Significant Index No. 413.02-00

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TAX EXEMPT AND
GOVERNMENT ENTITIES
DIVISION

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

AUG 2 1 2003

T:EP:RA:T:A2

Re:

Dear

On March 17, 2003, your authorized representative requested a ruling on behalf of the Trustees of the above-named pension plan (the "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 December 31, 2001.

Ruling Requested

Specifically, you have asked whether contributions of $434,226 to the Plan, that were made 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 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 the Laborers District Council (the "Council"), on behalf of Laborers These locals are affiliates of the Laborers International Union of . The Plan covers employees who generally work for employers who belong to the (the "Association"), either as industry laborers or The Plan is governed by a six-member Board of Trustees, of whom half are designated by the Council and half by the Association, respectively.

Currently, the Plan covers approximately 350 active workers, 250 retirees and beneficiaries, and 100 inactive vested participants. Approximately 55 employers contribute to the Plan pursuant to the terms of various collective bargaining agreements negotiated between either the Association or individual employers and the Laborers' Local Unions that represent their workers. Each agreement requires an employer to contribute a negotiated fixed amount to the Plan for each hour that an employee is paid wages. The negotiated contribution rate for all employer groups, effective May 1, 2000, was $.50 per hour. Subsequently, the contribution rate was increased for some employer groups to $.55 per hour effective March 1, 2002, and for other employer groups to $.55 per hour effective May 1, 2002.

The valuation date for the Plan is January 1, the first day of the plan year. For the 2001 plan year, the Plan's actuary determined that the expected contributions for the year would be $342,100. The deductible limit, determined under § 404(a)(1)(A)(iii), for the year was calculated to be $385,567. The actual contributions made to the Plan for the 2001 plan year totaled $434,226.

For the 2001 plan year, the expected contributions were determined based upon the number of active employees in the Plan, the contribution rate in effect 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 had at least one pension credit. The number of active employees, thus determined, for the 2001 plan year was 311.

The contribution rate for the 2001 plan year was $.50 per hour, the same for all participating employees.

The total hours assumed to be worked by each employee for the 2001 plan year was 2,200. Historical figures based on the ratio of total annual contributions over average contribution rates for the 1991-2000 plan years showed that the average hours worked during a year, based on a 10-year average, was 2,445.

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 January 1, 2001, the limitations under § 404(a) that applied to the Plan was determined as of the January 1, 2001 valuation date, as if all employees under the Plan were employed by a single employer, as required under § 413(b)(7). As of the January 1, 2001 valuation date, the amount of contributions that were expected to be made to the Plan for the plan year pursuant to the terms of the collective bargaining agreements were also determined. For the plan year, both the expected contributions and the valuation of the Plan were based on the same number of employees. For the 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 $342,100 for the 2001 plan year. This amount was determined as of the valuation date in a manner consistent with the manner in which actual contributions to the plan was 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 2,200 hours assumed to be worked per participant for the 2001 plan year was below the 10-year historical average hours of 2,445. A chart prepared by the Plan's actuary demonstrated that only once, in 1993, did the average number of hours worked fall below 2,200. Prior to that year, the average hours worked ranged from approximately 2,200 to 2,300. Subsequent to 1993, the average hours worked rose sharply to almost 2,800 in 1995, but then fell again to approximately 2,370 in 1997 and 1998. After a brief spike in the average (to 2,754) in 1999, the average hours worked fell again to approximately 2,496 in 2000. In full consideration of these facts, it would appear that a more reasonable approximation to the expected hours worked for the 2001 plan year would be a figure closer to the 10-year average of 2,445.

The contributions that would be expected for 2001, using an assumption of 2,445 hours worked per participant, would have been $380,198 (2,455 x 311 participants x $.50 contribution rate per participant). This figure exceeds the originally computed amount of expected contributions.

The deductible limitation under § 404(a)(1)(A)(iii), also determined as of the valuation date at the beginning of the plan year, was $385,567. The deductible limitation was in excess of the amount of expected or anticipated contributions, even when the expected contributions are recalculated using an assumption of 2,445 hours worked per participant. The actual contributions to the Plan, determined as of the end of the plan year, totaled $434,226. Therefore, the actual contributions for the plan year exceeded the deductible limit under § 404(a)(1). Because the anticipated contributions (as recalculated using an assumption of 2,445 hours worked) did not exceed the deductible limit for the Plan for the tax year related to the 2001 plan year, in accordance with § 413(b)(7) the actual contributions made to the Plan for the 2001 plan year 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 January 1, 2001 (when recalculated as described above) do not exceed the limitations under § 404(a) of the Code. Therefore the actual contributions totaling $434,226 for 2001 are deductible under § 404(a)(1)(A)(iii) for the tax year related to that plan year.

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

If you have any questions regarding this matter, please contact

Sincerely,

Martin L. Pippins

Martin L. Pippins, Manager
Employee Plans Actuarial Group 2