

U.S. Department of Labor

Office of Pension and Welfare Benefit Programs
Washington, D.C. 20210



JUL 24 1985

85-28A

Mr. J. G. Ritter, III
Hunton & Williams
707 East Main Street
P.O. Box 1535
Richmond, Virginia 23212

Re: Dibrell Brothers, Incorporated (Dibrell)
Identification Number F-2981A

Dear Mr. Ritter:

This is in reply to your letter of September 28, 1984, in which you requested an advisory opinion as to whether a foreign subsidiary of Dibrell would be considered an "affiliate" within the meaning of section 407(d)(7) of the Employee Retirement Income Security Act of 1974 (ERISA).

Dibrell is a Virginia corporation principally engaged in the tobacco business. Dibrell owns 100% of Dibrell-Kentucky Incorporated which in turn owns 100% of Tobacco Export and Import Company, Inc. (TEI). COF Commercial de Fuma Ltda (COF) and Verafumos, Comercio, Industria Agricultura de Fumos e Cereais Ltda (Verafumos) are Brazilian "limitadas" which you state we may assume are corporations within the meaning of section 7701(a)(3) of the Internal Revenue Code (the Code). TEI owns 100% of the "quotas" of COF and COF owns approximately 99% of the quotas of Verafumos. A quota is an equity interest in a limitada. You state we may assume that quotas are stock.

Dibrell proposes to reorganize Verafumos into two separate limitadas, one a processing company and one a farmer relations company. The reorganization of Verafumos will be accomplished in either one of two ways. Verafumos will be merged into COF and the assets attributable to the farming operations of Verafumos spun off to a new limitada to be known as Farmer. Alternatively, either before or after the merger of Verafumos into COF, Dibrell or Verafumos will purchase an existing limitada which would become Farmer. The assets relating to the farming operations of Verafumos would then be contributed to Farmer in exchange for quotas of Farmer. As a result of either method of reorganizing Verafumos, Farmer will become a wholly-owned subsidiary of COF or TEI. Following reorganization, 50% of the quotas and more than 50% of the "value" of Farmer held by COF or TEI will be distributed through TEI and Dibrell-Kentucky Incorporated to Dibrell. For purposes of this letter, we assume that by the term "value" you mean the total value of all classes of equity interests of Farmer. The quotas will then be transferred by Dibrell to the Dibrell Brothers, Incorporated Savings and Profit Sharing Plan (the Plan) either through contribution or sale. After either method of reorganization is effected, the Plan will hold one-half of the voting power and more than one-half of the value of Farmer. For purposes of this letter, we assume that by the term "voting power" you mean the total combined voting power of all classes of equity interests of Farmer entitled to vote. The Plan is an eligible individual account plan as defined in ERISA section 407(d)(3).

You are specifically requesting the following advisory opinions: (1) that Farmer will be considered an affiliate of Dibrell within the meaning of ERISA section 407(d)(7) at the time the quotas of Farmer are transferred to the Plan; and (2) that Farmer will be considered an affiliate of Dibrell

within the meaning of ERISA section 407(d)(7) after the quotas have been transferred to the Plan. You are particularly concerned that Farmer may not be considered an affiliate of Dibrell for purposes of ERISA section 407(d)(7) because under Code section 1563(b), as a foreign subsidiary of Dibrell, Farmer would not be considered a component member of a controlled group of corporations (with Dibrell as the common parent) within the meaning of Code section 1563(a). As a result, you are concerned that the statutory exemption provided by ERISA section 408(e), involving the acquisition by a plan of qualifying employer securities, may not be available for the transfer of the quotas of Farmer to the Plan.

ERISA section 3(5) defines the term "employer" to mean any person acting directly as an employer or indirectly in the interest of an employer in relation to an employee benefit plan. Accordingly, Dibrell is an employer with respect to the Plan within the meaning of ERISA section 3(5). A corporation is an affiliate of an employer under section 407(d)(7) if it is--

A member of any controlled group of corporations (as defined in section 1563(a) of the Internal Revenue Code of 1954, except that "applicable percentage" shall be substituted for "80 percent" wherever the latter percentage appears in such section) of which the employer who maintains the plan is a member. For purposes of the preceding sentence, the term "applicable percentage" means 50 percent, or such lower percentage as the Secretary may prescribe by regulation.

Code section 1563(a) defines a controlled group of corporations, in relevant part, to include --

One or more chains of corporations connected through stock ownership with a common parent corporation if --

(A) stock possessing at least 80 percent of the total combined voting power of all classes of stock entitled to vote or at least 80% of the total value of shares of all classes of stock of each of the corporations, except the common parent corporation, is owned ... by one or more of the other corporations; and (B) the common parent corporation owns ... stock possessing at least 80 percent of the total combined voting power of all classes of stock entitled to vote or at least 80% of the total value of shares of all classes of stock of at least one of the other corporations, excluding, in computing such voting power or value, stock owned directly by such other corporations.

Code section 1563(b)(1)(A) defines the term "component member of a controlled group of corporations" to include a member of such controlled group not treated as an excluded member as defined under Code section 1563(b)(2). Under Code section 1563(b)(2)(C), a foreign corporation subject to tax under Code section 881 for a given taxable year is treated as an excluded member.

Code section 1563(c)(2)(A)(i) provides that if a parent corporation owns 50 percent or more of the total combined voting power of all classes of stock entitled to vote or 50 percent or more of the total value of shares of all classes of stock in a subsidiary corporation, the stock in the subsidiary held by a trust which is a part of a plan of deferred compensation for the benefit of the employees of the parent or the subsidiary shall be treated as excluded stock for purposes of Code section 1563(a)(1).

Whether Farmer is an affiliate of an employer for purposes of ERISA section 407(d)(7) is an inherently factual question on which the Department is unwilling to issue an advisory opinion. (See section 5.01 of ERISA Procedure 76-1, 41 FR 36281, August 27, 1976). As a general matter, the

Department notes that section 1563 of the Code provides definitions and special rules for certain limitations on multiple tax benefits for controlled corporations under Subtitle A, Chapter 6, Subchapter B, Part II, sections 1561-1564 of the Code. However, for the purposes of ERISA, it is the Department's view that where a foreign corporation which would otherwise be a member of a controlled group of corporations within the meaning of section 1563(a) is excluded from component member status under section 1563(b)(1)(A) of the Code by reason of section 1563(b)(2)(C), such corporation would nevertheless be a member of the controlled group of corporations under section 407(d)(7) of ERISA.

In your letter, you indicate that after the Plan acquires its equity interest in Farmer, the Plan will own 50% of the voting power of Farmer and either COF or TEI will own the other 50%. You further explain that, after the Plan acquires its equity interest in Farmer, the Plan will own more than 50% of the value of Farmer and either COF or TEI will own the balance of the value of Farmer. In this connection, you observe that Code section 1563(c)(2) sets forth a special rule that is applicable where a corporation owns at least 50% of the voting power or value of another corporation. Specifically, you note that, under Code section 1563(c)(2)(A)(i), the ownership rules of Code section 1563(a) are applied for tax purposes without including stock which is held by a trust which is part of a plan of deferred compensation for the benefit of the employees of the parent corporation or a subsidiary corporation. Accordingly, you suggest that, in applying the affiliation rules of ERISA section 407(d)(7), the Plan's stock holdings in Farmer should be excluded in determining whether Farmer is a member of a controlled group of corporations under Code section 1563(a).

For purposes of applying the affiliation rules of ERISA section 407(d)(7), the eighty percent ownership test of Code section 1563(a) is replaced by a fifty percent ownership test. Generally, therefore, where a corporation owns at least 50% of the voting power or value of another corporation, the affiliation rules of ERISA section 407(d)(7) can be applied between the corporation and that entity without regard to the question of whether a plan's ownership interest in the entity should be disregarded in applying the tests of Code section 1563(a) by reason of the exclusion in Code section 1563(c)(2)(A)(i).

This letter relates only to ERISA section 407(d)(7) and Code section 1563 and not to any other provisions of ERISA or the Code. For example, this letter does not address the general fiduciary responsibility provisions of ERISA section 404. Moreover, no opinion is expressed herein as to whether a limitada is a corporation or whether the quotas of Farmer constitute stock under ERISA section 407(d)(5). Nor is any opinion expressed as to whether any eventual transfer of the quotas of Farmer to the Plan would satisfy the conditions of ERISA section 408(e).

This letter constitutes an advisory opinion under ERISA Procedure 76-1. Accordingly, this letter is issued subject to the provisions of that procedure, including section 10 relating to the effect of advisory opinions.

Sincerely,

Elliot I. Daniel
Assistant Administrator for Regulations and Interpretations