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1993

PLR/TAM 9344038 - 9344001

PLR 9344038 -- IRC Sec(s). 83, 8/02/1993

Private Letter Rulings

Private Letter Ruling 9344038, 8/02/1993, IRC Sec(s). 83

UIL No. 0083.00-00; 0132.03-00; 0162.00-00

Headnote:

Section 83 -- Property Transferred for Services

Reference(s): Code Sec. 83;

A company maintains a supplemental executive retirement plan under which participants have only an unsecured promise to receive deferred compensation. Independently of the sponsoring company, a participant negotiated with an insurance company for a policy to further protect the deferred compensation benefits payable to the participant under the plan.

The insurance company issued the policy without entering any collateral agreements with the sponsoring company, and without obtaining information about the sponsoring company other than publicly available information. The sponsoring company may increase the participant's compensation in the amount of the premium payment, and the participant will include that increase in gross income.

The Service has ruled that the issuance of the policy will not cause the deferred compensation to be included in the participants income until paid or made available.

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Full Text:

Date: August 2, 1993

CC:EE:1 – TR-31-1486-93

Dear

This is in response to your request for a ruling on behalf of X, as to the income tax consequences of the purchase of an insurance policy from Z to secure the future payment of nonqualified deferred compensation benefits pursuant to the Y Supplemental Executive Retirement Plan (the "Plan"). In connection with the Plan, Y maintains a so-called rabbi trust (together hereafter referred to as the "Plan") on which a favorable private letter ruling from the Service was previously obtained.

The terms of the arrangement are as follows. X is a participant in the Plan and will receive a benefit under the Plan provided X completes a specified period of employment with Y and retires under the Y Pension Plan. Benefits payable under the Plan commence as of the end of the month following a participant's retirement from Y and are paid monthly until a participant's death (with surviving spouse benefits continuing thereafter). The Plan provides that any financing vehicles used by Y to finance benefits due under the terms of the Plan will be subject to the claims of Y's creditors. The Plan states that it is unfunded and that as to benefits payments under the Plan, a participant has only the rights of an unsecured creditor against Y. Furthermore, the Plan states that benefits under the Plan can not be assigned, sold, transferred, pledged, encumbered or attached.

In order to further protect the future deferred compensation benefits payable to X pursuant to the Plan, Z, an insurance company that is unrelated to Y, proposes to issue and deliver to X, an insurance policy with X as the named insured. X has represented that X is not an officer or director of Z and does not own any stock of Z. X and Z negotiated all the terms of the policy, including the amount of the premium. Y was not present at and did not participate in any negotiations concerning the terms or premium of the policy. X will pay all the premiums due under the terms of the policy. Y may increase X's compensation by an amount determined

with reference to some or all of the premiums paid by X, although Y is not obligated to do so. X represents that to the extent that Y increases X's compensation by an amount determined with reference to the premiums payable under the policy, X will treat the increased compensation as includible compensation under  section 61(a)(1) of the Internal Revenue Code.

There is no contractual relationship between Y and Z, and Y will not be a signatory to the policy or any ancillary document. Z and Y will not enter into any indemnity or counter-indemnity agreements, Y will not escrow any amounts with respect to the policy and was not present at nor involved in any negotiations involving the policy. Further, Z has represented that in determining whether to issue the policy, it relied only on publicly available information, and received no information from Y other than publicly available information.

Under the terms of the policy, Z has agreed to indemnify X upon the occurrence of an Insured Event, as defined in the policy. The policy provides that Z will pay X any unpaid deferred compensation benefits when due under the terms of the Plan upon written claim from X and subject to proof satisfactory to Z that there has been an Insured Event during the period of the policy. After payment of any claim under the policy, Z is subrogated to all of X's rights against Y, and any other person or organization liable under the terms of the policy.

 Section 61(a) of the Code provides in general that gross income means all income from whatever source derived, including compensation for services. In *Commissioner v. Smith*, 324 U.S. 177, 181 (1945), the court found that the language of  section 61(a) of the Code, and its predecessor, was "broad enough to include in taxable income any economic or financial benefit conferred upon an employee as compensation, whatever the form or mode by which it is effected."

Under the economic benefit doctrine, an employee has currently includible income from an economic or financial benefit received as compensation, though not in cash form. Economic benefit applies when assets are unconditionally and irrevocably paid into a fund or trust to be used for the employee's sole benefit. *Sproull v. Commissioner*, 16 T.C. 244 (1951), *aff'd per curiam*, 195 F. 2d. 541 (1952)  Rev. Rul. 60-32, 1960-1 C.B. 174, Situation 4. In  Rev. Rul. 72-25, 1972-1 C.B. 127, and  Rev. Rul. 68-99, 1968-1 C.B. 193, an employee did not receive income as a result of the employer's purchase of an insurance contract to provide a source of funds for deferred compensation because the insurance contract is the employer's asset, subject to the claims of the employer's creditors.

 Section 83(a) of the Code provides that the excess (if any) of the fair market value of property transferred in connection with the performance of services over the amount (if any)

paid for the property is includible in the gross income of the person who performed the services for the first taxable year in which the property becomes transferable or is not subject to a substantial risk of forfeiture.

Section 1.83-3(a)(1) of the Income Tax Regulations provides that a transfer of property occurs when a person acquires a beneficial ownership interest in such property. Section 1.83-3(e) of the regulations provides that, for purposes of [section 83](#) of the Code, the term “property” includes real or personal property other than money or an unfunded and unsecured promise to pay money or property in the future. Property also includes a beneficial interest in assets (including money) transferred or set aside from claims of the transferor's creditors, for example, in a trust or escrow account.

Under the terms of the Y Supplemental Executive Retirement Plan, X has only Y's unsecured promise to pay the deferred compensation benefits. As a result of X independently obtaining the policy, Y has not transferred property to X that is set aside from Y's creditors for X. Since X negotiated the terms of, and obtained the policy without any involvement by Y, and Z issued the policy without entering into any collateral agreements with Y and without obtaining information about Y, other than publicly available information, no economic benefit has been conferred on X by Y.

X has indicated that to the extent Y increases X's compensation in the amount of the premium payment, X will include the amount as compensation under [section 61\(a\)\(1\)](#) of the Code. You have not requested rulings on whether the premium payments are a working condition fringe benefit under [section 132](#) of the Code or deductible by X under section 162. These related issues are, however, relevant to the conclusion that Y has not had any involvement in X obtaining the policy, which is in turn critical to the conclusion that there has been no transfer of property under section 83. Under the facts presented, it is our opinion that the payment of the premium by X is a nondeductible personal, living, or family expense under section 262, and is not deductible under section 162. Therefore, treatment of the amount as a working condition fringe under section 132 would be inappropriate.

Accordingly, based on the documents and facts submitted and the representations made, in particular the representation that the policy issued by Z to X was obtained by X without any involvement or participation by Y, and that X will include any reimbursed amounts in income under section 61(a)(1), the issuance of the policy to X by Z will not cause the deferred compensation benefits to be includible in X's taxable income prior to the time the amounts are paid or made available to X.

Except as specifically ruled on above, no opinion is expressed as to the federal tax consequences of the above transaction under any other provision of the Code.

This ruling is directed only to the taxpayer who requested it and applies only to the terms of the policy as submitted on June 18, 1993.  Section 6110(j)(3) of the Code provides that this ruling may not be used or cited as precedent.

Sincerely yours,

A. Thomas Brisendine

Chief, Branch 1

Office of the Associate

Chief Counsel

(Employee Benefits and

Exempt Organizations)

Enclosure:

Copy for section 6110 purposes

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