Pension Benefit Guaranty Corporation

80-5

May 12, 1980

REFERENCE:
[*1] 4001(b) Definitions. Employer and Controlled Group
4004(f)(4) Temporary Authority. Waiver of Employer Liability
4062 Liability of Employer in Single Employer Plans

OPINION:

We have reviewed your request of May 29, 1975, submitted to the Pension Benefit Guaranty Corporation ("PBGC") on behalf of the * * * Company ("* * *"). The letter requested a waiver of the liability which would otherwise be imposed under Sec. 4062 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1362 on account of the termination of the * * * Company * * * Retirement Plan (the "Plan"). In the course of this review, we have considered the information submitted in connection with the termination of the Plan, and additional financial information submitted with respect to the plan sponsor, * * *, and its parent, * * *, Inc. ("* * *"). n1

n1 Under ERISA Sec. 4062, liability on account of plan termination extends to all trades or businesses which are part of a "controlled group" with the plan sponsor. See ERISA Section 4001(b), 79 U.S.C. § 1301(b), and regulations promulgated under Internal Revenue Code § 414(c) 76 U.S.C. § 414(c); see also Pension Benefit Guaranty Corp. v. Ouimet Corp. 470 F. Supp. 945, (D. Mass. 1979) [*2]

ERISA Sec. 4004(f)(4), 29 U.S.C. § 1304(f)(4), gives the PBGC authority to waive or reduce employer liability resulting from the termination of a pension plan during the first 270 days after enactment of ERISA if the PBGC determines: (1) that the employer was unable, as a practical matter, to continue the plan, and (2) that a waiver or reduction is necessary to avoid unreasonable hardship.

* * * submitted its request for waiver within the requisite 270 days following the enactment of ERISA. No such application was submitted by its parent corporation, * * *, or other members of the controlled group, on a timely basis. However, since submitted its application on a timely basis, we will consider that application to also apply on behalf of its parent corporation, and other members of the controlled group. n2

n2 All parties seem to have proceeded on the basis that the application was submitted on behalf of the entire controlled group. * * * wrote to Congressman James Cleveland on July 18, 1977, to protest controlled group liability under ERISA. * * * also submitted copies of its consolidated financial statements for the fiscal years ended December 31, 1974 and 1975.

In its [*3] letter to PBGC of March 29, 1979, * * * stated that it was a producer of felt fabrics for two special uses: naval and military type uniforms and billiard tables. Due to the loss of major contracts, * * * was unable to continue operations. In January and February of 1975, according to the letter, the remaining labor force was laid off. Financial statements submitted for the fiscal year ended December 31, 1974 (copy attached) indicate a retained earnings deficit of $103,000.00. However, the financial statements for the same period of the parent corporation, * * *, indicate a book value equity in excess of $2 million (copy attached). n3 The statement also shows that retained earnings, as of December 31, 1974, were $3,796,312.

n3 The statement has been adjusted to reflect the investment on an equity basis in five subsidiaries, including * * * and * * *

A Dunn and Bradstreet, Inc. report updated as of March 11, 1977, (copy attached) indicated that for the fiscal year ended December 31, 1975 * * * net worth (on the basis of book values) increased by another $524,357.00, reflecting an increase in sales to a total of $9 million. In short, the controlled group to which * * * belongs [*4] appears to have substantial value. n4

n4 PBGC's conclusion that a controlled group exists is based on the accountant's note to the December 31, 1974 financial statement.

PBGC must take this value into account in processing any application for a waiver of liability. Only if liability results in unreasonable hardship to the controlled group would PBGC grant the request. Liability for payment of unfunded liabilities imposes a hardship on any employer, of course, regardless of its size. However, Congress, in enacting ERISA, decided that imposition of this liability was justifiable public policy, and further decided that liability would be avoided only to the extent it exceeded 30% of the net worth of the employer and its controlled group. (In other words, assuming the net worth on the basis of book values at termination to have been approximately $2.1 million, per the financial statements, liability up to $630,000 would be collectible under the statute.) In this case, the unfunded liabilities have been established at $88,383, less than 4% of the net worth established by the financial statements. n5

n5 Other tests of net worth, which would take into account the fair market value of assets rather than book value, along with the added value of the business as a going concern, would most likely result in much higher estimates of net worth. In determining the net worth of a business, PBGC would not be required to look solely to book value, but could look to other factors which help to establish the value of a business as a going concern. [*5]

We are not persuaded that unreasonable financial hardship would be imposed if the request for waiver is denied. Accordingly, we have determined that * * * and other members of its controlled group are jointly and severally liable to PBGC for the plan asset insufficiency at the date of Plan termination. This amount, as stated earlier, is $88,383. We hereby request payment of that amount.

The PBGC will charge interest, commencing forty-six (46) days after the date of this letter, on the unpaid portion (if any) of the liability at that time. The rate of interest will be that rate in effect under Section 6621 of the Internal Revenue Code ("IRC"), 26 U.S.C. § 6621, on the date interest begins to run. The rate of interest charged by PBGC on the unpaid portion of the liability from time to time will change in conformity with changes in the rate established by Section 6621 of the IRC. The PBGC will pay interest, at the applicable rate under IRC Section 6621, on any overpayment, from the date the overpayment is received by the PBGC to the date the PBGC issues a refund.

Your attention is called to the enclosed notice of the right to appeal the determination of employer liability within [*6] forty-five (45) days after the date of this letter Failure to file a timely appeal or otherwise respond to this letter within forty-five (45) days after the date hereof may lead to the issuance of a formal demand letter for the payment of the employer liability under ERISA Sec. 4068, 29 U.S.C. § 1368, which may in turn give rise to a lien in favor of the PBGC on the assets of * * * and other members of the controlled group to which it belongs.

Mitchell Strickler
Deputy General Counsel