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TAX EXEMPT AND
GOVERNMENT ENTITIES
DIVISION

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

DEC 12 2003

T:EP:RA:T:AS

Re:

On January 3, 2003, you 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 August 31, 2001.

Ruling Requested

Specifically, you have asked whether contributions of \$1,488,503 to the Plan, that were made for the plan year ended August 31, 2001, are fully deductible under §§ 404(a) and 413(b)(7) of the Code.

Facts

(the "Fund") is a trust fund authorized under section 302(c)(5) of the Labor Management Relations Act (29 U.S.C. § 186(c)(5)) that provides pension benefits pursuant to the terms of the Plan solely from employer contributions for employees who are covered by a collective bargaining agreement or other written agreement with the of the (the "Union"). The trust agreement provides for no more than two Union Trustees and no more than two Employer Trustees. 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.

¹ The Fund was renamed following an amendment in June, 2002 from the

As of September 1, 2000, the Plan covered a total of 403 participants' of whom 273 were active workers, 65 were retirees and beneficiaries, and 65 were inactive vested participants. The bargaining agreement between the Union and employers requires employers to contribute a negotiated fixed amount to the Plan for each hour that an employee is paid wages. The negotiated contribution rate in effect for the plan year beginning September 1, 2000 and ending August 31, 2001 (the "2000 plan year") for all employer groups was \$2.05 per hour.

For the 2000 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, 273, who had worked during the 1999 plan year. It was not expected that the Plan would receive withdrawal liability payments from employers for the 2000 plan year.

The total hours assumed to be worked by each employee for the 2000 plan year was 1,200. This assumption was based on an moving average of hours worked in previous years. Historical figures based on the ratio of total annual contributions over average contribution rates for the prior four plan years showed that the average hours worked during a year, based on a four-year average, was 1,008. The average number of hours worked for the 1999 plan year was 1,378. The average hours worked for three of the four years prior to 1999 did not exceed 1,000. However, the actual average number of hours worked per employee for the 2000 plan year was 1,562. For the 2001 plan year, a new actuarial firm was engaged, and the total hours assumed to be worked by each employee was based on the hours worked in the preceding plan year.

The valuation date for the Plan is September 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 \$671,580. The deductible limit, determined under § 404(a)(I)(A)(iii). for the year was calculated to be \$726,613. The actual contributions made to the Plan for the 2000 plan year totaled \$1,488,503.

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

² The information submitted with your request contained a preliminary valuation for the 2000 plan year. The number of participants considered in this ruling was obtained from the Schedule 8. Form 5500 filed for the 2000 plan year.

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), 108 T.C. 178 (1997), the Court 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 Court 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 Court 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 2000 plan year, the limitation under § 404(a) that applied to the Plan was determined as of the September 1, 2000 valuation date, as if all employees under the Plan were employed by a single employer, as required under § 413(b)(7). As of the September 1, 2000 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 2000 plan year, both the expected contributions and the valuation of the Plan were based on the same number of employees. For the 2000 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 \$671,580 for the 2000 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 the hourly contribution rate under the bargaining agreement), with the difference being that the expected or anticipated contributions were based on anticipated levels of work at the hourly contribution rate rather than on the actual number of hours worked.

The 1,200 hours assumed to be worked per participant for the 2000 plan year was conservative in that it exceeded the 4-year historical average of 1,008 hours. This conservative position was reasonable in light of the Plan's immediately previous hours-worked history (1,378 hours worked in the 1999 year). An analysis of the history of the number of hours worked showed that prior to January 1, 1999, work performed by a member of the Union during a plan year could have been in one of several geographic jurisdictions, resulting in work being recognized in one of five other pension plans in

The collective bargaining structure for the :

. was changed effective January 1, 1999, to provide that, in general³, all covered employees working in the trade in would have contributions made to the Plan on their behalf. This change in the collective bargaining agreement had the effect of both increasing both the number of participants covered by the Plan as well as the number of hours worked per participant per year. However, for the 2000 plan year (and subsequent to the valuation date for the plan year), contributions for covered employment exceeded that which was anticipated based on the number of active employees as of the valuation date and the expected number of hours worked per participant (using the historical average methodology of 1,200). We note that the change in the methodology for the 2001 plan year to compute the assumed hours worked based on the preceding year's hours worked rather than a historical average appears to improve the quality of this assumption in the case of the Plan for subsequent years.

The deductible limitation under § 404(a)(1)(A)(iii), also determined as of the September 1, 2000 valuation date was \$726,613. 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 the plan year, totaled \$1,488,503. Therefore, the actual contributions for the plan year exceeded the deductible limit under § 404(a)(1). Because the anticipated contributions did not exceed the deductible limit for the Plan for the tax year related to the 2000 plan year, in accordance with § 413(b)(7) the actual contributions made to the Plan for the 2000 plan year will not be

³ The bargaining structure excluded *two* counties and one employer from the coverage requirements.

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 September 1, 2000 do not exceed the limitations under § 404(a) of the Code. Therefore the actual contributions totaling \$1,488,503 for the plan year ending August 31, 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 6115 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, Manager
Employee Plans Actuarial Group 2