

Pension Benefit Guaranty Corporation

81-17

June 26, 1981

REFERENCE:

[\*1] 4001(b) Definitions. Employer and Controlled Group  
29 CFR 2612 Trades or Business under Common Control  
4062 Liability of Employer in Single Employer Plans

OPINION:

This concerns employer liability resulting from the termination of the Retirement Plan for Employees of \* \* \* Inc. \* \* \* (the "Plan").

The Plan terminated by an agreement with the Pension Benefit Guaranty Corporation (the "PBGC") which established the plan termination date for purposes of Title IV of the Employee Retirement Income Security Act of 1974 ("ERISA") as July 28, 1977.

Section 4062 of ERISA, 29 U.S.C. § 1362, imposes liability for pension plan underfunding upon any employer who maintained a plan (other than a multiemployer plan) at termination. The amount of the liability is the lesser of (1) the amount by which plan assets are insufficient to fund the plan benefits guaranteed under Title IV of ERISA, or (2) 30 percent of the employer's net worth, determined as of a day the PBGC chooses, but within 120 days of the termination date, computed without regard to any liability imposed by the section.

Pursuant to 29 C.F.R., Part 2612, all trades or businesses under common control within the meaning of § 414(c) of the Internal [\*2] Revenue Code of 1954, as amended, are treated as a single employer. As we understand the facts, \* \* \* Inc. (A or "the Company") was the sponsor of the Plan on the date the Plan was terminated. At that time \* \* \* Ltd. \* \* \* owned 99% and Mr. B owned 1% of the outstanding shares of stock in A. Consequently, A and LTD, as well as any other trades or businesses under common ownership with them, constitute the employer maintaining the Plan within the meaning of § 4062 of ERISA, 29 U.S.C. § 1362, and as such are liable for the underfunding of the Plan.

The Plan does not have sufficient assets to pay benefits guaranteed under Title IV of ERISA. The PBGC has determined that the Plan asset insufficiency is \$80,462. On the date of termination the Plan assets had zero value. The value of guaranteed benefits under the Plan as of the date of Plan termination was \$80,462. The PBGC has further determined that the employer's net worth is not a limiting factor on its § 4062 liability. Accordingly, the employer is liable to the PBGC in the amount of \$80,462.

On April 6, 1981, the PBGC received from Ltd. a letter and a banker's draft in the amount of \$462. The letter referred to an agreement [\*3] which Ltd. made with Mr. B, who held an ownership interest in A on the date of Plan termination and who purchased the Company from Ltd. more than a year after the date of Plan termination. As we understand that agreement, Ltd, in effect, discounted the sale price of the Company by \$80,000 and Mr. B agreed that the Company would assume, to the extent of \$80,000, Ltd's liability to the PBGC under § 4062 of ERISA. In the April 6 letter Ltd. suggested that the payment of \$462 fully satisfied Ltd's statutory liability to the PBGC, since Mr. B had agreed in behalf of the Company to pay the remaining \$80,000 owed under § 4062 to the PBGC.

It is the opinion of the PBGC that Ltd's. payment merely reduces the employer's § 4062 liability from \$80,462 to \$80,000. The PBGC has concluded that neither the terms of the sale of the Company nor the payment by Ltd. of \$462 extinguish Ltd's liability to the PBGC under § 4062 of ERISA. Consequently, the PBGC will continue to look to A, Ltd and any other trades or businesses under common ownership with them for full payment of the amount by which the Plan was underfunded on the date of termination.

If you have any questions, please call \* \* \* the [\*4] attorney handling this matter, at (202) 254-4873 or write to him at the above address.

Henry Rose  
General Counsel

