Mastering U.S. Tax Reporting of Foreign Retirement Account Ownership and Distributions

TUESDAY, OCTOBER 6, 2020, 1:00-2:50 pm Eastern

IMPORTANT INFORMATION FOR THE LIVE PROGRAM

This program is approved for 2 CPE credit hours. To earn credit you must:

- Participate in the program on your own computer connection (no sharing) – if you need to register additional people, please call customer service at 1-800-926-7926 ext. 1 (or 404-881-1141 ext. 1). Strafford accepts American Express, Visa, MasterCard, Discover.
- **Listen on-line** via your computer speakers.
- **Respond to five prompts during the program plus a single verification code**.
- To earn full credit, you must remain connected for the entire program.

WHO TO CONTACT DURING THE LIVE PROGRAM

For Additional Registrations:
-Call Strafford Customer Service 1-800-926-7926 x1 (or 404-881-1141 x1)

For Assistance During the Live Program:
-On the web, use the chat box at the bottom left of the screen

If you get disconnected during the program, you can simply log in using your original instructions and PIN.

INFO 2011-0096

UIL No. 9114.03-25, 9114.03-42

FULL TEXT:

October 31, 2011

Number: 2011-0096

Release Date: 12/30/2011

CC:INTL:B01

GENIN-141313-11

UIL: 9114.03-25, 9114.03-42

Reference:

Request for information concerning the U.S. income tax treaties with Malta and the United Kingdom

Dear [Redacted Text]:

This letter responds to your recent request for information concerning the application of the U.S.-Malta income tax treaty (the Malta Treaty) [1] and the U.S.-U.K. income tax treaty(the U.K. Treaty) [2] to certain transfers between pension funds.

Transfers from one Malta pension fund to another Malta pension fund

Article 18 (Pension Funds) of the Malta Treaty provides that

> Where an individual who is a resident of one of the States is a member or beneficiary of, or participant in, a pension fund that is a resident of the other State, income earned by the pension fund may be taxed as income of that individual only when, and, subject to the provisions of paragraph 1 of Article 17 (Pensions, Social Security,

Annuities, Alimony, and Child Support), to the extent that, it is paid to, or for the benefit of, that individual from the pension fund (and not transferred to another pension fund in that other State).

Paragraph 1(k) of Article 3 (General Definitions) of the Malta Treaty defines a "pension fund" for purposes of the Malta Treaty as any person established in a Contracting State that is:

i) in the case of pension funds established in the United States, generally exempt from income taxation, and in the case of pension funds established in Malta, a licensed fund or scheme subject to tax only on income derived from immovable property situated in Malta; and

ii) operated principally either:

A) to administer or provide pension or retirement benefits; or

B) to earn income for the benefit of one or more persons meeting the requirements of subparagraph i) and clause A) of this subparagraph.

If an individual is a resident of the United States under Article 4 (Resident) of the Malta Treaty and a member or beneficiary of, or participant in, a pension fund established in Malta, then a transfer of income earned by that pension fund to another pension fund established in Malta would not be taxed currently as income of the individual provided that each pension fund qualifies as a " pension fund" within the meaning of Article 3(1)(k) of the Malta Treaty.

Transfers from a U.K. pension scheme to a third-country pension scheme

Paragraph 1 of Article 18 (Pension Schemes) of the U.K. Treaty provides that:

Where an individual who is a resident of a Contracting State is a member or beneficiary of, or participant in, a pension scheme established in the other Contracting State, income earned by the pension scheme may be taxed as income of that individual only when, and, subject to paragraphs 1 and 2 of Article 17 (Pensions, Social Security, Annuities, Alimony, and Child Support) of this Convention, to the extent that, it is paid to, or for the benefit of, that individual from the pension scheme (and not transferred to another pension scheme).

Paragraph 1(o) of Article 3 (General Definitions) of the U.K. Treaty defines the term " pension scheme" as:

[A]ny plan, scheme, fund, trust or other arrangement *established in a Contracting State* which is:

(i) generally exempt from income taxation in that State; and

(ii) operated principally to administer or provide pension or retirement benefits or to earn income for the benefit of one or more such arrangements.

(Emphasis added).

If an individual is a resident of the United States under Article 4 (Residence) of the U.K. Treaty and a member or beneficiary of, or participant in, a pension scheme established in the United Kingdom, then a transfer of income earned by that pension scheme to another pension scheme established in the United Kingdom would not be taxed currently as income of the individual provided that each pension scheme qualifies as a " pension scheme" within the meaning of Article 3(1)(o) of the U.K. Treaty.

However, a pension scheme established in a third country, e.g., Malta, would not be a pension scheme within the meaning of Article 3(1)(o) of the U.K. treaty because it is not established in one of the two Contracting States (the United Kingdom and the United States).Therefore, if the transfer were to a pension scheme established in a third country, instead of to another pension scheme established in the United Kingdom, the transfer could be treated as a distribution that would be subject to taxation as income of the individual under paragraphs 1 and 2 of Article 17 of the U.K. Treaty .

Effect of U.S. citizenship or "green card" holder status

U.S. citizens and lawful permanent residents ("green card holders") are generally subject to U.S. income tax on their worldwide income without regard to where they reside. If a U.S. citizen or green card holder is a resident of the United States under the residence article of either the U.K. Treaty or the Malta Treaty, as the case may be, at the time of a transfer from one pension scheme to another pension scheme, then the rules described above apply. If, however, the U.S. citizen or green card holder is not a resident of the United States under the residence article of the applicable treaty at the time of the transfer, then Article 18 of the Malta Treaty or Article 18(1) of the U.K. Treaty would not apply.

Information reporting with respect to foreign pension schemes

Section 6048 of the Internal Revenue Code generally requires U.S. persons who make transfers to or receive distributions from foreign trusts to report certain information on Form 3520 (Annual Return to Report Transactions With Foreign Trusts and Receipt of Certain Foreign Gifts). U.S. persons who are treated as owners of foreign trusts under the grantor trust rules (§§671-679) also are required to file Form 3520 and to ensure that the foreign trust files Form 3520-A (Annual Information Return of Foreign Trust With a US Owner). As a general rule, these reporting requirements apply to any foreign pension scheme that is classified as a trust for U.S. tax purposes.

This letter has called your attention to certain general principles of the law. It is intended for informational purposes only and does not constitute a ruling. See Rev. Proc. 2011-1, §2.04, 2011-1 IRB 7 (Jan. 3, 2011).

If you have any additional questions, please contact [Redacted Text] at ([Redacted Text])[Redacted Text].

Sincerely,

By: __________________________

M Grace Fleeman

Senior Technical Reviewer, Branch 1

(International)

[1] Convention Between the Government of the United States of America and the Government of Malta for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, signed at Valletta, August 8, 2008.

[2] Convention Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital Gains, signed at London, July 24, 2001, as amended by Protocol, signed at Washington, July 19, 2002.

d.

INFO 2011-0096

UIL No. 9114.03-25, 9114.03-42

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benefit of one or more such arrangements.

(Emphasis added).

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Sincerely,

By: ___________________________

M Grace Fleeman

Senior Technical Reviewer, Branch 1

(International)

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d.

Internal Revenue Service
memorandum

CC:INTL-174-87
Br3:PJHanley

date:

RECEIVED
OCT 27 1988
International Programs
IN:I

to: Internal Revenue Service Representative
OP:I:F:Singapore:JR:KDT

thru: Director, Office of Foreign Programs OP:I:F Sam

from: Senior Technician Reviewer, CC:INTL:Br3 878

RECEIVED
JAN 19 1989
REVENUE SERVICE REPRESENTATIVE
SINGAPORE, SINGAPORE

subject: Singapore Post Request for general technical opinion

This is in response to your request for a general technical opinion dated January 7, 1987, concerning the proper year of inclusion for U.S. tax purposes of certain compensation paid to U.S. individuals employed in Singapore and the portion, if any, excludible under section 911(a) of the Internal Revenue Code. The material facts presented in your request and in a follow-up memorandum are substantially as set forth below.

FACTS:

Singapore created the Central Provident Fund in 1955. The Fund provides income to an employee who ceases to work because of retirement or disability. Under Singapore law, an employer is required to make contributions on behalf of the employee, but the employer is entitled to deduct from the employee's monthly wages 50 percent of the total amount required to be contributed.

Employees who are not domiciled in Singapore and who are not employed on an employment or professional visit pass are not required to participate in the retirement/disability program. In addition, since June 1981, certain other employees are exempt from participating. An employee not wishing to participate in the program must file an application for exemption within six months from the date of commencement of employment and approval is granted on a case by case basis. One category which generally qualifies for the exemption is the foreign national employee who qualifies for Fund type benefits under similar programs in other countries (such as U.S. nationals covered by Social Security or other pension funds). Most U.S. individuals employed in Singapore are thus exempt from participating.

One of the following conditions must be satisfied before any of the contributions to the Fund on behalf of an employee may be withdrawn: 1) the employee's death, 2) the employee's physical or mental incapacitation, 3) the employee reaches the age of 55, 4) the employee is not a citizen of Singapore and leaves Singapore permanently. Most U.S. individuals participating in the program receive a lump sum distribution upon termination of their employment in Singapore.

Additional salient features of the Fund program are as follows:

1) The "employee's contributions" (the amounts contributed by the employer that are withheld from the employee's wages at the employer's election) to the Fund are withheld by the employer each pay period and, together with the employer's contributions, are paid over to the Singapore government each month. The total amount contributed is held by the government in trust for the employee.

2) The funds, neither in whole nor in part, are subject to the claims of the employer's creditors or the employee's creditors. The funds, once contributed, are set aside for the sole benefit of the employee.

3) The contributions are not forfeitable. The participating employee will receive all of the contributions, together with any interest accrued or paid on them. In the event of the employee's death prior to distribution, the contributions and interest are payable to the employee's designated beneficiary.

4) Under Singapore tax law, the funds contributed by the employer (not including the portion withheld from the employee's wages) are exempt from Singapore tax. That is, those contributions are not included in income by the employee. The portion of the contributions that is withheld from the employee's wages and contributed to the Fund is reported by the employee as income but is deductible by the employee for purposes of determining his taxable income under Singapore law.

ISSUES:

1. Which is the proper year of inclusion for U.S. tax purposes of a) the employer's contributions to the Fund, b) the employee's contributions, and c) any interest earned on those contributions?

2. What portion, if any, of the contributions are excludible from the employee's income under section 911?

LAW AND ANALYSIS:

Section 402(b) of the Income Tax Code provides rules for taxing an employee on contributions made on his behalf by an employer to an employees' trust that is not exempt under section 501(a). Generally, any such contributions made to a trust after August 1, 1969, during a taxable year of the employer which ends within or with a taxable year of the trust for which it is not so exempt shall be included as compensation in the gross income of the employee for his taxable year during which the contribution is made, but only to the extent that the employee's interest in such contribution is substantially vested at the time the contribution is made. See sections 402(b) and 83(a) of the Code and section 1.402(b)-(1)(a)(1) of the Income Tax Regulations. Property is substantially vested when it is either transferable or not subject to a substantial risk of forfeiture. See section 1.402(b)-(1)(a)(1) and section 1.83-3(b) of the regulations.

Where a portion of an employee's salary is withheld and contributed to a retirement plan, the withholding is mandated by law, and the employee has a vested interest in those amounts when contributed, the amounts are includible in the employee's income when paid into the plan under section 61(a) of the Code. See Rev. Rul. 56-473, 1956-2 C.B. 22; Rev. Rul. 57-326, 1957-2 C.B. 42; and Rev. Rul. 72-250, 1972-1 C.B. 22.

Pursuant to section 402(b), interest earned on the amounts contributed to a trust is taxed when distributed or made available to the employee under section 72 of the Code. See section 1.402(b)-1(b)(7) of the regulations.

Section 911(a)(1) of the Code provides that foreign earned income may be excluded from gross income at the taxpayer's election if the taxpayer is a qualified individual.

Section 911(b)(1)(A) defines the term "foreign earned income" as the amount received by such individual from sources within a foreign country or countries which constitutes earned income attributable to services performed by such individual if certain other criteria, not relevant to this discussion, are met. Section 911(b)(1)(B), however, specifically excludes from the definition of "foreign earned income" income which is included in a taxpayer's gross income by reason of section 402(b).

HOLDING:

The total amount of contributions made to the Fund on behalf of an employee (both employer and employee contributions) are includible in the employee's gross income for the employee's taxable year in which the contributions are made since the contributions are nonforfeitable and, thus, there is no substantial risk of forfeiture of those contributions. The amounts contributed to the Fund on behalf of an employee that are employer contributions are includible in the employee's gross income by reason of section 402(b) of the Code. Thus, pursuant to section 911(b)(1)(B), no portion of the employer contributions constitute "foreign earned income" within the meaning of section 911(b)(1)(A). Therefore, no portion of those amounts are excludible from the employee's gross income under section 911(a). The amounts withheld from the employee's salary and contributed to the Fund as employee contributions are includible in the employee's gross income pursuant to section 61(a). However, those amounts will constitute "foreign earned income," and, thus, are excludible from the employee's gross income, at the employee's election, pursuant to section 911(a)(1), subject to the limitation in section 911(b)(2). Any interest credited to the trust which is attributable to the contributions held in trust for the employee is includible in the employee's gross income when distributed or made available to the employee pursuant to section 72.

Internal Revenue Service
memorandum

CC:INTL:FREV-253878-96
Br3:GFleeman

date: OCT 10 1997

to: Robert Uhar
Chief, Support and Services Branch
CP:IN:D:C:SS:QMS

from: Barbara A. Felker
Chief, CC:INTL:Br3

subject: Singapore Central Provident Fund

This memorandum supplements our memorandum of October 25, 1996 (copy attached) concerning the taxability of contributions to the Central Provident Fund ("Fund") and the earnings thereon. In that memorandum, we made the following statement:

> CC:EBEO has advised us that amounts withheld from an employee's wages and contributed to the Fund can be treated as employer contributions that are includible in the employee's gross income by reason of section 402(b) (rather than section 61). The significance of this change of position is that the amounts in question will not constitute "foreign earned income" within the meaning of section 911(b)(1)(A) and that no portion of the amounts contributed to the Fund will be eligible for exclusion from the employee's gross income under section 911(a)(1).

As you will recall, Shirley Sherwood, the RSR in Singapore, needed more information on this point before she could comfortably tell taxpayers that amounts withheld from an employee's wages are not earned income. We discussed this in a conference call with Ms. Sherwood on December 11, 1996 and agreed to provide additional advice.

CC:EBEO has now confirmed at pages 3 and 4 of a memorandum dated September 26, 1997 (copy attached) that nonelective amounts withheld from an employee's wages and contributed to the Fund are includible in the employee's gross income by reason of section 402(b) (rather than section 61):

> Because nonelective contributions withheld from an employee's salary are not withheld at the election of the employee and are not constructively received by the employee, those contributions are considered employer contributions and are taxable pursuant to § 402(b)(1). See Hicks v. United States, 205 F.Supp. 343 (W.D. Va. 1962), aff'd, 314 F.2d 180 (4th Cir. 1963); Rev. Rul. 63-180, 1963-2 [sic] C.B. 189. But

cf. Rev. Rul. 56-473, 1956-2 C.B. 22; Rev. Rul. 57-326, 1957-2 C.B. 42; Rev. Rul. 72-250, 1972-1 C.B. 22 (contrary pre-ERISA precedents that are superseded by § 414(h)).

Consequently, such amounts are not excludible from the employee's gross income under section 911. See Code §911(b)(1)(B)(iii). However, any elective amounts withheld from the employee's wages and contributed to the Fund would be includible in the employee's gross income by reason of section 61 (rather than section 402(b)) and therefore would be excludible under section 911.

Based on CC:EBEO's latest advice, we believe Ms. Sherwood should be advised that the only contributions to the Fund that are properly treated as foreign earned income for purposes of section 911 are amounts that an employee could have received in cash but elected to contribute to the Plan instead.

If you have any questions, please contact Grace Fleeman or me at (202) 622-3850.

Attachments

Internal Revenue Service
memorandum

CC:INTL:FREV-248679-96
Br3:MGFleeman

date: OCT 25 1996

to: Robert Uhar
Chief, Support and Services Branch
CP:IN:D:C:SS:QMS

from: Bernard T. Bress
Chief, CC:INTL:Br3

subject: Singapore Central Provident Fund

This memorandum confirms our oral response to your inquiry as to whether our 1988 memorandum (copy attached) still represents the Service's position with respect to the taxability of contributions to the Central Provident Fund ("Fund") and the earnings thereon.

Summary of 1988 Advice. Our 1988 memorandum reached the following conclusions:

1. The employer's contributions to the Fund are includible in the employees' gross income by reason of section 402(b). Pursuant to section 911(b)(1)(B)(iii), such amounts do not constitute "foreign earned income" within the meaning of section 911(b)(1)(A) and are not eligible for exclusion from the employees' gross income under section 911(a)(1).

2. Amounts that are withheld from an employee's wages and contributed to the Fund are includible in the employee's gross income by reason of section 61 (rather than section 402(b)). Such amounts constitute "foreign earned income" that is eligible for exclusion under section 911(a)(1) (subject to the limitation in section 911(b)(2)).

3. Interest earned by the Fund that is attributable to contributions held in trust for an employee is includible in the employee's gross income when distributed or made available to the employee.

Changes to 1988 Advice. As Grace Fleeman of this office advised you on October 3, 1996, our 1988 memorandum should be updated in two respects.

1. CC:EBEO has advised us that amounts withheld from an employee's wages and contributed to the Fund can be treated as employer contributions that are includible in the employee's gross income by reason of section 402(b) (rather than section 61). The significance of this change of position is that the amounts in question will not constitute "foreign earned income" within the meaning of section 911(b)(1)(A) and that no portion

of the amounts contributed to the Fund will be eligible for exclusion from the employee's gross income under section 911(a)(1).

2. Under section 402(b)(4), if the Fund does not satisfy certain nondiscrimination rules, employees who are "highly compensated" generally must include the interest attributable to contributions held in trust for them in gross income each year as it is earned. Because interest is not earned income, it is not eligible for exclusion from gross income under section 911(a)(1). It appears to CC:EBEO that section 402(b)(4) will apply to employees covered by the Fund only in rare cases.

If you have any questions, please contact Grace Fleeman at (202) 622-3850.

Attachment (1988 memorandum)

cc: Linda S. Marshall, CC:EBEO:Br1

Internal Revenue Service
memorandum

date: SEP 26 1997

to: Chief, Branch 3
Office of the Associate Chief Counsel (International)

from: Chief, Branch 1
Office of the Associate Chief Counsel (Employee Benefits and Exempt Organizations)

subject: Singapore Central Provident Fund

At your request, we are updating our assistance regarding the Singapore Central Provident Fund as in effect for 1993, to reflect subsequent changes to this arrangement.

Under Singapore law, an employer generally must contribute a certain proportion of each employee's wages to the Singapore Central Provident Fund. The employer is permitted to withhold up to half of the amount required to be contributed from each employee's wages. The Fund is held in trust for covered employees and their beneficiaries. Accounts are maintained for each employee benefitting under the Fund, to which contributions and earnings determined each year by the Singapore government are allocated. No portion of an employee's benefit is forfeitable. Under former Singapore law, benefits from the Fund generally could be withdrawn on an employee's attainment of age 55, death, or disability.

Although the materials you have sent to us provide little detail, it appears that two pertinent sets of changes have been made to the arrangement. The first pertinent change is that distributions from the Fund may now be made for a wide variety of purposes, including use for public housing, public transportation, home insurance, private housing, health care (including medical insurance), purchase of various types of investments, parents' retirement needs, college education, and life insurance. The second pertinent change is that employees are permitted to make certain additional elective contributions to the Fund. In addition, employers are no longer required to make contributions to the Fund for certain employees who are not citizens or permanent residents of Singapore. For such an employee, mandatory contributions to the Fund are not required if the employee's Employment/Professional Visit Pass or 3-year Work Permit has expired since August 1, 1995. However, the employer and employee may continue to make mandatory contributions to the Fund through 1998 upon their joint application to the Fund's Board. Thus, it appears that the issues addressed in this memorandum will affect far fewer taxpayers in the future.

Section 83(a) of the Code provides that the excess (if any) of the fair market value of property transferred in connection with the performance of services over the amount (if any) paid for the property is includible in the gross income of the person who performed the services for the first taxable year in which the property becomes transferable or is not subject to a substantial risk of forfeiture.

Section 1.83-3(e) of the Income Tax Regulations provides that, for purposes of § 83, the term "property" does not include an unfunded and unsecured promise to pay money or property in the future. However, the term "property" does include a beneficial interest in assets (including money) transferred or set aside from claims of the transferor's creditors, for example, in a trust or escrow account.

Section 402(b)(1) provides that contributions made by an employer to an employees' trust that is not exempt from tax under § 501(a) are included in the employee's gross income in accordance with § 83, except that the value of the employee's interest in the trust is substituted for the property's fair market value in applying § 83.

Under § 402(b)(2), the amount actually distributed or made available to any distributee by any such trust is taxable to the distributee in the year so distributed or made available under § 72 (relating to annuities), except that distributions of income of such trust before the annuity starting date are included in the gross income of the employee without regard to § 72(e)(5).

Section 1.402(b)-1(a)(1) of the regulations provides that employer contributions to a nonexempt employees' trust shall be included as compensation in the employee's gross income for the taxable year in which the contribution is made, but only to the extent that the employee's interest in such contribution is substantially vested as defined in § 1.83-3(b).

Section 402(b)(3) provides that a beneficiary of any trust described in § 402(b)(1) is not considered the owner of any portion of the trust under subpart E of part I of subchapter J. Section 1.402(b)-1(b)(6) of the regulations provides that where contributions made by the employee are not incidental when compared to contributions made by the employer, the beneficiary shall be considered to be the owner of the portion of the trust attributable to contributions made by the employee, if the applicable requirements of subpart E, part I, subchapter J, chapter I of the Code are satisfied. For purposes of this rule, contributions made by an employee are not incidental when compared to contributions made by the employer if the employee's total contributions as of any date exceed the employer's total contributions on behalf of the employee as of that date.

Section 402(b)(4)(A) provides that if one of the reasons a trust is not exempt from tax under § 501(a) is the failure of the plan of which it is a part to meet the requirements of § 401(a)(26) or § 410(b), then a highly compensated employee (as defined in § 414(q)) shall, in lieu of the amount determined under paragraph (1) or (2), include in gross income for the taxable year with or within which the taxable year of the trust ends an amount equal to the vested accrued benefit of the employee (other than the employee's investment in the contract) as of the close of the taxable year of the trust. Sections 410(b) and 401(a)(26) are part of a system of nondiscrimination rules a plan must satisfy to be considered a qualified plan that receives favorable tax treatment. Section 410(b) provides minimum coverage rules, pursuant to which a plan (together with certain other plans of the employer) must cover a minimum proportion of the employer's employees. Section 401(a)(26) provides minimum participation rules, pursuant to which a plan must permit a minimum number or proportion of an employer's employees to participate in the plan.

A technical correction contained in H.R. 11, 102d Cong., 2d Sess. § 6102(j)(1)(A) (1992) would have changed § 402(b)(4)(A) to provide that if one of the reasons a trust is not exempt from tax under § 501(a) is the failure of the plan of which it is a part to meet the requirements of § 401(a)(26) or § 410(b), then a highly compensated employee (as defined in § 414(q)) shall, in lieu of the amount determined under paragraph (1), include in gross income for the taxable year with or within which the taxable year of the trust ends an amount equal to the vested accrued benefit of the employee (other than the employee's investment in the contract) as of the close of the taxable year of the trust. H.R. 11 was passed by both the Senate and the House of Representatives but was never signed into law by the president.

As in our memorandum of October 24, 1996, we have concluded that the Fund is a nonexempt employees' trust described in § 402(b). It appears that contributions to the Fund generally are made as a uniform percentage of salary for the vast majority of each employer's employees. Thus, for most employers, Fund benefits of highly compensated employees would not be subject to the rules of § 402(b)(4)(A). However, it is possible that, if a significant number of an employer's nonhighly compensated employees are exempt from coverage under the Fund, benefits of the employer's highly compensated employees would be subject to the rules of § 402(b)(4)(A).

For an employee who is taxed under the rules of 402(b)(1), contributions paid by the employer to Fund are taxable pursuant to § 402(b)(1). Because nonelective contributions withheld from an employee's salary are not withheld at the election of the employee and are not constructively received by the employee, those contributions are considered employer contributions and are taxable pursuant to § 402(b)(1). See Hicks v. United States, 205 F.Supp. 343 (W.D. Va. 1962), aff'd, 314 F.2d 180 (4th Cir. 1963); Rev. Rul. 63-180, 1963-1 C.B. 189. But cf. Rev. Rul. 56-473, 1956-2 C.B. 22; Rev. Rul. 57-326, 1957-2 C.B. 42; Rev. Rul. 72-250, 1972-1 C.B. 22 (contrary pre-ERISA precedents that are superseded by § 414(h)). Additional contributions to the Fund made at the election of the employee are employee contributions that are taxed pursuant to § 61. As long as these additional elective contributions to an employee's account do not exceed employer contributions to the employee's account, no portion of the Fund will be considered owned by the employee under the grantor trust rules pursuant to § 402(b)(3) and § 1.402(b)-1(b)(6).

Under § 402(b)(2), interest income earned on an employee's portion of the Fund is taxable when amounts are distributed or made available from the Fund, in accordance with the rules of § 72 (concerning calculation of an exclusion ratio and application of this ratio to amounts distributed). Under § 1.451-2(a), amounts are considered made available from the Fund whenever a participant would be entitled to receive the distribution upon giving notice of intent to withdraw those amounts. Thus, the availability of distributions from the Fund for a wider variety of purposes under the changes made to the Fund may result in the taxation of amounts made available from the Fund under § 402(b)(2) in a greater variety of circumstances.

In the rare case in which § 402(b)(4) applies to a highly compensated employee's benefit under the Fund, such an employee would be taxed on his vested accrued benefit under the Fund (other than the previously taxed portion of the employee's Fund benefit) as of the end of each year. In this case, such an employee would, in effect, be taxed currently on the earnings attributed to his Fund balance as well as on contributions made on his behalf to the Fund. The tax consequences to such an employee of distributions from the Fund are unclear. Section 402(b)(4)(A) of the Code in its current form does not apply § 402(b)(2) to trigger application of § 72 to distributions to a highly compensated employee from a nonexempt trust to which § 402(b)(4)(A) applies. However, under the technical correction described above contained in H.R. 11, 102d Cong., 2d Sess. § 6102(j)(1)(A) (1992), a distribution to a highly compensated employee from a nonexempt employees' trust to which § 402(b)(4)(A) applies would be taxed under § 72 (relating to annuities). From this proposed technical correction, it appears that Congress intended to tax distributions to highly compensated employees from nonexempt employees' trusts in accordance with the rules of § 72. Accordingly, the tax consequences of distributions from the Fund are unclear in cases in which § 402(b)(4)(A) applies.

	Initiator	Reviewer	Reviewer	Reviewer	Reviewer	Reviewer
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