular contributions, the required specification of designated employee contributions must be completed before the period to which such contributions relate.

Employer A's resolution satisfies the criteria set forth in Revenue Ruling 81-35 and Revenue Ruling 81-36 by providing that Employer A will pick up and make contributions to Plan X in lieu of contributions by electing employees and that no such employee will have the option of receiving the contribution in cash instead of having such contribution paid to Plan X.

Accordingly, we conclude that:

1) The mandatory employee contributions picked up by Employer A shall be excluded from the current gross income of the employees until distributed or made available.

2) The picked-up contributions paid by Employer A are not considered wages for federal income tax withholding purposes, and, as such, federal income taxes need not be withheld on the picked-up contributions.

The effective date for the commencement of any proposed pick up as specified in the final resolution cannot be any earlier than the later of the date the final resolution is signed or put into effect.

This ruling is based on the assumption that Plan X is qualified under Code section 401(a) at all relevant times.

No opinion is expressed as to whether the amounts in question are subject to tax under the Federal Insurance Contributions Act. No opinion is expressed as to whether the amounts in question are paid pursuant to a "salary reduction agreement" within the meaning of Code section 3121(v)(1)(B).

This ruling is directed only to the taxpayer who requested it. Code section 6110(k) 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 pursuant to a power of attorney on file in this office. If you have any questions, please call at (202) 283-9610.

Sincerely yours,

Andrew E. Zuckerman
Manager, Employee Plans
Technical Group 1
Tax Exempt and Government
Entities Division

Enclosures:
Deleted Copy of the Ruling
Notice 437

cc: