

Pension Benefit Guaranty Corporation

98-1

February 17, 1998

REFERENCE:

[*1] 4021(b)(13) Plans Covered. Professional Service Employer Plans

OPINION:

I write pursuant to your request for reconsideration of the May 15, 1997, initial determination issued by the Pension Benefit Guaranty Corporation ("PBGC") that the * * * Defined Benefit Pension Plan (the "Plan") is subject to the termination insurance provisions of Title IV of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), and is not excluded from coverage under ERISA § 4021(b)(13) as a plan maintained by a professional service employer.

After thorough review and analysis, for the reasons discussed below, the PBGC sustains its initial determination and concludes that * * * is not a professional service employer as defined in section 4021(c)(2) of ERISA, and therefore the Plan is subject to the termination provisions of Title IV of ERISA. Thus, upon reconsideration, we find that the initial determination was correct.

As we understand the facts of this matter, * * * is a management consulting firm and is primarily engaged in the business of providing new business development and strategic consulting services to Fortune 500 Companies. The owner of the company * * *, had 15 years of experience [*2] in the field of management consulting prior to starting the firm and has a degree from the University of London. * * * oversees 100% of the management of the firm's business. It is undisputed that at no time has the plan had more than 25 active participants.

Section 4021 (b)(13) of ERISA excludes from coverage any plan "established and maintained by a professional service employer that does not at any time after the date of enactment of this Act have more than 25 active Participants in the plan."

Under § 4021 (c)(2) of ERISA, a professional service employer is any entity owned or controlled by professional individuals where both the entity and the professional individuals owning and controlling it are engaged in the performance of the same professional service. See PBGC Opinion Letter 76-106.

As stated in PBGC Opinion Letter 76-106, a professional individual generally is one who provides services that require knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship or from training in the performance [*3] of routine mental, manual or physical process. The rendering of professional services generally requires the consistent exercise of discretion and judgment in its performance and would usually be predominantly intellectual in character.

Based on our review of the relevant factors, it appears that * * * is not a professional service employer within the meaning of ERISA § 4021 (b)(13). * * * does not have an advanced degree and neither * * * nor * * * are required under state law to hold a specific license in order to perform duties as a management consultant. Moreover, the broad range of services that * * * provides are not those that require knowledge of an advanced type that is customarily acquired through a prolonged course of special intellectual instruction.

* * * contends that it has been deemed a qualified professional service employer by the IRS under Section 448(b) of the Internal Revenue Code ("IRC"). We disagree. IRC § 448(b) provides that "qualified personal service corporations" shall be treated as individuals for purposes of a particular method of accounting. The definitions of "qualified personal service corporations" under IRC § 448(d)(2) and "professional service employer" [*4] under ERISA § 4021(c)(2), however, are not, and were not intended to be, coextensive.

Because * * * cannot be deemed a professional service employer as defined by ERISA § 4021(c)(2), the Plan is not excluded from coverage under ERISA § 4021(b)(13). This is a final decision by the PBGC regarding the Plan.

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