

Pension Benefit Guaranty Corporation

76-65

May 13, 1976

REFERENCE:

[*1] 4044(d)(1) Allocation of Assets. Distribution of Residual Assets to Employer
4044(d)(2) Allocation of Assets. Distribution of Residual Assets Attributable to Employee Contributions

OPINION:

This is in reference to the termination of the above pension plan. We have been advised that the * * * (hereinafter "Plan") has assets in excess of the amount needed to cover all benefits of participants under the Plan and that the employer believes that all excess assets should revert to it, or, in the alternative, that all excess assets should be transferred to the employer's existing profit sharing plan and that the accounts of participants thereunder would be credited with an equitable portion of the excess assets.

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

With certain exceptions, Plan assets can only be used for the benefit of Plan participants. Section 403(c)(1) of the Act provides in pertinent part:

"Except as provided . . . under section 4042 and 4044 (relating to termination of insured plans), the assets [*2] of a plan shall never inure to the benefit of any employer . . ."

The only exception which appears to apply to the Plan is that contained in § 4044(d)(1) of the Act. That section provides:

"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 the law, and
- (C) the plan provides for such a distribution in these circumstances."

Based on the information provided by you and your consultant, Mr. * * *, it appears that all of the requirements of § 4044(d)(1) have been satisfied. Apparently, all liabilities of the Plan to participants can be satisfied with Plan assets and Section 11.05 of the Plan appears to provide for distribution of excess Plan assets to the employer upon Plan termination.

But, § 4044(d)(1) of the Act is subject to the limitation of § 4044(d)(2) of the Act, which provides:

"Notwithstanding the provisions of [§ 4044(d)(1)], if any assets of the plan attributable to employee contributions remain after all liability of the plan to participants and their beneficiaries have been satisfied, such assets shall be equitably [*3] distributed to the employees who made such contributions (or their beneficiaries) in accordance with their rate of contributions."

It appears that on its face § 4044(d)(2) would prohibit, without a showing of the source of the excess assets, the complete reversion of such assets to the employer where its employees had contributed to the plan.

The enactment history of § 4044(d)(2) evinces a clear Congressional intent to require the return to contributing employees of excess assets attributable to employee contributions upon termination of a pension plan. Both the House and Senate versions of the Act, which were sent to the Conference Committee, addressed the problem of excess plan assets.

Under the allocation of assets section of the House Bill, any assets which remained after satisfaction of all plan liabilities and which were attributable, under regulations of the Secretary of Labor, to accumulated investment earnings on employee contributions were to be ratably distributed to the employee contributors according to their rate of

contribution. H.R.2, as passed by the House, 93d Cong., 2d Sess. § 112(d)(1) (February 28, 1974).

Section 511 of the Senate version of the Act also [*4] dealt with the distribution of excess plan assets upon termination. It provided:

". . . any assets of the fund, attributable to employee contributions, remaining after complete satisfaction of rights of all beneficiaries accrued to the date of dissolution or termination shall be equitably distributed 93d Cong., 1st Sess. § 511 (September 19, 1973).

Thus, the House, which was concerned with the same problem as the Senate, chose to define more specifically that portion of residual plan assets attributable to employee contributions, namely accumulated investment earnings. As shown above, the Senate Bill contained no such specificity.

The Conference Committee Report contains no explanation of § 4044(d)(2). That provision, though, is identical in substance to the provision found in § 511 of the Senate Bill, supra. Section 511 in turn is identical to a provision contained in S.4 as reported by the Senate Committee on Labor and Public Welfare. The Committee Report accompanying S.4 states:

"The Committee believes it is unfair to permit the complete recapture by employers of surplus funds in terminated contributory plans, without regard to the fact that contributions by the workers [*5] helped to generate the surplus." S. Rep. No. 127, 93d Cong., 1st Sess. 30 (April 18, 1973).

The explanation shows that the provision was intended to distribute some portion of the excess plan assets to employees who made contributions to the plan because their contributions formed part of the asset pool which generated the surplus.

This Corporation must interpret § 4044(d)(2) in a way which will implement the Congressional intent of providing equity to employees who made contributions to pension plans. Section 3.02 of the Plan provides for mandatory employee contributions under the Plan of 2 1/2% of monthly earnings. Accordingly, based on the above cited provisions of the Act and legislative history, it is our opinion that a portion of the excess Plan assets is attributable to employee contribution and the limitation of § 4044(d)(2) of the Act applies to such excess Plan assets. Therefore, § 4044(d) of the Act prohibits any distribution of excess Plan assets which does not provide for a return of an equitable portion of those assets to the employees, and therefore any such distribution can not be approved by this Corporation.

With respect to the alternative of transferring excess [*6] assets to the employer's profit sharing plan, § 4044(d)(2) also governs and provides in pertinent part: ". . . such assets shall be equitably distributed . . ." It is our opinion that "distributed", as used therein, must be given its plain and ordinary meaning. Therefore, employees who contributed or their beneficiaries must be given the opportunity to receive immediately their share of the excess assets.

Pursuant to § 4041(b) of the Act, a timely Notice of Sufficiency is enclosed herewith. Please read and comply with its provisions carefully. In connection therewith, we call your attention to § 4041(a) of the Act, which provides that upon receiving a Notice of Sufficiency, the plan administrator may proceed with the termination of the plan in a manner consistent with Subtitle C of Title IV of the Act, which includes the provisions of § 4044.

Should you have any further questions, please do not hesitate to contact Messrs. * * *, or * * *, the attorneys assigned to this case, at (202) 254-4895. Mr. * * *, Case Officer, will continue to be available to help terminate the Plan in a manner consistent with the Act.

Henry Rose
General Counsel