Annuity and Life Insurance Contracts Purchased by Trusts Under Qualified Retirement Plans

By Vorris J. Blankenship

Vorris Blankenship explains the taxation of annuity and life insurance contracts that are purchased by trusts within qualified retirement plans.

Special tax rules apply to annuity and life insurance contracts purchased by trusts under qualified retirement plans. Those rules affect the tax treatment of the contracts while the trust owns them, as well as the treatment of the contracts after the trust has distributed them to employees or their beneficiaries. In analyzing the tax treatment of such contracts, this article uses the term "qualified plan" to mean and include both a plan qualified under Code Sec. 401(a) and a trust that is part of the plan.[1]

Life Insurance Contracts Purchased by Qualified Plans

Life insurance contracts purchased by qualified plans include, of course, traditional life insurance policies. In addition, the tax law governing qualified plans treats purchases of retirement income, endowment, and other contracts providing life insurance as purchases of life insurance contracts.[2]

Furthermore, the IRS has ruled that a life insurance contract purchased by a plan generally does not cease being a life insurance contract merely because its cash value has grown to an amount exceeding its death proceeds. However, the IRS concedes that a distributed contract is no longer a life insurance contract if the recipient employee elects to begin payments under a settlement option[3] or formally converts the contract to an annuity contract.[4] The Tax Court, however, has more expansively held that a contract automatically ceases being a life insurance contract when its cash value exceeds the death proceeds.[5]

Cost of Life Insurance Paid by a Qualified Plan

If the proceeds from a life insurance contract owned by a qualified plan are payable to an employee's beneficiary, the employee must generally include a portion of the cost of the insurance in his or her gross income. He or she must generally include the portion of the insurance cost paid from funds contributed by the employer or paid from funds earned by the plan (but not the cost paid from funds contributed by the employee). However, if the employee is a self-employed individual, he or she must include in gross income only the portion of the cost paid from plan earnings, and not the portions paid from employer or employee contributions.[6]

To determine the source of funds applied to the cost of insurance, the plan must apply employer contributions and plan income before applying employee contributions—unless the terms of the plan expressly allocate employee contributions first to the cost of the insurance.[7] For this purpose, the cost of the insurance is the portion of the amount paid for the contract attributable to the pure insurance element. The pure insurance element is the difference between (1) the maximum potential death benefit during the

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employee's tax year, and (2) the cash value of the policy at the end of the tax year.[8]

Of course, employee contributions applied to the cost of a life insurance contract increase the employee's investment in the contract. In addition, however, the cost of life insurance included in the employee's gross income increases his or her investment in the contract (though a self-employed individual may not add such cost to investment).[9] Fortunately, inclusion of the life insurance costs in the employee's gross income does not trigger the 10 percent penalty tax on early distributions.[10]

Life Insurance Proceeds Paid Directly to Beneficiary

If an insurer pays the proceeds of a plan-owned life insurance contract directly to a deceased employee's beneficiary, the beneficiary may exclude from his or her gross income the excess of the proceeds over the cash value of the contract.[11] If the insurer instead pays the proceeds in installments, the beneficiary may still exclude from gross income a portion of each installment payment equal to a prorated part of the otherwise nontaxable proceeds.[12]

However, proceeds equal to the cash value of the plan-owned contract are taxable to the beneficiary as a plan distribution.[13] Thus, the beneficiary may be entitled to treat part of the cash value as a nontaxable recovery of investment under the usual rules applicable to distributions from qualified plans.

Life Insurance Proceeds Paid to a Qualified Plan

If an insurer pays life insurance proceeds to a qualified plan, the tax treatment differs depending on whether the plan is required to pay the proceeds over to the beneficiary of the deceased employee. If payment to the beneficiary is required, the proceeds are taxable to the beneficiary as if he or she received the proceeds directly (*i.e.,* as explained under the preceding caption).[14]

If the plan satisfies its obligation to pay out the proceeds by instead making installment payments to the beneficiary, the beneficiary may add (1) the amount of the proceeds excluded from gross income as insurance to (2) the investment in the life insurance contract. The installments are then taxable as plan distributions to the beneficiary—with a *pro rata* portion of each distribution treated as nontaxable recovery of investment.[15]

If the plan is not required to pay the proceeds over to the beneficiary, the proceeds simply become a plan asset indistinguishable from any other plan asset.[16] Thus, the proceeds lose their character as life insurance proceeds and are generally taxable when distributed under the usual rules applicable to distributions from qualified plans.

Distribution of a Life Insurance Contract by a Qualified Plan

A qualified plan may distribute a life insurance contract to an employee. If it does so, the distribution is included in the employee's gross income to the extent the fair market value of the life insurance contract exceeds the employee's recovery of investment, under the usual rules applicable to plan distributions.[17]

However, an employee may exclude from income the entire amount of a distributed life insurance contract if he or she converts the contract to a *nontransferable* annuity contract within 60 days after its distribution.[18] If, on the other hand, the employee converts the distributed contract to a *transferable* annuity contract within the 60-day period, he or she must include its entire fair market value in gross income without reduction for recovery of investment.[19] The employee may avoid this harsh result (and avoid tax on the distribution altogether) only if he or she further converts the contract to a *nontransferable* annuity contract within the 60-day period.[20]

Thus, the mystery of the temporarily disappearing investment. If an employee retains a distributed life insurance contract in its original form and does not convert it to an annuity within 60 days, the contract is included in gross income only to the extent its fair market value exceeds the appropriate recovery of investment. However, if the employee converts the life insurance contract to a *transferable* annuity contract within 60 days, the entire fair market value of the distributed life insurance contract is included in gross income—without the benefit of any nontaxable recovery of investment. Finally, if the employee waits more than 60 days to convert the life insurance contract to an annuity contract (whether or not transferable), the nontaxable recovery of investment associated with the distribution of the life insurance contract magically reappears.[21]

Annuity Contracts Owned by Qualified Plans

Annuity contracts owned by qualified plans generally include purchased contracts without any life insurance element that provide payments taxable as

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annuity payments. Payments are taxable as annuity payments if the issuer must make the payments at regular intervals, the payments continue for more than one year after the annuity starting date, and the total expected payments are determinable on the annuity starting date.[22] The total expected payments must be determinable from the terms of the contract or from actuarially sound mortality tables and compound interest computations.[23]

For variable annuities, the amount of the payments may vary in accordance with investment experience, cost of living indices, foreign currency values or similar criteria. However, the issuer must make the payments for a definite or determinable period (including a period based on lifetimes).[24]

Annuity contracts also include so-called "face amount certificates."[25] Face amount certificates are obligations of issuers to pay an amount or amounts more than 24 months after issuance in return for the prior receipt of periodic payments from the owner of the certificate. Face amount certificates also include an obligation of a "face amount certificate company" to make similar payments in return for an immediate lump sum payment from the owner of the certificate.[26]

Distribution of an Annuity Contract by a Qualified Plan

If a qualified plan distributes a *nontransferable* annuity contract to an employee or other beneficiary, the distributee need not include any portion of the distribution in income.[27] However, if the distributed annuity contract is *transferable*, the distributee must include its entire fair market value in gross income without reduction for recovery of investment. The distributee may avoid this harsh result only if he or she converts the contract to a *nontransferable* annuity within 60 days. If the contract is so converted, the distributee need not include any portion of the distribution in gross income.[28]

An annuity contract is transferable if the owner can transfer it to any person other than the issuer. Thus, the contract is transferable if the owner can sell, assign or pledge the owner's interest in the contract to anyone other than the issuer. However, it is not transferable merely because the owner may designate a beneficiary to receive distributions after the owner's death.[29]

The usual rules governing the taxation of annuities apply to distributions under an annuity contract after a taxpayer receives the contract, whether the contract is transferable or nontransferable.[30] However, the nontaxable portion of distributions under a *transferable* contract will generally be larger than under a nontransferable contract. That is, the inclusion of the transferable contract in gross income when distributed increases the distributee's investment in the contract to an amount equal to its fair market value when distributed. On the other hand, the distributee may not increase the investment, if any, in a *nontransferable* annuity contract to the contract's fair market value since the distributee receives the contract tax-free from the plan.

Continuing Status of a Distributed Nontransferable Annuity

As noted, the regulations provide simply that no portion of the value of a distributed nontransferable annuity (or a contract timely converted to a nontransferable annuity) need be included in income.[31] In addition, though, it is clear the distribution will be tax-free only if the distributed or converted contract complies with the tax law requirements imposed on the distributing plan.[32] It is also clear the subsequent exchange of the contract for an annuity that does not comply with those requirements will cause the contract to become immediately taxable.[33]

In GCM 39882,[34] an employee received a nontransferable annuity contract tax-free upon the termination of his employer's qualified plan. The IRS stated that, since the distribution of the annuity was nontaxable, the annuity necessarily had to contain provisions complying with the tax law requirements imposed on the qualified plan (*e.g.,* minimum distribution rules and spousal annuity rules). Subsequently, the taxpayer sought to exchange the distributed annuity for a new nontransferable annuity issued by another insurer. The IRS held that, if the new nontransferable annuity contained the same required provisions as the old annuity, the proposed exchange of annuities would (1) be a mere substitution of issuers, (2) not violate the nontransferable requirement, and (3) not be taxable.

However, the GCM also held that the exchange would become taxable if the new nontransferable annuity contract did not contain the same required qualified plan provisions as the old annuity contract. That is, the contract would no longer be what the GCM called a "401 annuity contract." Thus, the annuity would lose the protection of the nontaxable status granted by the regulations to distributions of 401 annuity contracts. Although Code Sec. 1035 provides

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for certain nontaxable exchanges of annuity contracts, the IRS held that Code section not applicable—presumably because the section does not mandate the continuation of required qualified plan provisions.

There is also some indication a distributed nontransferable annuity contract will fail to qualify as a 401 annuity contract if its terms are merely inconsistent with provisions of the distributing plan—even though its terms are otherwise consistent with the tax law applicable to the plan. In *M. Silverman Est.*,[35] a qualified pension plan was required by its terms to provide an annuity to an employee when he reached age 65. However, upon its termination, the plan distributed annuity contracts to the employee that provided additional distribution options. Accordingly, when the employee reached age 65, he chose an option other than immediate annuity payments. On his subsequent death, his spouse received the remaining cash value of the contracts.

The issue was whether the contracts qualified for exclusion from the employee's gross estate for estate tax purposes. The estate tax exclusion in question was available only if the qualified pension plan had purchased the annuity contracts.[36] However, the Tax Court concluded that the exclusion was not available because the annuity contracts were not part of the qualified plan. The court reasoned that, because the annuity contracts provided distribution options in addition to the age 65 annuity specified by the plan, the contracts ceased being a part of the qualified plan upon their distribution to the employee. (Three concurring judges concluded the annuity contracts ceased to be a part of the plan later when the retired employee, contrary to the terms of the plan, declined to take annuity payments at age 65.)

Nontaxable Rollovers Involving 401 Annuity Contracts

The regulations confirm the unique status of a 401 annuity contract, referring somewhat awkwardly to such a contract as a "qualified plan distributed annuity contract." The regulations recognize that such a contract retains enough qualified plan characteristics to allow an employee to roll over a distribution received from the annuity issuer to another plan or IRA—provided the distribution otherwise satisfies the definition of an "eligible rollover distribution." It does not matter that the plan that originally distributed the contract has since terminated.[37]

The issuer of the 401 annuity contract must also provide the employee with an election to make a trustee-to-trustee rollover that is comparable to the election a qualified plan must offer.[38] Alternatively, if the employee should choose to receive an eligible rollover distribution directly, the annuity issuer must withhold the usual 20-percent tax applicable to such direct distributions.[39]

Alternative Conversion of a Distributing Plan to a Qualified Annuity Plan

An employer might be able to eliminate some of the uncertainty associated with the continuing status of 401 annuity contracts distributed by a terminating qualified plan—by instead converting the plan to a non-trusteed qualified plan (*i.e.,* a "qualified annuity plan" under Code Sec. 403(a)). In *J.A. Benjamin Est.,*[40] the trust under a terminating qualified plan distributed annuity contracts to employees. Several years later, one of the employees died before retirement and his spouse received the cash value of his annuity contract. The surviving spouse sought to invoke a then-existing statutory provision allowing capital gain treatment for a lump sum distribution received upon a plan participant's death.[41] The government, however, (1) noted that capital gain treatment was available only for amounts paid by a qualified plan, and (2) argued that the qualified plan in this case terminated long before payment of the lump sum under the annuity contract.

The court of appeals, on the other hand, concluded that the employer had converted the original trusteed qualified plan to a qualified annuity plan. The court noted that (1) a previous IRS ruling had held that an employer could convert a qualified annuity plan to a trusteed qualified plan,[42] and (2) the IRS conceded that the opposite conversion was also permissible.[43] Although the case was a factually difficult one, the court found sufficient inferences of fact to support its conclusion that the employer had satisfied the requirements for establishment of a successor qualified annuity plan. A dissenting judge, while not disputing the feasibility of a plan conversion, did not believe the facts supported the actual establishment of a successor qualified annuity plan.

The Peculiar Treatment of Distributions of Transferable Annuity Contracts

As noted above, an employee must include in gross income the entire fair market value of a distributed

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transferable annuity contract (or a distributed life insurance contract converted within 60 days to a transferable annuity contract)—without any reduction for recovery of investment.[44] This unusual treatment appears to have its genesis in 1962 legislation that defined the term "annuity" for retirement plan purposes to exclude transferable annuities.[45] The following year, the IRS amended the regulations to provide for the inclusion of the full value of distributed transferable annuities in gross income.[46] The rationale for this type of drastic treatment is unclear.

It is true the effect of the 1962 legislation was to change the tax law so that distributions of transferable annuities were no longer tax-free.[47] However, it would seem the rational result of that change should have been to tax such distributions the same as any other distributions of property from qualified plans, *i.e.,* by taking into account the nontaxable recovery of investment in the plan.[48] Why the IRS did not so provide is unclear. Perhaps the IRS intended its harsher regulatory provision as further discouragement for the distribution of transferable annuities. In any event, it is unlikely a court would invalidate the regulation. The IRS promulgated it contemporaneously with the 1962 legislation, and Congress has had over 40 years to change the regulation through legislation without having done so.[49]

The Question of Allocating Plan Investment to Nontransferable Annuity Contracts

It is unclear whether an employee may allocate investment in a qualified plan to a nontransferable annuity contract distributed by the plan. There does not appear to be any direct authority on this point. It is clear, however, that the normal Code Sec. 72 rules governing the taxation of distributions of property by a qualified plan do not directly apply to the distribution of annuity contracts from the plan. As noted above, the distribution of a *transferable* annuity is fully taxable without the benefit of the usual allocation of nontaxable recovery of plan investment under Code Sec. 72, and the distribution of a *nontransferable* annuity is not subject to tax under Code Sec. 72 (or any other provision).[50]

However, the regulatory denial of an allocation of plan investment to a distributed *transferable* annuity contract does seem to imply that the IRS would also deny the allocation for a *nontransferable* annuity contract.[51] In addition, in a different context, Congress has indicated its intent to deny the allocation of plan investment to distributed annuities. Specifically, Congress has denied the allocation of plan investment to annuities that are part of a lump sum distribution for which a taxpayer born before 1936 elects special income averaging computations.[52]

On the other hand, there are substantial arguments for allowing an allocation of plan investment to a nontransferable annuity. First, the general scheme for treatment of qualified plan distributions is to associate distributed property with the investment generating the property.[53] Also, by analogy, the tax-free distribution of a nontransferable annuity contract retaining attributes of the distributing qualified plan is somewhat similar to a tax-free direct transfer of funds between tax-advantaged retirement plans or annuities for purposes of plan administration. This type of administratively generated direct transfer (distinguishable from a rollover) carries with it a *pro rata* portion of the investment in the transferring plan or annuity.[54]

Furthermore, the denial of a nontaxable recovery of investment for a distributed *transferable* annuity contract may carry no implications for a distributed *nontransferable* annuity contract. The denial may be simply a regulatory aberration intended to discourage the distribution of transferable contracts.[55] Finally, the denial of an allocation of plan investment to annuities that are part of a distribution subject to special income averaging computations appears to be unique to, and limited to, those computations.[56] Thus, the denial of the allocation for those computations does not necessarily carry over to other types of situations.

Consequences of Inability to Allocate Plan Investment to Distributed Annuities

As noted above, the regulations do not allocate any of an employee's investment in a qualified plan to the distribution of a *transferable* annuity contract; thus, it is only logical to conclude that the unallocated investment remains with the employee's interest in the plan. Similarly, if it is ultimately determined that an employee may not make an allocation of investment to a distributed *nontransferable* annuity contract, the unallocated investment also apparently remains with the employee's interest in the plan. Thus, if an employee should take a final distribution of all funds remaining

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in a plan after the distribution of an annuity contract, the employee's nontaxable recovery of investment in the final distribution should include the investment originally attributable to the annuity contract.[57]

Consequently, if the amount of a final distribution equals or exceeds the total investment in the plan, the employee recovers all of the investment tax-free. The employee suffers no disadvantage due to his or her inability to allocate any of the investment to the distributed annuity. If the distributed annuity is *transferable*, the immediate nontaxable recovery of investment on the final plan distribution is normally at least as beneficial as would be the recovery of the investment against the taxable value of the distributed annuity. If the distributed annuity is *nontransferable*, the immediate nontaxable recovery of investment on the final plan distribution is normally more beneficial than recovery of the investment gradually over the life of the annuity contract.

If the investment remaining with the plan after the distribution of an annuity contract exceeds the amount of a final plan distribution consisting only of cash, the employee may deduct the excess.[58] Unfortunately, though, the deduction is a miscellaneous itemized deduction that, together with other of the employee's miscellaneous itemized deductions, may not exceed two percent of his or her adjusted gross income.[59] If the final distribution includes property other than cash, the employee may not take a loss deduction.[60] Instead, the distributed property takes on a tax basis equal to the employee's investment in the plan less any cash distributed.[61]

Thus, when plan investment exceeds the amount of the funds remaining in the plan after the distribution of a *transferable* annuity, the employee either is denied a loss deduction on a final plan distribution or must settle for a limited itemized deduction. On the other hand, inability to allocate investment to a distributed *nontransferable* annuity may or may not be disadvantageous under the same circumstances. It depends generally on whether the benefit derived from an itemized deduction, or the assignment of additional basis to other distributed property, outweighs the benefit derived from recovery of the investment over the life of the annuity.

The Effect of Multiple Qualified Plan Programs

The previous analysis in this article assumes that the qualified plans discussed above consist of only one plan program (*i.e.,* consist of only one Code Sec. 72 "contract"). However, it is possible for a plan to include other programs (*i.e.,* other Code Sec. 72 "contracts") separate from the annuity program. For this purpose, the regulations define a plan program as a separate program of interrelated contributions and benefits that are not interrelated with contributions and benefits under any other separate program. Thus, for plan distribution purposes, the tax law treats a separate plan program within a qualified plan as if, in effect, it were a separate plan.[62]

Unfortunately, however, if an annuity contract distributed by a qualified plan leaves behind the investment associated with it, it is unclear how the plan or employee assigns that investment to the various programs within the plan. It seems logical to argue that the investment should remain with the plan program that provided the annuity. If that argument were to prevail, it might be possible, for example, to generate a loss deduction by distributing all remaining funds in that plan program (even though other separate plan programs retained their funds).

In Summary

In many respects, the tax law treats life insurance purchased by a qualified plan almost as if the insured employee had personally purchased the insurance. That is, the plan treats the employee as bearing the cost of the insurance; and the employee's beneficiary generally excludes the death proceeds from gross income. Only the portion of the proceeds equal to the cash value of the insurance contract is taxable as a plan distribution after excluding the appropriate recovery of investment.

A qualified plan's distribution of a life insurance contract is also taxable as a distribution to the extent of the excess of the contract's fair market value over the tax-free recovery of investment. However, the tax law provides harsher treatment for distributions of transferable annuities (or life insurance contracts timely converted to transferable annuities). Such distributions are fully taxable without the benefit of nontaxable recovery of investment.

Distributions of contracts are nontaxable only if the contracts are nontransferable annuities—or are life insurance or transferable annuity contracts timely converted to nontransferable annuities. To assure tax-free treatment, the tax law requirements applicable to the distributing qualified plan (and perhaps other terms of the plan) must continue to apply to the dis-

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tributed contract. Unfortunately, the tax law does not provide a clear answer to the question of whether an employee may assign plan investment to a distributed or converted nontransferable annuity.

ENDNOTES

[1] For this purpose, Code Sec. 401(f) provides that a trust may in some cases include (1) a custodial account of a bank or other person authorized by the IRS, or (2) a contract issued by an insurance company.

[2] Reg. §1.402(a)-1(a)(2).

[3] LTR 8125016 (Mar. 24, 1981).

[4] Rev. Rul. 66-322, 1966-2 CB 123.

[5] *A.R. Evans,* 56 TC 1142, Dec. 30,942 (1971).

[6] Code Secs. 72(m)(3)(B), 404(a)(8)(C); Reg. §1.72-16(b)(2).

[7] Rev. Rul. 68-390, 1968-2 CB 175.

[8] Reg. §1.72-16(b)(3).

[9] Reg. §§1.72-16(b)(2), 1.72-16(b)(4), 1.72-8(a)(1).

[10] Notice 89-25, 1989-1 CB 662, Q&A 11.

[11] Reg. §1.72-16(c)(2)(ii).

[12] Reg. §1.72-16(c)(2)(iv).

[13] Reg. §1.72-16(c)(2)(iii).

[14] Reg. §1.72-16(b)(1).

[15] LTR 9618028 (Feb. 6, 1996).

[16] Reg. §1.72-16(c)(2)(iv).

[17] Reg. §1.402(a)-1(a)(1)(iii) provides that distributed property, including a life insurance contract, "shall be taken into account" by the distributee at its fair market value. Reg. §1.402(a)-1(a)(2) further provides that the "fair market value of the contract … must be included in the distributee's income in accordance with the provisions of section 402(a)" (*i.e.,* under the Code Sec. 72 annuity rules providing for the nontaxable recovery of investment) unless the contract is converted to a non–life insurance contract within 60 days (or unless it is rolled over tax-free to another qualified plan within 60 days). Note also that the fair market value of a distributed contract with life insurance elements may be more than its cash value, requiring the use of sophisticated methods of valuation. Rev. Proc. 2005-25, IRB 2005-17, 962.

[18] Reg. §1.402(a)-1(a)(2).

[19] *Id.* Where a distributed life insurance contract is simply converted to a *transferable* annuity contract within the 60-day period, the regulations provide that the "fair market value of the contract is includible in the distributee's gross income" (*i.e.,* the fair market value is not merely taken into account under the annuity rules of Code Sec. 72). Reg. §1.402(a)-1(a)(2).

[20] Reg. §1.402(a)-1(a)(2).

[21] *Id.*

[22] Reg. §1.72-2(b)(2).

[23] Reg. §1.72-2(b)(2)(iii).

[24] Reg. §1.72-2(b)(3)(i).

[25] Code Sec. 401(g).

[26] 15 USC §80a-2.

[27] Code Sec. 401(g); Reg. §§1.401-9(b), 1.402(a)-1(a)(2).

[28] Reg. §1.402(a)-1(a)(2). If a plan distributes a *transferable* annuity contract that the distributee does not convert to a *nontransferable* annuity contract within 60 days, the regulations provide that the "fair market value of the contract is includible in the distributee's gross income" (*i.e.,* the fair market value is not merely taken into account under the annuity rules of Code Sec. 72). Reg. §1.402(a)-1(a)(2).

[29] Reg. §1.401-9(b)(3).

[30] Code Secs. 402(a), 72(a).

[31] Reg. §1.402(a)-1(a)(2).

[32] *See* Reg. §§1.401(a)-20, Q&A 2, 1.401(a)(31)-1, Q&A 17, 1.402(c)(2), Q&A 10, 31.3405(c)-1, Q&A 4; GCM 39882 (May 27, 1992).

[33] GCM 39882 (May 27, 1992).

[34] *Id.*

[35] *M. Silverman Est.,* 61 TC 605, Dec. 32,449 (Feb. 4, 1974).

[36] Code Sec. 2039(c) (1966).

[37] Reg. §1.402(c)-2, Q&A 10.

[38] Reg. §1.401(a)(31)-1, Q&A 17.

[39] Reg. §31.3405(c)-1, Q&A 4.

[40] *J.A. Benjamin,* CA-7, 72-1 USTC ¶9472, 465 F2d 982.

[41] Code Sec. 403(a)(2) (1961).

[42] Rev. Rul. 55-427, 1955-2 CB 27. *See also,* Rev. Rul. 73-259, 1973-1 CB 199, holding that a conversion of a qualified annuity plan to a trusteed qualified plan was permissible if all the distribution restrictions applicable to the annuity plan were required to be enforced by the trusteed recipient plan.

[43] *J.A. Benjamin, supra* note 40.

[44] Reg. §1.402(a)-1(a)(2).

[45] Code Sec. 401(g) (1962).

[46] T.D. 6676 (Sept. 16, 1963), amending Reg. §1.402(a)-1(a)(2).

[47] *Cf.,* T.D. 6203 (Sept. 24, 1956), originally adopting Reg. §1.402(a)-1(a)(2).

[48] Code Secs. 402(a), 72; Reg. §1.402(a)-1(a)(1).

[49] T.D. 6676 (Sept. 16, 1963) is the source of the regulation and is contemporaneous with the related 1962 legislation. The regulation has remained substantially unchanged for over 40 years. In *National Muffler Dealers Ass'n,* SCt, 79-1 USTC ¶9264, 440 US 472, 477, 99 SCt 1304, the Supreme Court said: "A regulation may have particular force if it is a substantially contemporaneous construction of the statute by those presumed to have been aware of Congressional intent. * * * Other relevant considerations are the length of time the regulation has been in effect, the reliance placed on it, the consistency of the Commissioner's interpretation, and the degree of scrutiny Congress has devoted to the regulation during subsequent reenactments of the statute. [Citations omitted.]" *See also, Cleveland Indians Baseball Co.,* SCt, 2001-1 USTC ¶50,341, 532 US 200, 121 SCt 1433 (regulation unchanged for over 60 years); *J.J. Auborn,* 93 TC 612, Dec. 46,165 (1989) (unchanged for over 30 years).

[50] Reg. §1.402(a)-1(a)(2).

[51] *Id.*

[52] Code Sec. 402(e)(2) (1986) specifically provided that the full value of an annuity contract is taken into account as part of the taxable amount under the special computation, thus effectively allocating the entire investment in the plan to components of the lump sum distribution other than the annuity.

[53] Code Secs. 402(a), 72(a).

[54] *See* GCM 39882 (May 27, 1992) (transfer between 401 annuity contracts); Rev. Rul. 90-24, 1990-1 CB 97 (transfer between 403(b) annuity contracts).

[55] Reg. §1.402(a)-1(a)(2).

[56] *See supra* note 52.

[57] Code Secs. 402(a), 72.

[58] Rev. Rul. 72-305, 1972-1 CB 116; Rev. Rul 72-328, 1972-2 CB 224.

[59] Code Secs. 62(a), 67(b).

[60] Rev. Rul. 72-15, 1972-1 CB 114.

[61] Rev. Rul. 71-251, 1971-1 CB 129; Rev. Rul. 74-398, 1974-2 CB 136.

[62] Reg. §1.72-2(a)(3)(i).

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