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

TAX EXEMPT AND
GOVERNMENT ENTITIES
DIVISION

OCT 1 7 2002

T:EP:RA:T2

Re:

Dear

On November 30, 2001, you requested a ruling on behalf of the Trustees of the above-named pension plan regarding the application of § 413(b)(7) of the Internal Revenue Code (Code) in determining the deductibility of contributions made to the plan for the plan year ending on June 30,

Ruling Requested

Specifically, you have asked whether contributions of to the (the "Plan"), that were made for the plan year ended June 30, , are deductible under §§ 404(a) and 413(b)(7) of the Code.

Facts

The Plan is a multiemployer defined benefit pension plan, as defined under § 414(f)(1) of the Code, that was established pursuant to section 302(c)(5) of the Taft-Hartley Act (29 U.S.C. § 186(c)(5)). The Plan is qualified under § 401(a) of the Code. The employees covered by the Plan work for employers that Approximately employers make contributions to the Plan pursuant to several collective bargaining agreements. The collective bargaining agreements establish hourly rates at which the employers will contribute, thereby obligating employers to contribute on behalf of each covered employee in an amount equal to the employee's total hours of work multiplied by the negotiated contribution rate. There were different contribution rates under the bargaining agreements in effect during the 12-month period ending June 30,

The valuation date for the Plan is July 1, the first day of the plan year. For the July 1, through June 30, plan year, a deductible limit, under § 404(a)(1), of was calculated by the Plan's actuary. In accordance with § 413(b)(7), this

deductible limit was determined for the Plan as if all employees under the Plan were employed by one employer. The valuation report was submitted to the trustees of the Plan on March 2,

The valuation report contained a calculation of the expected contributions for the Plan year beginning July 1, based on the assumption that participants would work an average of 2,000 hours at an average contribution rate of per hour. A ten-year history of average hours of work by participants in the Plan showed fluctuations around 2,000 hours from 1,924 hours to 2,318 hours. The average contribution rate was determined from an analysis of the contribution rates for the participants. The expected contributions based on the number of participants, average contribution rate, and expected number of hours to be worked were for the plan year beginning July 1, In addition, in withdrawal liability payments were expected, increasing the total estimated contributions for the plan year to . The credit balance in the funding standard account as of the valuation date exceeded the net charges to the account, resulting in a minimum required contribution under § 412 of $ for the plan year beginning July 1,

The actual contributions made to the Plan for the plan year totaled which exceeded the estimated contributions of The actual contributions consisted of employer contributions required under the bargaining agreements and employer withdrawal liability payments. One withdrawing employer exercised its right under section 4219(c)(4) of the Employee Retirement Income Security Act of 1974 (ERISA) to prepay its entire remaining withdrawal liability in a lump sum amount in excess of

Applicable Law

Section 404(a) of the Code provides for limitations on tax deductions that may be taken for contributions to a qualified plan or trust.

Section 413 of the Code provides rules for collectively bargained pension plans and plans maintained by more than one employer. Section 413(a) of the Code provides that § 413(b) applies to plans maintained pursuant to an agreement which the Secretary of Labor finds to be a collective bargaining agreement between employee representatives and one or more employers and to each trust which is part of such plan.

Section 413(b) of the Code provides modified rules for determining whether collectively bargained plans satisfy statutory requirements, including participation, nondiscrimination, exclusive benefit rules, vesting, and funding. In addition, modifications are made to the determination of the deductible limitation under § 404(a) of the Code, as well as to the way the liability is determined for excise taxes arising under §§ 4971 and 4972 (due to accumulated funding deficiencies and to non-deductible contributions, respectively).

Section 413(b)(7) of the Code provides for the following in the determination of the deductible limit under § 404(a):

> "Each applicable limitation provided by section 404(a) shall be determined as if all participants in the plan were employed by a single employer. The amounts contributed to or under the plan by each employer who is a party to the agreement, for the portion of his taxable year which is included within such a plan year, shall be considered not to exceed such a limitation if the anticipated employer contributions for such plan year (determined in a manner consistent with the manner in which actual employer contributions for such plan year are determined) do not exceed such limitation. If such anticipated contributions exceed such a limitation, the portion of each such employer's contributions which is not deductible under section 404 shall be determined in accordance with regulations prescribed by the Secretary."

Section 4219(c)(4) of ERISA entitles an employer that withdraws from a multiemployer plan to prepay the outstanding amount of the unpaid annual withdrawal liability payments, plus any accrued interest, in whole or in part, without penalty.

G.C.M. 39677 advised that contributions to a multiemployer plan were not deductible under section § 404(a) of the Code because the contributions exceeded the deductible limit. Under the terms of the collective bargaining agreement at issue in G.C.M. 39677, the contributions were required to be a fixed dollar amount per year.

In American Stores v. Commissioner, 170 F.3d 1267 (10th Cir. 1999), aff'g 108 T.C. 178 (1997) the Tenth Circuit affirmed the Tax Court's disallowance of deductions for post year end contributions to a multiemployer plan, holding that the payment was "on account of" the previous taxable year under § 404(a)(6) only if a deduction for that taxable year was consistent with the plan's anticipatory treatment of the payment. The Tenth Circuit provided an exposition of § 413(b)(7) in the context of how § 413(b)(7) relates to the deductible limitation under § 404(a) for a defined benefit multiemployer plan. The Tenth Circuit stated, 170 F.3d at 1275, that "...Planwide compliance with deduction limits for the plan year is determined ex ante. At the beginning of the plan year, working from the terms of collective bargaining agreements and past contribution levels, the plan estimates what contributions it will receive 'for such plan year.' If that estimate is not greater than the planwide limit, every employer is then free, without any further determination and regardless of subsequent events, to deduct all the contributions it makes 'for the portion of his taxable year which is included within such a plan year.'"

Analysis

The taxpayer represents that the Plan is a Taft-Hartley plan maintained pursuant to an arrangement that is a collective bargaining agreement between employee representatives and one or more employers. Therefore, according to the taxpayer's representations, the provisions of § 413(b) apply to the Plan.

For the plan year beginning July 1, , the limitation under § 404(a) that applies to the Plan is the limitation under § 404(a)(1)(A)(iii) and the regulations thereunder. The deductible limitation under § 404(a)(1)(A)(iii) based on the plan year beginning July 1, , was determined as of the July 1, valuation date as if all employees under the Plan were employed by a single employer, as required under § 413(b)(7). As of the July 1, valuation date, the amount of contributions that was expected to be made to the Plan pursuant to the terms of the collective bargaining agreements was also determined. Both the expected contributions and the valuation of the Plan were based on the same number of employees. The amount of expected contributions, plus the amount of expected withdrawal liability payments, was less than the deductible limitation under § 404(a)(1)(A)(iii) calculated as of the valuation date.

Section 413(b)(7) provides that if anticipated contributions to the Plan, determined in a manner consistent with the way the actual contributions are determined for the plan year, do not exceed the deductible limit under § 404(a), then the actual contributions made to the Plan by each employer for the portion of the employer's tax year which is included within the plan year are considered not to exceed the applicable limitation under § 404(a).

The facts in the instant case are distinguishable from the facts under G.C.M. 39677. The expected contributions under the Plan are less than the deductible limitation under § 404(a)(1), whereas under the facts of G.C.M. 39677, the expected contributions to the plan exceeded the deductible limitation under § 404(a)(1). Under the facts of G.C.M. 39677, the collectively bargained contribution was a single, fixed, annual dollar amount, as required under the terms of the collective bargaining agreement. Accordingly, the anticipated contribution to the plan was the fixed annual dollar amount. The actual contributions made for the years under consideration in G.C.M. 39677 were equal to the anticipated contributions. However, the collectively bargained contribution requirement exceeded the deductible limit under § 404(a). Therefore, because the anticipated contributions were in excess of the deductible limit, the exception provided under § 413(b)(7) did not apply. G.C.M. 39677 appropriately concluded that the portions of the actual contributions that exceeded the deductible limits for the years under consideration were nondeductible.

In the case at hand, the expected or anticipated contributions to the Plan, including the withdrawal liability payments expected or anticipated to be made during the plan year, totaled This amount was determined as of the valuation date (i.e., July 1,) in a manner consistent with the manner in which actual contributions to the plan

were determined, based on the same assumptions (i.e., number of participants, number of hours worked, and hourly rates under the bargaining agreements), with the difference being that the expected or anticipated contributions were based on anticipated levels of work at anticipated hourly rates rather than on the actual number of hours worked and the actual hourly rates. The deductible limitation under § 404(a)(1)(A)(iii), also determined as of the valuation date at the beginning of the plan year, was in excess of the amount of expected or anticipated contributions. The actual contributions to the Plan, determined as of the end of the plan year, totaled Because the anticipated contributions did not exceed the deductible limit for the Plan, in accordance with § 413(b)(7) the actual contributions made to the Plan will not be considered to exceed the § 404(a) deductible limitation. This result agrees with the reasoning laid out in American Stores.

Conclusion

The anticipated contributions to the Plan for the plan year beginning July 1, do not exceed the limitations under § 404(a) of the Code. Therefore the actual contributions totaling are deductible under § 404(a)(1)(A)(iii) for the tax years related to the plan year beginning July 1,

If you have any questions regarding this matter, please contact

Sincerely,

Martin L. Pippins

Martin L. Pippins, Manager
Employee Plans Actuarial Group 2