

Pension Benefit Guaranty Corporation

77-129

February 9, 1977

REFERENCE:

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

OPINION:

This is in response to your request for an opinion whether the excess assets of * * * ("Plan") may be returned to the * * * ("Employer") which sponsors the Plan. If they may not, you further request an opinion whether the excess assets may be transferred to another plan sponsored by the Employer with such assets to be used to provide part of the benefits under this other plan for the participants thereunder formerly covered by the Plan.

The Pension Benefit Guaranty Corporation ("PBGC") has carefully examined the Plan provisions and has determined that the Employee Retirement Income Security Act of 1974 ("Act") precludes the return of any excess assets of the Plan to the Employer.

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 of a plan shall never inure to the benefit of any employer"

The only exception which arguably applies to the Plan is that contained in [*2] § 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."

The only question arising under § 4044(d)(1) is whether the Plan provides for the return of excess assets of the Plan to the Employer within the meaning of § 4044(d)(1)(C).

It is our understanding that the Plan was amended on December 30, 1975, and a new § 14.08 was added thereto, which expressly provides, inter alia, for the return to the Employer of excess assets attributable to actuarial error.

However, though § 11.01 of the Plan reserves the right in the Employer to amend the Plan, it further provides that:

"3) no amendment shall provide for the use of funds or assets held under this Trust other than for the benefit of employees and no funds contributed to this Trust or assets of this Trust shall ever revert to or be used or enjoyed by the Employer."

Thus, the Plan specifically prohibits the type of amendment which added § [*3] 14.08.

We are aware of your argument that § 11.01(4) of the Plan permits the Plan to be amended to return excess assets to the Employer if all liabilities under the Plan are fully satisfied. That section provides:

"4) no amendment shall divert any part of the Trust Fund to purposes other than for the exclusive benefit of the Participants or their beneficiaries at any time prior to the satisfaction of all liabilities with respect to such Participants and their beneficiaries under this Trust Agreement."

However, we believe that § 11.01(4) must be read in conjunction with the clear restrictions on certain Plan amendments set forth in § 11.01(3) of the Plan. Giving effect to § 14.08 by operation of § 11.01(4) of the Plan would

render § 11.01(3) of the Plan totally devoid of substance and be contrary to the normal reading of Plan provisions.

Therefore, it is the opinion of the PBGC that the Plan does not provide for the return of excess assets to the Employer upon termination of the Plan. Accordingly, the requirement of § 4044(d)(1)(C) of the Act is not satisfied and the excess assets of the Plan may not be returned to the Employer.

With respect to whether the excess assets may [*4] be transferred to another plan sponsored by the Employer, § 4041(a) of the Act provides that upon receipt of a Notice of Sufficiency, the plan administrator may proceed with the termination of the plan in a manner consistent with, inter alia, § 4044 of the Act.

One of the requirements of § 4044 of the Act is that each participant entitled to a share of the excess plan assets must be given the opportunity to receive immediately that share. Moreover, we note that the Plan's own termination procedure in § 11.02 is consistent with this requirement under § 4044 because it requires upon termination of the Plan that "each participant will receive his allocable share. . . ." (emphasis added). It follows that upon the termination of the Plan, the participants have a right to receive immediately the excess Plan assets and that such assets cannot automatically be transferred to another plan sponsored by the Employer.

This letter is not a Notice of Sufficiency for the Plan. Case Officer * * * will shortly be in contact with you concerning a Notice of Sufficiency for the Plan. Should you have further questions of a legal nature, please do not hesitate to contact * * * the attorney [*5] assigned to this case. He may be reached by telephone at * * *

Henry Rose
General Counsel