

Pension Benefit Guaranty Corporation

88-7

May 2, 1988

REFERENCE:

[*1] 4204(d) - "Unrelated Party"

OPINION:

We write in response to your letter requesting the assistance of the Pension Benefit Guaranty Corporation ("PBGC") in connection with an assessment of partial withdrawal liability by the * * * (the "Trust") against the * * * Corporation * * *. The Trust asserts that * * * owes the Trust \$ 71,131.69 in partial withdrawal liability pursuant to Section 4205 of the Employee Retirement Income Security Act of 1974, as amended ("ERISA").

Based on your letter and telephone conversations between members of my staff and yourself, it appears that the imposition of partial withdrawal liability results from X's sale of certain assets to Y's Corporation * * *. X and Y are considered to be related parties under section 267(b) of the Internal Revenue Code (the "Code"), but are not so closely related as to constitute a controlled group of corporations. You acknowledge that there was a partial withdrawal by X under section 4205 of ERISA, and state that X could have avoided the imposition of withdrawal liability under section 4204 of ERISA but for that section's requirement that the sale be made to an "unrelated party."

You conclude your letter by arguing that:

X is [*2] the unwitting and innocent victim of an unfair provision of the law. On the one hand, X and Y are not closely enough related to constitute a controlled group of corporations, in which event no withdrawal liability would have been asserted. On the other hand, the two corporations are too closely related to permit a less onerous alternative than withdrawal liability.

You first request that the PBGC find that X's sale to Y satisfied the requirements of section 4204 of ERISA.

Section 4204 provides that, where certain other conditions are met, a complete or partial withdrawal does not occur solely because, "as a result of a bona fide, arm's-length sale of assets to an unrelated party," the seller ceases covered operations or ceases to have an obligation to contribute. Section 4204(d) provides that, for the purposes of section 4204, "unrelated party" is defined either according to the provisions of section 267(b) of the Code or according to regulations promulgated by the PBGC using principles similar to section 267(b) of the Code. The PBGC has not yet promulgated such regulations. Therefore, the definition of "unrelated party" contained in section 267(b) of the Code is controlling. [*3] You state that X and Y are not "unrelated parties" within the meaning of section 267(b) of the Code. Thus, X's sale to Y does not fulfill the requirements of section 4204.

The PBGC has the authority to vary by regulation two requirements of section 4204, namely, the purchaser's bond or escrow required by section 4204(a)(1)(B), and the sale-contract provision required by section 4204(a)(1)(C). ERISA § 4204(c). The PBGC has promulgated such a regulation. 29 C.F.R. § § 2643.1-2643.15 (1987). Prior to the promulgation of this regulation, the PBGC had the authority to grant individual variances of these two requirements of section 4204. ERISA § 4204(c). Congress, however, did not authorize the PBGC to grant an individual variance with regard to the "unrelated party" requirement. Accordingly, the PBGC may not grant a variance of the unrelated party requirement to X for its transaction with Y.

You also request that the PBGC issue an advisory opinion that the Trust may waive the "unrelated party" requirement, and you request that PBGC specifically authorize the Trust to do so in this case. The plan sponsor, however, has the responsibility for determining the amount of withdrawal [*4] liability owed by an employer and for collecting this liability. ERISA § 4202. A plan may adopt rules providing for other terms and conditions for the satisfaction of an employer's withdrawal liability, if such rules are consistent with ERISA. ERISA § 4224. Plan fiduciaries also have general authority to compromise disputed claims, abandon worthless claims, and otherwise conduct the plan's affairs so as to best serve the interests of participants and beneficiaries. As stated by Senator Williams, for himself and Senator Javits, during consideration of the Multiemployer Pension Plan Amendments Act of 1980 (which added sections 4201-4225 to ERISA) on August 26, 1980:

We do not intend to restrict plan sponsors' prudent exercise of judgment in administering the withdrawal liability provisions generally. It is expected that plan trustees will need to make practical collection decisions which are consistent with their fiduciary duties and characteristic of any responsible creditor concerned with maximizing the total ultimate recovery at supportable costs. Thus, for example, where it is prudent and in the participants' interest, plan trustees may decide to settle a withdrawal [*5] liability dispute for less than the full amount claimed, to cooperate with the employer's other creditors in a contractual or court-supervised renegotiation of the employer's indebtedness, or even to forego the assessment or further collection of liability where it is apparent from the circumstances that the costs involved would exceed the amount likely to be recovered.

126 Cong. Rec. 23288 (1980) (emphasis added). No provision of ERISA, however, expressly provides for a plan sponsor's waiver of withdrawal liability in circumstances such as X's withdrawal from the Trust. Nor does ERISA otherwise authorize a plan sponsor to waive withdrawal liability imposed by ERISA merely because it appears "fair" to do so. Rather, the plan sponsor must "maximiz[e] the total ultimate recovery at supportable costs." Id.

Should you have any further questions on this matter, please contact John Sutter of my office at the above address or (202) 778-8820.

Gary M. Ford
General Counsel