Pension Benefit Guaranty Corporation

OPINION 97-1

May 5, 1997

REFERENCE:
[*1] 4001(b)(1)4001 Definitions
4201(a)4201 Withdrawal Liability Established
29 CFR 4001.3>4001.3>

OPINION:

This responds to your request for the opinion of the Pension Benefit Guaranty Corporation ("PBGC") concerning the application of the employer liability provisions of the Employee Retirement Income Security Act of 1974 ("ERISA") to members of controlled groups located outside the United States.

Your request makes the following representations of fact. Company A is a privately-owned domestic holding corporation whose assets are its equity interests in several operating subsidiaries located throughout the world, including Company B, a domestic corporation. In September 1993, Company A and Company B (collectively, the "Debtors") petitioned for reorganization under Chapter 11 of the Bankruptcy Code.

Company B was obligated to contribute to the Plan, a "multiemployer plan" within the meaning of section 4001(a)(3) of ERISA. On January 1, 1994, Company B permanently ceased all covered operations or to have an obligation to contribute under the Plan within the meaning of ERISA § 4203(a). Subsequently, the Plan underwent a "mass withdrawal" within the meaning of 29 C.F.R. § 4001.2. The Plan [*2] filed bankruptcy claims against the Debtors for withdrawal liability, including liability allocable as a result of the mass withdrawal. The Debtors and the Plan entered into a settlement agreement that provided that the Plan would have an allowed general unsecured claim against Company B. The settlement agreement released certain entities that are under "common control" with Company B within the meaning of ERISA § 4001(b)(1). The settlement agreement expressly provided, however, that the release does not apply to eight wholly-owned subsidiaries of Company A that are incorporated and operate in the United Kingdom (collectively, the "UK Entities"). We assume that the settlement agreement was duly approved by the bankruptcy court.

You ask (i) whether the UK Entities constitute a "single employer" with the Debtors within the meaning of ERISA § 4001(b)(1), and if so (ii) whether the UK Entities' location outside the United States affects the principle that all controlled group members are jointly and severally liable for withdrawal liability.

As you know, section 4221 of ERISA provides that disputes between a plan sponsor and an employer on issues concerning withdrawal and withdrawal [*3] liability are to be resolved through arbitration. PBGC does not involve itself in such proceedings. However, PBGC will continue its practice of answering general questions of interpretation under Title IV of ERISA.

Section 4201(a) of ERISA provides that "if an employer withdraws from a multiemployer plan[,] . . . then the employer is liable to the plan in the amount determined under [part 1 of subtitle E of Title IV of ERISA] to be its withdrawal liability." Section 4001(b)(1) provides that for purposes of Title IV,

under regulations prescribed by [PBGC], all employees of trades or businesses (whether or not incorporated) which are under common control shall be treated as employed by a single employer and all such trades or businesses as a single employer. The regulations prescribed under the preceding sentence shall be consistent and coextensive with regulations prescribed for similar purposes by the Secretary of the Treasury under section 414(c) of the Internal Revenue Code of 1986 [("IRC")].

This principle of treating commonly controlled businesses as a single employer was subsequently reaffirmed during debates on the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"). [*4] As the Senate floor sponsor stated:

Under current law, a group of trades or businesses under common control, whether or not incorporated, is treated as a single employer for purposes of employer liability under Title IV. Thus, if a terminating single employer plan is maintained by one or more members of a controlled group, the entire group is the "employer" and is responsible for any employer liability. The leading case in this area is Pension Benefit Guaranty Corporation v. Ouimet Corp., 470 F. Supp. 945 (D. Mass. 1979), [aff'd, 630 F.2d 4 (1st Cir. 1980), cert. denied, 450 U.S. 914 (1981),] in which the court held that all members of a controlled group are jointly and severally liable for employer liability imposed under section 4062 of ERISA. The bill does not modify the definition of "employer" in any way, and the Ouimet decision remains good law.

126 Cong. Rec. 23,287 (1980) (statement of Sen. Williams). In the years since MPPAA was enacted, the principle that withdrawal liability is a joint and several obligation of all controlled group members has become well settled. [*5] Your question concerns the application of this principle to foreign controlled group members.

Because it appears from your inquiry that Company A has a "controlling interest" in the UK Entities within the meaning of the section 414(c) regulations, the UK Entities would be under "common control" with the Debtors within the meaning of section 4001(b)(1) of ERISA and therefore treated with the Debtors as a single employer for purposes of section 4201(a). See 26 C.F.R. § 1.414(c)-2(a), (b)(1), (2)(A). It is our opinion that, as such, they would be jointly and severally liable for withdrawal liability.

In our view, your inquiry does not implicate extraterritorial application of ERISA. The Plan and its related trust are established and administered in the United States (see ERISA § 4021(a); IRC § 401(a)). The events that triggered liability under ERISA took place in the United States and involved the cessation of the contribution obligation or covered operations, under the Plan, of one or more United States entities. Thus, the liability in question represents the domestic application of United States law. The fact that this liability may ultimately include within its scope certain [*6] foreign affiliates does not compel a different conclusion, as by statute such affiliates are part of a "single employer." As the courts have correctly noted, Title IV's controlled group principle is intended to prevent business owners from avoiding liability by fractionalizing their business operations, and from juggling their activities to eviscerate the liability provisions of ERISA. These purposes would be ill-served by a controlled group principle that did not apply to *all* entities under common control.

Even if the question involved extraterritorial application of ERISA, we would reach the same conclusion. It is well settled that Congress has the power to enact laws that have extraterritorial application, but is presumed not to have exercised that power unless its intent to do so is clear from the statute. We think controlled group liability under ERISA was intended to have extraterritorial application, and that this is clear from the relevant statutes.

In original section 4001(b) of ERISA (now section 4001(b)(1)), Congress authorized PBGC to promulgate regulations governing the treatment of entities under common control. Those regulations are to be "consistent and coextensive" [*7] with certain Treasury regulations. Accordingly, when PBGC adopted regulations in 1976 to implement section 4001(b), it incorporated those Treasury regulations by reference. A few years later, in enacting MPPAA, Congress carried forward the controlled group principle for purposes of the new withdrawal liability rules. It did so again in 1986 when it enacted section 4001(a)(14) and amended section 4062(a) to codify the principle of controlled group liability in the context of termination of a single-employer plan, using slightly different terminology to describe the "employer." None of these legislative actions indicated any Congressional intent that controlled group liability be limited to domestic entities.

The PBGC regulations provide that two or more trades or businesses will be considered under common control (and hence a single employer) for purposes of Title IV of ERISA if they are "'under common control,' as defined in regulations prescribed under section 414(c) of the [IRC]." 29 C.F.R. § 4001.3(a)(1), (2). Section 414(c) of the IRC authorizes the Secretary of the Treasury to prescribe regulations based on "principles similar to the principles which apply in the case [*8] of subsection (b) [of section 414]."

Under section 414(b) of the IRC, employees of corporations that are "members of a controlled group of corporations (within the meaning of section 1563(a), determined without regard to section 1563(a)(4) and (e)(3)(C)) shall be treated as employed by a single employer." The Treasury Regulations under section 414(b) provide, in pertinent part, that

the term "members of a controlled group" means two or more corporations connected through stock ownership described in section 1563(a)(1), (2), or (3), whether or not such corporations are "component members of a controlled group"

within the meaning of section 1563(b).

26 C.F.R. § 1.414(b)-1(a). Thus, the governing Treasury regulation under section 414(b) does not incorporate the "foreign corporation" exclusion of section 1563(b)(2)(C). (That subsection excludes certain foreign entities from controlled group membership for purposes of filing consolidated tax returns.)

It follows that one of the "principles which apply in the case of subsection (b) [of section 414]" is that corporations connected through stock ownership under section 1563(a) shall be treated as a single employer, even if they might [*9] otherwise be excluded from the group under section 1563(b). And, true to Congress's mandate that the regulations under IRC § 414(c) be based on principles similar to those that apply under IRC § 414(b), the stock ownership tests set forth at 26 C.F.R. § 1.414(c)-1 et seq. substantially reflect the stock ownership tests of IRC § 1563(a), with no express exclusion of foreign entities.

Other sections of the IRC amply demonstrate that Congress knew how to specify a subgroup of corporations, such as "foreign corporations" or "domestic corporations," when that was its intent. See, for example, section 861(a)(1) (referring to "domestic corporations"); sections 881-84 (dealing with taxation of "foreign corporations"); and section 864(b) (providing rules for whether a "foreign corporation" is engaged in trade or business within the United States). Clearly, if Congress had intended to except foreign entities from the ambit of relevant controlled group provisions such as sections 414 and 1563(a) of the IRC or section 4001(b) of ERISA, it would have done so expressly. Instead, as noted above, the exclusion of foreign entities in section 1563(b) is to be disregarded when determining [*10] the membership of a "controlled group of corporations" under IRC § 414(b). This principle of expansive controlled group membership, which serves to effectuate the prophylactic purposes of controlled group liability, is embodied in the section 414(c) regulations as well. In sum, we think that section 4001(b)(1) of ERISA ultimately incorporates IRC provisions that generally apply to all corporations under common control, including foreign corporations. Accordingly, it would be our opinion that Congress intended for the controlled group principle under Title IV of ERISA to have extraterritorial application on the facts you have given.

The opinions stated herein are limited to Title IV of ERISA, and we express no view regarding jurisdictional issues relating to suits against foreign situs entities.

We hope the foregoing response is helpful. If you have any questions, please feel free to call Nathaniel Rayle of this Office at 202.326.4020, ext. 3886.

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General Counsel