Pension Benefit Guaranty Corporation

85-2

January 14, 1985

REFERENCE:
[*1] 4021 Plans Covered
4021(a)(1) Plans Covered. Tax Qualification in Practice
4021(a)(2) Plans Covered. Tax Qualification by IRS Determination

OPINION:

This is in response to your inquiry concerning whether the arrangement constituted a single pension plan or an aggregate of separate pension plans. A Notice of Intent to Terminate has been filed with the Pension Benefit Guaranty Corporation ("PBGC") for the Plan of your client, A Company, as a separate Plan termination. However, you now assert that (1) at least through 1978 Plan operated as a single plan, (2) the group of automobile dealers known as the X group did not authorize the adoption of separate plans and (3) even assuming that separate plans were created after 1978, the spin-off did not comply with Treasury Regulation § 1.414(1)-1(n), which sets forth rules on the allocation of assets in spunoff plans. In the alternative, you suggest that the X group of employers was treated as maintaining a single plan at least through 1978. The Association, the plan administrator, maintains that Plan was an aggregate of separate plans from inception. Upon careful review of the Plan records and documents provided to the PBGC, we conclude that, [*2] although the weight of evidence favors the view that Plan was a single plan prior to the adoption of the restated master plan document by all participating employers during the year 1977, the restated plan document created an aggregate of single plans and the allocation of assets among those separate plans was valid.

Our conclusion as to the nature of an entity -- whether it is a single plan or an aggregate of single plans -- is based on its structure and how it actually operates on an ongoing basis. We look to the documents governing the entity and to relevant evidence of how it has operated and continues to operate. Such evidence may include the reasonable expectations and intent of the parties. The availability of funds held by an entity to provide benefits is a central factor in our analysis. If the evidence shows that benefit payments are effectively restricted, by whatever means, so that there is a minimal risk that funds attributable to the contributions of one employer will be used to pay the benefits of another employer's employee-participants, then the entity is an aggregate of single plans, because all assets are not available to pay all benefits. Where the plan document [*3] is clear as to the intent of the parties, we will generally be guided by such express intent.

While the appropriate characterization of Plan, prior to the adoption of the restated plan, is not entirely free from doubt, the plan provisions, together with other evidence, lead us to conclude that, as originally adopted and maintained (until the adoption of such restated plan), Plan was a single plan. However, the restated plan that was adopted by all contributing employers in 1977 clearly established that Association and the contributing employers intended that Plan thereafter be treated as an aggregate of single plans.

Prior to the adoption of the restated plan, Article IV, Section 6 of the plan document provided that upon discontinuance of an employer's contributions the Trustees had "the right to reduce benefits for retired or vested employees of an employer in accordance with sound actuarial principles." Under this provision, any such reduction of benefits was not specifically related to the assets contributed by the withdrawing employer. Thus, while this provision was never applied by the Trustees, n1 there was the possibility that all assets in the trust might be used to pay [*4] benefits of employees of an employer who withdrew without sufficient assets in his account to provide his employees' benefits. This conclusion is reinforced by Associations treatment of the three employer withdrawals from Plan prior to September 1976. In each of these cases, none of the employees of the employers who discontinued participation had vested benefits at the date of withdrawal. In none of these cases did Association recognize the existence of separate plans by providing any of the participants' accrued benefits to the extent funded, nor did Association return the withdrawing employers' account balances.

n1 The restated plan was adopted by Association in September, 1976. Prior to September 1976, only three employers withdrew from Plan and the circumstances of such withdrawals did not occasion the application of the cut-

back provision.

Further, the presence of Article IV, Section 6 - the cut-back provision - appears to negate a construction that Article VI, Section 8 of the plan document, headed "Termination of Plan", was intended to apply to a withdrawal of an employer, leading us to conclude that Article VI, Section 8 was intended to apply on the termination [*5] of the entire Plan arrangement. In such event Article VI, Section 8 provides for the allocation of all plan assets to pay all plan benefits without regard to the assets separately attributable to each employer. See also Article II, Section 7 of the trust agreement. n2

n2 Article II, Section 7 reads as follows:

Section 7. Diversion of Fund Corpus Income. In the event of the termination of the Plan, no part of the Fund corpus or income shall, prior to the satisfaction of all liabilities to employees or pensioners, be used for, or diverted to, purposes other than the exclusive benefit of the participants in the Plan or their beneficiaries. Reversion to, or diversion for, any Employer Unit shall not occur regardless of whether by the operation or natural termination of this Fund, by power of revocation or amendment, by the happening of a contingency, or by any other means prior to the satisfaction of all such liabilities referred to above. Any excess in the Fund after the satisfaction of all such liabilities shall be returned to the Employer Units in any equitable manner as determined by the Termination Committee.

We recognize that other plan provisions may be interpreted [*6] as meaning that Plan was an aggregate of single plans from inception. For example, Article II, Section 3A refers to "the termination of the Employer Unit's Plan" and suggests that a distribution to participants might be made at such time. To ascertain the terms of such distribution, one would have to look to Article VI, Section 8 discussed hereinabove. Further, the Plan trust agreement provided for assignment of units in the trust fund to each participating employer and for the allocation of expenses to each employer's account. Trust Agreement, Article IV, Sections 4-6. We also note that separate accounts were maintained by Association for each participating employer, with the separate accounts being credited with the employer's contributions and debited for benefit payments to such employer's employee-participants and for a share of expenses. n3 Nevertheless, while recognizing that plan provisions may be contradictory to some extent, on balance we conclude that the weight of the evidence favors an interpretation that Plan was a single plan prior to the adoption of the restated plan.

n3 Our sampling of the separate account records indicates that negative balances were created in certain accounts from time to time but that the negative balances were treated as loans, were subsequently made positive through the employer's contributions and did not result in the use of assets contributed by one employer to pay benefits of employees of another employer. [*7]

On the other hand, it seems clear that at least upon adopting the restated plan it was the intent of the parties that Plan be an aggregate of single plans. We emphasize that all particiing employers adopted the restated plan during the year 1977, and the document shows a clear intent on the part of the participating employers that Plan was to be an aggregate of single plans. Section 5.3 of the amended plan document provides that benefits of an employer's employees be conditioned on "the sufficiency of plan assets in the event the Employer terminates this Plan." Clearly, this provision relates to the withdrawal from Plan by an employer, characterizes such event as the termination of the employer's plan and limits benefits of employees of such terminating employer to the asset balance of the terminating employer. Article X, Section 10.1A. further provides that an employer's withdrawal constitutes a termination of a separate plan. Section 10.1A states that if "the Employer decides to terminate the Plan and distribute the assets held in trust", his employees' interests' "shall be determined on the basis of each Participant's vested accrued benefit to the extent funded." Section 10.1A [*8] also provides that a notice of intent to terminate shall be filed with the PBGC. Beginning in December, 1976, 26 notices of intent to terminate separate employer plans were filed with the PBGC.

In addition, other provisions show that the restated plan created an aggregate of single plans. For example, Article II, Section 2.1 provides that "This Plan and Trust shall be established by an Employer." "Employer" is defined as the business that executes a Joinder Agreement. Section 1.9. "Plan" means

Pension Plan and the Joinder Agreement executed by the Employer." Section 1.19.

You assert, however, that the Form 5500-C and actuarial reports prepared through 1978 indicate an intent that the risk for benefit payments for all participants be shared among all employers, since each employer's contributions were not based strictly on its individual liabilities. As to the Form 5500-C, we note that this form was filed with respect to each employer, which is an additional indication of the existence of separate plans. We recognize that actuarial valuations and the actuarial information contained in each Form 5500-C were prepared, prior to that of January 1, 1979,

for the entire group of [*9] participating employers. The actuarial valuations prior to 1979 were prepared to determine the cents per hour contribution of three groups of participating employers based on the benefit formula adopted by the employer. This procedure resulted in the overfunding of some of the individual plans and the underfunding of others. While, by itself, this funding procedure is indicative of a single plan, in view of the express intent of the plan document, we conclude that the funding method employed is not determinative of Plan's structure. n4 In the final analysis, the contributions made by each employer were computed for its own pool of employees on a cents per hour basis, were credited to the separate account maintained for each employer, and by the terms of the plan were not available to pay benefits of employers of any other employer. n5

n4 We interpret certain post-September 1976 statements in the actuarial reports and correspondence in this case to the effect that the plan was being treated as a single plan as relating to the actuarial approach used in determining the basis for an employer's contributions and not to whether the actual contributions made by an employer could be used to pay benefits of employees of another employer.

n5 While the 1977 Form 5500-C contained the statement that all assets in the Fund were available to pay benefits of all employees, the weight of the evidence does not support this statement. As indicated earlier in this letter, the restated plan showed a clear intent to treat Plan as an aggregate of single plans and payment of benefits of all employees out of all Plan assets would have been inconsistent with such intent. Absent a showing that, after the adoption of the restated plan, assets contributed by one employer were actually used to pay benefits of employees of another employer, we do not find the statement enough to overcome the stated intent of the plan document. [*10]

You have cited, as support for a finding that a single plan existed, Plan's attempt to resolve the problem of the underfunding attributable to the failure to record the past service of employees who transferred employment among the X group of employer prior to 1977. As we understand it, this information was not provided to Assoc. by the X dealers until Association undertook the verification of employment records in 1977. Association considered the alternatives of funding the liability for the deficiency (1) by a one-time assessment on all X employers, to be allocated based on the number of the employer's participants and contribution hours and the "generation of the original liabilities", or (2) by increasing the hourly contribution rate of all X employers. Ultimately Association recommended the first alternative and assessed all X employers for a share of the underfunding. You suggest that this assessment was inconsistent with the position that Plan was an aggregate of single plans, because an allocation of liabilities prepared by Association showed that the deficiency "belonged" to only five employers. The assessments were, however, credited to each contributing employer's [*11] separate account and not used to pay benefits of employees of any other employer, except to the extent that funds reflecting transferred past service liability were later transferred to the accounts of the employers who ultimately were charged with the payment of benefits attributable to such past service liability. This treatment is not inconsistent with the existence of an aggregate of single plans and does not alter our conclusion.

Finally, you contend that, in changing from a single plan to an aggregate of single plans, Association failed to comply with Section 208 of Title I of ERISA and IRC § 414(1) (the parallel provision to ERISA Sec. 208). We understand that you requested a determination from the Internal Revenue Service on this question and that Internal Revenue Service declined to rule on the ground the question related to a completed transaction.

Section 208 of Title I of ERISA provides in pertinent part as follows:

A pension plan may not merge or consolidate with, or transfer its assets or liabilities to, any other plan after the date of the enactment of this Act, unless each participant in the plan would (if the plan then terminated) receive a benefit immediately [*12] after the merger, consolidation, or transfer which is equal to or greater than the benefit he would have been entitled than the benefit he would have been entitled to receive immediately before the merger, consolidation, or transfer (if the plan had then terminated) . . . .

At the time of the adoption of the restated plan, Plan's assets were not allocated to participants' benefits on a termination basis. However, Regulations (Treas. Reg. § 1.414(1)-1) under Section 208 and IRC § 414(1) include a special temporary rule whereby a single plan that had previously had a separate accounting of Plan assets among component employers could be split up in accordance with its historical asset maintenance, if the plan administrator acted by July 1, 1978. See, Treas. Reg. § 1.414(1)-1(n)(3). From the inception of Plan, Association maintained a separate accounting of each employer's assets. Thus, the separate accounting requirement of the special temporary rule was met.

The special temporary rule also requires that the assets that are separately accounted for and the liabilities with respect to each group of employees be allocated to the separate plan for the group of employees. What constitutes [*13] an "allocation" is not specified in the regulation. Both before and after the adoption of the restated plan, all Plan assets

were held in a single trust. With respect to the allocation of assets requirement, we do not construe this to mean that assets must be transferred to separate trusts under the separate plans. Therefore the maintenance of separate account records for each employer would appear to satisfy the asset allocation requirement. Further, Plan's actuarial valuation as of August 1, 1976, contained a separate listing of each employer's liabilities, which, in our view, satisfied the requirement for the allocation of liabilities in the special temporary rule. n6

n6 We note that Plan's next actuarial valuation did not value employers' liabilities separately. However, this information was readily available in Association's records and, indeed, was essential to the filings with PBGC of the 26 notices of intent to terminate referred to above.

If you should desire reconsideration of this determination, you may file a request for reconsideration addressed to:

Legal Department, Pension Benefit Guaranty Corporation, 2020 K Street, NW, Mail Code 250, Washington, DC 20006 [*14]

All of the requirements pertinent to a request for reconsideration are set forth in Subparts A and C of the PBGC's Administrative Review regulation (a copy of which is enclosed).

A purpose of the reconsideration process is the examination of information not already submitted and of issues not already raised. If you do not file a request for reconsideration, it is possible that any judicial review of this determination will be limited to grounds that the PBGC has had an opportunity to consider.

You must file the request for reconsideration within 30 days after the date of this determination. An extension of time within which to file may be available; § 2606.4 of the enclosed regulation contains the provisions governing extensions of time.

I hope this answers your inquiry. Should you have any questions concerning this matter, please contact * * * of this office at (202) 254-4895.

Thomas Veal
Acting Director, Legal Department