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

TAX EXEMPT AND
GOVERNMENT ENTITIES
DIVISION

APR 2 8 2003

T:EP:RA:T:A2

Re:

Dear

On September 20, 2002, your authorized representative 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 years ending on December 31, 2000 and December 31, 2001.

Ruling Requested

Specifically, you have asked whether contributions of to the (the "Plan"), that were made for the plan year ended December 31, 2000, and contributions of that were made to the Plan for the plan year ended December 31, 2001, are fully deductible under §§ 404(a) and 413(b)(7) of the Code.

Facts

The Plan is a nationwide collectively bargained 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 Plan is sponsored by a Board of Trustees consisting of an equal number of union representatives and employer representatives in accordance with a written trust agreement.

As of December 31, 2000, the Plan had approximately participants, including approximately active participants. Additionally, over employers contributed to the Plan. Contributions to the Plan are made by the employers pursuant to the terms of collective bargaining agreements between the employers and the

or
or with the . itself. Each agreement requires an employer to contribute a negotiated fixed amount to the Plan for each hour that an employee is paid wages.

The valuation date for the Plan is January 1, the first day of the plan year. For the 2000 plan year, the Plan's actuary determined that the expected contributions for the year would be and that this level of contributions would exceed the deductible limit. In response, the Plan Trustees adopted an amendment that retroactively increased benefits for the 2000 plan year. Taking the benefit increase into account, the Plan's actuary recalculated a deductible limit, under § 404(a)(1), of . 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.

In March, 2000, subsequent to the valuation date for the 2000 plan year, began contributing to the Plan on behalf of approximately mechanics and passenger service employees. For the 2000 plan year, contributions made by in the amount of accounted for of the Plan's total actual contributions.

The actual contributions made to the Plan for the 2000 plan year totaled including in withdrawal liability payments.

For the 2001 plan year, the Plan's actuary determined that the expected contributions for the year would be . The deductible limit under § 404(a)(1) for the year was calculated to be In March, 2001, began contributing to the Plan on behalf of approximately The actual contributions made to the Plan for the 2001 plan year totaled including in contributions made by , and in withdrawal liability payments.

ceased to be a contributing member of the Plan after 2001, and the Plan consequently ceased to cover approximately

For the 2000 and 2001 plan years, the expected contributions were determined based upon the number of active employees in the Plan, the average contribution rate for the plan year, and total hours assumed to be worked by each employee. The number of active employees in the Plan was based upon the number of employees who worked at least in the prior plan year and who had at least one pension credit as of the end of that year. The number of active employees, thus determined, for the 2000 plan year was and the number of active employees for the 2001 plan year was

The average contribution rate for the plan year was based on an analysis of all known bargained contribution rates applicable for that plan year. For the 2000 plan year, the

average contribution rate was determined to be per hour worked. For the 2001 plan year, the average contribution rate was determined to be

The total hours assumed to be worked by each employee was for both the 2000 and 2001 plan years. The total hours so determined was based on the historical experience of the Plan combined with the Plan Trustees' best estimate of the economic outlook for the industries supporting the plan.

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 each of the plan years beginning January 1, 2000 and 2001, the limitations under § 404(a) that applied to the Plan were determined as of the January 1, 2000 and January 1, 2001 valuation dates, respectively, as if all employees under the Plan were employed by a single employer, as required under § 413(b)(7). As of the January 1, 2000 and January 1, 2001 valuation dates, the amount of contributions that were expected to be made to the Plan for those respective plan years pursuant to the terms of the collective bargaining agreements were also determined. For each plan year, both the expected contributions and the valuation of the Plan were based on the same number of employees. For each plan year, the amount of expected contributions 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 totaled for the 2000 plan year, and for the 2001 plan year. These amounts were determined as of the respective plan year valuation dates 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), also determined as of the valuation dates at the beginning of the respective plan years, was with respect to the 2000 plan year, and with respect to the 2001 plan year. For both years, the deductible limitation was in excess of the amount of expected or anticipated contributions. The actual contributions to the Plan, determined as of the end of each plan year, totaled for the 2000 plan year, and for the 2001 plan year. The actual contributions for the two plan years exceeded the respective deductible limits under § 404(a)(1) by for the 2000 plan year, and by for the 2001 plan year. Each year's contributions included unexpected contributions due to the post-valuation date participation of employees in the Plan. Because the anticipated contributions did not exceed the deductible limits for the Plan for the 2000 and 2001 plan years, in accordance with § 413(b)(7) the actual contributions made to the Plan for the 2000 and 2001 plan years

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 years beginning January 1, 2000, and January 1, 2001 do not exceed the limitations under § 404(a) of the Code. Therefore the actual contributions totaling for 2000, and for 2001 are deductible under § 404(a)(1)(A)(iii) for the tax years related to those respective plan years.

If you have any questions regarding this matter, please contact

Sincerely,

Martin L. Pippins

Martin L. Pippins, Manager
Employee Plans Actuarial Group 2