

U.S. Department of Labor

Labor-Management Services Administration
Washington, D.C. 20216



Reply to the Attention of:

OPINION NO. 84-20A
Sec. 407(d)(4)

APR 27 1984

Mr. Charles F. Plenge
Johnson, Bromberg & Leeds
4400 Republic National Bank Tower
Dallas, Texas 75201

Re: E-Z Serve, Inc.
Identification Number F-2691A

Dear Mr. Plenge:

This is in response to your request for an advisory opinion or, in the alternative, an information letter on behalf of E-Z Serve, Inc. (the Company) with respect to whether the proposed contribution or sale of certain real property to the Profit Sharing Trust for Employees of E-Z Serve, Inc. (the Plan) and simultaneous leaseback of the property to the Company will be exempt, from the prohibitions of sections 406 and 407 of the Employee Retirement Income Security Act of 1974 (ERISA) by operation of the exemption contained in section 408(e) of ERISA for the acquisition, sale or lease of qualifying employer real property.

Your request contains the following facts and representations. The Company and its wholly-owned subsidiaries are engaged in the business of wholesale and retail gasoline marketing, crude oil refining, crude oil and refined product trading and oil and gas exploration. In connection with the wholesale and retail gasoline marketing portion of its business, the Company and its subsidiaries own numerous parcels of real property throughout California, Nevada and Texas on which are located retail convenience store-service station facilities (Retail Outlets or Improvements). Many of these Retail Outlets are leased to independent, third party, commission-agent retailers.

The Plan is a profit-sharing plan designed to invest primarily in "qualifying employer securities" and "qualifying employer real property", as those terms are defined in section 407(d) and (e) of ERISA. For the Plan year ending September 30, 1983, the Company proposes to make a contribution of \$20,000 in cash and ten parcels of real property (the Land) (exclusive of the Retail Outlets and other Improvement located thereon). The approximate total value of the Land is \$350,000, which will be reconfirmed by appraisals at the time of the proposed contribution. The Land will be simultaneously leased back to the Company. Upon termination of any lease, or upon default under any lease, all Improvements on the Land will become the property of the Plan. The following list describes the location and approximate fair market value of the Land.

Parcel No.	Address of Land	Approximate Value of Land
1	Highway 95 and Gaviland Searchlight, Nevada	\$40,000
2	350 Stephens Riverside, California	\$28,000
3	1855 Columbia Avenue Riverside, California	\$50,000
4	4689 Market Street San Diego, California	\$39,000
5	300 West Broadway Needles, California	\$35,000
6	101 N. China Lake Blvd. Ridgecrest, California	\$50,000
7	703 East Holt Avenue Ontario, California	\$40,000
8	81939 Trona Road Trona, California	\$9,000
9	409 East Broadway Needles, California	\$28,000
10	1632 West Broadway Needles, California	\$30,000

It is proposed that the Land owned by the Plan and leased to the Company will be assigned or subleased to one of the Company's wholly-owned subsidiaries (E-Z Serve of California, Inc.), which in turn will sublease or rent (or has already subleased or rented) the Land, along with the Improvements (including the Retail Outlets) which will be owned by the subsidiary, to independent, third-party, commission-agent retailers for from six-month to one-year periods.

You represent that the Trustees of the Plan have determined that, if the Land is qualifying employer real property, the proposed leases of the Land otherwise meet the requirements of the statutory exemption contained in section 408(e) of ERISA.

You have asked for an advisory opinion that the Land is qualifying employer real property under section 407(d)(4) of ERISA.

Section 408(e) of ERISA provides, in pertinent part, that the restrictions of section 406 and 407 of ERISA shall not apply to the acquisition, sale or lease by a plan of qualifying employer real property--

- (1) if such acquisition, sale or lease is for adequate consideration,
- (2) if no commission is charged with respect thereto, and
- (3) if--
 - (A) the plan is an eligible individual account plan (as defined in section 407(d)(3)),
or

(B) in the case of an acquisition or lease of qualifying employer real property by a plan which is not an eligible individual account plan, or of an acquisition of qualifying employer securities by such a plan, the lease or acquisition is not prohibited by section 407(a).

Section 407(d)(2) of ERISA defines the term "employer real property" as real property (and related personal property) which is leased to an employer of employees covered by the plan, or to an affiliate of such employer.

Section 407(d)(4) of ERISA defines the term "qualifying employer real property" as parcels of employer real property--

- (A) if a substantial number of the parcels are dispersed geographically;
- (B) if each parcel of real property and the improvements thereon are suitable (or adaptable without excessive cost) for more than one use;
- (C) even if all of such real property is leased to one lessee (which may be an employer, or an affiliate of an employer); and
- (D) if the acquisition and retention of such property comply with the provisions of this part (other than section 404(a)(1)(B) to the extent it requires diversification, and sections 404(a)(1)(C), 406, and subsection (a) of this section).

In the Department's view, the leasing of real property by a plan to an employer under circumstances where the improvements thereon are owned by the employer or its affiliate, will not, in itself, prevent the lease from constituting qualifying employer real property.

This portion of the Department's response constitutes an advisory opinion under ERISA Procedure 76-1. Accordingly, it is issued subject to the provisions of that procedure, including section 10 thereof, relating to the effect of advisory opinions.

Whether a substantial number of parcels of employer real property are geographically dispersed so as to provide protection for a plan in the event of adverse economic conditions in any one area and whether such parcels are suitable or adaptable without excessive cost for more than one use, are both questions which are inherently factual in nature. Although the Department has in the past issued advisory opinions in which it concluded, on the basis of factual representations submitted by a private party, that certain parcels of real property met the requirements of section 407(d)(4)(A) and (B) of ERISA, in the absence of highly unusual circumstances, the Department will not issue advisory opinions covering these factual issues.

We are happy to provide you with the following general information with respect to the factors relevant to a determination that property is qualifying employer real property. With respect to the number of parcels, we note that the Department has taken the position that there must be more than one parcel of property to meet the "substantial number" requirement of section 407(d)(4)(A) of ERISA.

With respect to whether a substantial number of the parcels is dispersed geographically, the Conference Report accompanying ERISA, H. Rep. No. 93-1280, 93rd Cong., 2d Sess. (1974), at page 318, indicates that Congress intended the geographic dispersion of qualifying employer real property to be sufficient so that adverse economic conditions peculiar to one area would not significantly affect the economic status of the plan as a whole. In this context,

it is important to determine the market area served by the business or industry located on each parcel. If there is any overlap in the market area it is important to determine the number of parcels with overlapping market areas relative to the total number of parcels.

With respect to whether each parcel of real property and the improvements thereon are suitable or adaptable without excessive cost for more than one use, attention should not only be directed to the type of improvement on the parcel, but also to the geographic location of such property and improvement.

Careful attention should be paid to the effect of such an arrangement on the requirements of section 407(d)(4)(D) of ERISA which incorporates by reference the requirement of section 404(a)(1)(B) of ERISA (except to the extent it requires diversification), that a plan fiduciary discharge his or her duties with respect to a plan with care, skill, prudence and diligence. The Department notes that plan fiduciaries may properly consider the fact that the improvements will become plan property upon default or termination of the lease in determining whether section 407(d)(4)(B) has been satisfied.

We trust this information has been helpful to you.

Sincerely,

Elliot I. Daniel
Acting Assistant Administrator for Fiduciary Standards
Office of Pension and Welfare Benefit Programs