INTERNAL REVENUE SERVICE

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X =

Country A =

Country B =

Plan =

Trust =

Participant =

This is in response to your request for a ruling dated December 4, 2000 and subsequent correspondence, on behalf of the Participant concerning the income tax consequences of the nonqualified deferred compensation agreement (the "Plan") and a trust agreement (the "Trust") that will be established by X.

The Plan will provide compensation benefits to a key employee (the "Participant") of X upon the termination his employment. The Plan also provides for distributions to alleviate an unforeseeable emergency of the Participant.

The right of the Participant to the payment of deferred compensation or any other benefits may not be anticipated, alienated, sold, transferred, assigned, pledged or encumbered except by will or by laws of descent and distribution, and shall not be subject to attachment or garnishment by creditors of the Participant, or the Participant's beneficiary.

X will establish a trust to hold assets to provide X with a source of funds to pay its obligations to the Participant under the Plan. The Trust will conform to the model trust contained in Revenue Procedure 92-64, 1992-2 C.B. 422, including the order in which the sections of the model trust language appear. The Trust does not contain any language that is inconsistent with, or conflicts with, the language of the model trust agreement.

Under the Plan and the Trust, the interest of the Participant (or beneficiary) in the trust estate shall be no greater than the interest of any general unsecured creditor of X.

Section 451(a) of the Code provides that the amount of any item of gross income shall be included in gross income for the taxable year in which the taxpayer receives it, unless, under the method of accounting used in computing taxable income, such amount is to be properly accounted for in a different period. Section 1.451-1(a) of the regulations provides that under the cash receipts and disbursements method of accounting, amounts are included in gross income when actually or constructively received.

Section 1.451-2(a) of the regulations provides that income is constructively received in the taxable year during which it is credited to the taxpayer's account or set apart for him or otherwise made available so that he may draw upon it at any time, or so that he could have drawn upon it during the taxable year if notice of intention to withdraw had been given. However, income is not constructively received if the taxpayer's control of its receipt is subject to substantial limitations or restrictions.

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, 194 F.2d 541 (6th Cir. 1952); Rev. Rul. 60-31, Situation 4. In Rev. Rul. 72-25, 1972-1 C.B. 127, and Rev. Rul. 68-99, 1968-1 C.B. 193, an employee does 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 claims of the employer's creditors.

Various revenue rulings have considered the tax consequences of nonqualified deferred compensation arrangements. Rev. Rul. 60-31, Situation 1-3, 1960-1 C.B. 174, holds that a mere promise to pay, not represented by notes or secured in any way, does not constitute receipt of income within the meaning of the cash receipts and disbursements method of accounting. See also, Rev. Rul. 69-650, 1969-2 C.B. 106, and Rev. Rul. 69-649, 1969-2 C.B. 106.

Under the terms of the Trust, assets will be placed in trust to be used to provide deferred compensation benefits to the Participant. However, the trustee has the obligation to hold the trust assets and income for the benefit of X's general creditors in the event of X's insolvency. The Trust further provides that the Participant receives no beneficial ownership in or preferred claim on the trust assets. Therefore, although the assets are held in trust, in the event of X's insolvency they are fully within reach of X's general creditors, as are any other assets of X.

Section 301.7701-4(a) of the Procedure and Administration Regulations provides that, generally, an arrangement will be treated as a trust if it can be shown that the purpose of the arrangement is to vest in trustees responsibility for the protection and conservation of property for beneficiaries who cannot share in the discharge of this responsibility and, therefore, are not associates in a joint enterprise for the conduct of business for profit.

Provided (i) that creation of the Trust does not cause the Plan to be other than "unfunded" for purposes of Title I of the Employee Retirement Income Security Act of 1974 and (ii) that the provision of the Trust requiring use of trust assets to satisfy claims of X's general creditors in the event of X's insolvency is enforceable by such creditors under the applicable law, we conclude that:

1. Under section 451 of the Code, benefits payable under the Plan and out of the Trust will be includible as compensation in the gross income of the Participant or his beneficiary under the cash receipts and disbursements method of accounting only in the taxable year or years in which such amounts are actually distributed or otherwise made available, whichever is earlier.

This ruling is contingent upon the adoption of the Plan and the Trust with the requested amendments. Moreover, if the Plan or Trust is substantially amended, this ruling may not remain in effect.

This ruling is directed only to the taxpayer who requested it. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent. Except as specifically ruled on above, no opinion is expressed as to the federal tax consequences of the transaction described above under any other provision of the Code.

Sincerely yours,
ROBERT MISNER
Assistant Chief, Executive Compensation
Branch
Office of the Division Counsel/Associate
Chief Counsel
(Tax Exempt and Government Entities)

Enclosure:
Copy for section 6110 purposes