Pension Benefit Guaranty Corporation

76-60

April 30, 1976

REFERENCE:
[*1] 403(c)(1) Establishment of Trust. Restriction on Use of Plan Assets to Benefit Employer
4044(d)(1) Allocation of Assets. Distribution of Residual Assets to Employer

OPINION:

This is in reference to the above matter. We have been advised that * * * (the "Plan") has assets in excess of the amount needed to cover all benefits of participants under the plan and that the employer believes that any excess assets should revert to it.

This Corporation has carefully examined the Plan provisions and has determined that the Employee Retirement Income * * * Security Act of 1974 (the "Act") precludes the reversion to the employer of any excess Plan assets.

Section 4044 of the Act governs the allocation of plan assets upon termination. It provides that the assets of a terminated plan are to be allocated "among the participants and beneficiaries of the plan" according to the priority categories established in § 4044(a). Section 4044(d)(1) further provides that:

"Any residual assets of a plan may be distributed to the employer if -

(A) all liabilities of the plan to participants have been satisfied,

(B) the distribution does not contravene any provision of law, and

(C) the plan provides for such [*2] a distribution in these circumstances."

Section 403(c)(1) of ERISA provides, in pertinent part:

"Except as provided . . . under sections 4042 and 4044 (relating to termination of insured plans), the assets of a plan shall never inure to the benefit of any employer. . . ."

Article XIII of the Plan contains the provisions governing termination of the Plan. Those provisions do not provide for reversion of excess Plan assets to the employer. Nor is there any such provision elsewhere in the plan. Section 13.2 of the Plan does not by its terms allow the employer to amend the Plan. Rather that power is given to the * * * Life Insurance Company. Most importantly, Section 13.2 specifically provides that "no amendment shall ever cause any reversion of funds to the employer." Thus, on its face the Plan does not meet the statutory criteria that would enable any excess Plan assets to revert to the employer.

In addition to the above cited provisions of ERISA, its enactment history evinces a clear Congressional intent to require the return of such assets to participants upon termination of a pension plan, unless the plan specifically provides otherwise. Both the House and Senate version [*3] of ERISA which were sent to the Conference Committee addressed the problem of excess plan assets.

Under the House Bill, with certain exceptions not relevant here, plan assets in an ongoing plan were to be used for the exclusive purpose of providing benefits to participants and defraying reasonable administrative expenses of the plan. H.R. 2, as passed by the House, 93rd Cong., 2d Sess. § 111(a)(1) (February 28, 1974). Under the allocation of assets section of that Bill, any assets remaining after a plan had been * * * terminated and all liabilities of the plan had been satisfied could only be returned to the employer if the plan document so provided and, then, only after a hearing at which it was found by the Secretary of Labor that there had been compliance with the purposes of the allocation of assets section. Id. § 112(d)(3). In the absence of a specific plan provision directing how residual assets were to be distributed, such assets were to be distributed ratably to each person otherwise receiving a distribution under the allocation of assets provisions. Ibid.

The Senate version of ERISA also dealt with the distribution of excess plan assets upon termination. [*4] It provided that where residual assets of a plan existed after satisfaction of all liabilities of the plan to its participants and

* * * beneficiaries, such assets were to be distributed ratably to the plan beneficiaries, or to the contributors to the plan, if the plan so provided. H.R. 4200, as passed by the Senate, 93rd Cong., 1st Sess. § 510 (September 19, 1973). And, like the House version, the Senate version also provided that plan assets should be held for the exclusive purpose of providing benefits and defraying reasonable expenses of administration. Ibid.

The enacted version of ERISA implements the intent so clearly expressed in both the House and Senate versions. Thus, * * * § 403(c) of ERISA provides (with certain exceptions not * * * relevant here) that plan assets shall be held for the exclusive purposes of providing benefits and defraying administrative costs and can never inure to the benefit of an employer upon termination except under § 4042 and § 4044. Section 4042 does not apply to the instant case, and § 4044(d)(1) provides that plan assets may only be returned to the employer if certain defined conditions are met. One of those conditions is that [*5] the plan specifically provide that residual assets are to be returned to the employer.

It is the opinion of the Pension Benefit Guaranty Corporation that any amendment to a terminating or terminated pension * * * plan to allow a return of excess plan assets to the employer would render nugatory both direct statutory provisions and the Congressional intent evident in the legislative history and thus should not be permitted. Therefore, the Pension Benefit Guaranty Corporation cannot approve the proposed allocation of assets of the Plan contained on the Form 4576, dated November 6, 1975, that was submitted to the Internal Revenue Service.

I hope this explanation proves helpful to you. Should you have any further questions of a legal nature, please do not hesitate to contact Mr. * * * the Staff * * * Attorney assigned to this case (Tel. No. (202) 254-4895). Mr. * * * Case Officer, will also continue to be available to help you terminate the Plan in a manner consistent with the Act.

Henry Rose
General Counsel