

U.S. DEPARTMENT OF LABOR  
LABOR-MANAGEMENT SERVICES ADMINISTRATION

**Pension and Welfare Programs**

**Washington, D.C. 20216**



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**230**

OPINION 76-132

Jonathan K. Wright, Esq.  
Schumacker and Lunkeheimer  
1810-14 TwoPenn Center Plaza  
Philadelphia, Pa. 19102

414(c)(5)

Re: Exemption Application No. D-332

Dear Mr. Wright:

This is in response to your submission of November 3, 1975 on behalf of your client, the Stewart Equipment Co. of Philadelphia (the Employer). In that submission, you applied for an administrative exemption under section 408(a) of the Employee Retirement Income Security Act of 1974 (the Act) and section 4975(c)(2) of the Internal Revenue Code of 1954 (the Code) from the prohibitions of section 406 of the Act and the excise taxes imposed by sections 4975(a) and (b) of the Code by reason of section 4975(c)(1) of the Code. The application was filed pursuant to ERISA Procedure 75-1 (40 FR 18471, April 28, 1976) and Rev. Proc. 75-26, 1976-1 C.B. 722, by the Employer and by the Industrial Valley Bank as Trustee of the Profit Sharing Plan of the Stewart Equipment Company of Philadelphia (the Plan).

The application states that the Plan purchased a plant located at 1165 Masonford Road, West Cohshohocken, Pennsylvania (the Property) in 1962. Since its purchase, the Plan has leased the Property to the Employer. On January 31, 1975, the market value of the property represented more than 50 percent of the market value of total Plan assets. The Plan now wishes to sell the Property to the Employer.

The Employer is a party in interest and a disqualified person with respect to the Plan as those terms are defined in section 3(14)(C) of the Act and section 4975(e)(2)(C) of the Code, respectively. Section 406(a)(1)(A) of the Act prohibits a fiduciary with respect to a plan from causing the plan to engage in a transaction which he knows or should know constitutes a direct or indirect sale of property between a plan and a party in interest. Under section 4975(c)(1) of the Code, the direct or indirect sale of property between a plan and a disqualified person is a prohibited transaction. Thus, in the absence of an administrative or statutory exemption, the sale of the Property to the Employer would be prohibited, and any disqualified person who participates in the transaction (other than a fiduciary acting as such) would be subject to the taxes imposed by section 4975(a) and (b) of the Code.

In addition, section 406(a)(2) of the Act prohibits, in relevant part, a fiduciary from permitting a plan to hold any employer real property if he knows or should know that holding such real property violates section 407(a) of the Act. Section 407(a) prohibits, among other things, a plan from holding any employer real property which is not qualifying employer real property. The term "employer real property" is defined in section 407(d)(2) of the Act to mean real property which is leased to an employer of employees covered by the plan. Section 407(d)(4) of the Act defines the term "qualifying employer real property" to include parcels of employer real property if, among other things, a substantial number of the parcels are dispersed geographically. Such economic dispersion must be sufficient so that adverse economic conditions peculiar to one area would not significantly affect the economic status of the plan as a whole. See H.F. Rep. No. 93-1280, 93d Cong., 2nd Sess. 318 (1974). Based upon the information provided in the submission, the requirements of geographic dispersion would not be met, and, therefore, the Property would not constitute qualifying employer real property within the meaning of section 407(d)(4). Accordingly, the holding of the Property would be prohibited by section 406(a)(2) of the Act.

However, the transition rules contained in sections 414(c)(5) and 2003(c)(2)(E) of the Act permit a plan to Dispose of employer real property owned by the Plan on June 30, 1974, and at all times thereafter, to a party in interest, if the plan is required to dispose of such property in order to comply with the provisions of section 407(a) and if the plan receives not less than adequate consideration. Section 3(18)(B) of the Act defines the term "adequate consideration" in the case of an asset other than a security for which there is a generally recognized market, as the fair market value of the asset as determined in good faith by the trustee or named fiduciary pursuant to the terms of the plan and in accordance with regulations promulgated by the Department of Labor. The Department has not yet issued regulations under section 3(18), and in the absence of such regulations, a determination as to what constitutes "adequate consideration" must be made by the plan trustees or other named fiduciaries in light of all the relevant facts and circumstances.

The transitional sections of the Act will permit the Plan to sell the Property to the Employer provided the Plan receives not less than adequate consideration for such Property. Since section 414(c)(5) and 2003(c)(2)(E) of the Act would permit the Plan to sell the Property to the Employer for not less than adequate consideration, an administrative exemption is not necessary. Accordingly, your exemption application file will be closed without further action.

Sincerely,

Alan D. Lebowitz  
Chief, Employee Plans  
Prohibited Transactions Staff  
Internal Revenue Service

Fred W. Stuckwisch  
Director, Office of Regulatory  
Standards and Exceptions  
U.S. Department of Labor