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C

Internal Revenue Service (I.R.S.)

Private Letter Ruling

Issue: August 14, 1998
May 19, 1998

Section 402--Taxability of Beneficiary of Employee's Trust (Time and Manner of Taxation)

402.00-00 Taxability of Beneficiary of Employee's Trust (Time and Manner of Taxation)

402.03-00 Foreign Situs Trust

402.08-00 Rollover Contributions

402.08-01 Rollover Lump Sums

CP:E:EP:T:3

LEGEND:

Taxpayer A:

Agency B:

City C:

Company D:

Company E:

Company F:

Annuity Contract G:

Annuity Contract H:

Plan I:

Group Plan J:

Group Plan K:

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Plan L:

Province M:

City N:

Plan X:

Dear ***

This is in response to the ***, letter submitted on your behalf by your authorized representative, as supplemented by letters dated ***, ***, and ***, in which you request several letter rulings concerning a proposed rollover of amounts from Plan L, maintained with Company F in Canada, into an individual retirement arrangement (IRA) set up and maintained in the United States. The following facts and representations support your ruling request.

Taxpayer A, a United States citizen, is employed by Agency B, which is located in Province M, Canada. Taxpayer A resides in City C and has never resided in Canada. Although employed by Agency B, Taxpayer A commutes from City C to Canada for employment purposes.

Agency B was established in by separate agreements between the United States and Canada which were ratified by both countries and have the effect of law in each country. Article IV of the Agreement(s) relating to the establishment of Agency B provides that Agency B may employ both Canadian and American citizens. Their employment shall be subject to the relevant Canadian labor and other laws, and the Government of Canada agrees to take such measures as may be necessary to permit United States citizens to accept employment with Agency B on a similar basis to Canadian citizens.

In ***, Agency B adopted Plan X for all of its employees. Initially, Agency B made Plan X contributions for all of its employees, including those who were citizens of the United States, into a variable investment registered plan purchased through Company D of City N, Canada.

In ***, Plan X was frozen for Agency B employees who were United States citizens. From *** through ***, contributions for United States employees were made to Annuity Contracts G and H held within a plan established in the United States and managed by Company E.

In ***, the funds previously invested with Company D for Agency B employees who were United States citizens were deposited with Company D in Plan I, a registered plan. In ***, all funds held by Company D were converted to Group Plan J, a group registered retirement savings plan established in Canada.

In ***, all funds held in Group Plan J were transferred to Group Plan K, a group registered retirement savings plan established in Canada, held with Company F.

Taxpayer A holds Plan L, his individual account in Group Plan K, with Company F. Taxpayer A intends to transfer his balance in Plan L into an IRA set up and maintained in the United States.

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In an ***, letter, Revenue Canada advised Taxpayer A that a distribution from Plan L would be subject to Canadian non-resident tax withholding under subparagraph 212(1)(1) of the Canadian Income Tax Act. The letter also indicated that if Taxpayer A could roll over his Plan L distribution into an IRA without subjecting said Plan L distribution to taxation in the United States, then Revenue Canada would reconsider its decision regarding Canadian non-resident withholding.

Based on the above, Taxpayer A requests the following letter rulings:

1. That Taxpayer A's Plan L balance is an amount eligible to be rolled over pursuant to section 402(c) of the Internal Revenue Code; and
2. that Taxpayer A's Plan L balance may be rolled over into an IRA set up and maintained in the United States.

With respect to the requested letter rulings, Code section 402(c)(1) provides that, if an employee transfers any portion of an eligible rollover distribution into an eligible retirement plan, the amount so transferred shall not be includible in income for the taxable year in which paid.

Code section 402(c)(4) provides that an "eligible rollover distribution" is a distribution to an employee of all or any portion of the balance to the credit of the employee in a qualified trust; except that such term shall not include--

(A) any distribution which is one of a series of substantially equal periodic payments (not less frequently than annually) made--

(i) for the life (or life expectancy) of the employee or the joint lives (or joint life expectancies) of the employee and the employee's designated beneficiary, or

(ii) for a specified period of 10 years or more, and

(B) any distribution to the extent such distribution is required under section 401(a)(9).

Code section 402(c)(8)(B) defines an eligible retirement plan to include, inter alia, an IRA described in Code section 408(a).

Code section 408(a) provides, in pertinent part, that the term "individual retirement account" means a trust created or organized in the United States for the exclusive benefit of an individual or his beneficiaries.

Code section 408(d)(3)(A) provides that paragraph (1) does not apply to any amount paid or distributed out of an individual retirement account or individual retirement annuity to the individual for whose benefit the account or annuity is maintained if (i) the entire amount received (including money and any other property) is paid into an individual retirement account or individual retirement annuity (other than an endowment contract) for the benefit of such individual not later than the 60th day after the day on which he receives the payment or distribution.

Revenue Ruling 89-95, 1989-2 C.B. 131, provides, in pertinent part at page 132, that a Canadian registered retirement savings plan (RRSP) is not a "qualified" plan for United States tax purposes.

Revenue Procedure 89-45, 1989-2 C.B. 596, provides, in pertinent part, that Canadian registered retirement savings plans are provided certain income tax

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benefits for Canadian tax purposes; however, these plans do not meet the requirements for qualification as individual retirement accounts under section 408(a) of the Internal Revenue Code.

The above authority stands for the following propositions:

- a. A RRSP is not an IRA as that term is defined in Code section 408(a);
- b. A distribution from a RRSP does not constitute an "eligible rollover distribution" as that term is defined in Code section 402(c)(4); and
- c. The provisions of the Internal Revenue Code do not authorize funds distributed from a RRSP to be rolled over into an IRA.

However, it is also necessary to consider the effect, if any, which the Convention Between the United States and Canada has on the above propositions and on Taxpayer A's proposed rollover of a RRSP distribution into an IRA as defined in Code section 408(a). With respect to this effect, it should be noted that the United States and Canada have not adopted the U.S. Model Income Tax Treaty Model Convention). Thus, Article 18(6)(c) of the Model Convention does not apply to the proposed transaction.

Article XVIII(1) (Pensions and Annuities) of the Convention Between the United States and Canada with Respect to Taxes on Income and on Capital, dated September 26, 1980, as amended (Convention), provides that pensions and annuities arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State, but the amount of any such pension that would be excluded from taxable income in the first-mentioned State if the recipient were a resident thereof shall be exempt from taxation in that other State.

Article 9(3) of the March 17, 1995, Protocol to the Convention adds the following paragraph (7) to Article XVIII of the Convention:

"a natural person who is a citizen or resident of a Contracting State and a beneficiary of a trust, company, organization or other arrangement that is a resident of the other Contracting State, generally exempt from income taxation in that other State and operated exclusively to provide pension, retirement or employee benefits may elect to defer taxation in the first-mentioned State, under rules established by the competent authority of that State, with respect to any income accrued in the plan but not distributed by the plan, until such time as and to the extent that a distribution is made from the plan or any plan substituted therefor".

Notice 96-31, 1996-1 C.B. 378, provides, in pertinent part, that registered retirement income funds and RRSPs meet the conditions of the Protocol to the Convention and, as a result, qualify for the benefits of Article XVIII of the Convention, as amended by Article 9(3) of the Protocol.

Paragraph 7 which, as noted above, was added to Article XVIII of the Convention by Article 9(3) of the Protocol replaced paragraph 5 of Article XXIX (Miscellaneous Rules). The new paragraph makes reciprocal the rule that it replaced and expands its scope so that it no longer applies only to residents and citizens of the United States who are beneficiaries of Canadian Registered Retirement Savings Plans.

In general, Paragraph XVIII(7) of the Convention provides for deferral of

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taxation on earnings on contributions to qualified retirement arrangements as long as certain conditions are met. Paragraph XVIII(7) of the Convention does not provide an exemption or deferral with respect to amounts distributed from qualified retirement arrangements.

In this case, Taxpayer A's distribution from Plan L will be a taxable event in accordance with the Canadian Income Tax Act even if the distribution is "rolled over" to an IRA set up and maintained in the United States. Thus, Article XVIII(1) (Pensions and annuities) of the Convention will not operate to exclude the distribution from Taxpayer A's taxable income.

Thus, with respect to your ruling requests, we conclude as follows:

1. That Taxpayer A's Plan L balance is not an amount eligible to be rolled over pursuant to section 402(c) of the Internal Revenue Code; and
2. that Taxpayer A's Plan L balance may not be rolled over into an IRA set up and maintained in the United States.

Pursuant to a power of attorney on file in this office, a copy of this letter ruling is being sent to your authorized representative.

Sincerely yours,

Frances V. Sloan

Chief, Employee Plans

Technical Branch 3

Enclosures:

Deleted copy of ruling letter

Form 437

This document may not be used or cited as precedent. Section 6110(j)(3) of the Internal Revenue Code.

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